Grondbeleid

BR 2019/54

Gerecht van de Europese Unie 22 mei 2019, nr. T-791/16
(H. Kanninen, J. Schwarcz en C. Iliopoulos)
m.nt. M. Fokkema[1]

ECLI:EU:T:2019:346

Vermeende verkoop van grond boven de marktprijs door Real Madrid.

Staatssteun – Verkoop van grond boven de marktprijs – Vermeende steun toegekend aan Real Madrid – Begrip steunmaatregel – Market Economy Operator-beginsel – Schikking.

In Case T-791/16,
Real Madrid Club de Fútbol, established in Madrid (Spain), represented by J. Pérez-Bustamante Köster and F. Löwhagen, lawyers,
applicant,
v
European Commission, represented by P.-J. Loewenthal, G. Luengo and P. Němečková, acting as Agents,
defendant,
APPLICATION under Article 263 TFEU seeking the annulment of Commission Decision (EU) 2016/2393 of 4 July 2016 on the State aid SA.33754 (2013/C) (ex 2013/NN) implemented by Spain for Real Madrid CF (OJ 2016 L 358, p. 3),
THE GENERAL COURT (Fourth Chamber),
composed of H. Kanninen (Rapporteur), President, J. Schwarcz and C. Iliopoulos, Judges,
Registrar: I. Dragan, Administrator,
having regard to the written part of the procedure and further to the hearing on 5 September 2018,
gives the following

Background to the dispute

1 On 20 December 1991, the Ayuntamiento de Madrid (Madrid City Council, Spain), the Gerencia Municipal de Urbanismo of that city council (City council urban development department) and the applicant, Real Madrid Club de Fútbol, concluded an agreement concerning the renovation of the Santiago Bernabéu stadium in Madrid ('the 1991 agreement').

2 On 29 November 1996, the applicant and the Comunidad autonoma de Madrid (the Autonomous Community of Madrid) entered into a land swap agreement ('the 1996 agreement').

3 On 29 May 1998, the applicant and Madrid City Council concluded an agreement with the aim of implementing the land swap that was envisaged in the 1996 agreement ('the 1998 implementation agreement'). The 1998 implementation agreement provided that the applicant was to transfer certain land to that city council and that, as consideration, the city council was to transfer to the applicant land which would match its obligations towards the applicant, that is, the transfer of plots of land worth approximately EUR 13.5 million. It was envisaged that that city council would transfer the plots located in the Julián Camarillo Sur area (plots 33 and 34) and plot B-32 in the Las Tablas area in Madrid ('plot B-32'). For the purpose of that swap, the technical departments of that city council estimated the value of the latter plot at EUR 595 194.

4 On 29 July 2011, the applicant and Madrid City Council signed an agreement with the aim of settling a legal dispute between them, concerning the 1991 agreement and the land swap which had been the subject of the 1996 agreement and the 1998 implementation agreement ('the 2011 settlement agreement'). Under that settlement agreement, the parties acknowledged the legal impossibility of transferring plot B-32 as matters stood at the time to the applicant. That city council, taking the view that it was impossible for it to perform its obligations under the 1998 implementation agreement, decided to compensate the applicant by paying it an amount corresponding to the value of that plot in 2011. In a 2011 report, the technical departments of Madrid City Council estimated that value at EUR 22 693 054.44. The parties agreed that the compensation would be paid by replacing the transfer of that plot with the transfer of other plots to the applicant. Those latter plots were identified as an estate of 3 600 m^2, various pieces of land with a total surface area of 7 966 m^2 and an area of 3 035 m^2, the total value of those latter plots being estimated at EUR 19 972 348.96. The parties also agreed to offset their mutual debts. The result was a remaining net claim of EUR 8.04 for Real Madrid against Madrid City Council.

5 Under an urban development agreement concluded in September 2011 between Madrid City Council and the applicant, the applicant undertook to transfer back certain immovable property. In connection with that transaction, that city council and the Autonomous Community of Madrid altered the land use plan of Madrid ('the PGOU').

6 Informed in 2011 of the existence of presumed State aid in favour of the applicant, granted in the form of an advantageous transfer of immovable property, the European Commission, on 20 December 2011, asked the Kingdom of Spain to comment on that information. On 23 December 2011 and 20 February 2012, that Member State replied to the request from the Commission. On 2 April 2012, the Commission sent another request, to which that Member State replied on 18 June 2012.

7 By letter of 18 December 2013, the Commission informed the Kingdom of Spain of its decision to initiate the procedure provided for in Article 108(2) TFEU. It reached the preliminary view that the compensation granted to the applicant by Madrid City Council under the 2011 settlement agreement constituted State aid in favour of the applicant for the purposes of Article 107(1) TFEU. It invited the Kingdom of Spain and the interested parties to provide relevant information in order to ascertain whether the transfer of plot B-32 to the applicant was indeed impossible under the

1 Manfred Fokkema is advocaat bij Infense advocaten.

1998 implementation agreement for that city council and to study the possible consequences of that impossibility in the light of Spanish law. It requested further details on the value of the plots of land included in the 2011 settlement agreement and the urban development agreement referred to in paragraph 5 above. On 16 January 2014, the Kingdom of Spain submitted its observations on that decision to initiate the procedure.

8 By Decision (EU) 2016/2393 of 4 July 2016 on the State aid SA.33754 (2013/C) (ex 2013/NN) implemented by Spain for Real Madrid CF (OJ 2016 L 358, p. 3) ('the contested decision'), the Commission found, under Article 1 of that decision, that the State aid amounting to EUR 18 418 054.44, unlawfully granted on 29 July 2011 by the Kingdom of Spain in breach of Article 108(3) TFEU, in favour of the applicant, was incompatible with the internal market.

9 In the contested decision, the Commission found that a market economy operator in a similar situation to Madrid City Council would not have signed the 2011 settlement agreement. It took the view, in the first place, that considering the legal uncertainties in 2011 surrounding the issue of whether that city council was liable to pay compensation to the applicant on account of not having been able to transfer plot B-32 to the applicant under the 1998 implementation agreement, a market economy operator in the same situation would have sought legal advice before entering into the 2011 settlement agreement, so as to establish the likelihood that it was indeed liable for that failure. The Commission stated that that city council had not sought such legal advice. In the second place, it found that a market economy operator in a similar situation to the city council concerned would not have agreed to pay the applicant compensation of EUR 22 693 054.44 under such an agreement, since that amount far exceeds the maximum extent of its legal liability stemming from the failure to comply with the obligation to transfer that plot.

10 In the contested decision, the Commission examined the valuation of the land made by the technical departments of Madrid City Council, that contained in a 2011 report by the Spanish Ministry of Finance, that of the report communicated by the applicant and commissioned from a property consultancy office ('the property consultancy's report') and that of the report ordered by the Commission from a property valuation office ('the property valuation office's report'). It observed, inter alia, that the latter report offered a detailed and thorough comparison and upheld the value of plot B-32 in 2011 as assessed in that report at EUR 4 275 000.

Procedure and forms of order sought

11 By application lodged at the Registry of the General Court on 14 November 2016, the applicant brought the present action claiming that the Court should:

– declare the action admissible;
– annul the contested decision in its entirety;
– order the Commission to pay the costs.

12 In its statement of defence, lodged at the Court Registry on 2 March 2017, the Commission contends that the Court should:

– dismiss the action as unfounded;
– order the applicant to pay the costs.

13 The applicant lodged the reply at the Court Registry on 25 April 2017 and the Commission lodged the rejoinder at the Court Registry on 6 June 2017.

14 Acting on a proposal from the Judge-Rapporteur, the Court decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure of the General Court, put written questions to the parties, requesting them to answer those questions in writing. The parties answered those questions within the prescribed periods.

15 The parties presented oral argument and replied to the Court's oral questions at the hearing on 5 September 2018.

Law

The requests for the hearing of witnesses and for the communication of documents

16 In the application, the applicant has set out a request seeking that the authors of the property consultancy's report be heard, relying on Articles 85 and 88 and Article 91(d) of the Rules of Procedure, for the purposes of obtaining the observations of those persons on the method of valuation of plot B-32 used by the Commission and by the errors committed, in the applicant's view, in the property valuation office's report. It has also set out a request, relying on Article 89(3) of those rules, for the purposes of obtaining from the Commission the communication of a copy of the contract concluded with that property valuation office.

17 The Commission contends that the hearing requested is unnecessary inasmuch as it stated in detail the reasons for which it rejected the valuation made in the property consultancy's report, a copy of the complete version of which was attached to the application and reproduces in full the analysis and the findings of the report's authors. As regards the request for the communication of a document, the Commission has attached to the defence a non-confidential version of the contract signed with the property valuation office.

18 As regards the request for the hearing of witnesses made by the applicant, it must be pointed out that the Court is the sole judge of whether the information available to it concerning the cases before it needs to be supplemented (see judgment of 28 June 2016, *Portugal Telecom* v *Commission*, T-208/13, EU:T:2016:368, paragraph 280 and the case-law cited).

19 It is apparent from the case-law that if the Court is able to rule on the basis of the forms of order sought, the pleas in law and the arguments put forward in the course of both the written and the oral procedure and in the light of the documents produced, the applicant's request for examination of a witness must be rejected without the Court

being required to provide specific reasons for its finding that it is unnecessary to seek additional evidence (see judgment of 28 June 2016, *Portugal Telecom* v *Commission*, T-208/13, EU:T:2016:368, paragraph 285 and the case-law cited).

20 In the present case, it is sufficient to observe that a copy of the property consultancy's report was communicated as an annex to the application and that that report already contains all the information enabling the analysis and the findings of its authors to be understood. Moreover, in recitals 47 and 54 of the contested decision, the Commission reproduced the applicant's arguments based on the findings of that report. In recital 64 of that decision, it stated the results of that report and how it differed from the valuations upheld in the 1998 implementation agreement. In recital 66 of that decision, it mentioned the method of the property consultancy's report for valuing plot B-32, as given by the applicant. In recitals 107 and 110 of that decision, it recalled the valuation and the method of valuation, respectively, upheld in that report. It moreover stated in detail why it had rejected the valuation contained in the property consultancy's report. It is therefore unnecessary to grant the applicant's request for the hearing of witnesses.

21 As regards the request made by the applicant for the communication of a document, it is sufficient to observe that the Commission has communicated, as an annex to the defence, a non-confidential version of the contract signed with the property valuation office. For that reason, it is no longer necessary to rule on that request.

Substance

22 As a preliminary point, it is important to note that in the contested decision the Commission found, in the first place, that a market economy operator in the same situation as Madrid City Council would have sought legal advice before signing the 2011 settlement agreement and that, in the absence of such advice, that city council should not have agreed to be considered liable for the failure to comply with the obligation to transfer plot B-32.

23 In the second place, in order to determine whether aid was granted and, if so, the amount of such aid, the Commission based its assessment on the hypothesis that Madrid City Council had been held fully liable for the non-transferal of plot B-32 and it examined the value of that plot alone, upon which the acknowledgement of that city council's debt to the applicant under the 2011 settlement agreement was based.

24 In support of the action, the applicant relies on three pleas in law. In the first plea, it claims that the Commission incorrectly determined that there was an advantage granted to it. In the second plea, it pleads infringement of Article 107(1) TFEU in conjunction with breach of the general principle of sound administration, to claim that the Commission made manifest errors of assessment in basing its decision on an expert's report which lacked any probative value and in rejecting, without justification, the other valuations of plot B-32. In the third plea, it alleges infringement of Article 107(1) TFEU and breach of the obligation to state reasons and of the principle of sound administration and it argues that the contested decision contains contradictions in the determination of the value of the compensation granted to the applicant.

25 In the context of the first plea, the applicant puts forward three complaints. In the first complaint, it alleges that the Commission incorrectly replaced the condition based on the market economy operator principle by a procedural test of whether external legal advice was taken. In the second, it claims that it was for the Commission to prove that Madrid City Council was not under an obligation to provide compensation for the harm caused by the failure to perform its contractual obligations and that the Commission did not correctly determine the maximum level of liability of that city council. In the third, it argues that the value of plot B-32, as accepted in the 2011 settlement agreement, is well below the financial exposure of that city council for the purposes of freeing itself of liability on account of the failure to comply with the 1998 implementation agreement.

26 In essence, in the first and second complaints of the first plea, the applicant takes issue with the contested decision in relation to the grounds that Madrid City Council incorrectly accepted liability on account of the non-transferral of plot B-32, in the light, inter alia, of the failure to produce external advice establishing that liability. In addition, in the third complaint of the first plea and the second and third pleas, the applicant challenges the finding that there was State aid and the valuation of its amount.

27 The Court will first examine the first and second complaints of the first plea, then, together, the third complaint of that plea and the second plea and, lastly, the third plea.

The first and second complaints of the first plea

28 According to the applicant, first, the Commission cannot replace the condition based on the market economy operator principle by a procedural test concerning external legal advice, according to which, in the absence of such advice, a hypothetical market economy operator in a similar situation would not have assumed full legal liability for the failure to perform a contractual obligation.

29 It argues that Madrid City Council took legal advice provided by its legal departments prior to concluding the 2011 settlement agreement and was under no obligation to take external legal advice before concluding that agreement.

30 The applicant also challenges the Commission's argument according to which Madrid City Council was not under any obligation to conclude the 2011 settlement agreement prior to such an obligation being declared by a court. It takes issue, in particular, with what it claims to be the Commission's interpretation of the judgment of 27 September 1988, *Asteris and Others* (106/87 to 120/87, EU:C:1988:457).

31 Secondly, the applicant asserts that, in order to establish that there was State aid for the purposes of Article 107(1) TFEU, it was for the Commission to establish that Madrid City Council was not under an obligation to provide compensation for the harm caused by the failure to perform

its contractual obligations. It further alleges that the Commission did not correctly determine the maximum level of liability of that city council. That being so, there is no legal uncertainty as regards the liability of that city council for the failure to comply with the 1998 implementation agreement. Under Spanish law, that city council could have avoided all liability for not having transferred plot B-32 only in two situations, namely if that implementation agreement had been null and void because it had provided for a transfer obligation which was impossible as of the outset or if the transfer obligation had been valid at the outset but, before it became enforceable, an obstacle such as to exonerate the city council concerned from the execution of its obligation arose. It submits that the conditions required for those situations to exist are not present in the case before the Court.

32 The Commission disputes the applicant's arguments.

33 In this connection it must, as a preliminary point, be stated in the first place that, in support of the first complaint of the first plea, the applicant raised in the reply an argument concerning the alleged application of the selectivity criterion. In response to a question put by the Court at the hearing, the applicant stated that that argument was not to be understood as a plea claiming that the measure was not selective, but only as expressing the absence of an economic advantage in connection with the analysis of the condition based on the market economy operator principle. There is therefore no need to rule on the question raised by the Commission as to the admissibility of the argument alleging that the measure was not selective.

34 In the second place, as it has been observed, for the purposes of determining whether there was aid in the present case and assessing the amount of that aid, the Commission based its reasoning on the hypothesis that Madrid City Council had been found fully liable for the non-transferral of plot B-32. In doing so, the Commission did not reach a conclusion differing from that reached by that city council and the applicant, which, by concluding the 2011 settlement agreement to the effect that a debt corresponding to the value of that plot was owed to the applicant, also found that that city council was to bear full liability for the non-transferral of that plot.

35 Irrespective of whether or not the first and second complaints of the first plea are, ultimately, ineffective, since they seek to raise the issue of whether Madrid City Council was liable and the extent of its liability, which has been accepted by the Commission as it was by that city council and the applicant, it must be pointed out that the Commission noted, in the contested decision, that a market economy operator in the same situation as that city council should have sought legal advice before signing the 2011 settlement agreement.

36 It is important to recall that, according to Article 107(1) TFEU, save as otherwise provided in the Treaties, 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 is, in so far as it affects trade between Member States, incompatible with the internal market.

37 According to the settled case-law of the Court of Justice, classification of a measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 43 and the case-law cited).

38 It is also settled case-law that the definition of 'aid' is more general than that of a 'subsidy', because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see judgments of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission*, C-328/99 and C-399/00, EU:C:2003:252, paragraph 35 and the case-law cited, and of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 40 and the case-law cited).

39 It follows from Article 107(1) TFEU that the concept of aid is objective, the test being, in particular, whether a State measure confers an advantage on one or more particular undertakings.

40 Thus, in order to determine whether a measure constitutes State aid, it is necessary, inter alia, to determine whether the recipient undertaking receives an advantage that it would not have obtained under normal market conditions (judgments of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 60, and of 29 April 1999, *Spain* v *Commission*, C-342/96, EU:C:1999:210, paragraph 41; see also, judgment of 12 June 2014, *Sarc* v *Commission*, T-488/11, not published, EU:T:2014:497, paragraph 90 and the case-law cited). Hence, it is now settled case-law that the supply of goods or services on preferential terms is capable of constituting State aid for the purposes of Article 107(1) TFEU (see judgments of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 59 and the case-law cited; of 1 July 2010, *ThyssenKrupp Acciai Speciali Terni* v *Commission*, T-62/08, EU:T:2010:268, paragraph 57 and the case-law cited; and of 28 February 2012, *Land Burgenland* v *Commission*, T-268/08 and T-281/08, EU:T:2012:90, paragraph 47 and the case-law cited).

41 The application of the test of a private operator in a market economy entails comparing the way in which the public authorities acted with the way in which a private operator of a comparable size would have acted in the same circumstances. If the State is merely, in fact, acting as any private operator would under normal market conditions (see, to that effect, judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C-357/14 P, EU:C:2015:642,

paragraph 144 and the case-law cited), then there is no advantage attributable to intervention by the State because the recipient could theoretically have derived the same benefits from the mere functioning of the market (see judgment of 30 April 2014, *Tisza Erőmű* v *Commission*, T-468/08, not published, EU:T:2014:235, paragraph 85 and the case-law cited; see also, to that effect, judgment of 28 February 2012, *Land Burgenland* v *Commission*, T-268/08 and T-281/08, EU:T:2012:90, paragraph 48 and the case-law cited).

42 In the present case, it is necessary to determine whether the applicant obtained an advantage that it would not have done under normal market conditions.

43 More specifically, and as the Commission correctly observed in recital 86 of the contested decision, it is necessary to determine whether the 2011 settlement agreement conferred an economic advantage on the applicant, in the application of the market economy operator principle.

44 With respect to the issue of, on one hand, whether the Commission replaced the condition based on the market economy operator principle by a procedural test concerning external legal advice and, on the other hand, whether or not there was any obligation to conclude the 2011 settlement agreement before such an obligation was declared by a court (see paragraph 30 above), it is useful to reiterate the Commission's findings in the contested decision as to the absence of legal advice concerning the liability of Madrid City Council on account of the failure to transfer plot B-32.

45 In recital 93 of the contested decision, the Commission found that, considering the legal uncertainties in 2011 surrounding the question whether Madrid City Council was liable to compensate the applicant for that city council's failure to transfer plot B-32, a market economy operator in the same situation as that city council would have sought legal advice before entering into the 2011 settlement agreement, and it pointed out that Madrid City Council did not do so. The Commission added, in recital 94 of the contested decision, that it had asked the Kingdom of Spain to provide it with 'any legal advice [that city council had] sought before entering into [that settlement agreement]'. It stated, in footnote 23 to the contested decision, that the Kingdom of Spain had confirmed the absence of 'such external advice'.

46 Thus, apart from in that footnote where the Commission expressly refers to 'external' advice, it is neither stated in the various relevant recitals of the contested decision, namely recitals 93, 94, 105 and 108, what the Commission understood by legal advice, nor that it takes issue with the lack of any advice given by an independent organisation.

47 When asked a question to that effect at the hearing, the Commission confirmed that, had it received any other report containing expert advice, it would have taken it into account.

48 In addition, it is apparent from the documents communicated by the parties during the written part of the procedure and the replies of the parties to the questions put at the hearing that the Commission did indeed ask the Kingdom of Spain during the administrative procedure, by email dated 2 March 2016, whether Madrid City Council had sought an independent legal opinion on its obligations and the various options open to it.

49 It was the Kingdom of Spain which stated, in its email in reply dated 9 March 2016, that, if an independent legal opinion was to be understood to mean external advice, the competent authorities had indicated that no consultation of that type had been carried out.

50 No document has been produced proving that there was any reply to that latter email by the Commission to the effect that the independent legal opinion did not mean only external advice.

51 However, as the Commission in essence observes, the applicability of the private investor criterion requires that it be established, unequivocally and on the basis of objective and verifiable evidence, that there was an evaluation comparable to one to which a private operator would have had access prior to or at the point of adoption of the measure at issue (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 81 to 83, and of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraphs 57 and 58).

52 In order to reply to the Commission's request, the Kingdom of Spain could have relied on any legal analysis which Madrid City Council would have had drawn up in the circumstances given in paragraph 51 above.

53 In the present case, the applicant submitted at the hearing that Madrid City Council had received two technical experts' reports from its own council departments before concluding the 2011 settlement agreement. The expert advice is substantiated by reading the summary of grounds for that agreement, which reproduces that city council's findings on that matter.

54 It must be noted, first, that the reports containing expert advice from the city council departments which were allegedly received by Madrid City Council were not communicated either during the procedure before the Commission or during that before the Court. Despite the multiple points at which the Kingdom of Spain and the Commission could have been in contact during the administrative procedure, and also the opportunities offered to that city council to participate in that procedure, no legal analysis as to that city council's liability with respect to the non-transferral of plot B-32 was communicated to the Commission.

55 Secondly, although the summary of grounds of the 2011 settlement agreement does contain some factual information on the regulations applicable to plot B-32 and the obligation on Madrid City Council to transfer that plot, such a summary cannot be regarded as a real legal analysis of the causes leading to the acknowledgement of that city council's liability for the non-transferral of that plot. In particular, the development of the regulations applicable to that plot as of the 1991 agreement until the 2011 settlement agreement is not stated in detail. Nor is there any analysis of who would be liable, and on what grounds, for the non-transferral of the plot in question. It is, by contrast, merely stated, as the Commission observes, that the transfer of the plot concerned was impossible and attention is drawn to the good will

of the parties with a view to reaching an agreement in a context in which the liabilities of each of them were unclear.

56 As regards the applicant's challenging of the Commission's alleged argument that Madrid City Council had no obligation to conclude the 2011 settlement agreement until such an obligation had been declared by a court, it is sufficient to observe that such a challenge has no factual basis, since at no point in the contested decision did the Commission find that the obligation to conclude that settlement agreement should have been the result of a court decision.

57 It is important to add that, in contrast to the case which gave rise to the judgment of 27 September 1988, *Asteris and Others* (106/87 to 120/87, EU:C:1988:457), in which the national authorities had been ordered to provide compensation for a loss resulting from an unlawful act declared by a court decision, in the present case Madrid City Council was not found to be liable in court proceedings and the compensation granted to the applicant is the result of the 2011 settlement agreement which is aimed at ending a dispute between the parties and under which only that city council bore the liability for the non-transferral of plot B-32.

58 The Commission did not err in concluding, in recital 105 of the contested decision, that a prudent market economy operator, when faced with a situation such as that in the case before it, would have sought legal advice before signing the 2011 settlement agreement and accepting full legal liability for the impossibility of transferring plot B-32 under the 1998 implementation agreement.

59 Such a finding is all the more warranted having regard to the legal framework applicable to plot B-32 as of the date of the 1998 implementation agreement until that of the conclusion of the 2011 settlement agreement and considering the shared competence with regard to urban planning held by the Autonomous Community of Madrid and Madrid City Council, together with the applicant's knowledge of that legal context.

60 In this respect, it is useful to note that it is apparent from the documents in the file that, as of the 1996 agreement until the 2011 settlement agreement, the legal regime applicable to plot B-32 did not facilitate the transfer of that plot.

61 According to the facts as accepted in the contested decision, which are not disputed, when the applicant and the Autonomous Community of Madrid signed the 1996 agreement, the plots of land and rights to be transferred were to be identified at a later point and the parties set the value of the transaction at EUR 27 million. When the 1998 implementation agreement was signed, the parties agreed upon, inter alia, the transfer of plot B-32 to the applicant and the value of that plot was estimated by the technical departments of Madrid City Council at EUR 595 194. Account had been taken of the fact that only the land planning had been concluded for the area in which that plot was located but not yet its urban development and the fact that no building activity had started yet.

62 According to other facts accepted in the contested decision, which are not disputed either, in 1998 plot B-32 was not transferred by Madrid City Council to the applicant because Madrid City Council did not yet hold legal ownership of that plot. It was envisaged in the 1998 implementation agreement that the transfer would become effective seven days after the registration of Madrid City Council as owner of plot B-32 in the Spanish Property Register. On 28 July 2000, Madrid City Council became the owner of that plot, but that fact was not registered in the Property Register until 11 February 2003. That plot was not transferred. It was considered, under the local urban development plan dated 28 July 1995, to be classified for basic sport use and was included in the PGOU, approved on 17 April 1997 by that city council and the Autonomous Community of Madrid.

63 It is apparent from the contested decision that, according to Ley 9/2001, de 17 de julio 2001, del Suelo de la Comunidad de Madrid (Law 9/2001 of 17 July 2001 concerning the land planning of the Autonomous Community of Madrid), all pieces of land, facilities, constructions and buildings have to be used in accordance with their designation and corresponding land planning classification and, under Article 7.7.2(a) of the PGOU, the plots which fall within the category of being for 'sport use' are plots of land in public ownership. That law was in force when Madrid City Council was registered as owner of plot B-32 in 2003. The same law includes an obligation for pieces of land considered to be for basic sport use to be land in public ownership and any transfer is to be precluded, since the public nature of the plot renders it inalienable.

64 The applicant does not dispute that, when the 1998 implementation agreement was signed, plot B-32 was designated, under the PGOU, as being for 'basic sport use'. Nor did it dispute that, in 2003, when Madrid City Council had to execute its transfer obligation, that plot was public council land and was inalienable.

65 It is important to observe that the applicant therefore knew, at the date the 1998 implementation agreement was concluded, that Madrid City Council was not the owner of plot B-32, that that plot fell within a specific category, namely the category of being for basic sport use, and that it was necessary, at the very least, that the city council concerned acquire the plot and that the plot be registered in the Property Register before its transfer to the applicant could be envisaged.

66 Nor did the applicant dispute that plots falling within the category of being for 'basic sport use' constituted plots in public ownership by virtue of Article 7.7.2(a) of the PGOU, approved on 17 April 1997 and therefore applicable at the date of the 1998 implementation agreement. In signing that implementation agreement, it therefore knew that, before the transfer of plot B-32 into its ownership, that plot had to be declassified so that it could be transferred, since plots of land in public ownership cannot, as such, under Spanish law, be transferred.

67 It is apparent from the contested decision and from the answers to the questions put by the Court that the PGOU is a document with regard to which competence is held not only by Madrid City Council but also by the Autonomous Community of Madrid. That city council cannot amend the

PGOU of its own motion, but must propose that amendment to that autonomous community.

68 It must be added that the legal framework applicable to plot B-32 changed between the date on which the 1998 implementation agreement was signed and the date on which the 2011 settlement agreement was signed. Law 9/2001 of 17 July 2001 concerning the land planning of the Autonomous Community of Madrid provided that all pieces of land, facilities, constructions and buildings had to be used in accordance with their designation and corresponding land planning classification.

69 It is common ground between the parties that, although the plots falling within the category of being for 'basic sport use' were already plots in public ownership under Article 7.7.2(a) of the PGOU, Law 9/2001 of 17 July 2001 concerning the land planning of the Autonomous Community of Madrid rendered the possibility of transferring plot B-32 even more difficult.

70 It is important to add that, inasmuch as neither the Kingdom of Spain, nor Madrid City Council or the applicant have communicated to the Commission a detailed legal analysis concerning that city council's liability for the non-transferral of plot B-32, it is not for the Commission to carry out that analysis itself and to make a global assessment, taking into account — in addition to the evidence provided — all other relevant evidence enabling it to determine whether the Kingdom of Spain took the measure in question in its capacity as a market economy operator or as the State of the Kingdom of Spain (see, to that effect, judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 86, and of 24 October 2013, *Land Burgenland and Others* v *Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 60). The Commission does not bear the evidential burden for the purposes of proving that that city council was not required to provide compensation for the loss caused by the failure to perform its contractual obligations and for the purposes of determining the city council's maximum level of liability.

71 It follows from all the forgoing that the first and second complaints of the first plea must be rejected.

The third complaint of the first plea and the second plea

72 By the third complaint of the first plea and the second plea the applicant challenges, in essence, the assessment of the value of the advantage and, in particular, of the value of plot B-32 as adopted by the Commission.

73 The applicant claims that Madrid City Council was unable to exonerate itself from liability on account of the failure to comply with the 1998 implementation agreement and that the financial exposure of that city council was not equivalent to the price of plot B-32 for that city council. It submits that the market value of that plot, as promised to the applicant, is the value of the right to receive full ownership of that plot, without any restriction as to its resale.

74 The maximum level of financial exposure of Madrid City Council in the event of a dispute with the applicant and if it were liable in law for the failure to comply with the 1998 implementation agreement is, the applicant submits, between EUR 33 and EUR 240 million, according to the estimations of the property consultancy's report. The financial exposure would, in any case, be more than EUR 4 275 000. The applicant asserts that the Commission did not dispute that it would have been possible to change the land planning classification of plot B-32 in order to enable that plot to be transferred.

75 The applicant adds that the financial exposure of Madrid City Council, even if it were not to be found liable for failure to comply with the contract (should it be held that the transfer was impossible as of the outset or subsequently became impossible in a situation where the city council was exonerated from its obligations), would not be zero but would be significantly greater than the value of plot B-32. It argues that Madrid City Council's maximum level of financial exposure would correspond to EUR 40 million were the 1998 implementation agreement to be held null and void, or EUR 33 million were it to be held that the implementation agreement should be held void on account of an obstacle precluding execution which arose subsequently.

76 The applicant adds that the Commission adopted an estimation of the market value of plot B-32 which was manifestly incorrect and it relies on three other estimations which each attribute a value to that plot of between EUR 22 million and EUR 25 million.

77 Having set out the various scenarios contained in the property valuation office's report, namely scenarios SE-00, SE-01, SE-02 and SE-03, the applicant claims that scenario SE-03, according to which plot B-32 is the object merely of a right of use, valued at EUR 4 275 000, allowing exploitation for 30 years for basic sport use, lacks any probative value.

78 Scenario SE-03 does not enable the market value of plot B-32 to be determined, but only an investment value.

79 Moreover, the applicant submits, the estimation of the market value made by the property valuation office is vitiated by obvious methodological errors. First, solely a right of use was taken into consideration, which was valued incorrectly. The estimation does not comply with the rules applicable to the valuation of rights of use provided for in Orden Ministerial ECO/805/2003, de 27 de marzo, sobre normas de valoración de bienes inmuebles y de determinados derechos para ciertas finalidades financieras (Ministerial Order ECO/805/2003 of 27 March 2003 on the rules for the valuation of immovable property and of certain rights for financial purposes). According to the estimations produced by the applicant, the value of the right of use was between EUR 23 million and EUR 24 million, depending on its duration. Secondly, the investment plan accepted in the property valuation office's report does not observe the criterion of greatest and best use of the land and is inappropriate in order to maximise the value of the plot.

80 The applicant submits that the relevance of the other valuations available in addition to that contained in the property valuation office's report has not been adequately refuted.

81 The Commission disputes the applicant's arguments.

82 As a preliminary point, it must be stated that, according to the applicant, the financial exposure of Madrid City Council as a result of the failure to comply with the 1998 implementation agreement, irrespective of whether that city council were to be held liable for that failure to comply, in any event exceeded the market value of plot B-32. Thus, it is not, in its view, even necessary for the Court to rule on that value.

83 In this connection, it is important to note, first, that Madrid City Council has not proven that it commissioned legal advice prior to signing the 2011 settlement agreement in order to clarify who was to bear, in the light of Spanish law, liability for the non-transferral of plot B-32. Secondly, in that settlement agreement the applicant and that city council relied on the value of that plot, as estimated by the technical departments of that city council, in order to compensate the applicant on account of the impossibility of transferring that plot to it under the 1998 implementation agreement.

84 In those circumstances, notwithstanding the finding which the Commission happened to reach beforehand — namely that a prudent market economy operator would not, in the same conditions as those in the present case, have signed the 2011 settlement agreement without legal advice — that institution cannot be criticised, with regard to the assessment of whether there was an advantage and its amount, for concerning itself with the value of plot B-32, having accepted the premiss that Madrid City Council was liable.

85 That said, it may usefully be pointed out that the conduct of a private investor, which must be compared to that of a public investor, need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term. That conduct must, at least, be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term (judgment of 21 March 1991, *Italy* v *Commission*, C-305/89, EU:C:1991:142, paragraph 20).

86 In those circumstances, the application of the criterion of the private investor is not aimed at establishing what could be the maximum profitability obtained by an investor in a particular sector or across the whole economy, but at establishing whether a comparable private investor could, in the circumstances of the case under consideration, have made the investment concerned. It is thus a matter of establishing whether the investment concerned is the result of a degree of economic rationality, at least in the long term (judgment of 3 July 2014, *Spain and Others* v *Commission*, T-319/12 and T-321/12, not published, EU:T:2014:604, paragraph 42).

87 According to that case-law, it is thus necessary to assess whether, having regard to the initial intention of the parties to the 1998 implementation agreement, and also to the regulations applicable to plot B-32, both at the date at which that implementation agreement was signed and at the date of the signing of the 2011 settlement agreement, it is reasonable to think that a market economy operator would have accepted to pay all the compensation for the non-transferral of the plot concerned, which was estimated to be equal to the value of that plot, namely EUR 22 690 000.

88 It must be added that, so far as concerns the scope of the review by the General Court, in the light of the case-law, although that review is in principle a comprehensive one with regard to whether a measure comes within the scope of Article 107(1) TFEU, the Court of Justice has held that such judicial review was limited where the appraisals by the Commission were technical or complex in nature (see judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 114 and the case-law cited, and of 28 October 2015, *Hammar Nordic Plugg* v *Commission*, T-253/12, EU:T:2015:811, paragraph 30 (not published)).

89 The review by the European Union judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 66).

90 It has already been held that, in order to determine whether the sale of land by the public authorities to a private individual constitutes State aid, the Commission must apply the test of a private investor in a market economy, to determine whether the price paid by the presumed recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. As a rule, the application of that test requires the Commission to make a complex economic assessment (judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 68).

91 It is important to add that, since plot B-32 was not transferred, it was provided that compensation would be paid whose valuation is characterised by the absence of an unconditional bidding procedure. Such a fact may also render the Commission's task complex (see, by analogy, judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 70).

92 Only a manifest error in the determination of the value of plot B-32 is therefore capable of rendering the contested decision unlawful (see, to that effect, judgment of 28 October 2015, *Hammar Nordic Plugg* v *Commission*, T-253/12, EU:T:2015:811, paragraph 34 (not published)).

93 In the present case, it is apparent from the contested decision and the other information in the file that the various estimations made in order to determine the value of plot B-32 differ considerably.

94 For the purposes of the 1998 implementation agreement, the assumed value of plot B-32 was determined by officials in the City council urban development department at EUR 595 194. It is stated that that valuation was

made 'using the valuation methodology laid down in Spanish law', without any further details being provided.

95 For the purposes of the 2011 settlement agreement, the departments of Madrid City Council based their assessment on the cadastral value, which, according to the applicant, takes account of factors such as the value of the land, the value of the constructions thereon, the location and the market at issue. In the report published on 27 July 2011, those departments determined the value of plot B-32 to be EUR 22 693 054.44. The details of the valuation are set out in recital 36 of the contested decision and they were not disputed by the parties. That was the value which was adopted in the 2011 settlement agreement.

96 After the 2011 settlement agreement was signed, the officials of the Spanish Land Registry, which is part of the Spanish Ministry of Economy and Finance, updated the value of plot B-32 and estimated that value as not less than EUR 25 776 296. According to the applicant, such an update serves to bring the cadastral value closer to the market value, without exceeding that market value. The cadastral value is based, for example, on data relating to actual transactions on the market. Those officials are independent from the officials of Madrid City Council.

97 The applicant commissioned and has produced the property consultancy's report, in which the market value of plot B-32 in 1998 was assessed at EUR 574 000, which is thus relatively similar to the value upheld for the purposes of the 1998 implementation agreement. In the same report, the market value of the same plot in 2011 was assessed at EUR 22 690 000, which approximately corresponds to the value upheld in the 2011 settlement agreement. The applicant states that the property consultancy's report uses the static residual valuation method, on the assumption of the sale of the various units shortly after construction of sports infrastructure on the land concerned. That report took into account a transfer to full ownership without restrictions as to resale as well as the objective of that settlement agreement to provide compensation.

98 In the property valuation office's report, ordered by the Commission, in short, four scenarios were envisaged: scenario SE-00, in which the land is public property and has no market value but only a cost price, namely EUR 3 930 000; scenario SE-01, in which the land is intended for the construction of social housing and is assessed at EUR 18 000 000; scenario SE-02, in which the market value of the land corresponds to 10% of the value in the sector, namely EUR 12 245 000; scenario SE-03, in which plot B-32 cannot be transferred, but can only be the object of a right of use, which would allow exploitation of that land for 30 years for sport use, any subsequent resale being excluded, which would lead to a value of EUR 4 275 000.

99 The Commission stated that in the present case it adopted the value as it followed from scenario SE-03 of the property valuation office's report, having regard to the land planning classification of the land determining its use and excluding its resale.

100 First of all, it must be held that the Commission did not commit any manifest error in adopting the value following from such a scenario, which was estimated having regard to the right of use of plot B-32.

101 It is not disputed that, in order to determine the value of plot B-32, it was necessary to base the assessment on the situation at the date of the 2011 settlement agreement. That date corresponds in fact to that of the offsetting of debts and payment of compensation as decided upon in that settlement agreement and which are at the origin of the present proceedings.

102 As is apparent from the legal regime applicable to plot B-32, at that date, such a plot was part of public land and could not be transferred, it being only possible to grant a right of use.

103 As the Commission correctly observed in recital 123 of the contested decision, were the payment of compensation to be sought from Madrid City Council, the value of plot B-32 had to correspond to the value which it had for that city council, and thus to the right of use of that plot and not the hypothetical value it would have had had it been transferrable.

104 Next, as regards the right of use, the applicant claimed that that right had not been valued correctly and that its estimation did not comply with the rules applicable to the valuation of rights of use in Spain.

105 On that issue, it must be held that the Commission did not commit a manifest error of assessment in adopting scenario SE-03 in the property valuation office's report.

106 The other scenarios in the property valuation office's report and the other estimations on which the applicant relies represent a much greater departure from the circumstances of the case, inasmuch as they are not based on the hypothesis of an estimation of a right of use of a plot which is part of public land, but on an asset which could be sold with full ownership.

107 In scenario SE-03 of the property valuation office's report, the Commission had available to it the only hypothesis seeking to estimate the right of use of plot B-32.

108 The applicant also claims that the Commission based its decision on the erroneous assumption that the right of use could not be sold.

109 Admittedly, it is stated in recital 111 of the contested decision that the land planning classification of the land determines its use and excludes its resale. In response to a question put by the Court, the Commission stated that it had given precedence to the hypothesis which consisted in accepting the investment value and exploitation of the right of use for 30 years for sport use.

110 Such a hypothesis is also the closest to what the applicant had in mind in 1996, in its land swap transaction with Madrid City Council, since that exchange was initially agreed upon with the intention that the applicant would itself exploit the land that it received from that city council.

111 Lastly, as regards the complaint alleging infringement of the principle of sound administration, it must be observed that the Commission commissioned an expert's report drawn up on the basis of several scenarios, that it analysed those various scenarios and other valuations made

and that it therefore did not simply accept the findings of the property valuation office's report.

112 As regards the applicant's argument based on the differences between the initial and final versions of the property valuation office's report, it is sufficient to point out that the values upheld in those two versions in respect of scenario SE-03 are practically identical, as the Commission has correctly observed, that is EUR 4 270 000 for the purposes of the initial report and EUR 4 275 000 for the purposes of the final report.

113 It follows from all the foregoing that the third complaint of the first plea and the second plea must be rejected as unfounded.

The third plea in law

114 The applicant argues that the Commission infringed Article 107(1) TFEU, Article 296 TFEU, the obligation to state reasons and the principle of sound administration, enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, inasmuch as it disputed the value of plot B-32 in order to determine that there was an advantage while accepting that the value of the other plots transferred to the applicant by way of compensation under the 2011 settlement agreement was correct. However, that latter value was calculated using the same valuation method as that used by Madrid City Council for the purposes of plot B-32. Relying on various cases, the applicant asserts that the Commission bore the burden of proving that there had been State aid and that it was not for it to evaluate merely some of the benefits of the transaction in a selective and isolated manner. Moreover, the applicant states that it was required to accept the valuation of the land made by that city council, notwithstanding the under-estimation of its value. Under Spanish law, it had no means of legal redress enabling it to challenge the valuation for the purposes of claiming the difference between the contractual valuation and the market value. Were the Commission to have examined if the benefits of the transaction were balanced, it would have concluded that the amount of State aid allegedly granted would in no case have exceeded EUR 10 931 835.

115 The Commission points out that the purpose of the investigation in the present case was to examine whether there was any State aid resulting from the compensation granted by Madrid City Council following its failure to comply with the 1998 implementation agreement, to determine whether a prudent market economy operator would have accepted full liability without prior legal advice, given the many legal uncertainties, and to ascertain whether the debt agreed upon by that city council corresponded to the financial exposure which that operator would have accepted for the specific value of plot B-32 in 2011. The decision initiating the procedure and the contested decision were clear in that regard. According to the Commission, it is also necessary to assess the reasons stated for the contested decision having regard to its context and it was not required to reply to all the arguments put forward during the administrative procedure by an interested party. It asserts that, in accordance with the case-law, it stated sufficient reasons for that decision. It adds that the purpose of the investigation was not to determine whether the applicant had received unlawful aid having regard to all the commitments made in the 2011 settlement agreement. It contends that the cases relied upon by the applicant are not relevant and, if the applicant had received a lesser benefit than that which had been agreed upon, it could have claimed the value fixed in the 2011 settlement agreement, which it did not do.

116 In this connection, according to the case-law, in order to verify whether the advantage could have been obtained under normal market conditions, the Commission is required to carry out a complete analysis of all factors that are relevant to the transaction at issue and its context (see judgment of 30 June 2015, *Netherlands and Others* v *Commission*, T-186/13, T-190/13 and T-193/13, not published, EU:T:2015:447, paragraph 88 and the case-law cited).

117 It has also been held that, so far as concerns the assessment of the value of aid in the form of the sale of land by a public entity to a private individual at a purportedly preferential price, the principle of a private investor operating in a market economy applied and that the value of the aid was equal to the difference between what the recipient actually paid and what it should have paid at the time under normal market conditions to purchase an equivalent piece of land from a private vendor (see judgment of 30 June 2015, *Netherlands and Others* v *Commission*, T-186/13, T-190/13 and T-193/13, not published, EU:T:2015:447, paragraph 77 and the case-law cited).

118 It must be stated that, according to the case-law, to assess the lawfulness of the contested decision, it is necessary to take into account the information at the Commission's disposal or available to it at the date on which it adopted that decision. In that regard, if it should prove to be the case that the Commission's assessment is contradicted or placed in doubt by information of which it was unaware during the administrative procedure, it must be established whether such information could have been known to and taken into consideration by it at the appropriate time and, if that were the case, whether that information should as a matter of course have been considered by the Commission, at least as relevant data in order to apply the private investor test (judgment of 30 June 2015, *Netherlands and Others* v *Commission*, T-186/13, T-190/13 and T-193/13, not published, EU:T:2015:447, paragraph 90 and the case-law cited).

119 In the present case, it must be pointed out that the Commission has accepted that it examined whether there was State aid resulting from the compensation granted by Madrid City Council in connection with the 2011 settlement agreement.

120 It is important to note that, under the 2011 settlement agreement, the parties agreed that the compensation would be paid by replacing the transfer of plot B-32 by the transfer by Madrid City Council of other plots to the applicant and by offsetting their mutual debts. The result was a remaining net claim of EUR 8.04 for the applicant against that city council.

121 The 2011 settlement agreement thus did not concern only the acknowledgement of the debt resulting from

the non-transferral of plot B-32, but it sought to compensate the applicant for that non-transferral by transferring other plots to it and by offsetting mutual debts.

122 However, it is common ground that the plots transferred instead of plot B-32 have not been subject to a valuation by the Commission. It reproduced the values accepted in the 2011 settlement agreement.

123 In reply to written questions put by the Court, the applicant confirmed, without the Commission contesting that point, that during the administrative procedure, it had mentioned that there was a difference between the values of the plots transferred under the 2011 settlement agreement and the value of those plots as given in the property consultancy's report, and thus that the value of those plots had possibly been overestimated.

124 In addition, the applicant also pointed out in the administrative procedure that the property valuation office's report did not contain any valuation of the plots transferred under the 2011 settlement agreement.

125 Therefore, by merely examining the value of plot B-32, the Commission did not take into consideration all the aspects of the transaction at issue and its context. Contrary to what it was required to do, it thus could not have carried out a complete analysis of all the relevant factors, for the purposes of establishing not only the valuation of the amount of aid, but also, above all, whether there was in fact an advantage resulting from the measure at issue, considered in the light of all the relevant factors.

126 It must be stated that, in reply to questions put by the Court, the Commission advanced that it was not required to take account of facts postdating those which had been the object of the investigation procedure or of advantages which were unrelated to the measure under investigation as such.

127 However, it is sufficient to point out that an estimation of the plots transferred under the 2011 settlement agreement was included in the property consultancy's report communicated during the administrative procedure. Moreover, the measure under investigation was not restricted merely to the acceptance of the debt resulting from the non-transferral of plot B-32, but to the possible existence of State aid stemming from the compensation granted by Madrid City Council under the 2011 settlement agreement.

128 The Commission therefore has not proven to the requisite standard that the measure at issue conferred an advantage on the applicant. Since at least one of the cumulative requirements mentioned in paragraph 37 above is not satisfied, the Commission could not treat the measure at issue as State aid for the purposes of Article 107(1) TFEU.

129 It follows from the foregoing that the third plea in law must be declared well founded. Consequently, the contested decision must be annulled.

Costs

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

On those grounds,

THE GENERAL COURT (Fourth Chamber),

hereby:

1. Annuls Commission Decision (EU) 2016/2393 of 4 July 2016 on the State aid SA.33754 (2013/C) (ex 2013/NN) implemented by Spain for Real Madrid CF;
2. Declares that the European Commission is to bear its own costs and orders it to pay the costs incurred by Real Madrid Club de Fútbol.

Noot

Europese Commissie staat buitenspel tegen Real Madrid

1. Na de uitspraak van het Gerecht van Eerste Aanleg (hierna: Gerecht) stond in diverse (voetbal)media dat Real Madrid geen 18,4 miljoen euro aan vermeende staatssteun hoeft terug te betalen. Steun die zou zijn verleend bij een — aantal, deels niet uitgevoerde — grondtransactie(s). Enkele persorganen suggereerden in hun wedstrijdverslag een klinkende eindoverwinning voor Real Madrid. Er zou geen sprake zijn geweest van staatssteunverlening.

2. Het eindsignaal dat van staatssteun geen sprake is, heeft echter nog niet geklonken. Er is nu een voorlopige uitslag bekend. De Europese Commissie (EC) staat volgens het Gerecht buitenspel; bewijs van staatssteun is niet geleverd. Het is denkbaar dat er nog een verlenging van de wedstrijd komt, waarmee de EC de kans krijgt om zich te herpakken en de wedstrijd alsnog naar zich toe zou kunnen trekken.

3. Zeker na het afgelopen Europese voetbalseizoen mag bekend verondersteld worden, dat een ploeg die (halverwege) de wedstijd niet meer lijkt te kunnen verliezen, alsnog onderuit kan gaan. De Koninklijke ondervond dit op pijnlijke wijze tegen Ajax, terwijl laatstgenoemde club vervolgens hetzelfde overkwam in de halve finale van de Champions League.

Wedstrijdverslag

4. De Spaanse voetbalclub heeft volgens de EC miljoenen aan staatssteun ontvangen, omdat Real Madrid – in de kern beschouwd – in 2011 een kavel grond tegen een veel hogere koopsom heeft weten 'te verkopen' aan de stad Madrid, dan waarvoor die grond in 1998 van de lokale overheid was gekocht. Deze grond bleek niet geleverd te kunnen worden aan Real Madrid. Dit was aanleiding voor partijen, nadat de gemeente aansprakelijk was gesteld, tot het aangaan van een schikkingsovereenkomst. Hierbij steeg de transferwaarde van de grond met miljoenen: van € 595.194 naar een bedrag van € 22.700.000. De schikkingsafspraken zien ook op andere percelen grond en er wordt een aantal

schulden van Real Madrid jegens de gemeente, tezamen met andere wederzijdse verplichtingen, tegen elkaar weggestreept.[2]

5. Kortom, een tamelijk ingewikkeld feitencomplex, hetgeen zich ook vaak voordoet bij een project- of gebiedsontwikkeling. Zeker als er sprake is van een langdurige stedelijke herontwikkeling en er een aanslag wordt gepleegd op het uithoudingsvermogen van de betrokken spelers. Dit vergt weleens de inzet van een contractuele wisselspeler, die afhankelijk van de omstandigheden staatssteunrechtelijk bezien goed, maar ook verkeerd kan uitpakken (volgens de EC). Daarover in de analyse straks meer.

6. Volgens de EC is er in Madrid sprake van een overtreding van de Europese staatssteunregels. Het perceel grond kent volgens haar een waarde van circa 4.3 miljoen euro, in plaats van 22.7 miljoen euro. De Europese staatssteunwaakhond deelt een kaart uit met directe gevolgen. Er dient aan vermeende staatssteun een bedrag van 18,4 miljoen euro terugbetaald te worden. Real Madrid protesteert en stapt naar het Gerecht. Van deze arbiter krijgt Real Madrid gelijk.

7. Het Gerecht concludeert namelijk dat de EC niet bewezen heeft dat er sprake is geweest van een voordeelverstrekking aan Real Madrid. Als dit door de EC niet bewezen is, dan is een staatssteun-overtreding ook niet bewezen. Het Gerecht geeft de EC in feite een rode kaart: er gaat een gerechtelijke streep door de door de EC opgelegde terugbetalingsverplichting.

Wedstrijdanalyse

8. Volgens het Gerecht heeft de EC haar staatssteunonderzoek niet op de juiste wijze verricht. De EC heeft (vooral) alleen gekeken naar de waarde van de verkochte grond, maar er is geen rekening gehouden met alle aspecten van de transactie en de context daarvan, waaronder de (niet door de EC op waarde getaxeerde) levering van andere gronden aan Real Madrid. Ondanks dat dit wel vereist is, heeft de EC daardoor geen volledige analyse verricht naar alle relevante omstandigheden van het geval.[3] Dit levert bewijsrechtelijk bezien een standaard buitenspelsituatie op.

9. Net als bij de veelbesproken gebiedsontwikkeling Damplein te Leidschendam-Voorburg, heeft de EC ter staving van de aanwezigheid van staatssteun verzuimd een juiste en volledige Market Economy Operator-toets uit te voeren.[4] Door die toets na te laten, althans deze niet op de juiste wijze uit te voeren, kan niet worden geconcludeerd dat er sprake is van een voordeelverstrekking.

10 Dat er geen sprake zou zijn van staatssteun, is met dit arrest (dus) niet vast komen te staan. Het Gerecht concludeert slechts dat de Europese Commissie (hierna: EC) buitenspel staat omdat bewijs voor staatssteun niet is geleverd. De EC heeft nog recht op een herkansingswedstrijd: zij kan hoger beroep instellen bij het Hof van Justitie of een nieuw besluit nemen. Ook kan de EC de wedstrijd als verloren beschouwen en het hierbij laten. De EC is aan zet. Real Madrid hoeft in voorkomend geval slechts te verdedigen.

11. Een nieuw besluit nemen deed de EC in de zaak Leidschendam-Voorburg. Na het doen van een nieuw MEO-onderzoek concludeerde de EC alsnog dat de gemeente — via het aangaan van gewijzigde (financiële) samenwerkingsafspraken — geen staatssteun had verleend.[5] Die contractaanpassingen bleken achteraf een gouden wissel te zijn geweest. Of zoals ik eerder al heb gesteld: het staatssteunrecht kan niet alleen een doeltreffend breek-, maar ook een nuttig smeedijzer blijken te zijn om een vastgelopen gebiedsontwikkeling vlot te trekken.[6]

12. Met de Real Madrid uitspraak wordt eens te meer bevestigd dat het bij de vraag of er bij een (wijziging van een) project- of gebiedsontwikkeling sprake is van ongeoorloofde staatssteun, niet alleen aankomt op de waardebepaling van betrokken grondtransacties als zodanig, maar op een volledige analyse van de contractuele en contextuele aspecten c.q. omstandigheden van de desbetreffende transfer.[7]

M. Fokkema

2 Rechtsoverweging 121. Zie nader over de schikking (en andere staatssteunkwesties) bij voetbalclubs ook A.A. Khatib, "De spannende kennismaking tussen staatsteun en voetbal nader onderzocht", NtER april 2017, p. 35 en de factsheet "Staatssteun aan BVO's" van het Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, maart 2018, p. 15-16.

3 Rechtsoverweging 125.

4 GvEA 30 mei 2015, *BR* 2015/86, m.nt. A.D.L. Knook.

5 Besluit EC 15 januari 2016, C(2016) 85 final.

6 M. Fokkema, "Staatssteun en de gecontracteerde gebiedsontwikkeling: doeltreffend breek- en nuttig smeedijzer", *TA* 2017/5.

7 Zie ook Rb. Noord Nederland 17 april 2019, ECLI:NL:RBNNE:2019:1681, ro. 4.3.11 ev.

Bestuursrecht algemeen

BR 2019/55

Afdeling bestuursrechtspraak van de Raad van State
22 mei 2019, nr. 201807916/1/A3
(Mr. E. Helder)
m.nt. S.M. Schipper & S.E.A. Groeneveld[1]

(Art. 3 Wob)

ECLI:NL:RVS:2019:1633

Documenten uit een personeelsdossier zijn na de ontvangst van een Wob-verzoek om die informatie vernietigd.

Vernietiging van stukken na het verstrijken van een op grond van de Archiefwet vastgestelde termijn is in beginsel rechtmatig. Dit is anders indien er voor het verstrijken van die termijn een verzoek om die informatie op grond van de Wob is gedaan. Vanaf dat moment staat het het bestuursorgaan niet meer vrij om de gevraagde informatie te vernietigen. Indien een Wob-verzoek wordt ingediend na het verstrijken van de bewaartermijn, ontslaat de mogelijkheid van het reeds vernietigd zijn van de gevraagde informatie het bestuursorgaan niet van de ver-

1 Sanne Schipper en Sophie Groeneveld zijn advocaat bij AKD.