

Judgement of the Court of Justice (Fourth Chamber) of September 02, 2021 NeXovation Inc. v Commission, in the Case C-665/19 P (ECLI:EU:C:2021:666). State aid. Obligation to state reasons. Doubts about the compatibility of one measure with the internal market. Potential competitors are Interested party. The doubts within the meaning of Article 4 of Regulation No 659/1999 about the non-discriminatory nature of a national tender process, in so far as one concurrent had received preferential treatment oblige the Commission to open the formal investigation procedure to initiate the procedure referred to in Article 108(2) TFEU and prohibits the Commission adopt a decision not to raise objections. (JIRP)

KEYWORDS: State Aid, Obligation to state reasons, Doubts about the compatibility, Interested party, Potential competitors, doubts about the non-discriminatory nature of a national tender process.

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 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').

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.

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').

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

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.

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.

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.

The appellant claims inter alia that the Court of Justice should set aside paragraphs 3 and 4 of the operative part of the judgment under appeal and annul the first and second contested decisions.

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.

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.

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.

The Court of Justice only examine the fourth plea in law, relative to the infringement of the appellant procedural rights

DOCTRINE:

Obligation to state reasons

52 *...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).*

Decision not to raise objections under Article 4(3) of Regulation No 659/1999: Doubts about the compatibility of one measure with the internal market

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).*

Interested party

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.*

Doubts within the meaning of Article 4 of Regulation No 659/1999 about the non-discriminatory nature of a national tender process and procedural duties of the Commission

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.

The Court (Fourth Chamber):

- 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.**