

HILO y ENCABEZADO

Judgement of the Court of Justice (Fourth Chamber) of September 02, 2021 *Ja zum Nürburgring v Commission*, in the Case C-647/19 P (ECLI:EU:C:2021:666). State aid. Interested party. The status of interested party doesn't presuppose the existence of a competitive relationship. (JIRP)

KEYWORDS: State Aid, Interested party

CONTEXT

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.

Between 2002 and 2012, the public undertakings owning Nürburgring ('the sellers') were the beneficiaries of aid, mainly from the Land of Rhineland-Palatinate. In 2011, the appellant, a German motor sport association, filed a first complaint with the Commission concerning that aid. 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, Bad Neuenahr-Ahrweiler, Germany) made a finding that the sellers were insolvent and decided to proceed to the sale of their assets ('the Nürburgring assets'). A tender process ('the tender process') was initiated and concluded with the sale of those assets to Capricorn Nürburgring Besitzgesellschaft GmbH ('Capricorn').

In 2013, the appellant - an association that defends the interests of German motor sport in relation specifically to the Nürburgring race track, that its central objective is to ensure the operation of that race track under economic conditions oriented towards the public interest so as to allow access to it for sporting and other event - filed a second complaint with the Commission, on the ground that the tender process was not open, transparent, non-discriminatory and unconditional. According to the appellant, the successful buyer thus received new aid and 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 that buyer.

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').

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.

By application lodged at the General Court Registry on 10 July 2015, the appellant, then the applicant, brought an action for annulment of the first and second contested decisions.

In the judgment under appeal, the General Court dismissed the action as in part inadmissible and in part unfounded.

The appellant claims *inter alia* that the Court of Justice should, set aside the judgment under appeal.

In support of its appeal, the appellant relies on five grounds of appeal, claiming at first an error in law in the finding that it was not individually concerned by the first contested decision as a competitor of the beneficiary of the aid at issue.

The Commission submits that the General Court gave a partial reading of the Court's case-law in this area and disregarded the fact that the status of interested party presupposes the existence of a competitive relationship.

DOCTRINE

56...*The concept of 'interested party' is defined in Article 1(h) of Regulation 659/1999 as referring to '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'. That provision reproduces the definition of 'parties concerned' within the meaning of Article 108(2) TFEU, as established by the case-law of the Court (judgment of 2 April 1998, Commission v Sytraval and Brink's France, C-367/95 P, EU:C:1998:154, paragraph 41 and the case-law cited).*

57 *As the Advocate General observed in point 30 of his Opinion, while an undertaking in competition with the beneficiary of an aid measure indisputably acts as an 'interested party' within the meaning of Article 108(2) TFEU, an undertaking that is not a competitor of the beneficiary of the aid at issue can be categorised as having that status, if it can demonstrate that its interests could be adversely affected by the grant of that aid. According to the Court's case-law, means demonstrating that aid is likely to have a specific effect on its situation (see, to that effect, judgments of 24 May 2011, Commission v Kronoply and Kronotex, C-83/09 P, EU:C:2011:341, paragraph 65, and of 27 October 2011, Austria v Scheucher-Fleisch and Others, C-47/10 P, EU:C:2011:698, paragraph 132).*

58 *Therefore, the Court cannot accept the Commission's argument that it follows from the judgments of 9 July 2009, 3F v Commission (C-319/07 P, EU:C:2009:435); of 24 May 2011, Commission v Kronoply and Kronotex (C-83/09 P, EU:C:2011:341); and of 6 November 2018, Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci (C-622/16 P to C-624/16 P, EU:C:2018:873), that the status of interested party presupposes a competitive relationship.*

59 *As is apparent from paragraph 104 of the judgment of 9 July 2009, 3F v Commission (C-319/07 P, EU:C:2009:435), the Court recognised that a trade union was an interested party on the basis that the measures at issue in that case could affect its interests and those of its members during collective negotiations.*

60 *As regards the judgment of 24 May 2011, Commission v Kronoply and Kronotex (C-83/09 P, EU:C:2011:341, paragraph 64), the Court did not base its analysis on a competitive relationship between the beneficiary of the aid and the applicant undertaking in that case, but relied on the fact that the latter undertaking required the same raw material for its production process as that beneficiary.*

61 Finally, the judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018: 873, paragraph 43), relied on by the Commission, is of no relevance. Paragraph 43 of that judgment did not discuss whether a person or undertaking was an interested party, but instead whether, in the light of a Commission decision which left intact all of the effects of the national measures at issue establishing an aid scheme, the legal position of a complainant who alleges that these measures place it at a competitive disadvantage had been directly affected.

62 In the second place, the Commission submits that the General Court's recognition of the appellant's status as an interested party is based, as is apparent from paragraph 88 of the judgment under appeal, on the fact that the appellant could have had potentially relevant information. However, the mere fact that a person possesses information that might be relevant in the context of a formal investigation procedure regarding a measure to determine whether it constitutes unlawful State aid is not sufficient to confer such status on that person.

63 It is true that, in paragraph 86 of the judgment under appeal, the General Court referred to the appellant's status as an 'association whose non-profit-making objective is the reinstatement and promotion of a race track at the Nürburgring and the promotion of the collective interests of its members, some of which organise sporting events on that race track', and to the fact that the appellant's interests 'may have been specifically affected by the granting of aid that, according to the [appellant], ought to have been established in the second [contested decision], since the tender process, in its view, was not open, transparent, non-discriminatory and unconditional and did not lead to the sale of the Nürburgring assets to Capricorn at a market price'.

64 However, it is apparent from paragraph 88 of that judgment that, in order to recognise the appellant as an 'interested party', within the meaning of Article 1(h) of Regulation No 659/1999, the General Court ultimately relied on the fact that it could not 'be excluded that the applicant, in view of its objective, which is precisely the reinstatement and promotion of a race track at the Nürburgring, and in view of the fact that it has taken part in the first stage of the tender process and has collected, in that context, a wealth of information concerning the Nürburgring assets, might be able to submit to the Commission, in the context of the formal investigation procedure laid down in Article 108(2) TFEU, comments that the Commission might take into account in assessing whether the tender process was open, transparent, non-discriminatory and unconditional and whether the Nürburgring assets were sold, in that context, at a market price'.

65 As the Advocate General observed, in essence, in points 33 and 34 of his Opinion, the fact that a person has information that could be relevant in the context of a formal investigation procedure does not mean that the interests of that person could be affected by the grant of that aid and that that aid is likely to have a specific effects on his or her situation, for the purposes of the case-law cited in paragraph 57 above. Therefore, simply being in possession of relevant information is not sufficient to categorise that person as an 'interested party'.

66 However, it is apparent from the file at first instance, which was sent to the Court in accordance with Article 167(2) of the Rules of Procedure of the Court of Justice that, before the General Court, the appellant claimed, *inter alia*, to be an association that defends the interests of German motor sport in relation specifically to the Nürburgring race track, that its central objective is to ensure the operation of that race track under economic conditions oriented towards the public interest so as to allow access to it for sporting

and other events and that Capricorn pursues a concept aimed at maximising profits, which is at odds with the appellant's objectives.

67 In the light of those arguments, which are not disputed by the Commission, it must be accepted that the alleged grant of aid to Capricorn in connection with the acquisition of the Nürburgring could affect the interests of the appellant and its members, such that it must be classified as an 'interested party' within the meaning of Article 1(h) of Regulation No 659/1999.

68 Accordingly, it must be held that the action for annulment of the second contested decision is admissible.

The Court (Fourth Chamber):

- 1. Sets aside the judgment of the General Court of the European Union of 19 June 2019, *Ja zum Nürburgring v Commission* (T-373/15, EU:T:2019:432), 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 the 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 *Ja zum Nürburgring eV* and the European Commission to bear their own costs.**