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⁽¹⁾ Text with EEA relevance.

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)

REGULATIONS

COMMISSION REGULATION (EU) 2017/363

of 1 March 2017

amending Regulation (EU) No 965/2012 as regards the specific approval of single-engined turbine aeroplane operations at night or in instrument meteorological conditions and the approval requirements for the dangerous goods training relating to commercial specialised operations, non-commercial operations of complex motor-powered aircraft and non-commercial specialised operations of complex motor-powered aircraft

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC ⁽¹⁾, and in particular Article 8(5) thereof,

Whereas:

- (1) Pursuant to Regulation (EC) No 216/2008, the Commission should adopt the necessary implementing rules for establishing the conditions for the safe operation of aircraft. Commission Regulation (EU) No 965/2012 ⁽²⁾ establishes those conditions.
- (2) The application of Regulation (EU) No 965/2012 to ferry-flights would lead to a disproportionate administrative burden on the industry and on competent authorities. In order to introduce a more proportionate and risk-based approach to the application of that Regulation, one-off flights carrying no passengers or cargo where the aircraft is ferried for refurbishment, repair, maintenance checks, inspections, delivery, export or similar purposes should be exempted from the application of Regulation (EU) No 965/2012.
- (3) The International Civil Aviation Organisation (ICAO) standards and recommended practices, set out in Part I of Annex 6 to the Convention on International Civil Aviation, signed in Chicago on 7 December 1944, include provisions for the operation of single-engined turbine aeroplanes at night or in instrument meteorological conditions. Those provisions contain, inter alia, a requirement that, in approving such operations, the State of the operator needs to ensure that certain conditions are complied with, including those relating to installed equipment, engine reliability, engine monitoring, operator procedures and flight crew training. Union law should be aligned with those provisions, by ensuring that commercial air transport operations of single-engined aeroplanes at night or in instrument meteorological conditions are subject to the approval of the competent authority.

⁽¹⁾ OJ L 79, 19.3.2008, p. 1.

⁽²⁾ Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ L 296, 25.10.2012, p. 1).

- (4) That alignment makes the possibility of operating, by means of a derogation, single-engined aeroplanes under the conditions set out in the existing exemptions granted by Member States in accordance with Article 8(2) of Council Regulation (EEC) No 3922/91 ⁽¹⁾, provided for in Article 6(5) of Regulation (EU) No 965/2012, obsolete. That provision should therefore be deleted. Those exemptions for the operation of single-engined aeroplanes, including the conditions set out therein, should be considered to constitute approvals by the competent authority as required under the aligned legal framework for a suitable period after the entry into force of this Regulation, so as to ensure a smooth transition. After that transitional period, it should no longer be possible to rely upon such exemptions, such approvals being required instead. Any relevant changes to the operation of those aeroplanes during that transitional period should continue to be notified.
- (5) Operators of commercial specialised operations, as well as operators conducting non-commercial operations with complex motor-powered aircraft or non-commercial specialised operations with complex motor-powered aircraft that do not transport dangerous goods should continue to establish and maintain dangerous goods training programmes, in accordance with Annex III (Part-ORO) to Regulation (EU) No 965/2012. However, in order to introduce a more proportionate and risk-based approach to the application of those rules, the competent authority should no longer be required to approve such training programmes.
- (6) Regulation (EU) No 965/2012 should therefore be amended accordingly. In particular, Annex III (Part-ORO) to that Regulation should be amended to adopt a more proportionate and risk-based approach to the approval requirements for dangerous goods training programmes and a new subpart on single-engined turbine aeroplane operations should be added to its Annex V (Part-SPA).
- (7) The measures provided for in this Regulation regarding single-engined turbine aeroplanes are based on the opinion ⁽²⁾ issued by the European Aviation Safety Agency in accordance with point (b) of Article 17(2) and Article 19(1) of Regulation (EC) No 216/2008.
- (8) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 65 of Regulation (EC) No 216/2008,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 965/2012 is amended as follows:

- (1) Article 6(3) is replaced by the following:

‘3. By way of derogation from Article 5 and without prejudice to Regulation (EC) No 216/2008 and Commission Regulation (EU) No 748/2012 ^(*) related to the permit to fly, flights related to the introduction or modification of aircraft types conducted by design or production organisations within the scope of their privileges, as well as flights carrying no passengers or cargo where the aircraft is ferried for refurbishment, repair, maintenance checks, inspections, delivery, export or similar purposes shall be operated under conditions set out in Member States’ national law.

^(*) Commission Regulation (EU) No 748/2012 of 3 August 2012 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations (OJ L 224, 21.8.2012, p. 1).’;

- (2) Article 6(5) is replaced by the following:

‘5. Until 2 September 2017, exemptions granted before 22 March 2017 in accordance with Article 8(2) of Regulation (EEC) No 3922/91, as provided for in Article 6(5) of Regulation (EU) No 965/2012 as applicable before 22 March 2017, shall be considered to constitute approvals referred to in point (a) of CAT.POL.A.300 of Annex IV (Part-CAT). After 2 September 2017, those exemptions shall no longer be valid for the operation of single-engined aeroplanes.

⁽¹⁾ Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation (OJ L 373, 31.12.1991, p. 4).

⁽²⁾ European Aviation Safety Agency Opinion No 06/2015 of 11 November 2015 for a Commission Regulation establishing technical special approval requirements for the operation of single engine turbine aircraft at night or in instrument meteorological conditions.

If any change to the operation of those aeroplanes that affects the conditions set out in those exemptions is envisaged between 22 March 2017 and 2 September 2017, that envisaged change shall be notified to the Commission and the Agency before it is implemented. The Commission and the Agency shall assess the envisaged change in accordance with Article 14(5) of Regulation (EC) No 216/2008.;

(3) Annexes II, III, IV and V are amended in accordance with the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 2017.

For the Commission

The President

Jean-Claude JUNKER

ANNEX

Annexes II, III, IV and V to Regulation (EU) No 965/2012 are amended as follows:

(1) in Annex II (Part-ARO), Appendix II is replaced by the following:

‘Appendix II

OPERATIONS SPECIFICATIONS (subject to the approved conditions in the operations manual)				
Issuing authority contact details Telephone ⁽¹⁾ : _____; Fax _____; Email: _____				
AOC ⁽²⁾ : _____		Operator Name ⁽³⁾ : _____		Date ⁽⁴⁾ : _____ Signature: _____
Dba Trading Name: _____ Operations specifications #: _____				
Aircraft model ⁽⁵⁾ : _____ Registration marks ⁽⁶⁾ : _____				
Types of operations: Commercial air transport ☐ Passengers ☐ Cargo ☐ Others ⁽⁷⁾ : _____				
Area of operation ⁽⁸⁾ : _____				
Special limitations ⁽⁹⁾ : _____				
Specific approvals:	Yes	No	Specification ⁽¹⁰⁾	Remarks
Dangerous goods	☐	☐		
Low visibility operations Take-off Approach and landing	☐	☐	CAT ⁽¹¹⁾ ... RVR ⁽¹²⁾ : m DA/H: ft RVR: m	
RVSM ⁽¹³⁾ ☐ N/A	☐	☐		
ETOPS ⁽¹⁴⁾ ☐ N/A	☐	☐	Maximum diversion time ⁽¹⁵⁾ : min.	
Complex navigation specifications for PBN operations ⁽¹⁶⁾	☐	☐		⁽¹⁷⁾
Minimum navigation performance specification	☐	☐		
Operations of single-engined turbine aeroplane at night or in IMC (SET-IMC)	☐	☐	⁽¹⁸⁾	
Helicopter operations with the aid of night vision imaging systems	☐	☐		
Helicopter hoist operations	☐	☐		
Helicopter emergency medical service operations	☐	☐		
Helicopter offshore operations	☐	☐		
Cabin crew training ⁽¹⁹⁾	☐	☐		
Issue of CC attestation ⁽²⁰⁾	☐	☐		
Continuing airworthiness	☐	☐	⁽²¹⁾	
Others ⁽²²⁾				

- (¹) Telephone and fax contact details of the competent authority, including the country code. Email to be provided if available.
- (²) Insertion of associated air operator certificate (AOC) number.
- (³) Insertion of the operator's registered name and the operator's trading name, if different. Insert "Dba" before the trading name (for "Doing business as").
- (⁴) Issue date of the operations specifications (dd-mm-yyyy) and signature of the competent authority representative.
- (⁵) Insertion of ICAO designation of the aircraft make, model and series, or master series, if a series has been designated (e.g. Boeing-737-3K2 or Boeing-777-232).
- (⁶) Either the registration marks are listed in the operations specifications or in the operations manual. In the latter case, the related operations specifications must make a reference to the related page in the operation manual. In case not all specific approvals apply to the aircraft model, the registration marks of the aircraft may be entered in the remark column to the related specific approval.
- (⁷) Other type of transportation to be specified (e.g. emergency medical service).
- (⁸) Listing of geographical area(s) of authorised operation (by geographical coordinates or specific routes, flight information region or national or regional boundaries).
- (⁹) Listing of applicable special limitations (e.g. VFR only, Day only, etc.).
- (¹⁰) List in this column the most permissive criteria for each approval or the approval type (with appropriate criteria).
- (¹¹) Insertion of applicable precision approach category: LTS CAT I, CAT II, OTS CAT II, CAT IIIA, CAT IIIB or CAT IIIC. Insertion of minimum runway visual range (RVR) in meters and decision height (DH) in feet. One line is used per listed approach category.
- (¹²) Insertion of approved minimum take-off RVR in metres. One line per approval may be used if different approvals are granted.
- (¹³) Not applicable (N/A) box may be checked only if the aircraft maximum ceiling is below FL290.
- (¹⁴) Extended range operations (ETOPS) currently applies only to two-engined aircraft. Therefore, the not applicable (N/A) box may be checked if the aircraft model has more or less than two engines.
- (¹⁵) The threshold distance may also be listed (in NM), as well as the engine type.
- (¹⁶) Performance-based navigation (PBN): one line is used for each complex PBN specific approval (e.g. RNP AR APCH), with appropriate limitations listed in the "Specifications" and/or "Remarks" columns. Procedure-specific approvals of specific RNP AR APCH procedures may be listed in the operations specifications or in the operations manual. In the latter case, the related operations specifications must have a reference to the related page in the operations manual.
- (¹⁷) Specify if the specific approval is limited to certain runway ends and/or aerodromes.
- (¹⁸) Insertion of the particular airframe/engine combination.
- (¹⁹) Approval to conduct the training course and examination to be completed by applicants for a cabin crew attestation as specified in Annex V (Part-CC) to Regulation (EU) No 1178/2011.
- (²⁰) Approval to issue cabin crew attestations as specified in Annex V (Part-CC) to Regulation (EU) No 1178/2011.
- (²¹) The name of the person/organisation responsible for ensuring that the continuing airworthiness of the aircraft is maintained and a reference to the regulation that requires the work, i.e. Subpart G of Annex I (Part-M) to Regulation (EU) No 1321/2014.
- (²²) Other approvals or data may be entered here, using one line (or one multi-line block) per authorisation (e.g. short landing operations, steep approach operations, helicopter operations to/from a public interest site, helicopter operations over a hostile environment located outside a congested area, helicopter operations without a safe forced landing capability, operations with increased bank angles, maximum distance from an adequate aerodrome for two-engined aeroplanes without an ETOPS approval, aircraft used for non-commercial operations).

EASA FORM 139 Issue 3¹;

(2) Annex III (Part-ORO) is amended as follows:

(a) in point ORO.GEN.110, points (j) and (k) are replaced by the following:

'(j) The operator shall establish and maintain dangerous goods training programmes for personnel as required by the technical instructions. Such training programmes shall be commensurate with the responsibilities of personnel. Training programmes of operators performing CAT, whether they transport dangerous goods or not, and of operators conducting operations other than CAT referred to in points (b), (c) and (d) of point ORO.GEN.005 that transport dangerous goods shall be subject to review and approval by the competent authority.

(k) Notwithstanding point (j), operators conducting commercial operations with the following aircraft shall ensure that the flight crew has received an appropriate dangerous goods training or briefing, to enable them to recognise undeclared dangerous goods brought on-board by passengers or as cargo:

(1) a sailplane;

(2) a balloon;

(3) a single-engined propeller-driven aeroplane having a maximum certified take-off mass of 5 700 kg or less and a MOPSC of 5 or less operated in a flight taking off and landing at the same aerodrome or operating site, under VFR by day; or

(4) an other-than complex motor-powered helicopter, single-engined, with a MOPSC of 5 or less operated in a flight taking off and landing at the same aerodrome or operating site, under VFR by day²;

(b) in point ORO.FC.A.250, point (a) is replaced by the following:

‘(a) The holder of a CPL(A) (aeroplane) shall only act as commander in commercial air transport on a single-pilot aeroplane if either of the following conditions is met:

- (1) when carrying passengers under VFR outside a radius of 50 NM (90 km) from an aerodrome of departure, he/she has a minimum of 500 hours of flight time on aeroplanes or holds a valid instrument rating;
- (2) when operating on a multi-engine type under IFR, he/she has a minimum of 700 hours of flight time on aeroplanes, including 400 hours as pilot-in-command. These hours shall include 100 hours under IFR and 40 hours in multi-engine operations. The 400 hours as pilot-in-command may be substituted by hours operating as co-pilot within an established multi-pilot crew system prescribed in the operations manual, on the basis of two hours of flight time as co-pilot for one hour of flight time as pilot-in command;
- (3) when operating on a single-engined aeroplane under IFR, he/she has a minimum of 700 hours of flight time on aeroplanes, including 400 hours as pilot-in-command. Those hours shall include 100 hours under IFR. The 400 hours as pilot-in-command may be substituted by hours operating as co-pilot within an established multi-pilot crew system prescribed in the operations manual, on the basis of two hours of flight time as co-pilot for one hour of flight time as pilot-in command.’;

(3) Annex IV (Part-CAT) is amended as follows:

(a) point CAT.OP.MPA.136 is replaced by the following:

‘CAT.OP.MPA.136 Routes and areas of operation — single-engined aeroplanes

Unless approved by the competent authority in accordance with Annex V (Part-SPA), Subpart L — SINGLE-ENGINE TURBINE AEROPLANE OPERATIONS AT NIGHT OR IN IMC (SET-IMC), the operator shall ensure that operations of single-engined aeroplanes are only conducted along routes, or within areas, where surfaces are available that permit a safe forced landing to be executed.’;

(b) in point CAT.OP.MPA.180, point (a) is replaced by the following:

‘(a) Where it is not possible to use the departure aerodrome as a take-off alternate aerodrome due to meteorological or performance reasons, the operator shall select another adequate take-off alternate aerodrome that is no further from the departure aerodrome than:

- (1) for two-engined aeroplanes:
 - (i) one hour flying time at an OEI cruising speed according to the AFM in still air standard conditions based on the actual take-off mass; or
 - (ii) the ETOPS diversion time approved in accordance with Annex V (Part-SPA), Subpart F, subject to any MEL restriction, up to a maximum of two hours, at the OEI cruising speed according to the AFM in still air standard conditions based on the actual take-off mass;
- (2) for three and four-engined aeroplanes, two hours flying time at the OEI cruising speed according to the AFM in still air standard conditions based on the actual take-off mass;
- (3) for operations approved in accordance with Annex V (Part-SPA), Subpart L — SINGLE-ENGINE TURBINE AEROPLANE OPERATIONS AT NIGHT OR IN IMC (SET-IMC), 30 minutes flying time at normal cruising speed in still air conditions, based on the actual take-off mass.

In the case of multi-engined aeroplanes, if the AFM does not contain an OEI cruising speed, the speed to be used for calculation shall be that which is achieved with the remaining engine(s) set at maximum continuous power.’;

(c) in point CAT.POL.A.300, point (a) is replaced by the following:

‘(a) Unless approved by the competent authority in accordance with Annex V (Part-SPA), Subpart L — SINGLE-ENGINE TURBINE AEROPLANE OPERATIONS AT NIGHT OR IN IMC (SET-IMC), the operator shall not operate a single-engined aeroplane:

(1) at night; or

(2) in IMC, except under special VFR.’;

(d) point CAT.POL.A.320 is replaced by the following:

‘CAT.POL.A.320 En-route — single-engined aeroplanes

(a) In the meteorological conditions expected for the flight, and in the event of engine failure, the aeroplane shall be capable of reaching a place at which a safe forced landing can be made, unless the operator is approved by the competent authority in accordance with Annex V (Part-SPA), Subpart L — SINGLE-ENGINE TURBINE AEROPLANE OPERATIONS AT NIGHT OR IN IMC (SET-IMC) and makes use of a risk period.

(b) For the purposes of point (a), it shall be assumed that, at the point of engine failure:

(1) the aeroplane is not flying at an altitude exceeding that at which the rate of climb equals 300 ft per minute, with the engine operating within the maximum continuous power conditions specified; and

(2) the en-route gradient is the gross gradient of descent increased by a gradient of 0,5 %.’;

(4) in Annex V (Part-SPA), the following Subpart L is added:

‘SUBPART L

SINGLE-ENGINE TURBINE AEROPLANE OPERATIONS AT NIGHT OR IN INSTRUMENT METEOROLOGICAL CONDITIONS (SET-IMC)

SPA.SET-IMC.100 SET-IMC operations

In commercial air transport (CAT) operations, single-engined turbine aeroplanes shall only be operated at night or in IMC if the operator has been granted a SET-IMC approval by the competent authority.

SPA.SET-IMC.105 SET-IMC operations approval

To obtain a SET-IMC approval by the competent authority, the operator shall provide evidence that all the following conditions have been complied with:

(a) an acceptable level of turbine engine reliability is achieved in service by the world fleet for the particular airframe-engine combination;

(b) specific maintenance instructions and procedures to ensure the intended levels of continued airworthiness and reliability of the aeroplane and its propulsion system have been established and included in the operator's aircraft maintenance programme in accordance with Annex I to Regulation (EU) No 1321/2014 (Part-M), including all the following:

(1) an engine trend monitoring programme, except for aeroplanes first issued with an individual certificate of airworthiness after 31 December 2004 that shall have an automatic trend monitoring system;

(2) a propulsion and associated systems' reliability programme;

(c) flight crew composition and a training/checking programme for the flight crew members involved in these operations have been established;

- (d) operating procedures have been established specifying all the following:
 - (1) the equipment to be carried, including its operating limitations and appropriate entries in the MEL;
 - (2) the flight planning;
 - (3) the normal procedures;
 - (4) the contingency procedures, including procedures following a propulsion system failure, as well as forced landing procedures in all weather conditions;
 - (5) the monitoring and incident reporting.
- (e) a safety risk assessment has been performed, including the determination of an acceptable risk period if an operator intends to make use of it.

SPA.SET-IMC.110 Equipment requirements for SET-IMC operations

Aeroplanes used for SET-IMC operations shall be equipped with all the following equipment:

- (a) two separate electrical generating systems, each one capable of supplying adequate power to all essential flight instruments, navigation systems and aeroplane systems required for continued flight to the destination or alternate aerodrome;
- (b) two attitude indicators, powered from independent sources;
- (c) for passenger operations, a shoulder harness or a safety belt with a diagonal shoulder strap for each passenger seat;
- (d) airborne weather-detecting equipment;
- (e) in a pressurised aeroplane, sufficient supplemental oxygen for all occupants to allow descent, following engine failure at the maximum certificated cruising altitude, at the best range gliding speed and in the best gliding configuration, assuming the maximum cabin leak rate, until sustained cabin altitudes below 13 000 ft are reached;
- (f) an area navigation system capable of being programmed with the positions of landing sites and providing lateral guidance to the flight crew to reach those sites;
- (g) a radio altimeter;
- (h) a landing light, capable of illuminating the touchdown point on the power-off glide path from 200 ft away;
- (i) an emergency electrical supply system of sufficient capacity and endurance capable of providing power, following the failure of all generated power, to additional loads necessary for all of the following:
 - (1) the essential flight and area navigation instruments during descent from maximum operating altitude after engine failure;
 - (2) the means to provide for one attempt to restart the engine;
 - (3) if appropriate, the extension of landing gear and flaps;
 - (4) the use of the radio altimeter throughout the landing approach;
 - (5) the landing light;
 - (6) one pitot heater;
 - (7) if installed, the electrical means to give sufficient protection against impairment of the pilot's vision for landing;

- (j) an ignition system that activates automatically, or is capable of being operated manually, for take-off, landing, and during flight, in visible moisture;
 - (k) a means of continuously monitoring the power train lubrication system to detect the presence of debris associated with the imminent failure of a drivetrain component, including a flight crew compartment caution indication;
 - (l) an emergency engine power control device that permits continuing operation of the engine at a sufficient power range to safely complete the flight in the event of any reasonably probable failure of the fuel control unit.'.
-

COMMISSION IMPLEMENTING REGULATION (EU) 2017/364**of 1 March 2017****establishing the standard import values for determining the entry price of certain fruit and vegetables**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 ⁽¹⁾,

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors ⁽²⁾, and in particular Article 136(1) thereof,

Whereas:

- (1) Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XVI, Part A thereto.
- (2) The standard import value is calculated each working day, in accordance with Article 136(1) of Implementing Regulation (EU) No 543/2011, taking into account variable daily data. Therefore this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 1 March 2017.

*For the Commission,
On behalf of the President,*

Jerzy PLEWA

Director-General

Directorate-General for Agriculture and Rural Development

⁽¹⁾ OJ L 347, 20.12.2013, p. 671.

⁽²⁾ OJ L 157, 15.6.2011, p. 1.

ANNEX

Standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)		
CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	EG	232,7
	IL	149,3
	MA	98,0
	TR	92,9
	ZZ	143,2
0707 00 05	MA	80,2
	TR	196,9
	ZZ	138,6
0709 91 00	EG	97,7
	ZZ	97,7
0709 93 10	MA	53,4
	TR	164,4
	ZZ	108,9
0805 10 22, 0805 10 24, 0805 10 28	EG	43,8
	IL	72,5
	MA	45,0
	TN	55,7
	TR	75,0
	ZZ	58,4
	ZZ	58,4
0805 50 10	EG	74,7
	TR	71,7
	ZZ	73,2
0808 30 90	CL	157,0
	CN	100,4
	ZA	108,2
	ZZ	121,9

⁽¹⁾ Nomenclature of countries laid down by Commission Regulation (EU) No 1106/2012 of 27 November 2012 implementing Regulation (EC) No 471/2009 of the European Parliament and of the Council on Community statistics relating to external trade with non-member countries, as regards the update of the nomenclature of countries and territories (OJ L 328, 28.11.2012, p. 7). Code 'ZZ' stands for 'of other origin'.

DECISIONS

COMMISSION DECISION (EU) 2017/365

of 4 July 2016

on the State aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) implemented by Spain for Valencia Club de Fútbol Sociedad Anónima Deportiva, Hércules Club de Fútbol Sociedad Anónima Deportiva and Elche Club de Fútbol Sociedad Anónima Deportiva

(notified under document C(2016) 4060)

(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) thereof,

Having regards to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, in respect of the aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) ⁽¹⁾,

Having called on interested parties to submit their comments pursuant to the provisions cited above and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) The attention of the Commission was drawn by press reports and information sent by citizens in 2012-2013 to allegations that State aid in the form of loan guarantees was granted by the regional government of Valencia ('Generalitat Valenciana') in favour of three football clubs in Valencia: *Valencia Club de Fútbol Sociedad Anónima Deportiva* ('Valencia CF'), *Hércules Club de Fútbol Sociedad Anónima Deportiva* ('Hercules CF') and *Elche Club de Fútbol Sociedad Anónima Deportiva* ('Elche CF'). According to these reports, the guarantee in favour of Valencia CF was subsequently increased at least twice, in order to cover overdue capital, interest and costs. Spain was asked to comment on these reports on 8 April 2013. Spain sent information to the Commission on 27 May and 3 June 2013.
- (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 on the Functioning of the European Union ('TFEU') in respect of the aid ('the opening decision'). Spain submitted comments on the opening decision by letter dated 10 February 2014.
- (3) The Commission requested information to Spain by letter of 1 August 2014, replied to on 30 September and 13 October 2014. The Commission requested additional information to Spain by letter of 23 January 2015, replied to on 27 April 2015.
- (4) *Instituto Valenciano de Finanzas* (IVF), the financial institution of the Generalitat Valenciana, submitted comments on 3 November and 15 December 2014, 20 February, 25 February, 31 March and 18 May 2015. IVF submitted further information with e-mails of 3, 5, 13, 19, 20, 26 and 30 November 2015, 1, 11, 14, 15, 16, 17 and 18 December 2015, and 4 and 13 May 2016.

⁽¹⁾ OJ C 69, 7.3.2014, p. 99.

- (5) The opening decision was published in the *Official Journal of the European Union* ⁽²⁾ on 7 March 2014. The Commission invited interested parties to submit their comments on the measures. The Commission received observations from three interested parties: *Liga Nacional de Fútbol Profesional* on 7 April 2014; Valencia CF on 7 April, 16 June, 30 October and 15 December 2014, and 12 May 2015; and *Fundación Valencia Club de Fútbol* ('Fundacion Valencia') on 19 May 2015. It forwarded them to Spain, which was given the opportunity to react; Spain's comments were received by letters dated 30 September and 13 October 2014 and 3 July 2015. Valencia CF submitted further clarifications on 14 December 2015 and 26 January 2016. A meeting was held on 29 January 2015 in Brussels with the participation of the Commission services, the Spanish authorities, representatives of IVF and representatives of Valencia CF.

2. DESCRIPTION OF THE MEASURES AND BENEFICIARIES

2.1. Measure 1: the 2009 State guarantee in favour of Valencia CF

- (6) On 5 November 2009, IVF provided a guarantee for a bank loan of EUR 75 million from Bancaja (now Bankia) to Fundacion Valencia. IVF is a public financing institution under the control of the Generalitat Valenciana, and the latter's representatives also participate in IVF's General Council and Investment Committee.
- (7) The express purpose of the loan, as stated in the decision to grant the IVF guarantee to Fundacion Valencia, was to finance the acquisition of shares of Valencia CF by Fundacion Valencia, in the context of the decision by Valencia CF to carry out a capital increase of EUR 92,4 million for the issuance of 1 922 250 new shares (reaching the total number of the shares at 2 114 475). The new shares were subscribed at par with the existing ones, for a nominal value of EUR 48,08 per share. Through this loan, Fundacion Valencia acquired 70,6 % of the total shares of Valencia CF for the abovementioned price of EUR 48,08 per share. Other participations in the same capital increase reached the amount of EUR 18,8 million. Subsequently, from these shares, 52 212 shares were sold at the price of EUR 56,50 per share during the 2010-2011 financial year, 878 shares were sold at the price of EUR 57,00 per share during the 2011-2012 financial year, and 1 481 368 shares were sold at the price of EUR 67,50 per share in the financial year 2013-2014.
- (8) The guarantee by IVF covered 100 % of the loan's principal, plus interest and costs of the guaranteed transaction. There was an annual guarantee premium of 0,5 % for IVF and a one-off 1 % commitment fee ⁽³⁾, to be paid by Fundacion Valencia. As a counter-guarantee, IVF received a second-rank pledge after Bankia on the shares of Valencia CF owned by Fundacion Valencia. The duration of the underlying loan was 6 years, within which there was a grace period (for the payment of the loan's capital) of 4 years. The interest rate of the underlying loan was equal to: (a) 6 % until 26 August 2010 (first year of loan); and (b) from 26 August 2010 onwards, Euribor 1 year + 3,5 % margin with 6 % minimum rate. The agreed payment schedule of the loan's capital foresaw annual repayments of interest starting in August 2010, whereas as regards the loan's capital it was agreed to repay EUR 37,5 million on 26 August 2014 and EUR 37,5 million on 26 August 2015. The repayment of the loan's capital and interest was foreseen to be funded with the proceeds from the sale of the shares that Fundacion Valencia acquired in Valencia CF.

2.2. Measure 2: the 2010 State guarantee in favour of Hercules CF

- (9) On 26 July 2010, IVF provided a guarantee for a bank loan of EUR 18 million from Caja de Ahorros del Mediterráneo to Fundacion Hercules. The express purpose of the loan, as stated in the decision to grant the IVF guarantee to Fundacion Hercules, was to finance the acquisition of shares of Hercules CF by Fundacion Hercules, in the context of the capital increase decided by Hercules CF, through a capital injection. The guarantee covered 100 % of the loan's principal, plus interest and costs of the guaranteed transaction. There was an annual guarantee premium of 1 % for IVF, to be paid by the Fundacion Hercules. As a counter-guarantee, IVF received a pledge on shares of Hercules CF owned by Fundacion Hercules; provisionally until the pledging of the shares, IVF received a guarantee by the owner of the José Rico Pérez stadium, Aligestión Integral SA, and pledging of the

⁽²⁾ See footnote 1.

⁽³⁾ A fee charged by a lender to a borrower for an unused credit line or undisbursed loan

shares in Hercules CF owned by Aligestión Integral SA. The duration of the underlying loan was 5 years. The interest rate of the underlying loan was equal to: (a) fixed rate of 4 % in the first 36 months; and (b) Euribor 1 year + 2 % margin in the last 24 months. There was also a 0,5 % commitment fee. The guaranteed loan's repayment (capital and interest) was foreseen to take place through the sale of the acquired shares in Hercules CF.

- (10) Following the granting of the State guarantee by IVF, the underlying loan was not repaid by Fundacion Hercules. As a result, on 24 January 2012, IVF, which had to fulfil its legal obligation as a guarantor, repaid the amount of EUR 18,4 million to the lending bank, replaced the latter as creditor of the loan in question and subsequently initiated legal proceedings against Fundacion Hercules CF in order to recover the abovementioned amount.

2.3. Measure 3: the 2011 State guarantees in favour of Elche CF

- (11) On 17 February 2011, IVF provided two guarantees for two bank loans totalling EUR 14 million, from Caja de Ahorros del Mediterráneo (EUR 9 million) and from Banco de Valencia (EUR 5 million), to Fundacion Elche. The express purpose of both loans, as stated in the decisions to grant the IVF guarantees to Fundacion Elche, was to finance the acquisition of shares of Elche CF by Fundacion Elche, in the context of the capital increase decided by Elche CF through a capital injection. The guarantees covered 100 % of the loan's principal, plus interest and costs of the guaranteed transaction. There was an annual guarantee premium of 1 % for IVF, to be paid by Fundacion Elche. As a counter guarantee, IVF received a pledge on shares of Elche CF, owned by Fundacion Elche. The duration of the underlying loan was 5 years. The interest rate of the underlying loan was equal to Euribor 1 year + 3,5 % margin. There was also a 0,5 % commitment fee. The guaranteed loan's repayment (capital and interest) was foreseen to take place through the sale of the acquired shares in Elche CF.

2.4. Measure 4: the 2010 and 2013 increases of the 2009 State guarantee in favour of Valencia CF

- (12) On 10 November 2010, IVF increased its guarantee to Fundacion Valencia by EUR 6 million. Purpose of the guarantee increase was to cover an increase by EUR 6 million of Bankia's existing loan which aimed at paying overdue capital, interest and costs, stemming from the defaulted interest payment of 26 August 2010 of the guaranteed loan. As a result of this increase, the initial payment schedule of the underlying loan's capital (see recital 7 above) was changed and foresaw repayments of EUR 40,5 million on 26 August 2014 and EUR 40,5 million on 26 August 2015. The loan's interest rate remained the same.
- (13) According to the submissions of the Spanish authorities and Valencia CF during the formal investigation procedure, in February 2013 IVF paid EUR 4,9 million in order to cover Bankia's partial invocation of the State guarantee due to the non-payment of the interest instalment of 26 August 2012. The Commission, based on the information available at the time, opened the formal investigation procedure in December 2013 on the belief that IVF had increased its existing guarantee in February 2013 similarly to the guarantee increase of 10 November 2010.

2.5. The beneficiaries

- (14) Valencia CF is a professional Spanish football club based in Valencia and founded in 1919. It participates in the Spanish first league ('La Liga') and is one of the biggest football clubs in Spanish and European football. Valencia CF has won six La Liga titles and seven Copa del Rey trophies. In the all-time La Liga table, Valencia is in third position behind Real Madrid CF and FC Barcelona. It has also reached eight major European finals, winning five of them. Valencia CF has also been a member of the G-14 group of leading European football clubs. In Spain it is the third most supported football club by fans. It is also one of the biggest clubs in the world in terms of number of members (registered paying supporters), with more than 50 000 season ticket holders and more than 20 000 season ticket holders on the waiting list, playing its home games at the Mestalla stadium, which seats 55 000 spectators.

- (15) Table 1 below includes the data on the financial performance of Valencia CF in the period June 2007-June 2012.

Table 1

Key financial data of Valencia CF June 2007-June 2012

(EUR million)

	7/2006-6/2007	7/2007-6/2008	7/2008-6/2009	7/2009-6/2010	7/2010-6/2011	7/2011-6/2012
Turnover	107,6	99,4	82,4	101,3	116,8	119,6
EBT	- 26,1	12,4	- 59,2	17,9	0,1	8,3
EBT margin (ratio)	- 0,24	0,12	- 0,72	0,18	0,00	0,07
Registered capital	9,2	9,2	9,2	101,7	101,7	101,7
Own equity	- 26,3	5,9	- 33,3	57,3	55,4	57,6
Debt/equity (ratio)	- 11,1	73,5	-16,5	8,0	6,9	6,6

Source: annual reports and business data sourcing.

- (16) Fundacion Valencia is a non-profit foundation whose founding aim is to 'preserve, disseminate and promote the sports-related, cultural and social aspects of Valencia Club de Fútbol and the link between the Club and its fans'. Fundacion Valencia was established in 1996 and was a shareholder in Valencia CF from that day. The activities of Fundacion Valencia are related to, among others, promoting football, managing Valencia CF's youth teams and promoting women's and amateur football. Following the capital injection in question (see recital 7 above), Fundacion Valencia acquired a controlling shareholding in Valencia CF, in particular 72 % against 1,6 % that it controlled before the capital injection, and became the parent entity of Valencia CF (*). Also, all members of the Board of Directors of Valencia CF were also members of the Board of Fundacion Valencia.

- (17) Table 2 below includes the financial data of Fundacion Valencia in the period June 2008-June 2011.

Table 2

Key financial data of Fundacion Valencia June 2008-June 2011

(EUR million)

	7/2007-6/2008	7/2008-6/2009	7/2009-6/2010	7/2010-6/2011
Gross income	1,7	1,8	1,2	1,5
EBT	- 0,01	0,00	- 4,4	- 4,8
Total assets	0,6	0,6	74,1	71,8
Own equity	0,03	0,03	- 4,4	- 9,9
Debt	0,5	0,6	76,5	81,6

Source: annual reports of Fundacion Valencia.

(*) The annual report of Valencia CF of June 2012 states that Valencia CF belongs to a group of companies whose parent or holding company is Fundacion Valencia.

- (18) Hercules CF is a professional Spanish football club based in Alicante, in the region of Valencia. Founded in 1922, it currently plays in the Spanish third division ('Segunda División B'), and holds home games at the José Rico Pérez stadium, which seats 30 000 spectators. At the time of the measure under scrutiny (July 2010), Hercules CF had just qualified to La Liga as a runner-up of the Spanish second division ('Segunda División') of the season 2009-2010. As submitted by the Spanish authorities, on 25 January 2012, Hercules CF entered into an agreement with the majority of its private creditors which had entered insolvency proceedings starting on 5 July 2011 ('concurso de acreedores'), which included a haircut of 50 % of their claims and a deferral by 7 years of payment of ordinary claims, extendable by 2 years in case of loss of its professional status. Table 3 below includes the data on the financial performance of Hercules CF in the period June 2008-June 2012.

Table 3

Key financial data of Hercules CF June 2008-June 2012

(EUR million)

	7/2007-6/2008	7/2008-6/2009	7/2009-6/2010	7/2010-6/2011	7/2011-6/2012
Turnover	4,0	4,1	5,4	24,8	6,2
EBT	- 5,7	- 9,8	- 17,6	- 12,9	- 0,4
EBT margin (ratio)	- 1,4	- 2,4	- 3,3	- 0,5	- 0,1
Registered capital	3,8	3,8	3,8	21,2	21,2
Own equity	- 22,6	- 29,6	- 29,4	- 39,0	- 36,6
Debt/equity (ratio)	- 1,1	- 1,0	- 1,6	- 1,3	- 1,4

Source: annual reports and business data sourcing.

- (19) *Fundación Hércules de Alicante* ('Fundacion Hercules') is an organisation with the mission of promoting social welfare and matters related to Hercules CF, not involved in economic activities. With the capital injection in question (see recital 9 above), Fundacion Hercules acquired 81,96 % and thus a controlling shareholding in Hercules CF, with the second-ranked shareholder owning 16,99 % (before the capital injection, Fundacion Hercules did not hold shares). Also, as foreseen by the statutes and by-laws of Fundacion Hercules, the members of the Board of Directors of Hercules CF are legally members of the governing body of Fundacion Hercules ('Patronato'). Table 4 below includes the financial data of Fundacion Hercules in the period June 2009-June 2011.

Table 4

Key financial data of Fundacion Hercules June 2009-June 2011

(EUR million)

	7/2008-6/2009	7/2009-6/2010	7/2010-6/2011
Gross income	0,6	0,4	0,4
EBT	0,0	0,0	0,0
Total assets	0,06	0,12	17,58
Own equity	0,03	0,03	- 1,00
Debt	0,03	0,09	18,58

Source: annual reports of Fundacion Hercules.

- (20) Elche CF is a professional Spanish football club based in Elche, province of Alicante, in the region of Valencia. Founded in 1923, it currently plays in the Spanish second division, holding home matches at the Manuel Martínez Valero stadium which seats 38 750 spectators. At the time of the granting of the measures in question (February 2011), it was playing in the second division, whereas subsequently it played in La Liga in the seasons 2013-2014 and 2014-2015. Table 5 below includes the data on the financial performance of Elche CF in the period June 2007-June 2011. As submitted by the Spanish authorities, Elche CF entered insolvency proceedings on 6 August 2015.

Table 5

Key financial data of Elche CF June 2007-June 2011

(EUR million)

	7/2006-6/2007	7/2007-6/2008	7/2008-6/2009	7/2009-6/2010	7/2010-6/2011
Turnover	5,9	7,1	4,4	4,4	4,8
EBT	- 6,2	- 3,9	- 3,3	- 1,1	1,4
EBT margin (ratio)	- 1,1	- 0,5	- 0,8	- 0,3	0,3
Registered capital	13,4	13,4	17,4	8,1	22,1
Own equity	16,0	12,1	- 10,2	- 10,2	4,3
Debt/equity (ratio)	1,9	2,7	- 2,7	- 2,7	4,6

Source: annual reports of Elche CF.

- (21) *Fundación Elche Club de Fútbol* ('Fundacion Elche') is a non-profit organisation in the Valencia region, with the mission of promoting and developing sports-related activities, not involved in economic activities. With the capital injection in question (see recital 10 above), Fundacion Elche acquired a controlling shareholding of 63,45 % as the only shareholder of Elche CF with more than 10 % (before the capital injection it did not hold shares). Also, the majority of the members of Elche CF's Board of Directors were also members of the Board of Fundacion Elche.
- (22) Table 6 below includes the financial data of Fundacion Elche in the period 2009-2011.

Table 6

Key financial data of Fundacion Elche December 2009-December 2011

(EUR million)

	2009	2010	2011
Gross income	0,2	0,3	0,3
EBT	0,0	0,0	0,0
Total assets	1,8	1,4	15,4
Own equity	1,4	1,4	1,4
Debt	0,4	0,08	14,1

Source: annual reports of Fundacion Elche.

2.6. The 2009 viability plan of Valencia CF

- (23) According to the Spanish authorities, the decision of IVF to grant the 2009 guarantee in favour of Valencia CF was taken on the basis of a 'viability plan' dated May 2009. That viability plan included:
- (a) A presentation of Valencia CF's financial data in the period between June 2004 and June 2009, with references to main points of the club's difficult economic situation:
 - Activities consistently making a loss both in the general business and in buying and selling players' rights.
 - Building of new stadium halted due to significant slippage in the budget of EUR 366 million, due to lack of resources for the stadium's long-term financing.
 - Fall in value of four land plots of the Mestalla stadium offered for sale and lack of buyers, reducing the expected sale price from over EUR 350 million to EUR 250 million.
 - Deficit partially covered by extraordinary property transactions.
 - Significant debt increase with corresponding financial burden.
 - Negative own funds partly covered by the sale of one of the Mestalla land plots and the activation of tax credits.
 - (b) The financial and business measures under which the club would exit those difficulties:
 - Capital increase of EUR 92 million.
 - Financing of new stadium with long-term instruments.
 - Increase of income mainly through the new stadium becoming operational, resulting in a significant increase in the season-ticket holders and the revenue-producing area (parking, shops, services, etc.).
 - Reduced expenditure mainly in the football squad due to changes in sporting policy: squad composition, remuneration structures, etc.
 - Sale of land plots (Mestalla and Ciudad Deportiva de Paterna land plots).
 - Sale of players' rights during the first 2 years of the plan.
 - (c) The planned sports investments in June 2010-June 2015 and planned sales, profits and purchases in June 2010-June 2011.
 - (d) The planned property disinvestments and relevant revenues per year: (i) sale of 'third-party' property at EUR 80 million, planned to produce profit of EUR 42 million in June 2011; (ii) sale of Mestalla land plots at EUR 250 million, planned to produce profit of EUR 160 million in December 2011; and (iii) sale of Paterna land plot at EUR 35 million, planned to produce profit of EUR 33 million in June 2012.
 - (e) The club's financing needs in the period 2010-2015, with graphs showing the necessary amounts per year, the corresponding months of financing per year and the main usages and sources of financing per year.
 - (f) A forecast that Valencia CF would achieve (among others) the following results until June 2015:

Table 7

Forecasted financial data of Valencia CF June 2010-June 2015, as presented in the 'viability plan'

(EUR million)

	7/2009-6/2010	7/2010-6/2011	7/2011-6/2012	7/2012-6/2013	7/2013-6/2014	7/2014-6/2015
Turnover	92,2	93,7	122,4	128,6	134,7	138,7
Operating Result	- 30,0	- 24,7	- 8,9	- 0,2	1,9	5,1

	(EUR million)					
	7/2009- 6/2010	7/2010- 6/2011	7/2011- 6/2012	7/2012- 6/2013	7/2013- 6/2014	7/2014- 6/2015
Operating margin (ratio)	– 0,33	– 0,26	– 0,07	0,00	0,01	0,04
EBT	– 9,5	50,5	154,8	– 0,2	1,9	5,1
EBT margin (ratio)	– 0,1	0,54	1,26	0,00	0,01	0,04
Registered capital	99,8	99,8	99,8	99,8	99,8	99,8
Own equity	39,9	76,5	202,9	203,4	204,7	208,2
ROE margin (ratio)	– 0,23	0,66	0,76	0,00	0,01	0,02
Debt/equity (ratio)	10,17	5,20	0,53	0,39	0,35	0,40

2.7. The 2014 sale by Fundacion Valencia of shares in Valencia CF

- (24) According to the comments of Spain, Fundacion Valencia and Valencia CF, after receiving consent by IVF (such consent was a clause in IVF's guarantee), Fundacion Valencia publicly announced in January 2014 its intention to launch a process to sell its shares in Valencia CF. In February 2014 a Management Committee was set up to oversee the process, which was comprised of representatives of Bankia, Generalitat Valenciana (represented by IVF), Valencia CF and Fundacion Valencia. The sales process was managed by KPMG (appointed by Bankia) and PwC. There were the following seven bidders, from China, USA, Saudi Arabia, Singapore, Russia and Costa Rica:

- (a) Dalian Wanda Group, [...] (*).
- (b) Promontoria Holding 93 BV, [...].
- (c) The Up 54 Limited, [...].
- (d) Global Emerging Market, [...].
- (e) Meriton Holdings Limited, a company based in Singapore belonging to Peter Lim, a Singaporean businessman and investor, with a fortune valued at USD 2,4 billion (according to Forbes).
- (f) Zolotaya Zvezda, [...].
- (g) Mr Mario Alvarado Orozco, [...].

- (25) The main criteria for the evaluation of the offers were:

- (a) Repayment of Valencia CF's loans (the winner indeed repaid Valencia's guaranteed loan, resulting in the cancellation of the State guarantee under investigation, see recital 28 below).
- (b) Capital injection and reduction of Valencia CF's debt.
- (c) Commitment to complete Valencia CF's new stadium (construction was ceased) and closure of the relevant outstanding commitments with municipality (exchange of grounds and associated sports area).
- (d) The new stadium to remain as asset of Valencia CF.

(*) Confidential data.

- (e) Valencia CF to keep permanently its assets. Income from assets disposal to be used solely for the recapitalisation of Valencia CF.
 - (f) The winner to guarantee Valencia CF's asset and financial balance for 5 years, and to undertake not to sell the club or lose control of shares for a minimum of 5 years.
 - (g) 'Social area' criteria included: presence of small shareholders, maintaining of Fundacion Valencia's role, promotion of women's football and other sports activities, promotion of Valencia CF's international image.
- (26) KPMG and PwC sent instructions to the selected investors in order to seek binding offers. After the deadline for the submission of binding offers, the offers were opened and the Management Committee examined them for compliance with the requirements of the tender process. The offers of the following three interested investors were eliminated: [...] (withdrawal), [...] (withdrawal) and [...] (failure to submit solvency information). A period of 3 weeks from the submission deadline was set in order to select the best investor. In the latter stage, the four remaining offers were evaluated by the Management Committee and the advisory bodies PwC and KPMG. The Board of Fundacion Valencia made the final decision from among the shortlisted investors.
- (27) The selected offer was the one submitted by *Meriton Holdings Limited*, which included a EUR 100 million purchase price for 70,06 % of Valencia CF's shareholding, i.e. 1 481 368 shares or EUR 67,5 per share, a long-term refinancing of Valencia CF's EUR 229 million debt to Bankia, a EUR 100 million shareholder credit line and a commitment not to dilute shares owned by minority shareholders.
- (28) After the collection of the abovementioned price by Fundacion Valencia, in October 2014 the latter repaid to Bankia the total amount of the 2009 loan of EUR 75 million plus its 2010 increase by EUR 6 million, together with outstanding interest and other costs and obligations. Subsequently IVF's State guarantee was cancelled. A surplus amount of EUR 6 million remained with Fundacion Valencia after the repayment of the Bankia loan.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (29) On 18 December 2013, the Commission decided to open the formal investigation procedure. In its decision opening the formal investigation procedure, the Commission came to the preliminary view that Valencia CF, Hercules CF and Elche CF could be considered firms in difficulty at the time the measures identified were provided. The Commission also expressed doubts on the measures' alignment with the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽⁹⁾ ('2008 Guarantee Notice') and preliminarily concluded that the measures granted an advantage to the beneficiaries.
- (30) In addition, in its opening decision the Commission was of the preliminary view that the Spanish State, through the Generalitat Valenciana, had a clear and direct influence on IVF and preliminarily concluded that the measures were imputable to the State.
- (31) On the basis of the above, the Commission expressed doubts as regards the four measures under assessment and came to the preliminary conclusion that all of them entailed State aid.
- (32) Furthermore, the Commission considered that the entities that ultimately benefitted from the State guaranteed loans were Valencia CF, Hercules CF and Elche CF as the loans and the guarantees were granted in order to buy the shares which were newly issued by the clubs in order to increase their own capital. The Commission also came to the preliminary view that it could not be excluded that Fundacion Valencia, Fundacion Hercules and Fundacion Elche did also benefit from the identified measures rather than being pure intermediaries, between the State and the clubs, for the granting of the aid.
- (33) The Commission also expressed doubts on the compatibility with the internal market of the four measures under assessment, in particular since the Spanish authorities did not provide any possible grounds for compatibility.
- (34) In view of the nature of the measures at issue and of the fact that Valencia CF, Hercules CF and Elche CF could be considered firms in difficulty at the time of the granting of the measures, the Commission noted that the compatibility of the measures could only be assessed under Article 107(3)(c) TFEU, and in particular in the light of

⁽⁹⁾ OJ C 155, 20.6.2008, p. 10.

the 2004 Community guidelines on state aid for rescuing and restructuring firms in difficulty ⁽⁶⁾ ('2004 R&R Guidelines'). The Commission first noted that the conditions for rescue aid laid down in Section 3.1 of the 2004 R&R Guidelines did not seem to be met. In relation to restructuring aid as defined in Section 3.2 of the 2004 R&R Guidelines, the Commission highlighted that the measures identified had been granted in the absence of a credible restructuring plan satisfying the conditions laid down in the 2004 R&R Guidelines.

- (35) Finally, the Commission noted that Valencia CF seemed to have benefitted from repeated measures in its favour while it was in difficulty, thus the 'one time, last time' condition under Section 3.3 of the 2004 R&R Guidelines did not seem to be met.

4. POSITION OF THE MEMBER STATE

- (36) Both the Spanish authorities and IVF (as an instrument of the Generalitat Valenciana and also granting authority of the measures in question) submitted comments during the formal investigation procedure. Those comments coincide to a great extent and thus will be presented together in the following recitals. They will be presented as comments of Spain since IVF constitutes an entity which belongs and falls under the control of the Generalitat Valenciana.
- (37) Spain considers that measures 1, 2, 3 and 4 did not entail State aid under Article 107(1) TFEU because the granting of the guarantees in question and also their terms and conditions were in line with the budgets approved by the provisions and limits foreseen by Spanish legislation ⁽⁷⁾.
- (38) Spain also notes that measures 1, 2, 3 and 4 did not entail an undue advantage to the recipients of the guarantees in question under Article 107(1) TFEU because the provisions of the 2008 Guarantee Notice were fulfilled, in particular:
- (a) The underlying transactions were described and measurable.
 - (b) IVF received counter-guarantees for the guarantees in question, in particular pledges on the shares acquired by the Fundaciones with the guaranteed loans.
 - (c) The recipients of the guarantees, i.e. the three Fundaciones, were not in difficulty at the time of the guarantees' granting.
 - (d) The guarantee fees and interest rates of the guaranteed loans were at market level.
- (39) Furthermore, Spain claims that the 2009 decision of Fundacion Valencia to invest in the Valencia CF's shareholding was in conformity with the market economy investor principle, and that therefore no undue advantage was granted under Article 107(1) TFEU, for the following reasons:
- (a) The decision of IVF to grant measure 1 was based on a viability plan of Valencia CF describing the club's good economic prospects, to come especially from the operations of the club's new stadium (see recital 20 above).
 - (b) The loan received by Fundacion Valencia was agreed to be repaid with the proceeds coming from the sale of the shares that Fundacion Valencia acquired in Valencia CF in 2009.
 - (c) There was significant participation in the 2014 sales process by important investors, which proves the market interest.
 - (d) The winning price in the abovementioned 2014 sales process was higher than the price at which Fundacion Valencia acquired shares in Valencia CF in 2009 (EUR 67,5 per share vs EUR 48,08 per share, respectively).

⁽⁶⁾ OJ C 244, 1.10.2004, p. 2.

⁽⁷⁾ In particular: (a) the Eighth Additional Provision of the Generalitat Valenciana Law 7/1990 of 28 December 1990 on Budgets for 1991, which set up the IVF; and (b) the Legislative Decree of 26 June 1991 of the Council of Valencia which amended the Generalitat Valenciana's Law on Public Finance.

- (40) In addition, Spain argues that the measures under scrutiny do not fulfil the criterion of distortion of competition and effect on trade between Member States under Article 107(1) TFEU because:
- (a) In 2012, when comparing Valencia CF's situation with that of other actors in equivalent leagues, such as the Premier League, one sees that Valencia CF generated less broadcasting rights revenue even than Blackpool, the team with the lowest income in the Premier League. Also, in the 2011-2012 season Valencia CF had the front of the players' shirts left without any main sponsor, which shows the problem that the club is having in competing in the sponsorship market. Finally, the club had to sell during the period under investigation its most valuable players, which mitigated the club's chances for success in sport competitions.
 - (b) Hercules CF was in the second division when it was given the loan. Therefore its geographical scope is, and has always been, local, and it has never taken part in European competitions.
 - (c) Elche CF has never qualified for a European competition and its economic influence rarely extends beyond the province of Alicante. Also, Elche is an entity, which, in itself, does not have the capacity to attract football players from other markets under financial conditions that would have altered competition.
- (41) Spain submits that, according to the plan for the repayment of the guaranteed loan to Fundacion Valencia, the latter had the obligation to sell all the acquired shares in Valencia CF by 30 June 2015, as follows: (a) in Phase 1, to be concluded on 31 December 2010, Fundacion Valencia would sell at least 47 663 shares at the price of EUR 53,5 per share; and (b) in Phase 2, to be concluded on 30 June 2015, Fundacion Valencia would sell 852 452 shares. Fundacion Valencia's obligation was to use the proceeds from the sale of the shares for the repayment of the guaranteed loan.
- (42) Spain does not disagree with the Commission's preliminary findings (and even acknowledges) that IVF's decisions to grant the measures in question were imputable to the State, and that Valencia CF, Hercules CF and Elche CF were in difficulty at the time of the granting of the measures in question. In addition, Spain acknowledges that the guarantees granted by IVF for the loans to Fundacion Valencia, Fundacion Hercules and Fundacion Elche covered in each case 100 % of the underlying loan capital, plus interest and costs of the guaranteed transaction.
- (43) Spain also advanced compatibility grounds for measures 1 and 4 (in favour of Valencia CF and Fundacion Valencia) under the 2004 R&R Guidelines, in case the Commission would conclude that they amount to State aid.
- (44) As regards return to viability, Spain considers that the 2009 viability plan ensures the long-term viability of Valencia CF. Furthermore, Spain is of the view that the sale of Valencia CF's most valuable players is an appropriate and proportionate compensatory measure. Furthermore, in relation to aid limited to the minimum (own contribution), Spain claims that the participation of private buyers in the 2009 capital increase, amounting to EUR 18,8 million, should be accepted as own contribution. Finally, as regards the 'one time, last time' principle, Spain is of the view that it was respected, since measure 4 only includes the increase of 10 November 2010 of the existing guarantee by EUR 6 million, which cannot therefore be considered as a new guarantee and thus new State aid to Valencia CF. According to Spain, measure 4 does not include any other State guarantee, since in February 2013 IVF only paid EUR 4,9 million in order to cover Bankia's partial invocation of the State guarantee due the non-payment of the interest instalment of 26 August 2012.
- (45) Finally, the Commission notes that Spain has not provided a plan on the financial prospects of Hercules CF and Elche CF at the time when the State guarantees in their favour (2010 and 2011) were granted. In addition, Spain has not provided comments on the compatibility of measures 2 and 3 with the internal market on any grounds.

5. COMMENTS FROM INTERESTED PARTIES

- (46) During the formal investigation procedure, the Commission received comments from Valencia CF and Fundacion Valencia, which coincide to a great extent with the comments made by Spain and IVF (see recitals 36-45 above). In addition to those coinciding arguments, those interested parties argued the following:
- (a) Valencia CF argues that the sale of the shares that Fundacion Valencia had acquired in 2009 for a price above the acquisition price of EUR 48,08 per share (see recital 6 above), and the fact that those shares were pledged by IVF for its guarantee, show that IVF acted following the market economy investor principle because of the value of those shares which would cover IVF's risk as a guarantor.

- (b) Valencia CF argues that, since the ownership of Valencia CF was transferred in the context of an open and competitive tendering procedure, the aid element was reflected in the market price and included in the purchase price. Therefore, it is the seller of the shares who keeps the benefit of the aid. Valencia CF has submitted that the above is in line with case-law ⁽⁸⁾. According to Valencia CF, in light of the above, the aid amount of the State guarantee would need to be recovered from the seller, i.e. Fundacion Valencia.
- (c) Valencia CF furthermore supports that the aggregated market value of its players ⁽⁹⁾ together with the fact that its registered capital in the period 2007-2009 was not lost but remained stable and the club returned to profits in 2011 and 2012 could be sufficient to rebut the presumption that Valencia CF was in financial difficulties because it had a negative equity during the 2007-2009 period. In addition, the open bidding process launched by Fundacion Valencia, the high number of bidders and the purchase price paid by Meriton Holdings Limited confirmed that the real economic value of Valencia CF goes beyond the net value reflected in Valencia CF's annual accounts and includes the market value of its players, the club's brand name and its international projection.
- (d) In addition, Valencia CF submits that the calculation of any aid element should take into account the fact that at the time of the measure under scrutiny Valencia CF was not in 'bad/financial difficulties' but rather had a 'satisfactory rating category' and that the pledge over Valencia CF's shares granted by Fundacion Valencia to IVF should be considered as a 'high' or, at least, a 'normal' level of collateralisation.
- (e) Valencia CF also argues that the 2009 guarantee would be compatible with the 2009 Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ⁽¹⁰⁾ which was adopted to address deficiencies stemming from the economic and financial crisis which began in October 2008.
- (f) Fundacion Valencia submits that its administrative bodies adopted a payment plan which was submitted to Generalitat Valenciana and to Bankia in order for the latter to grant the guarantee and loan in question. According to that payment plan, Fundacion Valencia had the obligation to sell all the acquired shares in Valencia CF by 30 June 2015, as follows: (a) in Phase 1, to be concluded on 31 December 2010, Fundacion Valencia would sell at least 47 663 shares at the price of EUR 53,5 per share, with proceeds of approximately EUR 2,5 million; and (b) in Phase 2, to be concluded on 30 June 2015, Fundacion Valencia would sell 852 452 shares at prices ranging from EUR 53,5 to EUR 67,5 per share. Fundacion Valencia marks the deadline of 30 June 2015 as coinciding exactly with the maturity date of the guaranteed loan. Fundacion Valencia's obligation was to use all proceeds from the sale of the shares to amortise the guaranteed loan. Fundacion Valencia indicates that the sale price of the shares was to be equivalent to their nominal value plus any interest that might accrue on the guaranteed loan over the period in question. Similarly, the sale amount was to be increased if the annual interest on the loan agreement concluded between Fundacion Valencia and Bankia for the acquisition of the shares were to increase (i.e. exceed the agreed 6 %). Fundacion Valencia adds that the guaranteed loan was to be repaid also with the use of monetary contributions by institutional trustees and third parties (public institutions and private companies) and by recurring income obtained from its regular activities. In this context, Fundacion Valencia submits that the first interest payment due on 27 August 2010 was not possible to be made because of the delay in the sale of shares in Phase 1, causing the increase of the guaranteed loan by EUR 6 million on 10 November 2010 (measure 4, see recital 11 above).
- (g) Fundacion Valencia also submits that in February 2013 it made a payment of EUR 5 221 517,39 to Bankia for the prior partial exercise of the guarantee and the corresponding payment of the same amount by IVF (guarantor).
- (h) Fundacion Valencia finally submits that the 2009 guarantee was cancelled on 24 October 2014. However, as a result of various legal proceedings launched in Spain, the guarantee was not always in force and there were some periods in which it did not exist due to the courts having declared it invalid *ab initio*, and other periods where it was suspended by a court order conceding protective measures. In this context, Fundacion Valencia

⁽⁸⁾ Commission decision of 12 May 2004 in case C40/00, recital 120; Judgement of the Court of 20 September 2001 in case C-390/98, recitals 77-78; and Judgement of the Court of 8 May 2003 in cases C-328/99 and C-399/00, recital 83.

⁽⁹⁾ As submitted by Valencia CF: (a) the aggregated book value (purchase cost minus annual amortisation) of Valencia CF's players, as reflected in its 2008/09 annual accounts, was EUR 95,7 million; (b) the estimated overall market value of Valencia CF's players in June 2009 was approximately EUR 235,7 million; and (c) in the financial year ending in June 2010 players were sold for EUR 78,7 million (whereas spending on new signings totalled EUR 14,5 million).

⁽¹⁰⁾ OJ C 16, 22.1.2009, p. 1.

claims that, should it be determined that the guarantee in question entails some element of State aid, these periods of suspension or invalidity should also be taken into account by the Commission in its assessment.

- (47) The Commission also received comments from Liga Nacional de Fútbol Profesional (Professional Football League 'LFP'), i.e. the sports association made up of all the public limited sports companies and football clubs in the First and Second Divisions of Spain that participate in official professional competitions on a national scale.
- (48) In its comments, LFP supports that an initial reading of the opening decision does not provide the clarity it should regarding the possible effect on competition that might arise from the potential aid, nor does it provide such clarity regarding the effect on trade between Member States. Furthermore, LFP argues that the sports sector in general and the football sector in particular, especially due to its popularity among young people, should be subject to special treatment, as recognised by Article 165 TFEU. Finally, LFP claims that the sporting activities undertaken by professional sport clubs perform an unquestionable public service function, which determines that in accordance with Article 106(2) TFEU, the application of rules on competition to these clubs must not obstruct the performance, 'in law or in fact', of the particular tasks assigned to them. In that context, LFP argues that the exception laid down in Article 107(3)(c) TFEU that declares the compatibility with the internal market of '*aid to facilitate the development of certain economic activities or [...] where such aid does not adversely affect trading conditions to an extent contrary to the common interest*' clearly responds to this idea. Moreover, LFP supports that the fact that to date the Commission has not adopted guidelines on application of the rules on State aid in the Treaty to commercial sporting activities represents a burden when evaluating the present case, with the mere analogous application of various generic, heterogeneous norms from outside the sector under scrutiny being unable to provide an appropriate solution, as there is a clear and evident risk of conducting a biased and partial evaluation of the case, in addition to the legal uncertainty this entails. Finally, LFP submits that to evaluate the alleged aid and its legality under Union law, the Commission should take certain LFP rules into consideration, referring in particular to the acceptance of the clubs' budgets, the limits in clubs' spending, the economic and financial capacity of the clubs, the protection of creditors, the rationality in the clubs' finances, the promotion of responsible spending and the protection of the clubs' long-term viability and sustainability.

6. OBSERVATIONS FROM SPAIN ON THE COMMENTS OF INTERESTED THIRD PARTIES

- (49) In its observations on the comments submitted by interested parties, Spain reiterated its position as submitted with its letter of 27 April 2015, which contained most of the arguments described in recitals 36 to 45 above.

7. ASSESSMENT OF THE MEASURES

7.1. Existence of State aid

- (50) By virtue of Article 107(1) TFEU, 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 production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (51) In order to conclude whether State aid is present, the Commission must assess whether the cumulative criteria of Article 107(1) TFEU (i.e. transfer of State resources, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for each of the four measures under assessment.

7.1.1. State resources and imputability to the State

- (52) In order to be considered aid in the sense of Article 107(1) TFEU, a measure must be granted directly or indirectly from State resources and it must be imputable to the State. According to case-law, resources of an undertaking are to be considered state resources if the State is capable, by exercising its dominant influence over such undertakings, to direct the use of their resources ⁽¹¹⁾.
- (53) The transfer of State resources may take many forms, including State guarantees. The latter put State resources at risk, as their call is paid through the State budget. Moreover, any guarantee that is not properly remunerated implies a loss of financial resources for the State. In addition, the creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee, is sufficient for the purposes of Article 107(1) ⁽¹²⁾.

⁽¹¹⁾ Case C-482/99 French Republic/Commission (Stardust Marine) [2002] ECR I-4397.

⁽¹²⁾ Case C-200/97 *Ecotrade* EU:C:1998:579, paragraph 41 and Joined Cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others* EU:C:2013:175, paragraphs 137-139.

- (54) The Commission first notes that all measures under scrutiny were subscribed in their entirety by IVF. According to the institutional information provided in IVF's website ⁽¹³⁾, IVF was created by Law 7/1990 (28 December 1990), as a public law entity subject to the Government of Valencia, and is intended to act as the main instrument of public credit policy and contribute to the exercise of the powers of the Government of Valencia on the financial system. IVF is a public financing institution under the control of the Generalitat Valenciana, and the latter's representatives also participate in IVF's General Council and Investment Committee. At present, IVF is attached to the Department of Finance of the Generalitat Valenciana . ⁽¹⁴⁾.
- (55) On the basis of the above, the Commission observes that the very objective of IVF is closely linked to the public administration and to the implementation of public authority decisions. The public nature of the undertaking's activities is an essential indicator of the imputability of an undertaking's conduct to the State ⁽¹⁵⁾, in particular in so far as the undertaking is used by the State as a vehicle for the implementation of a policy ⁽¹⁶⁾ rather than for the pursuit of a purely commercial purpose ⁽¹⁷⁾. Spain has not presented any arguments with regard to this indicator. Moreover, it is noted that representatives of the Generalitat Valenciana participate in IVF's General Council (see recital 6 above).
- (56) On the basis of the above considerations, the Commission considers that the State had a clear and direct influence on IVF. This is not disputed by Spain. The latter furthermore submits that the granting of the guarantees in question and also their terms and conditions were in line with the budgets approved by the provisions and limits foreseen by Spanish legislation, referring in particular to IVF (see recital 37), which demonstrates that the measures in question entailed State resources. In the light of the above, the Commission is of the view that the measures granted by IVF constitute State resources and are imputable to Spain.

7.1.2. *Selective advantage*

- (57) The State measures under scrutiny provide for a selective advantage as they are for the benefit of individual undertakings. In the case at stake, the State measures in question allowed the financing of the acquisition of shares by the respective Fundaciones in the three clubs under scrutiny, through capital injections.
- (58) As regards the existence of an advantage, Spain claims that the decision to grant measure 1 was in conformity with the market economy investor principle due to the 2009 viability plan. The Commission cannot accept this claim for the following reasons:
- (a) The 2009 viability plan does not include a sensitivity analysis of the risks that could have an impact on the financial performance of Valencia CF. Key aspects of that assessment were missing, like for instance the effect of the club's different possible placements in the championships final ranking, changes in the prices in the real estate market, in the sponsoring market or in the broadcasting market, potential risks regarding the ability of fans to pay season or single-match tickets, injury risks of players, changes in the market of players' transfers etc.
- (b) Moreover, the financial results forecasted by the viability plan were below a level, which could be considered as adequate for the restoration of Valencia CF's long-term viability. Indeed, as demonstrated in Table 4 above, the 2009 viability plan presented operating losses until the economic year ending in June 2013, i.e. in the 4 years following the granting of measure 1. In addition, the operating profits forecasted for the economic years ending in June 2014 and June 2015 were at very low operating margins, of 1 % and 4 % respectively. Finally, as regards the club's forecasted earnings before taxes until the economic year ending in June 2015, the same analysis stands as for the operating results above, whereas the significantly high results of EUR 50,5 million in the year ending in June 2011 and EUR 154,8 million in June 2012 are not representative of the club's financial performance but constitute extraordinary results stemming from the sale of land plots.
- (59) On the basis of the above, the Commission considers that the 2009 viability plan did not demonstrate any prospect of Valencia CF for the repayment of the 2009 guaranteed loan, since it did not include any elements of recovery of Valencia CF from its annual losses or significantly high levels of debt and lacked credible and elaborated financial forecasts that a sound and credible viability plan should include.

⁽¹³⁾ <http://www.ivf.gva.es/>

⁽¹⁴⁾ <http://www.ivf.gva.es/p.aspx?pag=InformacionInstitucional>

⁽¹⁵⁾ Stardust Marine, § 56; Air France, § 58.

⁽¹⁶⁾ Steinlike & Weinlig v Germany, 78/76, judgment of 22 March 1977, §§ 17-18.

⁽¹⁷⁾ Pearle BV et al. v Hoofdbedrijfschap Ambachten, C-345/02, judgment of 15 July 2004, § 37.

- (60) In addition, Valencia CF argues that the open bidding process launched by Fundacion Valencia, the high number of bidders and the purchase price paid by *Meriton Holdings Limited* confirmed that the real economic value of Valencia CF goes beyond the net value reflected in Valencia CF's annual accounts and includes the market value of its players, the club's brand name and its international projection. The Commission cannot accept this argument since the sale of the club's shares to *Meriton Holdings Limited* took place in 2014, i.e. 5 years after 2009, the time at which measure 1 was granted, and more than 3 years after measure 4 was granted, therefore it is not relevant for the assessment of the financial situation of Valencia CF in 2009.
- (61) Valencia CF also claims that the sale of the shares that Fundacion Valencia had acquired in 2009 — which were sold at a price above the acquisition price of EUR 48,08 per share — and the fact that those shares were pledged by IVF for its guarantee, show that IVF as a guarantor acted following the market economy investor principle because the value of those shares would cover IVF's risk as a guarantor. The Commission cannot accept this claim because the sales of the shares in question took place after their pledging by IVF, in the financial years 2010-2011, 2011-2012 and 2013-2014. Therefore the prices at which those sales took place cannot be considered as indicative of the value of the shares in question in 2009.
- (62) As regards measure 4 and in particular its part related to the alleged increase of the existing guarantee in February 2013, on which the Commission opened the formal investigation procedure, the Commission notes that the Spanish authorities clarified during the formal investigation procedure that this was a payment by IVF of EUR 4,9 million in February 2013 in order to cover Bankia's partial invocation of the State guarantee, due to the non-payment of the interest instalment of 26 August 2012. The Commission considers that this payment was a fulfilment of IVF's obligation as guarantor and not a new measure in favour of the beneficiary. Thus, the Commission considers that this payment of February 2013 did not confer an additional advantage to the beneficiary and therefore does not constitute State aid.
- (63) As regards the identification of the beneficiaries, the Commission notes that, according to settled case-law, an entity owning controlling shareholdings in a company must be regarded as taking part in the latter's economic activity if it actually exercises that control by involving itself directly or indirectly in the management thereof, if: (a) members of its board(s) are appointed to the board(s) of the controlled company; and (b) funding arrangements are in place between the two entities ⁽¹⁸⁾.
- (64) In the case at hand, the capital injections allowed the three Fundaciones to acquire controlling shareholdings in their respective football clubs. In particular, Fundacion Valencia became the shareholder of 72 % (against 1,6 % that it controlled before the capital injection). Also, the annual report of Valencia CF (June 2012) states that Valencia CF belongs to a group of companies whose parent or holding company is Fundacion Valencia.
- (65) As regards Fundacion Hercules, it acquired 81,96 %, with the second-ranked shareholder owning 16,99 % (before the capital injection Fundacion Hercules did not hold shares).
- (66) Finally, Fundacion Elche acquired 63,45 % and became the only shareholder of Elche CF with more than 10 % (before the capital injection it did not hold shares).
- (67) As regards members of the boards of the Fundaciones and the football clubs, the Commission notes that: (a) all members of the Board of Directors of Valencia CF were also members of the Board of Fundacion Valencia; (b) the majority of the members of Elche CF's Board of Directors were also members of the Board of Fundacion Elche; and (c) as foreseen by the statutes and by-laws of Fundacion Hercules, the members of the Board of Directors of Hercules CF are legally members of the governing body of Fundacion Hercules ('Patronato'). Finally, as regards funding arrangements between the Fundaciones and their respective football clubs, the Commission notes that the former were engaged in repaying the loans that had funded the clubs, e.g. through the sale of the shares that they had thus acquired. Therefore the Fundaciones had an active and ongoing role in funding the clubs, not only as the parties that had funded the clubs' capital increases but also as the parties that serviced the loans through which those capitals were obtained by the clubs. The above indicates that the three Fundaciones, as parent or holding entities, were involved in the management of their respective football clubs.
- (68) At the same time, the Commission notes that, as stated in the loan and guarantee contracts, the guarantees for the loans of EUR 75 million to Fundacion Valencia, EUR 18 million to Fundacion Hercules and EUR 14 million

⁽¹⁸⁾ See judgment of the Court in case *Cassa di Risparmio di Firenze*, C-222/04.

to Fundacion Elche were granted by IVF with the sole purpose of the acquisition by the Fundaciones of shares in Valencia CF, Hercules CF and Elche CF, respectively. The Commission notes that this financial construction aimed at facilitating the funding of the football clubs' capital increases by using the Fundaciones as financial vehicles, therefore the purpose of the measures was not to benefit the Fundaciones, but rather the respective clubs. In this respect, the Commission also notes that the financial situation of the Fundaciones at the time when the measures in question were granted (see Tables 2, 4 and 6) show that the Fundaciones' position was not improved thanks to the guarantees in question but remained as before, and kept being characterised by low income, losses or zero results, low value of assets and relatively increased debt. In addition, despite the fact that the Fundaciones were the borrowers-debtors of the loans and the entities covered by the guarantees, the risk for the triggering of the guarantees was linked to the performance of the clubs, since the guaranteed loans' repayment (capital and interest) was foreseen to take place through the sale of the acquired shares in the football clubs. This is true also for measure 4, since the latter was caused by the delay in Phase 1 of the sale of the acquired shares in Valencia CF, which was planned to fund the loan's amortisation.

- (69) On the basis of the above, the Commission considers that the beneficiaries of the aid measures in question are Valencia CF for measures 1 and 4, Hercules CF for measure 2, Elche CF for measure 3.
- (70) As regards the financial difficulties of the beneficiaries, as already noted, the measures under scrutiny were intended to facilitate the funding of the football clubs' capital increases and the risk for the triggering of the guarantees was linked to the performance of the football clubs, since the guaranteed loans' repayment was foreseen to take place through the sale of the acquired shares in the football clubs. On the basis of the above, the analysis that follows is based on the financial data of Valencia CF, Hercules CF and Elche CF, taking into account the individual merits of each individual beneficiary.
- (71) In order to establish a benchmark for the market conform price of the implemented State measures (and thus to determine whether the State guarantees constitute advantage to the clubs), the Commission needs to determine the credit rating of the beneficiaries. Spain did not provide information about the credit rating of the beneficiaries, which applied at the time the measures were granted. However, the Commission observes that, as set out in detail in Tables 1, 3 and 5 above Valencia CF, Hercules CF and Elche CF were in financial difficulty before the measures under scrutiny were implemented.
- (72) The 2004 R&R Guidelines provide for the definition of undertakings in difficulty applied in the period the measures were granted. Point 10(a) of the 2004 R&R Guidelines stipulates that a company is in difficulty when 'more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'. This provision reflects the assumption that a company experiencing a massive loss in its registered capital will be unable to stem losses that will almost certainly condemn it to go out of business in the short or medium term (as stipulated in point 9 of the 2004 R&R Guidelines).

Valencia CF

- (73) In the case of Valencia CF, as it appears in its financial statements, in the period June 2007-June 2009 its registered capital was not lost but remained stable. However, the financial statements of Valencia CF for the 3 fiscal years preceding the granting of the State guarantee (fiscal years ending June 2007, June 2008 and June 2009) show that the company had negative total equity in June 2007 and in June 2009 due to substantial losses in the respective years. For this reason the Commission considers that point 10(a) of the 2004 R&R Guidelines applies, because all of the capital has disappeared and more than one quarter of it had been lost in the fiscal year ending June 2009. In earlier cases⁽¹⁹⁾, the Commission concluded that, where a company has negative equity, there is an *a priori* assumption that the criteria of point 10(a) are met. The General Court also concluded in a recent judgment⁽²⁰⁾ that a company with negative equity can be considered as a company in difficulty in the sense of the 2004 R&R Guidelines: *'the existence of negative own capital which [...] may be considered to be an important indicator that an undertaking is in a difficult financial situation'*.

⁽¹⁹⁾ Commission Decision 2008/716/EC of 2 April 2008 on State aid C 38/07 (ex NN 45/07) implemented by France for Arbel Fauvet Rail SA (OJ L 238, 5.9.2008, p. 27), Commission Decision 2012/541/EU of 22 February 2012 on the State aid SA.26534 (C 27/10 ex NN 6/09) implemented by Greece in favour of United Textiles S.A. (OJ L 279, 12.10.2012, p. 30), Commission Decision 2014/539/EU of 27 March 2014 on the State aid SA.34572 (13/C) (ex 13/NN) implemented by Greece for Larco General Mining & Metallurgical Company S.A (OJ L 254, 28.8.2014, p. 24).

⁽²⁰⁾ Joined Cases T-102/07 *Freistaat Sachsen v Commission* and T-120/07 *MB Immobilien and MB System v Commission*, [2010] ECR II-585.

- (74) The Commission considers that in the period June 2007-June 2009 the registered capital of Valencia CF appears to be stable because during that period the club did not adopt any appropriate measures aiming at turning its own equity from negative to positive and, at the same time, at increasing it to an adequate level. Such appropriate measures could be either the capitalisation of losses or a capital increase or both. In this respect, the Commission considers that a capitalisation of losses would have resulted in the loss of the club's entire registered capital, since the accumulated losses were higher than the registered capital. For this reason the Commission considers that the criteria in point 10(a) of the Rescue and R&R Guidelines have been met in this case.
- (75) In addition, as regards the criteria in point 11 of the R&R Guidelines, the Commission notes that Valencia CF incurred significant losses in the financial years ending in June 2007 and June 2009, with losses of EUR 26,1 million and EUR 59,2 million, respectively. Furthermore, Valencia CF's turnover decreased more than 20 % from EUR 107,6 million in fiscal year ending June 2007 to EUR 99,4 million in June 2008 down to EUR 82,4 million in June 2009. In addition, Valencia CF had significant levels of debt, as can be seen by its debt-to-equity ratio which was 73,5 in June 2008 and negative in 2007 and 2009. On the same topic, the Commission notes that Valencia CF's debt/equity ratio turned positive in June 2010 and further, whereas in the previous fiscal years it was negative: however, that development was only due to the capital injection that took place in 2009 thanks to the State guarantee in question and not as a result of the club's operations. In addition, the Commission notes that despite Valencia CF's debt/equity ratio turning positive in the year ending in June 2010, it remained at high level in the same year, thus demonstrating the club's high debt level.
- (76) Furthermore, in the year ending in June 2011 (the year when measure 4 was granted) Valencia CF had increased turnover and presented earnings. However, the club's level of profits remained close to zero, whereas its debt remained at significant levels.
- (77) The elements above demonstrate that already since June 2007 and at the time when measures 1 and 4 were granted, Valencia CF was in difficulty in the sense of point 11 of the 2004 R&R Guidelines, which states that a firm may be considered to be in difficulty 'where the usual signs [...] are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value'.

Hercules CF

- (78) As regards Hercules CF, according to its financial data (see Table 3 above), in the financial years ending in June 2008, 2009 and 2010 it had increasing losses (from EUR 5,7 million in the year ending in June 2008 to EUR 17,6 million in the year ending in June 2010). Those losses led to negative equity in the same years (of EUR 22,6 million, EUR 29,6 million and EUR 29,4 million, respectively). This demonstrates that Hercules CF was in financial difficulty in the sense of point 10(a) (in the same vein as for Valencia CF, see recitals 74-75 above) and 11 of the 2004 R&R Guidelines at the time before measure 2 was implemented.

Elche CF

- (79) As regards Elche CF, as it appears in its financial statements (see Table 5 above), the club has diminishing turnover (from 2008 to 2010) in the financial year ending in June 2009, negative EBT in the financial years ending in June 2007, 2008, 2009 and 2010, and negative own equity in the years ending in June 2009 and 2010 (EUR – 10,2 million in both financial years). The club's financial data improved during the financial year ending in June 2011, when it presented profits for the first time since June 2007 and its own equity turned from negative to positive (EUR 4,3 million) for the first time since June 2009. However that improvement was due to the capital injection that took place in the same financial year thanks to the State guarantee in question (measure 3). These elements demonstrate that Elche CF was in financial difficulty in the sense of points 10(a) and 11 of the 2004 R&R Guidelines at the time of measure 3.
- (80) At the same time, the Commission notes that Valencia CF, Hercules CF and Elche CF were not in an extreme difficult situation, in the sense of point 2.2 and point 4.1 letter (a) of the 2008 Guarantee Notice, in the years preceding the time when the measures under scrutiny were granted. One cannot ignore that Valencia CF had

profits of EUR 12,4 million in the financial year ending in June 2008 and held intangible assets of significant value in the form of football players' contracts. In particular: (a) the aggregated book value (purchase cost minus annual amortisation) of Valencia CF's players' contracts, as reflected in its 2008/09 annual accounts, was EUR 95,7 million; (b) the estimated overall market value of Valencia CF's players' contracts in June 2009 was approximately EUR 235,7 million; and (c) in the financial year ending in June 2010 players' contracts were sold for EUR 78,7 million (whereas spending on new signings totalled EUR 14,5 million). As regards Hercules CF, the club showed a 35 % increase of its annual turnover, from EUR 4 million in the year ending in June 2008 to EUR 5,4 million in the year ending in June 2010. Finally, Elche CF had a 82 % reduction of losses, from EUR 6,2 million in the year ending in June 2007 to EUR 1,1 million in the year ending in June 2010.

- (81) In addition, the Commission notes that the standard methodology of rating agencies is to consider debtors which are in default to fall below the CCC rating (or any rating of the C category). For example, the Standard & Poor's definition ⁽²¹⁾ for the C rating for short-term issuers of debt concerns 'vulnerable' debtors ⁽²²⁾, whereas its definition for the immediately lower ratings of R and SD-D concern, respectively, debtors 'under regulatory supervision' ⁽²³⁾ or in selective default or default ⁽²⁴⁾. Therefore, since none of Valencia CF, Hercules CF or Elche CF was in insolvency proceedings or default at the time when the measures in question were granted, the Commission considers that their rating at that time did not fall below the CCC category.
- (82) Finally, the Commission notes that the relatively high book value of Valencia's football players (assets) cannot mean that the club was not in financial difficulty. Whilst the book value of the players of Valencia CF was considerable, as depicted in its financial statements, a 'fire sale' value of the same players would be relatively low because buyers would use the known fact of the seller's (Valencia CF) difficulties in order to push for low prices. In addition, players' market value depends largely on random events like injuries etc., which makes such market value considerably volatile. On the basis of the above, the Commission maintains that Valencia CF was in difficulty at the time when measures 1 and 4 were granted.
- (83) In conclusion the Commission considers that due to the fact that the three clubs were in financial difficulty at the time before the measures were implemented they can be considered to have a rating in the category of CCC ⁽²⁵⁾.
- (84) Valencia CF supports that the aggregated market value of its players together with the fact that its registered capital in the period 2007-2009 was not lost but remained stable and the club returned to profits in 2011 and 2012 could be sufficient to rebut the presumption that Valencia CF was in financial difficulties because it had a negative equity during the 2007-2009 period. The Commission cannot accept the above arguments, for the reasons already explained in recitals 70-83.
- (85) As regards the aid element in the measures, all of which involve State guarantees, the Commission takes account of the 2008 Guarantee Notice, Sections 2.2 and 3.2. The 2008 Guarantee Notice stipulates that the fulfilment of certain conditions could be sufficient for the Commission to rule out the presence of State aid, such as that the borrower is not in financial difficulty and that the guarantee does not cover more than 80 % of the outstanding loan or other financial obligation. However, when the borrower does not pay a risk-carrying price for the guarantee, it obtains an advantage. Moreover, where the borrower is a firm in financial difficulty, it would not find a financial institution prepared to lend on any terms, without a State guarantee.

⁽²¹⁾ https://www.standardandpoors.com/en_US/web/guest/article/-/view/sourcelid/504352

⁽²²⁾ 'An obligor rated "C" is currently vulnerable to nonpayment that would result in a "SD" or "D" issuer rating, and is dependent upon favorable business, financial, and economic conditions for it to meet its financial commitments.'

⁽²³⁾ 'An obligor rated "R" is under regulatory supervision owing to its financial condition. During the pendency of the regulatory supervision the regulators may have the power to favor one class of obligations over others or pay some obligations and not others.'

⁽²⁴⁾ 'An obligor rated "SD" (selective default) or "D" has failed to pay one or more of its financial obligations (rated or unrated), excluding hybrid instruments classified as regulatory capital or in nonpayment according to terms, when it came due. An obligor is considered in default unless Standard & Poor's believes that such payments will be made within any stated grace period. However, any stated grace period longer than five business days will be treated as five business days. A "D" rating is assigned when Standard & Poor's believes that the default will be a general default and that the obligor will fail to pay all or substantially all of its obligations as they come due. An "SD" rating is assigned when Standard & Poor's believes that the obligor has selectively defaulted on a specific issue or class of obligations, excluding hybrid instruments classified as regulatory capital, but it will continue to meet its payment obligations on other issues or classes of obligations in a timely manner. An obligor's rating is lowered to "D" or "SD" if it is conducting a distressed exchange offer.'

⁽²⁵⁾ This rating category refers to companies with a payment capacity dependent upon sustained favourable conditions and consists of the ratings CCC+, CCC and CCC-, CC according to the rating scale of Standard and Poor's.

- (86) In this respect, the Commission disagrees with the argument of Spain that the conditions of the 2008 Guarantee Notice are fulfilled. Applying these criteria to the case at hand, the Commission finds that:
- (a) Valencia CF, Hercules CF and Elche CF were in financial difficulty (see recitals 70-82 above) at the time of granting of measures 1, 2, 3 and 4.
 - (b) As demonstrated in recitals 7-9 above, the guarantees covered more than 100 % of the underlying loans.
 - (c) The annual guarantee premiums of 0,5 %-1 % charged for the guarantees in question cannot be considered as reflecting the risk of default for the guaranteed loans, given the difficulties of Valencia CF, Hercules CF and Elche CF and in particular their high debt-to-equity ratio or the fact that they had negative equity at the time of the measures in question.
- (87) On the basis of the above, the Commission concludes that measures 1, 2, 3 and 4 do not respect the conditions set out in the 2008 Guarantee Notice and therefore comes to the view that the beneficiaries would not have obtained the measures under the same terms on the market and hence that these measures conferred an undue advantage to the beneficiaries.
- (88) Thus, in view of the above, the Commission considers that measures 1, 2, 3 and 4, provided by the State in 2009, 2010 and 2011 conferred an undue advantage to the beneficiaries.

7.1.3. Distortion of competition and effect on trade between Member States

- (89) The advantage for a professional club playing in the national first or second league may have an effect on competition and trade between Member States. Professional clubs of first and second leagues compete for presence in European competitions, in Spain through the Spanish Cup ('Copa del Rey') in which teams from La Liga and Segunda A and Segunda B compete, with the winner participating to the UEFA Europa League (unless they qualify for the UEFA Champions League). At the time of the measures under scrutiny, Valencia CF participated in international competitions (in the Europa League of seasons 2008-2009 and 2009-2010), whereas Hercules CF had just qualified to La Liga as a runner-up of the Segunda División and Elche CF was playing in the Segunda División (in season 2013-2014 it played in La Liga). Hercules CF and Elche CF also participated in Copa del Rey at the time of measures 2 and 3. Furthermore, professional clubs of first and second leagues are also active on the markets for merchandising and TV rights. Broadcasting rights, merchandising and sponsoring are sources of revenue for which such clubs compete with other clubs within and outside their home country. The more funds clubs have available to attract the best possible players, the more success they may have in sport competitions, which promises more revenue from the activities mentioned. Therefore, the Commission comes to the view that the measures under assessment are liable to distort or threaten to distort competition and affect trade between Member States.

7.1.4. Conclusion as regards the existence of aid

- (90) For the reasons stated above, the Commission concludes that measures 1, 2, 3 and 4 entailed State aid granted to Valencia CF (measure 1 and 4), Hercules CF (measure 2) and Elche CF (measure 3).

7.2. Quantification of the aid

- (91) The Commission has laid down the general principles for calculating the aid element in guarantees in the 2008 Guarantee Notice.
- (92) The Commission notes that the measures under scrutiny enabled their beneficiaries to continue operating so that, unlike other competitors with financial difficulties, those beneficiaries did not have to face the negative consequences normally deriving from their financial results.
- (93) According to Section 4.2 of the 2008 Guarantee Notice, the Commission considers that, for every guarantee, the aid amount is equal to the guarantee's subsidy element, i.e. the amount stemming from the difference between,

on the one hand, the interest rate of the loan actually applied thanks to the State guarantee plus the guarantee fee and, on the other hand, the interest rate that would have been applied to a loan without the State guarantee. The Commission notes that due to the limited number of observations of similar transactions on the market, such a benchmark will not provide a meaningful comparison. Therefore the Commission will use the relevant reference rate ⁽²⁶⁾, which is 1 000 basis points in view of the three football clubs' difficulties and the very low value of the loans' securities, plus 124-149 basis points as the base rates of Spain at the time of the aid measures. Indeed, each loan was securitised with a pledge on the acquired shares in the clubs. However, the latter were in difficulty, i.e. they were conducting operations resulting in losses, and there was no credible viability plan in place to demonstrate that those operations would turn to producing profits for their shareholders. Therefore those clubs' losses were encompassed in the value of the same clubs' shares, thus the value of those shares as loan security was close to zero. On the basis of the Commission's calculations, the aid amount in the measures under assessment would be EUR 20,381 million in the case of Valencia CF (EUR 19,193 million under measure 1 plus EUR 1,188 million under measure 4), EUR 6,143 million in the case of Hercules CF and EUR 3,688 million in the case of Elche CF. The Commission's calculations are as follows:

- (a) For measure 1: the applied interest rate of 6,5 % is deducted from the applicable market interest rate of 11,45 %, i.e. 1 000 basis points for Valencia CF plus 145 basis points as base rate for Spain in November 2009 ⁽²⁷⁾. The result is multiplied by the loan amount of EUR 75 million and by the loan's actual duration of 5,17 years. The final result equals EUR 19,193 million.
- (b) For measure 2: the applied interest rate of 4,41 % is deducted from the applicable market interest rate of 11,24 %, i.e. 1 000 basis points for Hercules CF plus 124 basis points as base rate for Spain in July 2010 ⁽²⁸⁾. The result is multiplied by the loan amount of EUR 18 million and by the loan's duration of 5 years. The final result equals EUR 6,143 million.
- (c) For measure 3: the applied interest rate of 6,22 % is deducted from the applicable market interest rate of 11,49 %, i.e. 1 000 basis points for Elche CF plus 149 basis points base rate for Spain in February 2011 ⁽²⁸⁾. The result is multiplied by the loan amount of EUR 14 million and by the loan's duration of 5 years. The final result equals EUR 3,688 million.
- (d) For measure 4: the applied interest rate of 6,5 % is deducted from the applicable market interest rate of 11,45 %, i.e. 1 000 basis points for Valencia CF plus 145 basis points base rate for Spain in November 2010 ⁽²⁸⁾. The result is multiplied by the loan amount of EUR 6 million and by the remainder of the loan's actual duration, equal to 4 years. The final result equals EUR 1,188 million.

(94) On the basis of the above, the total aid element in measures 1, 2, 3 and 4 amounts to EUR 30,212 million.

(95) Fundacion Valencia claims that, should it be determined that the guarantee in question entails some element of State aid, the periods of suspension or invalidity of the guarantee as a result of various legal proceedings launched in Spain should also be taken into account by the Commission in its assessment (see recital 46(h)). The Commission cannot accept this claim since no irreversible cancellation of the guarantee and no subsequent repayment of the underlying loan took place before the sale of the shares in Valencia CF therefore the advantage granted through the guarantee remained in place throughout the period between the granting of the guarantee and the cancellation of the guarantee following the sale of the shares in Valencia CF.

7.3. Legality of the aid

(96) Article 108(3) TFEU states that a Member State shall not put an aid measure into effect before the Commission has adopted a decision authorising this measure. The Commission observes that the identified measures were granted in breach of the notification and stand-still obligations established in Article 108(3) TFEU. Thus, the Commission considers that measures 1, 2, 3 and 4 qualify as unlawful State aid.

⁽²⁶⁾ Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

⁽²⁷⁾ See http://ec.europa.eu/competition/state_aid/legislation/base_rates_eu27_en.pdf

⁽²⁸⁾ See footnote 27.

7.4. Compatibility of the aid

- (97) The Commission must assess whether the aid measures identified above can be considered compatible with the internal market. According to the jurisprudence of the Union Courts, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ⁽²⁹⁾.
- (98) The Commission notes that Spain (or any interested party) has not provided comments on the compatibility of measures 2, 3 and 4 with the internal market on the basis of Article 107(3)(c) TFEU or on any other grounds.
- (99) Valencia CF argues that measure 1 would be compatible with the 2009 Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ⁽³⁰⁾ ('2009 Temporary Framework') which was adopted to address deficiencies stemming from the economic and financial crisis which began in October 2008. However, the Commission notes that Valencia CF's difficulties had started before the financial crisis, already in the fiscal year ending in June 2007 (see Table 1 above), whereas the 2009 Temporary Framework aimed at addressing problems arising in the context of the crisis. Indeed, according to point (i) of Section 4.3.2. of the Temporary Framework, 'the aid is granted to firms which were not in difficulty on 1 July 2008; it may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis.' Since Valencia CF was already in difficulty since June 2007, the Commission considers that the 2009 Temporary Framework is not applicable for the measures in favour of Valencia CF.
- (100) The Commission will assess whether the aid measures can be found compatible under Article 107(3)(c) TFEU allowing aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (101) In its assessment of the notion of 'development of economic activities' in the sports sector, the Commission takes due account of Article 165(1) TFEU and the last indent of Article 165(2) TFEU which provide that the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.
- (102) In its comments submitted during the formal investigation procedure, LFP claims that the sporting activities undertaken by professional sport clubs perform a public service function, which determines that in accordance with Article 106(2) TFEU, the application of rules on competition to these clubs must not obstruct the performance of the particular tasks assigned to them. The Commission notes that the measures in question supported professional football activities rather than amateur sport. Professional football services are supplied by market forces therefore there is no need for the State to attribute public service obligations for the provision of such services. At the same time, the Commission notes that it has not been demonstrated that the services of Valencia CF were attributed to it by the Spanish authorities in a way compatible with Article 106(2) TFEU, i.e. by way of an act clearly defining the public service, its duration or, the relevant compensation and its calculation. On the basis of the above, the Commission does not accept that the measures in question in favour of Valencia CF can be compatible under 106(2) TFEU.
- (103) For its assessment of aid measures under Article 107(3)(c) TFEU the Commission has issued a number of regulations, frameworks, guidelines and communications concerning aid forms and horizontal or sector purposes for which aid is awarded.
- (104) In view of the nature of the measures at issue and of the fact that the football clubs in question faced financial difficulties when the aid was awarded, and that the aid was awarded with the aim to address those difficulties, the Commission will assess whether the criteria laid down in the 2004 R&R Guidelines might apply, since the latter were in force at the time the aid measures at stake were granted (in 2009, 2010 and 2011) and the three football clubs qualify as undertakings in difficulty pursuant to these Guidelines. In this respect, Spain considers that if the Commission were to find State aid in measures 1 and 4 it would be compatible with the internal market on the basis of Article 107(3)(c) TFEU, and in particular as restructuring aid under the 2004 R&R Guidelines.

⁽²⁹⁾ C-364/90, *Italy v Commission*, point 20.

⁽³⁰⁾ OJ C 83, 7.4.2009, p. 1.

- (105) As will be explained below, the Commission notes that the aid measures under scrutiny cannot be considered compatible aid pursuant to the 2004 R&R Guidelines, because the conditions and principles of the latter are not met.

7.4.1. *Restoration of long-term viability*

- (106) According to point 34 of the 2004 R&R Guidelines, the grant of restructuring aid must be conditional on implementation of a restructuring plan, which must be endorsed by the Commission in all cases of individual aid. Point 35 explains that the restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions.
- (107) Pursuant to point 36 of the 2004 R&R Guidelines, the plan must describe the circumstances that led to the company's difficulties and take account of the present state and future market prospects with best-case, worst-case and base-case scenarios.
- (108) The plan must provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital must be high enough to enable the restructured firm to compete in the marketplace on its own merits (point 37).
- (109) During the formal investigation procedure, Spain submitted that the decision to grant measure 1 to Fundacion Valencia was based on a viability plan of May 2009.
- (110) The Commission notes that that viability plan does not include best-case, worst-case and base-case scenarios or an analysis of the risks that could have an impact on the restructuring of Valencia CF, like for instance the effect of the club's different possible placements in the championships final ranking, changes in the prices in the real estate market, in the sponsoring market or in the broadcasting market, potential risks regarding the ability of fans to pay season or single-match tickets, injury risks of players, changes in the market of players' transfers etc.
- (111) In addition, the financial results forecasted by the viability plan were below a level which could be considered as adequate for the restoration of Valencia CF's long-term viability. Indeed, as demonstrated in Table 6 above, the 2009 viability plan presented operating losses until the fiscal year ending in June 2013, i.e. in the 4 years following the granting of the 2009 State guarantee. In addition, the operating profits forecasted for the fiscal years ending in June 2014 and June 2015 were at a very low operating margins, of 1 % and 4 % respectively. Finally, as regards the club's forecasted earnings before taxes until the economic year ending in June 2015, the same analysis stands as for the operating results above, whereas the significantly high results of EUR 50,5 million in the fiscal year ending in June 2011 and EUR 154,8 million in June 2012 are not representative of the club's financial performance but constitute extraordinary results stemming from the sale of land plots.
- (112) On the basis of the above, as regards return to viability, the Commission comes to the conclusion that the impact of the different measures is not duly quantified and viability is not foreseen at adequate levels under different scenarios. Therefore, the Commission considers that the viability plan, even if it was considered as a genuine restructuring plan in the sense of the 2004 R&R Guidelines, was incomplete as to enable Valencia CF to restore its long-term viability within a reasonable timescale.
- (113) As regards Hercules CF and Elche CF, the Commission notes that no plan related to the viability of any of those two clubs was submitted, therefore also in the case of those two clubs point 34 of the 2004 R&R Guidelines is not fulfilled.

7.4.2. *Avoidance of undue distortions of competition (compensatory measures)*

- (114) According to point 38 of the 2004 R&R Guidelines, compensatory measures must be taken in order to ensure that the adverse effects on trading conditions are minimised as much as possible. These measures may comprise divestment of assets, reductions in capacity or market presence and reduction of entry barriers on the markets concerned (point 39).

- (115) In this regard, the sale of assets used in loss-making activities which would at any rate be necessary to restore viability will not be considered as a reduction of capacity or market presence for the purpose of the assessment of the compensatory measures (point 40).
- (116) Spain proposes as compensatory measures for Valencia CF the sale of the club's most valuable players (see recital 41 above). However, the Commission notes that the players sold were used in the club's loss-making activity, i.e. the participation in football competitions, therefore those sales cannot be considered as bringing a reduction of capacity or performance in Valencia's profitable areas of activity. Furthermore, the Commission notes that the sale of the abovementioned players was rather necessary as restructuring measure for the viability of Valencia CF, as also implied in the latter's 2009 viability plan. Indeed, those sales were necessary for the club to recover, through the increase of revenues and the reduction of the high costs of expensive players. Even if those sales could ultimately benefit a competitor, their primary aim was to enable the recovery of Valencia. Therefore they cannot be considered as bringing any benefit to Valencia CF's competitors.
- (117) Against this background, the Commission considers the compensatory measures proposed by Spain not to be sufficient under the 2004 R&R Guidelines in order to ensure that the adverse effects on trading conditions resulting from the granting of aid to Valencia CF are minimised as much as possible.
- (118) As regards Hercules CF and Elche CF, the Commission notes that no compensatory measures related to any of those two clubs were submitted, therefore also in the case of those two clubs point 38 of the 2004 R&R Guidelines is not fulfilled.

7.4.3. Aid limited to the minimum (own contribution)

- (119) According to point 43 of the 2004 R&R Guidelines, in order to limit the amount of aid to the strict minimum of the restructuring costs necessary, a significant contribution to the restructuring from the beneficiary's own resources is necessary. This can include the sale of assets that are not essential to the firm's survival, or external financing at market conditions.
- (120) The own contribution must be real, i.e. actual, excluding all future profits such as cash flow (point 43 of the 2004 R&R Guidelines). Inherently, the own contribution must not include any further State aid. For large firms like Valencia CF ⁽³¹⁾, the Commission usually considers a contribution of at least 50 % of the restructuring costs to be appropriate. However, in exceptional circumstances and in cases of particular hardship, the Commission may accept a lower contribution (point 44 of the 2004 R&R Guidelines).
- (121) In view of the total amount of the 2009 capital increase of EUR 92,4 million of Valencia CF, which can be considered as its restructuring cost, Spain proposes to consider as own contribution the private participations therein which reached the amount of EUR 18,8 million. However, the Commission notes that those private participations were equal to 20 % of the total restructuring costs. On this basis, the Commission considers that the private participations in the 2009 capital increase of Valencia CF are not sufficient to be acceptable as own contribution.
- (122) As regards Hercules CF and Elche CF, the Commission notes that measures 2 and 3 constituted 100 % of the financial sources of the respective capital injections into those clubs, therefore there was no private participation in those measures.
- (123) Therefore, the Commission considers that requirements of point 43 of the 2004 R&R Guidelines have not been fulfilled.

⁽³¹⁾ According to the *Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises* (OJ L 124, 20.5.2003, p. 36), the category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. Also, the data to apply to the headcount of staff and the financial amounts are those relating to the latest approved accounting period and calculated on an annual basis. In the case at hand, in the latest approved accounting periods before measures 1 and 2, Valencia CF had annual turnover of EUR 99,4 million in the financial year ending in June 2008 and EUR 82,4 million in the financial year ending in June 2009. Thus Valencia CF exceeded one of the thresholds under which an undertaking is considered to be an SME.

7.4.4. The 'one time, last time' principle

- (124) Finally, the aid must respect point 72 of the 2004 R&R Guidelines, which provides that a company that has received rescue and restructuring aid in the past 10 years is not eligible for rescue or restructuring aid (the 'one time, last time' principle). As regards Valencia CF, which benefitted from measures 1 and 4, Spain claims that measure 4 is only an increase of the existing guarantee by EUR 6 million, therefore it cannot be considered as a new guarantee and thus new State aid to Valencia CF. However, the Commission notes that the abovementioned 2010 increase of the 2009 existing State guarantee was not foreseen or programmed from the beginning, when the 2009 State guarantee was granted, but had an ad hoc character since it was granted in order to cover the unexpectedly defaulted interest payment of 26 August 2010 of the guaranteed loan (see recital 10 above). Therefore the Commission considers that measure 4 constitutes new State guarantee in favour of Valencia CF and is separable from measure 1. Since Valencia CF benefitted twice from restructuring aid in a period of 10 years, i.e. in 2009 and 2010, when it received the 2009 State guarantee and the 2010 increase of the previous (2009) guarantee, the Commission concludes that the 'one time, last time' principle is not respected in relation to measure 4, granted in favour of Valencia CF.

7.5. Conclusion

- (125) In view of the above, the Commission finds that the 2009 State guarantee and its 2010 increase in favour of Valencia CF, the 2011 State guarantee in favour of Hercules CF and the 2011 State guarantee in favour of Elche CF were granted in breach of Article 108(3) TFEU. The Commission also considers that the measures do not meet the conditions required by the 2004 R&R Guidelines. The Commission hence considers the aid not compatible with the internal market.

7.6. Recovery

- (126) According to the TFEU 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 ⁽³²⁾. 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 ⁽³³⁾. 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 ⁽³⁴⁾.
- (127) In line with the case-law, Article 16(1) of Council Regulation (EU) 2015/1589 ⁽³⁵⁾ laid down that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...].'
- (128) Thus, given that the measures at hand were not notified to the Commission in violation of Article 108 TFEU and are, therefore, to be considered as unlawful and incompatible aids, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aids were put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery.
- (129) The Commission notes that Valencia CF has submitted that (see recital 41 letter (b) above), since the ownership of Valencia CF was transferred in the context of an open and competitive tendering procedure, the aid element (if any) would have been reflected in the market price and included in the purchase price and that therefore it is the seller of the shares that keeps the benefit of the aid. According to Valencia CF, in the light of the above, the aid amount of the State guarantee would be recovered from the seller Fundacion Valencia.
- (130) The Commission considers that, as explained in recitals 47-48 above, since it was the club that ultimately benefitted from measures 1 and 4, with the 2014 sale, the aid was transferred also to the new Valencia CF owner.

⁽³²⁾ See Case C-70/72 *Commission v Germany* [1973] ECR 00813, paragraph 13.

⁽³³⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽³⁴⁾ See Case C-75/97 *Belgium v Commission* [1999] ECR I-030671 paragraphs 64-65.

⁽³⁵⁾ 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).

- (131) The Commission notes that Elche CF and Hercules CF are currently subject to collective insolvency proceedings (see recitals 18 and 20 above). In line with a well-established case-law, the fact that a beneficiary is insolvent or subject to bankruptcy proceedings has no effect on its obligation to repay unlawful and incompatible aid ⁽³⁶⁾.

8. CONCLUSION

- (132) The Commission concludes that Spain has unlawfully implemented aid to the sum of EUR 30,212 million in breach of Article 108(3) TFEU, in the form of:
- (a) The 2009 State guarantee granted by IVF for the purchase of shares in Valencia CF.
 - (b) The 2010 State guarantee granted by IVF for the purchase of shares in Hercules CF.
 - (c) The 2011 State guarantee granted by IVF for the purchase of shares in Elche CF.
 - (d) The 2010 increase of the 2009 State guarantee granted by IVF to cover an increase of the existing 2009 loan for the purchase of shares in Valencia CF.
- (133) The Commission concludes that Spain has not granted new aid through the 2013 payment of EUR 4,9 million of the State guarantees granted by IVF in favour of Valencia CF.
- (134) The aid is not compatible with the internal market since it cannot be authorised as restructuring aid or any other type of aid.
- (135) The amounts to be recovered are EUR 20,381 million from Valencia CF, EUR 6,143 million from Hercules CF and EUR 3,688 million from Elche CF,

HAS ADOPTED THIS DECISION:

Article 1

The following measures constitute State aid that was unlawfully put into effect by Spain in breach of Article 108(3) of the Treaty on the Functioning of the European Union and that are incompatible with the internal market:

Measure 1

The State guarantee granted by IVF on 5 November 2009 for a bank loan to Fundación Valencia for the subscription of shares in Valencia CF, in the context of the capital increase by Valencia CF, in the amount of EUR 19,193 million.

Measure 2

The State guarantee granted by IVF on 26 July 2010 for a bank loan to Fundación Hercules for the subscription of shares in Hercules CF, in the context of the capital increase by Hercules CF, in the amount of EUR 6,143 million.

Measure 3

The State guarantee granted by IVF on 17 February 2011 for two bank loans to Fundación Elche for the subscription of shares in Elche CF, in the context of the capital increase by Elche CF, in the amount of EUR 3,688 million.

Measure 4

The increase granted by IVF on 10 November 2010 to Fundación Valencia, in the amount of EUR 1,188 million for the payment of overdue capital, interest and costs of the loan guaranteed by measure 1.

⁽³⁶⁾ Case C-42-93, *Spain v Commission* ('Merco'), [1994] ECR I-4175.

Article 2

1. Spain shall recover the incompatible aid granted and as referred to in Article 1 from the Valencia CF for Measures 1 and 4, Hercules CF for Measure 2, and Elche CF for Measure 3.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽³⁷⁾ and with Commission Regulation (EC) No 271/2008 ⁽³⁸⁾ amending Regulation (EC) No 794/2004.
4. 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. Spain shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 4

1. Within 2 months following notification of this Decision, Spain shall submit the following information:
 - (a) the total amount (principal and recovery interests) to be recovered from each beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. 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 beneficiaries.

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

⁽³⁷⁾ 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).

⁽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).

CORRIGENDA**Corrigendum to Commission Delegated Regulation (EU) No 1062/2010 of 28 September 2010 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of televisions**

(Official Journal of the European Union L 314 of 30 November 2010)

On page 70, in Annex III, point 1:

for: '(g) the standby and off-mode power consumption or both measured in accordance with the procedure set out in Annex VII;'

read: '(g) the standby and off-mode power consumption, both measured in accordance with the procedure set out in Annex VII;'

on page 77, in Annex V:

for: '⑥ **Energy efficiency class**

— **Arrow:** width: 26 mm, height: 8 mm, 100 % black.'

read: '⑥ **Energy efficiency class**

— **Arrow:** width: 16 mm, height: 8 mm, 100 % black.'

