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EUROOPAN UNIONIN TUOMIOISTUIN  
EUROPEISKA UNIONENS DOMSTOL

## JUDGMENT OF THE COURT (Fourth Chamber) \*

1196458

2 September 2021

(Appeal – State aid – Aid in favour of the Nürburgring complex (Germany) – Decision declaring the aid partly incompatible with the internal market – Sale of the assets of the beneficiaries of the State aid found to be incompatible – Open, transparent, non-discriminatory and unconditional tender process – Decision declaring that the reimbursement of incompatible aid did not concern the new owner of the Nürburgring complex and that the latter did not receive new aid for the acquisition of that complex – Admissibility – Status as an interested party – Person individually concerned – Infringement of the procedural rights of the interested parties – Difficulties requiring the initiation of a formal investigation procedure – Justification)

In Case C-665/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 5 September 2019,

**NeXovation Inc.**, established in Hendersonville (United States), represented initially by A. von Bergwelt, M. Nordmann and L. Hettstedt, and subsequently by A. von Bergwelt and M. Nordmann, Rechtsanwälte,

appellant,

the other party to the proceedings being:

**European Commission**, represented by L. Flynn, T. Maxian Rusche and B. Stromsky, acting as Agents,

defendant at first instance,

THE COURT (Fourth Chamber),

\* Language of the case: English.

composed of M. Vilaras (Rapporteur), President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2021,

gives the following

### **Judgment**

- 1 By its appeal, NeXovation Inc. seeks to have set aside the judgment of the General Court of the European Union of 19 June 2019, *NeXovation v Commission* (T-353/15, ‘the judgment under appeal’, EU:T:2019:434), by which the General Court dismissed its action for the partial annulment of Commission Decision (EU) 2016/151 of 1 October 2014 on State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring (OJ 2016 L 34, p. 1) (‘the final decision’).

#### **Legal context**

- 2 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 [TFEU] (OJ 1999 L 83, p. 1), as amended by Council Regulation (EU) No 734/2013 of 22 July 2013 (OJ 2013 L 204, p. 15) (‘Regulation No 659/1999’), which was repealed by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), is applicable to the facts of the present case.
- 3 Article 1(h) of Regulation No 659/1999 defines, for the purposes of that regulation, the concept of ‘interested party’ to include ‘any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations’.
- 4 Under paragraphs 2 to 4 of Article 4 of Regulation No 659/1999, which is entitled ‘Preliminary examination of the notification and decisions of the Commission’:  

‘2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [107](1) [TFEU], it shall decide that the measure is compatible with the common market (hereinafter referred to as a “decision not to raise objections”). That decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [108](2) [TFEU] (hereinafter referred to as a “decision to initiate the formal investigation procedure”).’

5 Under Article 6(1) of that regulation:

‘The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.’

6 In accordance with the first sentence of Article 13(1) of Regulation No 659/1999, the examination of possible unlawful aid is to result in a decision pursuant to Article 4(2), (3) or (4) of that regulation.

### **Background to the dispute and the contested decisions**

7 The facts of the dispute are set out in paragraphs 1 to 15 of the judgment under appeal and, for the purposes of the present proceedings, may be summarised as follows.

8 The Nürburgring complex (‘the Nürburgring’), located in the Land of Rhineland-Palatinate (Germany), consists of a motor-car race track (‘the Nürburgring race track’), a leisure park, hotels and restaurants.

9 Between 2002 and 2012, the public undertakings owning the Nürburgring complex (‘the sellers’) were the beneficiaries of aid, mainly from the Land Rhineland-Palatinate. That aid was the subject matter of a formal investigation procedure under Article 108(2) TFEU, initiated by the Commission during 2012. In the same year, the Amtsgericht Bad Neuenahr-Ahrweiler (Local Court of Bad Neuenahr-Ahrweiler, Germany) made a finding that the sellers were insolvent and decided to proceed to the sale of their assets. A tender process (‘the tender process’) was initiated and concluded with the sale of those assets to Capricorn Nürburgring Besitzgesellschaft GmbH (‘Capricorn’).

- 10 On 10 April 2014, the appellant filed a complaint with the Commission, on the ground that the tender process had not been open, transparent, non-discriminatory and unconditional and had not achieved a market price for the sale of the Nürburgring assets, since the assets had been transferred to a domestic tenderer, whose offer was lower than the appellant's offer and which had been preferred in the tender process. According to the appellant, Capricorn thus received aid, corresponding to the difference between the purchase price which it had to pay for the Nürburgring assets and the market price of those assets, and Capricorn ensured the continuity of the sellers' economic activities, so that the decision on recovery of the aid received by the sellers had to be extended to Capricorn.
- 11 In Article 2 of the final decision, the Commission found that certain support measures in favour of the sellers were unlawful and incompatible with the internal market ('the aid to the sellers'). In Article 3(2) of that decision, the Commission stated that any potential recovery of the aid to the sellers would not concern Capricorn or its subsidiaries ('the first contested decision').
- 12 In the final indent of Article 1 of that decision, the Commission determined that the sale of the Nürburgring assets to Capricorn did not constitute State aid ('the second contested decision'). The Commission took the view in that regard that the tender process had been conducted in an open, transparent and non-discriminatory manner, that that process had resulted in a sale price consistent with the market and that there was no economic continuity between the sellers and the buyer.

#### **The procedure before the General Court and the judgment under appeal**

- 13 By application lodged at the General Court Registry on 26 June 2015, the appellant, then the applicant, brought an action for annulment of the first and second contested decisions.
- 14 The General Court dismissed the action as inadmissible in so far as it sought annulment of the first contested decision, since the appellant had not shown that it was individually concerned by that decision. The General Court held in that regard, in paragraph 53 of the judgment under appeal, that it could not be inferred solely from the appellant's participation in the administrative procedure that it had standing to bring an action against the first contested decision. Furthermore, in paragraph 55 of that judgment, the General Court found that the appellant held no position on the relevant markets that was likely to be affected by the aid to the sellers. Lastly, in paragraph 56 of that judgment, the General Court held that the appellant's arguments that it would have been able to acquire the Nürburgring assets and, therefore, enter the relevant markets, had it not been discriminated against in the tender process and that it found it difficult to acquire or operate other race tracks, due to the loss of reputation and the negative publicity resulting from the setback in the tender process, were not sufficient to distinguish it with regard to the aid to the sellers and the first contested decision.

- 15 As regards the action for annulment of the second contested decision, the General Court held, in paragraph 76 of the judgment under appeal, first, that the Commission's application for a decision that there is no need to adjudicate had to be rejected and, secondly, that that action for annulment was admissible, in so far as it sought to safeguard the procedural rights available to the appellant under Article 108(2) TFEU. It therefore examined the pleas in law relied on by the appellant in support of that application and, after having rejected them all, it held, in paragraph 214 of the judgment under appeal, that the application for annulment of the second contested decision had to be dismissed.

### **Forms of order sought by the parties before the Court of Justice**

- 16 The appellant claims that the Court of Justice should:
- set aside paragraphs 3 and 4 of the operative part of the judgment under appeal;
  - annul the first and second contested decisions;
  - in the alternative, refer the case back to the General Court, and
  - order the Commission to pay the costs.
- 17 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

### **The appeal**

- 18 In support of its appeal, the appellant relies on six grounds of appeal, claiming (i) that the General Court erred in holding that it was not individually concerned by the first contested decision; (ii) an error of law in the application of the concept of State aid; (iii) an error of law in the application of the concept of 'serious difficulties'; (iv) an error of law in the application of Article 20(2) of Regulation No 659/1999; (v) an error of law in the assessment of the impartiality of the examination of its complaint; and (vi) an error of law in the assessment of the adequacy of the statement of reasons for the second contested decision.
- 19 The first ground of appeal seeks to have the judgment under appeal set aside in so far as, by that judgment, the General Court held that the action for annulment of the first contested decision was inadmissible. The other grounds concern the General Court's rejection of the action for annulment of the second contested decision.

***The first ground of appeal***

*Arguments of the parties*

- 20 By its first ground of appeal, the appellant submits that the finding that it was not individually concerned by the first contested decision, since it had no position on the relevant markets capable of being affected by the aid granted to the sellers, is wrong both factually and legally.
- 21 According to the appellant, it is apparent from the judgment of 28 January 1986, *Cofaz and Others v Commission* (169/84, EU:C:1986:42, paragraph 28), that, at the stage of the analysis of the admissibility of an action against a decision such as the first contested decision, it is not for the General Court to draw a definitive conclusion on the appellant’s competitive position on the relevant markets, but to assess whether that decision may prejudice the appellant’s legitimate interests by adversely affecting its market position.
- 22 The appellant adds that the mere fact that it was not active on the relevant markets does not preclude the possibility of a substantial adverse effect on its position on the market, as confirmed by the judgments of 22 November 2007, *Spain v Lenzing* (C-525/04 P, EU:C:2007:698, paragraph 35), and of 22 December 2008, *British Aggregates v Commission* (C-487/06 P, EU:C:2008:757, paragraph 53). It is for the General Court to carry out a case-by-case examination in order to determine whether the person in question is individually concerned by a decision such as the first contested decision.
- 23 According to the appellant, the fact that it has been in competition with Capricorn for the acquisition of the Nürburgring assets and failed to acquire them as a result of aid granted to Capricorn, the fact that it lodged a complaint with the Commission, has been supported in its steps by the United States Mission to the European Union and relied on the Commission’s statements that, inter alia, the Commission was going to supervise the tender process, as well as the fact that the appellant was the subject of negative media coverage which damaged its reputation are all evidence that it is affected by the aid covered by the first contested decision. The fact that it was expressly named in the final decision and that its arguments have been thoroughly examined in that decision confirms that that decision directly affects it.
- 24 The appellant further points out that it did not withdraw from the tender process and if it were to turn out that Capricorn should not have been selected in that procedure, the appellant would have to be selected. That confirms its standing to bring proceedings against the first contested decision. That consideration is also consistent with the case-law on standing to bring proceedings in public procurement matters.
- 25 The Commission submits that the General Court did not err in law in its examination of whether the appellant was individually concerned by the first

contested decision and that, accordingly, the first ground of appeal must be rejected.

*Findings of the Court*

- 26 It should be noted that, according to the settled case-law of the Court of Justice, referred to by the General Court in paragraph 49 of the judgment under appeal, in relation to State aid, in addition to the undertaking in receipt of aid, competing undertakings have been recognised as individually concerned by a Commission decision terminating the formal examination procedure where they have played an active role in that procedure, provided that their position on the market is substantially affected by the aid measure which is the subject of the contested decision (judgments of 17 September 2015, *Mory and Others v Commission*, C-33/14 P, EU:C:2015:609, paragraph 98, and of 15 July 2021, *Deutsche Lufthansa v Commission*, C-453/19 P, EU:C:2021:608, paragraph 38).
- 27 In paragraph 55 of the judgment under appeal, the General Court stated that the appellant had itself acknowledged, in response to a question from the General Court, that it was not present on the relevant markets, listed in paragraph 54 of that judgment, on which competition was liable to be distorted by aid to the sellers. It therefore held, in paragraph 57 of that judgment, that the appellant was not individually concerned by the first contested decision and was not entitled to seek its annulment.
- 28 It must be stated that the appellant does not dispute that it was not present on the relevant markets and, therefore, does not fall within the cases covered by the case-law cited in paragraph 26 of the present judgment. In those circumstances, the General Court cannot be criticised for having erred in law, in that it held that the appellant was not individually concerned by the first contested decision and, therefore, was not entitled to bring an action for annulment of that decision on the basis of the fourth paragraph of Article 263 TFEU.
- 29 The arguments put forward by the appellant do not justify a different conclusion.
- 30 As regards the judgments of 22 November 2007, *Spain v Lenzing* (C-525/04 P, EU:C:2007:698, paragraph 35), and of 22 December 2008, *British Aggregates v Commission* (C-487/06 P, EU:C:2008:757, paragraph 53), it follows only that an adverse effect on such a position need not necessarily be inferred from a significant decline in turnover, appreciable financial losses or a significant reduction in market share, but may also result from a loss of profit or a less favourable development than would have been the case without the aid at issue. Contrary to what the appellant claims, it cannot therefore be inferred from that case-law that the position of an undertaking on the market may be affected, even if that undertaking is not present on the relevant markets.
- 31 As regards the argument that the appellant was in competition with Capricorn for the acquisition of the Nürburgring assets and should have won the tender process



instead of Capricorn, the General Court did not err in law by not taking that circumstance into account. The first contested decision concerns the aid to the sellers and, in particular, whether it may be recovered from Capricorn. The appellant does not explain the link between the fact that it was in competition with Capricorn for the acquisition of the Nürburgring assets and the alleged adverse effect on its market position by the first contested decision.

- 32 As regards the other circumstances referred to by the appellant, namely the fact that it lodged a complaint with the Commission, that it benefited from the support of the United States Mission to the European Union or that it relied on the Commission's statements, suffice it to note that they are also not capable of demonstrating the prejudice to the appellant's position on the market, within the meaning of the case-law cited in paragraph 26 of the present judgment, by the first contested decision.
- 33 It follows from all the foregoing that the first ground of appeal must be rejected as unfounded. Accordingly, the appeal must be dismissed in that it seeks to have the judgment under appeal set aside in so far as, by that judgment, the General Court dismissed the action for annulment of the first contested decision.

#### *The second ground of appeal*

- 34 The second ground of appeal is divided into four parts. It is appropriate to examine, first of all, the second to fourth parts of that ground of appeal.

#### *Arguments of the parties*

- 35 In the second part of the second ground of appeal, the appellant submits, in the first place, that, by stating, in paragraph 119 of the judgment under appeal, that the deadline for the submission of confirmatory offers in the tender process expired on 17 February 2014, the General Court did not take account of the fact that it had been misled, as regards those deadlines, by the sellers who had informed it that those deadlines had been extended until 31 March 2014 and that such an amendment to the conditions of the procedure should have been applied to all the tenderers.
- 36 In the second place, the appellant submits that the General Court ignored the submissions by which it made the argument that the approach followed in the tender process, such as reported in the final decision, with regard to deadlines, did not comply with the requirements of transparency and that no private investor would have taken such an approach. In the third place, the General Court also failed to take account of the fact that the final decision contained contradictory statements, in recitals 272 and 275(c), respectively, in relation to the issue of the extension by the sellers of the deadline for the submission of bids.
- 37 By the third part of the second ground of appeal, the appellant submits that the General Court did not take account of three arguments which it had put forward in

support of its claim that the tender process had lacked transparency. Those three arguments related to changes that occurred during the course of the tender process of which, according to the appellant, not all potential tenderers were informed, in infringement of the requirement of transparency.

- 38 First, before the General Court, the appellant claimed that, although it had initially been proposed to acquire the Nürburgring assets on the basis of a 'clean balance sheet', it subsequently became apparent that, in the event of the acquisition of the Nürburgring, it would have been obliged to take over as such a business lease contract concluded by a third party.
- 39 Secondly, the appellant also claimed that not all tenderers had been provided with the information relating to the business lease contract awarded to Capricorn, which had initially been developed as a 'fall-back' option should the tender process not be concluded successfully or should the Commission's decision relating to the tender process be contested, even though that information was relevant to the determination of the price to be offered in that process.
- 40 Thirdly, the appellant also claimed that an environmental selection criterion had been introduced subsequently in the tender process, without being communicated to all the tenderers. Contrary to what is stated in recital 275(i) of the final decision, that criterion did indeed have an impact on the outcome of that procedure.
- 41 By the fourth part of the second ground of appeal the appellant claims that the General Court failed to consider two series of arguments, one, relating to the claim alleging a lack of transparency of the tender process, and the other relating to the claim that that tender process was discriminatory.
- 42 In particular, as regards the lack of transparency of the tender process, the appellant has claimed: first, that no announcement of the tender process was made outside the European Union; secondly, that several important documents relating to the sale were not made available or were made available too late or were misleading; thirdly, that the Commission was wrong to conclude that the provision of a mark-up version of the asset purchase agreement was merely a part of the commercial negotiations and was not therefore relevant from a State aid perspective; fourthly, that the Commission was wrong to conclude that the late provision of information during the tender process had no effect on the submission of tenderers' final bids or on the finalisation of the financial calculations required for that purpose; and, fifthly, that the Commission was wrong to conclude that KPMG, the legal and financial adviser to the sellers, had provided all tenderers with all the necessary information to enable them to carry out a proper valuation of the Nürburgring assets.
- 43 In so far as concerns the discriminatory nature of the tender process, the appellant has argued that the Commission had failed to investigate the following matters: first, that the appellant had been discriminated against, inasmuch as it had not

been provided with copies of all the documents for the tender process in English; secondly, that Capricorn had been granted privileged access to information by comparison with the other tenderers; thirdly, that the same partner in a prominent American law firm had advised first the sellers and then Capricorn; and, fourthly, that Capricorn had received preferential support both after 17 February 2014 and in obtaining financing from Deutsche Bank AG.

- 44 In response to the second part of the second ground of appeal, the Commission submits that, in so far as this part relates to paragraph 119 of the judgment under appeal, it disputes the General Court's assessment of the facts without alleging any distortion and is therefore manifestly inadmissible. As regards the remainder of the appellant's arguments, it is not possible to determine clearly which paragraphs of the judgment under appeal it refers to, so that that part of that argument is also inadmissible.
- 45 As regards the third part of the second ground of appeal, the Commission submits, first, that the appellant's argument that the acquisition of the Nürburgring should have been made on the basis of a 'clean balance sheet' is, in actual fact, a new assessment of the facts. It is clear from the fourth indent of paragraph 9 of the judgment under appeal that the General Court accepted that potential buyers were not required to take over existing contracts or obligations and therefore dealt with the question of a 'clean balance sheet'.
- 46 Secondly, in paragraphs 146 to 149 of the judgment under appeal, the General Court examined the question of the business lease, rejecting the claims of discrimination and lack of transparency, for the reasons set out in paragraphs 119 to 133 of that judgment. The appellant thus misinterprets the judgment under appeal when it states that the General Court did not take account of its argument relating to the business lease.
- 47 Thirdly, as regards the alleged failure of the General Court to examine the question whether the sellers applied an environmental selection criterion, the Commission points out that the sellers' concern was whether the appellant's business concept was feasible and therefore concerned the credibility of the appellant's offer. The General Court set out other reasons showing that the appellant had not submitted a credible and binding offer accompanied by proof of financing and, therefore, did not have to rule on the question of the environmental selection criterion.
- 48 As regards the fourth part of the second ground of appeal, the Commission states that the General Court examined the argument that the tender process had not been announced beyond the European Union and found, in the second indent of paragraph 9 of the judgment under appeal, that the sellers published a call for expressions of interest in the *Financial Times*, the *Handelsblatt* and on the Nürburgring website. The General Court therefore dealt with that question.

- 49 In addition, the General Court found that, following an open, transparent and non-discriminatory procedure, the tender process had resulted in the award of the Nürburgring assets to the tenderer which submitted a credible and binding offer, which was also the highest offer. The General Court therefore had, in any event, sufficient reasons to reject the argument that the Commission should have had serious doubts as to the existence of aid in favour of Capricorn. The Commission takes the view that it was not therefore necessary for the General Court to examine other aspects of that procedure, so that the appellant's various arguments must be rejected as ineffective.

#### *Findings of the Court*

- 50 By criticising the General Court, in the context of the second to fourth parts of the second ground of appeal, for failing to respond to several arguments which it had put forward before it, the appellant claims, in essence, infringement of the obligation to state reasons arising from Article 36 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 of that Statute, and Article 117 of the Rules of Procedure of the General Court (see, to that effect, judgment of 20 May 2010, *Gogos v Commission*, C-583/08 P, EU:C:2010:287, paragraph 29 and the case-law cited).
- 51 In so far as the Commission claims that the appellant has not indicated which paragraphs of the judgment under appeal are referred to, in particular, by the second part of the second ground of appeal, it must be noted at the outset that it is apparent to the requisite legal standard from the appeal that the second to fourth parts of the second ground of appeal concern, first, paragraphs 119 to 121 of the judgment under appeal, relating to the complaint alleging the non-transparent nature of the tender process, and, second, paragraphs 122 to 134 of that judgment, relating to the complaint that that process was discriminatory. Since the appellant complains that the General Court did not answer certain arguments which it had put forward before it, the appellant was clearly unable to provide a more precise indication of the paragraphs of the judgment under appeal referred to in the second to fourth parts of its second ground of appeal.
- 52 Having clarified that point, it must be borne in mind that, according to settled case-law, the obligation on the General Court to state reasons for its decisions does not require it to provide an account that follows exhaustively and one by one all the arguments put forward by the parties to the dispute. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (judgment of 9 September 2008, *FIAMM and Others v Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 96 and the case-law cited).
- 53 In the present case, as regards, in the first place, the examination by the General Court of the complaint alleging the non-transparent nature of the tender process, it

should be noted that the General Court responded to it only very concisely, in paragraphs 119 to 121 of the judgment under appeal.

- 54 As the Advocate General observed in points 52, 60, 61 and 65 of his Opinion, those paragraphs of the judgment under appeal do not respond, even implicitly, to several of the appellant's arguments referred to in the second to fourth parts of the second ground of appeal, which were actually put forward before the General Court by the appellant, as is confirmed by the reading of its application before the General Court which is included in the file at first instance sent to the Court of Justice in accordance with Article 167(2) of the Rules of Procedure of the Court of Justice.
- 55 More specifically, this is the argument referred to in paragraph 36 above, relating to the fact that the tender process does not comply with the requirements of transparency with regard to deadlines, as well as those referred to in paragraphs 38 to 40 and 42 of the present judgment.
- 56 In the second place, it must be stated, as observed by the Advocate General in point 67 of his Opinion, that paragraphs 122 to 134 of the judgment under appeal, relating to the complaint that that process was discriminatory, do not contain any, even implicit, response to the appellant's arguments, referred to in paragraph 43 of the present judgment, which it put forward before the General Court.
- 57 The foregoing considerations cannot be called into question by the Commission's argument that at least some of the appellant's arguments to which the General Court did not respond are contradicted by the statements in paragraph 9 of the judgment under appeal. Suffice it to note, in that regard, that that paragraph of the judgment under appeal forms part of that judgment relating to the background to the dispute and summarises, in essence, the information in recitals 44 to 51 of the final decision. It cannot therefore be regarded as containing a response from the General Court to the appellant's arguments.
- 58 In those circumstances, the second to fourth parts of the second ground of appeal must be upheld and, without it being necessary to examine the first part of the second ground of appeal, or the third to sixth grounds of appeal, the judgment under appeal must be set aside in so far as, by that judgment, the General Court dismissed the action for annulment of the second contested decision.

#### **The action before the General Court**

- 59 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.
- 60 In the present case, in the light, in particular, of the fact that the action for annulment brought by the appellant in Case T-353/15 is based on grounds which

have been the subject of an adversarial debate before the General Court and the examination of which does not require the adoption of any additional measure of organisation of procedure or investigation of the case, the Court of Justice considers that that action is ready for adjudication and that a final ruling must be given on it (see, by analogy, judgment of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 130), within the limits of the dispute before it, namely the action for annulment of the second contested decision (see, to that effect, judgment of 1 July 2008, *Chronopost and La Poste v UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 134).

- 61 It must be borne in mind that the second contested decision is a decision not to raise objections under Article 4(3) of Regulation No 659/1999, the legality of which depends on whether the assessment of the information and evidence available to the Commission during the preliminary examination phase of the notified measure should have objectively raised doubts as to the compatibility of that measure with the internal market (judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others v Commission*, C-817/18 P, EU:C:2020:637, paragraph 80 and the case-law cited).
- 62 Since such doubts must trigger the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of Regulation No 659/1999 can participate, it must be held that any interested party within the meaning of the latter provision is directly and individually concerned by such a decision. If the beneficiaries of the procedural guarantees provided for in Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 are to be able to ensure that those guarantees are respected, it must be possible for them to challenge before the EU judicature the decision not to raise objections (judgment of 24 May 2011, *Commission v Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 47 and the case-law cited).
- 63 In the present case, it must be held, as the General Court did in paragraph 70 of the judgment under appeal, that the appellant has proven, by participating actively, up to the final stage, in the tender process and by lodging a complaint in that regard with the Commission, its genuine desire to enter the relevant markets and, therefore, its status of being a potential competitor of Capricorn, which had allegedly benefited, according to that complaint, from State aid the existence of which the Commission rejected in the second contested decision. The appellant must therefore be recognised as having the status of an interested party in relation to that decision.
- 64 In support of its action before the General Court, the appellant relied on five pleas in law claiming (i) misinterpretation of the concept of State aid, (ii) misinterpretation of the principle of economic continuity, which refers only to the first contested decision, (iii) failure to take account of the continuation of the sales process, (iv) infringement of its procedural rights and (v) infringement of the obligation to state reasons.

65 It is appropriate to examine, in the first place, the fourth plea in law.

*Arguments of the parties*

- 66 By its fourth plea, the appellant claims that the Commission adopted the second contested decision without initiating the formal investigation procedure, even though the initial examination already revealed serious difficulties. First, the Commission postponed the adoption of its decision on several occasions. Second, it did not carry out an exhaustive examination of the questions of fact and failed to examine several decisive aspects of the case. Third, it displayed inconsistency in its response to the appellant's arguments. Fourth, it did not correctly apply Article 107(1) TFEU and the other applicable provisions and did not provide an adequate statement of reasons.
- 67 In particular, the appellant complains that the Commission did not correctly assess the nature of the financing commitment submitted by Capricorn and the financial soundness of Capricorn's owner. According to the appellant, Capricorn faced significant financing problems from the beginning of the tender process and the financing of the tender which it submitted was far from being guaranteed. The appellant expressed its fears as to the financial reliability of Capricorn in its complaint of 10 April 2014 and in the additional letters of 19 May and 16 June 2014. It subsequently emerged that, in August 2014, payment of the second instalment of the sale price had to be deferred and Capricorn's owner had to provide security to the sellers.
- 68 The letter from Deutsche Bank of 10 March 2014, which supported Capricorn's offer, was a mere letter of intent and, moreover, lapsed and was withdrawn by Deutsche Bank a few weeks later. In a letter sent to the appellant's lawyers on 15 April 2015, the Public Prosecutor, Coblenz (Germany) confirmed, after examining the letter from Deutsche Bank of 10 March 2014, that that letter was in fact non-binding.
- 69 The Commission replies that the existence of serious difficulties is not demonstrated by the change in the date fixed by the Commission for the adoption of a decision without initiating a formal investigation procedure. Moreover, the appellant does not claim that the alleged postponements of the date of adoption of the final decision were caused by requests for additional information from the Commission.
- 70 As regards the letter from Deutsche Bank of 10 March 2014, the Commission points out that that letter contains a financing commitment, as confirmed by the German authorities. The Commission carried out its own analysis of that letter and found that it was unambiguously clear that Deutsche Bank was willing to grant a loan of EUR 45 million to Capricorn. It is true that the same letter also includes, at the very end, a non-liability clause, but it relates to the 'Term sheet' of conditions, as the precise conditions could change. Those conditions should be reviewed at the time of signing and entry into force of the financing agreement.

- 71 The Commission adds that the liquidator of the Nürburgring and the creditors' committee took the view that Capricorn had submitted the best offer with the best financial guarantee, on the basis, inter alia, of the letter from Deutsche Bank of 10 March 2014. The letter from the Public Prosecutor, Coblenz, relied on by the appellant, postdates the adoption of the final decision and the Commission cannot be criticised for not having taken it into consideration.
- 72 Lastly, the Commission states that its examination was more than sufficiently diligent, since the statements made to it by the public authorities of the Member State concerned did not contain any internal inconsistency which would have necessitated a more detailed examination and the complaints made by the appellant amounted to speculation and claims which were not supported by evidence.

### *Findings of the Court*

- 73 It should be noted that, in order to rule out the existence of unlawful aid granted to Capricorn when it acquired the Nürburgring assets, the Commission had to satisfy itself that that acquisition was made at a price corresponding to the market price, which would be the case if it could be confirmed that the tender process was open, transparent, non-discriminatory and unconditional.
- 74 As is apparent from recital 48 of the final decision, one of the factors taken into consideration for the purposes of selecting the buyer of the Nürburgring assets was the confirmation of the financing of its offer.
- 75 As is apparent from recital 272 of the final decision, the appellant's tender, which had offered a higher sale price than that offered by Capricorn, was rejected for lack of evidence of financing.
- 76 According to recital 273 of the final decision, only two offers were considered to have secured financing, namely Capricorn's offer and that of another tenderer. Since both the amount of the insured financing available to that other tenderer and the sale price it offered were lower than those of Capricorn, Capricorn's bid was ultimately successful.
- 77 It follows that if it were to transpire that it had been wrongly considered that Capricorn had confirmed financing for its tender, whereas, in reality, that was not the case, that fact would be such as to call into question, inter alia, the non-discriminatory nature of the tender process, in so far as it would be capable of showing that Capricorn had received preferential treatment since, unlike in the case of the appellant's tender, Capricorn's offer was not rejected.
- 78 Therefore, in the presence of doubts as to the confirmed nature of the financing of Capricorn's tender which could not be dispelled, the Commission was obliged to open the formal investigation procedure and could not adopt a decision not to raise objections, such as the second contested decision.



- 79 It must be held that the matters relied on by the appellant demonstrate the existence of such doubts.
- 80 In the first place, as the appellant submits, the Commission could not consider that the letter from Deutsche Bank of 10 March 2014 contained a binding financing commitment.
- 81 It is apparent from reading the letter from Deutsche Bank of 10 March 2014, as produced by the Commission before the General Court and is? included in the file at first instance, that it contains, on the first page, a clear indication that the ‘commitment’ contained in that letter is subject to the conditions set out, inter alia, in the ‘Term sheet’ annexed to that letter as Annex A.
- 82 That annex contains, at the end, an ‘important notice’, which states, inter alia, that ‘this term sheet is for discussion purposes only as it is not intended to create any legally binding obligations between us ... We therefore do not accept any liability for any direct, consequential or other loss arising from reliance on this document’.
- 83 It is clear from that information that the letter from Deutsche Bank of 10 March 2014 was not intended to create a binding financing obligation on the bank which issued it and for the benefit of Capricorn.
- 84 That conclusion is, moreover, confirmed by the statement in paragraph 9 of page 5 of that letter, entitled ‘Governing law and jurisdiction’, which refers to ‘any non-contractual obligations’ arising from that letter, without referring to contractual obligations, precisely because that letter was not intended to create such obligations.
- 85 In the second place, it is apparent from footnote 79 of the final decision that the second instalment of the sale price was not paid by Capricorn within the prescribed period and that, by an agreement concluded on 13 August 2014 between the insolvency administrator of the Nürburgring, the sellers and Capricorn, the payment of that instalment was deferred to a later date, in return for the payment of default interest by Capricorn and for the provision of additional guarantees. If Capricorn’s offer were in fact financed, Capricorn would logically have been able to pay the second instalment of the sale price within the prescribed period and would not have negotiated the deferral of its payment.
- 86 Accordingly, without it being necessary to examine the pleas in law other than the fourth put forward by the appellant in support of its action, it must be concluded that the assessment of whether the sale of the Nürburgring assets to Capricorn involved the grant to Capricorn of aid incompatible with the internal market raised doubts, within the meaning of Article 4 of Regulation No 659/1999, which should have led the Commission to initiate the procedure referred to in Article 108(2) TFEU.
- 87 The action must therefore be upheld and the second contested decision annulled.

**Costs**

- 88 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to the costs.
- 89 Under the first sentence of Article 138(3) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.
- 90 In the present case, it is appropriate to apply the latter provision, to the extent that the appeal is dismissed in that it concerns the judgment under appeal in so far as, by that judgment, the General Court dismissed the action for annulment of the first contested decision, but to the extent that the appeal is upheld in that it concerns that judgment under appeal in so far as, by that judgment, the General Court dismissed the action for annulment of the second contested decision, and in so far as the Court of Justice sets aside that decision.
- 91 Accordingly, the parties must be ordered to bear their own costs.

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

1. **Sets aside the judgment of the General Court of the European Union of 19 June 2019, *NeXovation v Commission* (T-353/15, EU:T:2019:434), in so far as, by that judgment, the General Court of the European Union dismissed the action for annulment of the last indent of Article 1 of Commission Decision (EU) 2016/151 of 1 October 2014 on State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring;**
2. **Dismisses the appeal as to the remainder;**
3. **Annuls the last indent of Article 1 of Commission Decision (EU) 2016/151 of 1 October 2014 on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring;**

**4. Orders NeXovation Inc. and the European Commission to bear their own costs.**

Vilaras

Piçarra

Šváby

Rodin

Jürimäe

Delivered in open court in Luxembourg on 2 September 2021.

A. Calot Escobar

M. Vilaras

Registrar

President of the Fourth Chamber

