Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

19 June 2019*

(State aid — Individual aid in favour of the Nürburgring complex for the construction of a leisure park, hotels and restaurants as well as for the organisation of motor races — Decision finding the aid to be incompatible with the internal market — Decision finding that the reimbursement of the aid found to be incompatible does not concern the new owner of the Nürburgring complex — Action for annulment — No substantial effect on competitive position — Association — Status of negotiator — Inadmissibility — Decision finding no State aid after the preliminary examination stage — Action for annulment — Interested party — Legal interest in bringing an action — Admissibility — Breach of procedural rights of interested parties — No difficulties that would have required the initiation of a formal investigation procedure — Complaint — Sale of the assets of the beneficiaries of the State aid found to be incompatible — Open, transparent, non-discriminatory and unconditional tender process — Obligation to state reasons — Principle of sound administration)

In Case T-373/15,

Ja zum Nürburgring eV, established in Nürburg (Germany), represented initially by D. Frey, M. Rudolph and S. Eggerath, then by D. Frey and M. Rudolph, lawyers,

applicant,

v

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

defendant,

ACTION pursuant to Article 263 TFEU seeking the partial annulment 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 (OJ 2016 L 34, p. 1),

THE GENERAL COURT (First Chamber, Extended Composition)

composed of I. Pelikánová, President, V. Valančius, P. Nihoul, J. Svenningsen and U. Öberg (Rapporteur), Judges,

Registrar: K. Guzdek, Administrator,

having regard to the written part of the procedure and further to the hearing on 25 April 2018,

gives the following

* Language of the case: German.

Judgment

I. Background to the dispute

1 The Nürburgring complex ('the Nürburgring'), located in the German Land of Rhineland-Palatinate, consists of a race track ('the Nürburgring race track'), a leisure park, hotels and restaurants.

2 Between 2002 and 2012, the owners of the Nürburgring ('the sellers'), namely the public undertakings Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH, were the beneficiaries, mainly from the Land of Rhineland-Palatinate, of support measures regarding the construction of a leisure park, hotels and restaurants as well as the organisation of Formula 1 races.

A. Administrative procedure and sale of the Nürburgring assets

3 On 5 April 2011, the applicant, Ja zum Nürburgring eV, a German motorsport association for the reinstatement and promotion of a race track at the Nürburgring, lodged a first complaint with the European Commission concerning aid paid by the Federal Republic of Germany to the Nürburgring race track.

4 By letter of 21 March 2012, the Commission notified the Federal Republic of Germany that it had decided to initiate a formal investigation procedure, under Article 108(2) TFEU, in respect of the various support measures implemented between 2002 and 2012 in favour of the Nürburgring. By that decision, a summary of which was published in the *Official Journal of the European Union* (OJ 2012 C 216, p. 14), the Commission invited interested parties to submit their comments on the measures concerned.

5 As a result of the granting of additional support measures which were notified to it by the Federal Republic of Germany, the Commission decided to extend the formal investigation procedure to those new measures. The decision was notified to the Federal Republic of Germany by letter of 7 August 2012. By that decision, a summary of which was published in the Official Journal (OJ 2012 C 333, p. 1), the Commission invited interested parties to submit their comments on those additional measures.

6 On 24 July 2012, the Amtsgericht Bad Neuenahr-Ahrweiler (Local Court, Bad Neuenahr-Ahrweiler, Germany) made a finding that the sellers were insolvent. On 1 November 2012 it opened insolvency proceedings with no declining of jurisdiction. It was decided to proceed to the sale of the sellers' assets ('the sale of the Nürburgring assets'). The sellers designated the auditing firm KPMG AG as legal and financial advisor.

7 On 1 November 2012, management of the Nürburgring was entrusted to Nürburgring Betriebsgesellschaft mbH, a 100% subsidiary of one of the sellers, Nürburgring GmbH, consisting of the administrators designated by the Amtsgericht Bad Neuenahr-Ahrweiler (Local Court, Bad Neuenahr-Ahrweiler).

8 On 15 May 2013, a tender process for the sale of the Nürburgring assets was launched ('the tender process').

9 On 23 May 2013, the Commission informed the Federal Republic of Germany and the administrators of the criteria which the tender process was required to meet in order to rule out any element of State aid and informed them of the obligation on the part of the successful buyer to reimburse such advantages as it might receive. Discussions had taken place in this regard between the Commission, the Federal Republic of Germany and the administrators since October 2012.

10 The tender process was carried out as follows:

– The launch of the tender process was announced on 14 May 2013 with a press release issued by one of the administrators;

– A call for tenders was published by KPMG in the *Financial Times*, the *Handelsblatt* and on the Nürburgring website on 15 May 2013;

– 70 potential buyers expressed their interest, including the applicant and the German automotive club ADAC eV;

– By letter of 19 July 2013, all interested investors received documentation on the Nürburgring and were invited to submit an indicative offer for the assets in their entirety, for defined asset clusters or for individual assets;

– The deadline for the submission of an indicative offer was set successively to 12 September 2013, by letter of 19 July 2013, and then to 26 September 2013, by letter of 12 September 2013; each of those letters indicated that offers submitted after expiry of the deadline would also be considered;

– At the beginning of February 2014, 24 potential buyers, including the ADAC, had submitted an indicative offer; the ADAC's offer concerned the Nürburgring race track alone; 18 of them were deemed eligible for due diligence, which did not include the ADAC;

– For the potential buyers invited to proceed to the next stage of the tender process, the deadline for the submission of confirmatory offers, which had to be fully financed and include a pre-negotiated asset purchase agreement, was set successively to 11 December 2013, by letter of 17 October 2013, and then to 17 February 2014, by letter of 17 December 2013; that last letter indicated that offers submitted after expiry of the deadline would also be considered, but pointed out that the sellers could nevertheless choose the successful buyer shortly after expiry of the deadline for the submission of offers;

– 13 potential buyers submitted confirmatory offers, four of which submitted an offer for all assets, namely Capricorn Nürburgring Besitzgesellschaft GmbH ('Capricorn' or 'the buyer'), a second bidder ('Bidder 2'), a third bidder ('Bidder 3') and a fourth potential buyer;

– As set out in the letters sent to interested investors on 19 July and 17 October 2013, investors were to be selected on the basis of requirements relating to (i) the maximisation of the total proceeds for all the assets and (ii) transaction security; in accordance with those criteria, in the last stage of the tender process, the offers made by Bidder 2 and by Capricorn were considered, both of which (i) offered to buy all the Nürburgring assets and (ii) had provided proof of the financial solidity of their offers on 7 and 11 March 2014, respectively. Draft transfer agreements were negotiated with both tenderers simultaneously;

– On 11 March 2014, the committee of the sellers' creditors, in the context of the sellers' insolvency proceedings, approved the sale of the Nürburgring assets to Capricorn, which offered EUR 77 million, while Bidder 2 offered between EUR 47 million and EUR 52 million.

11 On 23 December 2013, the applicant lodged a second complaint with the Commission, on the ground that the tender process was not transparent and non-discriminatory. According to the applicant, the successful buyer would thus receive new aid and ensure the continuity of the sellers' economic activities, so that the decision on recovery of the aid received by the sellers ought to be extended to that buyer.

B. Contested decisions

12 On 1 October 2014, the Commission adopted Decision (EU) 2016/151 on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring (OJ 2016 L 34, p. 1) ('the final decision').

13 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').

14 The Commission decided, in Article 3(2) of the final decision, that any potential recovery of the aid to the sellers would not concern Capricorn or its subsidiaries ('the first contested decision').

15 In the final indent of Article 1 of the final decision, the Commission determined that the sale of the Nürburgring assets to Capricorn did not constitute State aid ('the second contested decision').

16 The Commission took the view that the tender process had been conducted in an open, transparent and non-discriminatory manner, that that procedure had resulted in a sale price consistent with the market and that there was no economic continuity between the sellers and the buyer.

II. Procedure and forms of order sought

17 By application lodged at the Court Registry on 10 July 2015, the applicant brought the present action.

18 By letter of 27 October 2015, the Commission submitted a request for the translation of an annex to the application into the language of the case.

19 By document lodged at the Court Registry on 3 November 2015, the sellers sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By order of 18 April 2016, the President of the Eighth Chamber of the General Court granted that leave to intervene.

20 By letter lodged at the Court Registry on 3 May 2016, the sellers informed the Court that they were withdrawing their intervention.

21 By order of the President of the Eighth Chamber of the General Court of 27 June 2016, the sellers were removed from the Court Register as interveners and ordered to bear their own costs and pay those of the applicant relating to their intervention.

22 By separate document lodged at the Court Registry on 17 June 2016, the Commission sought from the Court a decision that the present action had become devoid of purpose and that there was no longer any need to adjudicate on it. On 22 August 2016, the applicant lodged its observations on that application for a decision that there is no need to adjudicate on the action.

23 By decision of the President of the General Court of 11 October 2016 a new Judge-Rapporteur was designated and the case was assigned to the First Chamber of the General Court.

24 On 26 July 2017, by way of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure of the General Court, the Court asked the parties to lodge certain documents and put to them written questions, asking them to reply in writing. The parties lodged their observations in response on 8 September 2017.

25 By order of 6 September 2017, the Court (First Chamber) decided to reserve its decision on the Commission's application for a decision that there is no need to adjudicate.

26 Acting on a proposal from the First Chamber, the General Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a chamber sitting in extended composition.

27 By document lodged at the Court Registry on 16 October 2017, the applicant requested that a hearing be held. The Commission did not express a view as to whether there should be a hearing within the period prescribed.

28 By document lodged at the Court Registry on 23 November 2017, the Commission lodged an application for withdrawal of documents produced by the applicant in an annex to its request that a hearing be held. On 13 December 2017, the applicant lodged its observations on that application for withdrawal of documents.

29 On 23 January 2018, the Court (First Chamber) decided to open the oral part of the procedure. On 23 February 2018, by way of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, the Court asked the parties to lodge certain documents and put to them written questions, asking them to reply in writing. In accordance with Article 24 of the Statute of the Court of Justice of the European Union, the Court also requested the Federal Republic of Germany to lodge certain documents and put to it written questions, asking it to reply in writing. The parties and the Federal Republic of Germany lodged their observations in response on 12, 14 and 19 March 2018.

30 The parties presented oral argument and replied to questions put by the Court at the hearing on 25 April 2018, at the end of which the oral part of the procedure was closed.

31 On 18 May 2018, the applicant requested that the oral part of the procedure be reopened. By decision of 11 April 2019, the President of the First Chamber (Extended Composition) of the General Court dismissed that request.

32 On 20 July 2018, the Commission also requested that the oral part of the procedure be reopened. By decision of 30 July 2018 the President of the First Chamber (Extended Composition) of the General Court dismissed that request.

33 The applicant claims that the Court should:

– reject the pleas of inadmissibility raised by the Commission;

– reject the Commission's application for a decision that there is no need to adjudicate;

– annul the first and second contested decisions;

– order the Commission to pay the costs.

34 The Commission contends that the Court should:

– primarily, dismiss the action as inadmissible;

– in the alternative, decide that there is no need to adjudicate on the action, for loss of legal interest in bringing proceedings on the part of the applicant;

– in the further alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

III. Law

A. Admissibility of the application for annulment of the first contested decision

35 The applicant seeks annulment of the first contested decision, whereby the Commission, after finding that there was no economic continuity between the sellers and the buyer, decided that any potential recovery of the aid to the sellers would not concern the buyer.

36 By the fourth part of the first plea, alleging that no new commercial model was put in place by Capricorn, and by the first two parts of the third plea, alleging errors in assessing the potential existence of economic continuity between the sellers and Capricorn, the applicant criticises the Commission for failing to find, in the first contested decision, that there was economic continuity. Moreover, by its seventh plea, the applicant submits that, by adopting the first contested decision, the Commission failed to assess its comments.

37 In its defence, the Commission contended that the action was inadmissible, in so far as, inter alia, it sought to challenge the first contested decision. According to the Commission, the applicant failed to establish both its legal interest in bringing proceedings and its standing to bringing an action.

38 Subsequently, the Commission concluded that there was no longer any need, in any event, for the Court to adjudicate on the case, including on the application for annulment of the first contested decision, on the ground that the applicant had lost any legal interest it might have previously had in bringing an action.

39 The parties agree that the first contested decision was taken after a formal investigation procedure.

40 In that regard, and in the first place, it must be recalled that, in its judgment of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraph 104), the Court of Justice held that a decision on economic continuity must be regarded as a decision which is 'related and complementary' to the final decision preceding it on the aid concerned, in so far as it defines the scope thereof as regards the status of beneficiary of that aid and, therefore, as regards that of the party obliged to repay that aid, following the occurrence of an event after the adoption of that decision, such as the acquisition by a third party of the assets of the initial beneficiary of that aid.

41 In the present case, by the first contested decision, the Commission, after finding that there was no economic continuity between the sellers and the buyer, decided that any potential recovery of the aid to the sellers would not concern the buyer.

42 It is therefore appropriate to find that the first contested decision is a decision which is 'related and complementary' to the decision on the aid to the sellers taken after the formal investigation procedure.

43 In the second place, it should be recalled that, under the fourth paragraph of Article 263 TFEU, 'any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

44 In so far as the first contested decision concerns the aid to the sellers, which was granted as individual aid and not under an aid scheme, that aid cannot be equated with a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU.

45 According to a consistent body of case-law, persons other than those to whom a decision is addressed may claim to be individually concerned by that decision only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by such a decision (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107, and of 19 May 1993, *Cook* v *Commission*, C-198/91, EU:C:1993:197, paragraph 20).

1. Effect on the applicant as a competitor

46 The applicant asserts that its position on the market was substantially affected, first, because of its status as a candidate for the purchase of the Nürburgring race track and, secondly, because of its past investments in the Nürburgring race track, which the first contested decision, in its view, rendered pointless.

47 The Commission disputes that line of argument.

48 In that regard, concerning 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 concerned (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 98 and the case-law cited; see also, to that effect, judgment of 5 November 2014, *Vtesse Networks* v *Commission*, T-362/10, EU:T:2014:928, paragraph 53 and the case-law cited).

49 The criterion of substantial effect serves to identify competitors that, as a result of aid, are distinguished individually in such a manner that they fulfil the requirements for admissibility as laid down in the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17). Accordingly, competitors that have standing to bring an action are affected by that aid by being differentiated from all other persons and distinguished individually just as in the case of the person to whom the decision under challenge is addressed. Thus, the existence of a substantial effect on the applicant's position on the market does not depend directly on the amount of the aid at issue, but on the significance of the adverse effect which that aid may have on that position. Such an adverse effect may vary, in respect of aid of a similar amount, in the light of criteria such as the size of the market concerned, the specific nature of the aid, the length of the period for which it was granted, whether the activity affected is the applicant's main or ancillary activity, and the possibilities which the applicant has to circumvent the negative effects of the aid (see judgment of 5 November 2014, *Vtesse Networks* v Commission, T-362/10, EU:T:2014:928, paragraph 41 and the case-law cited).

50 The mere status of potential competitor is therefore insufficient to confer on an individual the right to bring an action before the EU Courts in order to challenge a decision adopted by the Commission after a formal investigation procedure.

51 In the present case, it is appropriate to find that, on the one hand, the fact that the applicant is an association aimed at providing moral and material support for the reinstatement of motorsport on the Nürburgring does not necessarily preclude its characterisation as an 'undertaking' nor the characterisation of some of its activities as 'economic' activities (see, to that effect, judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 27 and 28). On the other hand, the applicant played an active role in the procedure that preceded the adoption of the first contested decision, in that it lodged a complaint on 23 December 2013, as it was of the opinion that there would be economic continuity between the sellers and the successful buyer, so that the decision on recovery of the aid to the sellers ought to be extended to that buyer.

52 It is, however, clear from the case-law cited in paragraph 48 above that it cannot be inferred solely from the applicant's participation in the administrative procedure that it has standing to bring an action. The applicant must, in any event, show that the aid to the sellers was likely to affect substantially its position on the market.

53 In recital 20 of the final decision, the Commission stated that the support measures in favour of the sellers concerned the financing of the construction and operation of the Nürburgring facilities. In addition, in recitals 173 to 176 and 178 of the final decision, the Commission noted that the markets on which competition was likely to be distorted as a result of those measures were those concerning the operation of race tracks, off-road parks, leisure parks, accommodation facilities, restaurants, safety driving centres, driving schools, multifunctional halls, and cash-free payment systems as well as those concerning the promotion of tourism, project development, the construction of real property, business management and trade with cars or motor bikes ('the relevant markets'). Lastly, in recital 180 of the final decision, the Commission indicated that the relevant markets could be considered to be EU-wide.

54 In the context of the present case, the applicant never claimed, let alone established, that, at the time of submitting the application and before that, it was present on the relevant markets. Therefore, it held no position on the relevant markets that was likely to be affected, let alone substantially, by the aid to the sellers. The applicant nevertheless claims, in essence, the status of potential competitor of Capricorn by virtue of its participation in the procedure for the purchase of the Nürburgring assets.

55 In any event, in the circumstances of the present case, the applicant's participation in the tender process was not sufficient to demonstrate a genuine desire on its part to enter the relevant markets. While it participated in the very first stage of the tender process by expressing its interest in purchasing the Nürburgring assets, which allowed it to have access to all the documents concerning those assets, the applicant itself recognised that it had never been in a position to submit an indicative offer in the subsequent stages of that procedure. In addition, even if the applicant states that it endorsed the ADAC's offer concerning the Nürburgring race track alone, on the ground that it shared its views on keeping and operating the race track, it does not claim, let alone demonstrate, that that endorsement, had the ADAC's offer been successful, would have been such as to enable it, as an economic operator, to enter the relevant markets.

56 Furthermore, in so far as the applicant maintains that its position on the market was substantially affected by virtue of its past investments in the Nürburgring race track, it must be observed that the mere fact of having invested in the Nürburgring, in any capacity, is not sufficient to establish that it was present, as an economic operator, on the relevant markets — which it does not, moreover, claim to have been — nor a fortiori that its position on those markets, as an economic operator, was substantially affected by the aid to the sellers that, according to the applicant, rendered its investments pointless. In any event, the applicant does not explain how, in its view, the first contested decision, whereby the buyer of the Nürburgring assets was not obliged to reimburse the aid to the sellers, affected the utility of its alleged investments in the Nürburgring.

57 It follows that none of the arguments put forward by the applicant is such as to establish, to the requisite legal standard, that the first contested decision substantially affected its alleged competitive position on the relevant markets affected by the aid to the sellers covered by that decision.

2. Effect on the applicant as a trade association

58 The applicant asserts that it has been affected as a trade association, since (i) the position on the market of one of its members, namely the ADAC, a candidate for the purchase of the Nürburgring assets, has been substantially affected, and (ii) it was conducting negotiations to safeguard the interests of German motorsport, in particular with regard to the reinstatement and the promotion of a race track at the Nürburgring, and it had participated in the administrative procedure by lodging a complaint and producing written comments and evidence.

59 The Commission disputes that line of argument.

60 In that regard, it must be recalled that a trade association which is responsible for safeguarding the collective interests of its members is, in principle, entitled to bring an action for the annulment of a final decision of the Commission on State aid only in two sets of circumstances, namely, first, where the undertakings which it represents or some of those undertakings themselves have *locus standi* and, second, if it can prove an interest of its own, in particular because its position as a negotiator has been affected by the measure of which annulment is sought (see judgment of 15 January 2013, *Aiscat* v *Commission*, T-182/10, EU:T:2013:9, paragraph 48 and the case-law cited).

61 With regard to the question of whether the applicant is justified in relying on one of its members itself having *locus standi*, it is apparent from the applicant's observations of 8 September 2017 in response to the questions put by the Court that the ADAC is not itself one of the members of the applicant and that only the members of the ADAC, namely the regional clubs, organise sporting events on the Nürburgring, in particular the ADAC Mittelrhein eV and the ADAC Nordrhein eV. The latter, according to the applicant, are also members of the applicant.

62 It follows from the information referred to in paragraph 61 above that the applicant cannot, as an association, rely on the ADAC itself possibly having *locus standi*, since the ADAC is not one of the members of the applicant and the applicant cannot, therefore, purport to represent it in the context of the present action.

63 Assuming that the applicant had intended, in essence, to rely on some of the regional clubs themselves having *locus standi*, those clubs being members of the ADAC and allegedly also of the applicant, it is appropriate to find that it has not proven, to the requisite legal standard, that the first contested decision has substantially affected a possible competitive position of those clubs on the relevant markets affected by the aid to the sellers covered by that decision, as required by the case-law cited in paragraph 48 above.

64 It must therefore be concluded that the applicant cannot rely, as a trade association, on either the ADAC itself possibly having *locus standi* or the ADAC's regional clubs themselves possibly having *locus standi*.

65 As to whether the applicant can claim *locus standi* as a negotiator, it is appropriate to recall that it is settled case-law, which refers, inter alia, to the judgments of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission* (67/85, 68/85 and 70/85, EU:C:1988:38, paragraphs 21 and 22), and of 24 March 1993, *CIRFS and Others* v *Commission* (C-313/90, EU:C:1993:111, paragraphs 29 and 30), that in order for an applicant association to be recognised as being individually concerned, it must be in a particular situation in which it occupies a clearly circumscribed position as negotiator which is intimately linked to the actual subject matter of the decision, thus placing it in a factual situation

which distinguishes it from all other persons (see, to that effect, judgment of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraph 87 and the case-law cited, and order of 29 March 2012, *Asociación Española de Banca* v *Commission*, T-236/10, EU:T:2012:176, paragraph 43 and the case-law cited).

66 In its judgment of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission* (67/85, 68/85 and 70/85, EU:C:1988:38, paragraphs 20 to 24), the Court acknowledged the standing of a professional public-interest body which not only had taken an active part in the procedure, inter alia by submitting written comments to the Commission, but also had negotiated, in the interests of the professionals concerned, gas tariffs that the Commission then considered to be aid incompatible with the internal market, and that, as such, was one of the parties to the contract which established the tariffs disallowed by the Commission.

67 In its judgment of 24 March 1993, *CIRFS and Others* v *Commission* (C-313/90, EU:C:1993:111, paragraphs 29 and 30), the Court similarly acknowledged the standing of a trade association which not only had taken an active part in the procedure, but also had acted as a negotiator in the introduction of the 'discipline' aimed at providing a framework for granting aid to the industry concerned, at issue in that case.

68 In order for the particular status of negotiator to be acknowledged in respect of an applicant trade association, the EU judicature has held that the fact that the applicant trade association had submitted comments during the formal investigation procedure (order of 29 March 2012, *Asociación Española de Banca* v *Commission*, T-236/10, EU:T:2012:176, paragraph 46) or that it had lodged the complaint that initiated that procedure (judgment of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraphs 94 and 95) was not sufficient.

69 With regard to the strict conditions laid down in the judgment of 13 December 2005, *Commission* v *Aktionsgemeinschaft Recht und Eigentum* (C-78/03 P, EU:C:2005:761, paragraphs 53 to 59), it must be found that the applicant has not established that it occupied, in the context of the formal investigation procedure that preceded the adoption of the first contested decision, a position as negotiator, clearly circumscribed and intimately linked to the subject matter of that decision, on which it may base its individual concern.

70 It follows from all the foregoing that the applicant has failed to demonstrate that either it was or any of its members were individually concerned by the first contested decision.

71 It should be remembered that the conditions for the admissibility of an action are cumulative (judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 199). Thus, without there being any need to examine the applicant's interest in bringing an action for annulment of the first contested decision, let alone the Commission's application for a decision that there is no need to adjudicate based on the loss, on the part of the applicant, of its legal interest in bringing an action for annulment of the first contested decision, it is appropriate to find that the action is inadmissible, in so far as it seeks annulment of the first decision, for lack of individual effect.

B. The application for annulment of the second contested decision

72 The applicant also seeks annulment of the second contested decision, whereby the Commission determined that the sale of the Nürburgring assets to Capricorn did not constitute State aid.

1. Admissibility and the application for a decision that there is no need to adjudicate

73 In its defence, the Commission contends that the action is inadmissible, in so far as it seeks annulment of the second contested decision. According to the Commission, the applicant failed to demonstrate both its legal interest in bringing proceedings and its standing to bring an action in connection with that decision. Moreover, the Commission claims that that decision does not constitute a reviewable act for the purposes of the fourth paragraph of Article 263 TFEU.

74 In the alternative, the Commission subsequently lodged an application for a decision that there is no need to adjudicate, on the ground that the applicant had, in any event, lost any interest it may have previously had in bringing an action for annulment of the second contested decision.

75 In the present case, it is appropriate to begin by examining whether the applicant has standing to bring an action for annulment of the second contested decision, before turning to, first, the extent to which it has and maintains an interest in securing such an annulment and, secondly, whether or not the second contested decision is a reviewable act for the purposes of the fourth paragraph of Article 263 TFEU.

76 As to its standing, the applicant maintains that it is directly and individually concerned by the second contested decision. In that regard, the applicant claims that its specific status of 'interested party' within the meaning of Article 1(h) of 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), in conjunction with the specific subject matter of the action, is sufficient to distinguish it individually, for the purposes of the fourth paragraph of Article 263 TFEU.

77 In addition, the applicant asserts that its position on the market as well as that of one of its members, namely the ADAC, have been substantially affected by reason of their status as candidates for the purchase of the Nürburgring assets.

78 Lastly, the application alleges individual concern as a trade organisation safeguarding the interests of German motorsport.

79 The Commission disputes that line of argument. It contends, inter alia, that the applicant, in so far as it has failed to show that either itself or the ADAC were in a competitive relationship with Capricorn, cannot be regarded as a 'party concerned' within the meaning of Article 108(2) TFEU.

80 In the context of the procedure for reviewing State aid, the preliminary examination stage for reviewing aid under Article 108(3) TFEU, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the investigation under Article 108(2) TFEU, which is designed to enable the Commission to be fully informed of all the facts of the case. It is only in connection with the procedure laid down in the latter provision that the FEU Treaty imposes the procedural guarantee consisting in the obligation, for the Commission, to give the parties concerned notice to submit their comments (judgments of 19 May 1993, *Cook* v *Commission*, C-198/91, EU:C:1993:197, paragraph 22; of 15 June 1993, *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraph 16; and of 17 July 2008, *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraph 35).

81 Where, without initiating the formal investigation procedure under Article 108(2) TFEU, the Commission finds, by a decision based on Article 108(3) TFEU, that a State measure does not constitute aid incompatible with the internal market, the persons intended to benefit from that procedural guarantee may secure compliance therewith only if they are able to challenge that decision before the EU Courts. For those reasons, the EU Courts declare to be admissible an action for annulment of such a decision brought by a party who is concerned within the meaning of

Article 108(2) TFEU where it seeks, by instituting proceedings, to safeguard the procedural rights available to it under the latter provision (judgment of 17 July 2008, *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraph 36).

82 Thus, it must be held that any interested party must be regarded as being directly and individually concerned by a decision finding the absence of aid at the conclusion of the preliminary examination phase (judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 68), bearing in mind that, where an interested party has lodged a complaint, refusal by the Commission to uphold that complaint must in any event be regarded as a refusal to initiate the procedure laid down in Article 108(2) TFEU (judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraphs 51 to 54).

83 In the present case, the parties agree that the second contested decision is a decision adopted after the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, and not after a formal investigation procedure. Since neither the applicant nor any of its members can, for the reasons mentioned in paragraphs 54 to 57, 61 to 64, 69 and 70 above, which also apply to the action against the second contested decision, be regarded as fulfilling the requirements for admissibility as laid down in the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), it is appropriate, in order to ascertain whether it has standing to bring an action for annulment of the second contested decision, to determine whether it has proven to the requisite legal standard that it is an interested party.

84 Under Article 1(h) of Regulation No 659/1999, any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid are to be regarded as an 'interested party'. In other words, it means an indeterminate group of addressees. That provision does not, however, rule out the possibility that an undertaking which is not a direct competitor of the beneficiary of the aid may be categorised as an 'interested party', provided that that undertaking demonstrates that its interests could be adversely affected by the granting of the aid. It is sufficient for that undertaking to establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation (see judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 63 to 65 and the case-law cited).

85 In addition, the Court has had the opportunity to clarify that it was not excluded that a body representing workers, established, by definition, to promote the collective interests of its members, may be regarded as a 'party concerned' within the meaning of Article 108(2) TFEU, if it shows that its interests or that of its affiliates might be affected by the granting of aid. That body, however, must show to the requisite legal standard that the aid is likely to have a real effect on its situation or that of those it represents (judgment of 9 July 2009, *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraph 33).

86 In that regard, it must be found that the applicant's own interests, 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, may have been specifically affected by the granting of aid that, according to the applicant, 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.

87 Since the Commission, in its assessment of the compatibility of State aid, takes account of numerous considerations of various kinds, the possibility cannot be excluded that a body representing collective interests in connection with those considerations might submit to the Commission comments which might possibly be taken into account by the Commission in the course of the formal investigation procedure provided for in Article 108(2) TFEU (see, to that effect, order of 6 October 2015, *Comité d'entreprise SNCM* v *Commission*, C-410/15 P(I), EU:C:2015:669, paragraph 12).

88 In the present case, it cannot 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.

89 Therefore, in the light of the considerations set out in paragraphs 84 and 85 above and of all the previous findings, the applicant's status of interested party must be recognised with regard to the second contested decision.

90 As to the applicant's legal interest in bringing an action, the Commission submits, in its application for a decision that there is no need to adjudicate, that the applicant lost that interest due, inter alia, to the fact that Capricorn had paid, allegedly, the purchase price of the Nürburgring assets in full and had waived its right to terminate the sales agreement in the event that the Commission should decide to recover the aid to the sellers from it.

91 It is important to recall, however, that 'parties concerned' within the meaning of Article 108(2) TFEU have a legal interest in securing the annulment of a decision taken after the preliminary examination stage, since, pursuant to the provisions of Article 108 TFEU, such annulment would require the Commission to initiate the formal investigation procedure, permitting them to submit their comments and thus exert an influence on the new Commission decision (judgment of 10 February 2009, *Deutsche Post and DHL International* v *Commission*, T-388/03, EU:T:2009:30, paragraphs 62 and 64). In the present case, the applicant has a legal interest in having the second contested decision annulled in so far as, by the fifth and eighth pleas, it calls into question the fact that that decision, which establishes that no aid was granted to Capricorn in the tender process, was adopted without the Commission initiating the formal investigation procedure, in breach of its procedural rights as an interested party.

92 If the Court were to annul the second contested decision for breach of the applicant's procedural rights, the Commission would, in principle, have to initiate the formal investigation procedure with regard to the sale of the Nürburgring assets and ask the applicant, as an interested party, to submit its comments. Consequently, the annulment of the second contested decision may, in itself, have legal consequences for the applicant, as an interested party.

93 It must therefore be concluded, with regard to the second contested decision, that the applicant has standing to bring an action, as an interested party, and has and maintains a legal interest in bringing an action, arising from the safeguard of the procedural rights available to it, in that same capacity, under Article 108(2) TFEU.

94 It follows that the plea of inadmissibility and, in the alternative, the Commission's application for a decision that there is no need to adjudicate must be rejected and that the present action is admissible, in so far as it relates to the second contested decision and seeks to safeguard the procedural rights available to the applicant under Article 108(2) TFEU. To the extent that the applicant's application for annulment goes beyond that objective, it must be dismissed as inadmissible, without there being any need for the Court to rule on the other pleas of inadmissibility put forward by the Commission.

2. Admissibility of the annexes

(a) Admissibility of Annexes C.1 and C.6 to C.9

95 In its rejoinder, the Commission expressly disputes the admissibility of four of the items of evidence produced by the applicant as an annex to the reply, namely Annexes C.1 and C.6 to C.8. In this respect, it notes that, in the absence of justification by the applicant regarding the late submission of those items of evidence, the latter ought to be declared inadmissible. The applicant submits that those annexes seek to dispute the allegations made by the Commission in its defence.

96 Moreover, the Commission disputes the admissibility of a legal article produced by the applicant as an annex to the reply, namely Annex C.9. In this respect, the applicant notes that it had provided full references for that article in the application.

97 Article 85(2) of the Rules of Procedure provides that in reply or rejoinder a party may produce or offer further evidence in support of its arguments, provided that the delay in the submission of such evidence is justified.

98 However, according to the case-law, evidence submitted in rebuttal and the amplification of evidence offered in response to evidence submitted in rebuttal by the opposing party in the defence are not covered by the time-bar rule in Article 85(1) and (2) of the Rules of Procedure. That provision concerns offers of fresh evidence and must be read in the light of Article 92(7) of those rules, which expressly provides that evidence may be submitted in rebuttal and previous evidence may be amplified (judgment of 12 September 2007, *Commission* v *Trends and Others*, T-448/04, not published, EU:T:2007:265, paragraph 52).

99 In the present case, it is appropriate to note that Annexes C.1 and C.6 to C.8 are evidence submitted in rebuttal and seek to dispute the allegations made by the Commission in the defence. In order to ensure observance of the adversarial principle, those annexes must therefore be accepted as admissible.

100 With regard to Annex C.9, it is appropriate to note that it was a publicly available document on which the applicant based its argument and the evidential value of which was nevertheless challenged by the Commission. For that reason, that annex must also be accepted as admissible.

(b) Admissibility of Annexes 7 and 8 to the observations of the Commission of 8 September 2017 in response to the questions put by the Court

101 In its request that a hearing be held, the applicant expressly disputes the admissibility of two of the items of evidence produced by the Commission as an annex to its observations of 8 September 2017 in response to the questions put by the Court, namely Annexes 7 and 8. It points out that, in its view, they were submitted late.

102 The Commission submits that the items of evidence at issue correspond to two letters from Deutsche Bank AG of 17 and 25 February 2014, making clear, in its view, the binding nature of a letter from Deutsche Bank dated 10 March 2014 in support of Capricorn's offer ('the letter from Deutsche Bank of 10 March 2014'). In that respect, it is appropriate to note that the binding nature of that letter was the subject of one of the questions put to the Commission by the Court by way of the measure of organisation of procedure of 26 July 2017.

103 In accordance with Article 89 of the Rules of Procedure, whereby the Court may put questions to the parties and request documents from them in order to clarify certain aspects of the dispute, those annexes must therefore be accepted as admissible.

(c) Admissibility of Annex G.13

104 At the hearing, the Commission expressly disputed the admissibility of one of the items of evidence produced by the applicant as an annex to its observations of 8 September 2017 in response to the questions put by the Court, namely Annex G.13, and requested its withdrawal.

105 The applicant submits that that item of evidence sought to support its endorsement of the ADAC's offer concerning the Nürburgring alone, mentioned in the application. In that respect, it is appropriate to note that the scope of the endorsement was the subject of one of the questions put to the applicant by the Court by way of the measure of organisation of procedure of 26 July 2017.

106 In accordance with Article 89 of the Rules of Procedure, whereby the Court may put questions to the parties and request documents from them in order to clarify certain aspects of the dispute, that annex must therefore be accepted as admissible and the application for withdrawal submitted by the Commission concerning that annex must be dismissed.

(d) Admissibility of Annexes H.1 and H.2

107 By document lodged at the Court Registry on 23 November 2017 (see paragraph 28 above), the Commission expressly disputes the admissibility of the two items of evidence produced by the applicant as an annex to its request that a hearing be held submitted on 16 October 2017, namely annexes H.1 and H.2, and requests their withdrawal.

108 It is appropriate to note that, as the applicant submitted, Annexes H.1 and H.2 seek to dispute the Commission's observations of 8 September 2017 in response to the questions put to the Commission by the Court on 26 July 2017.

109 In those circumstances, Annexes H.1 and H.2 must be accepted as admissible and the applications for withdrawal submitted by the Commission concerning those annexes must be dismissed.

3. Substance

(a) Preliminary observations on the scope of judicial review concerning a decision that there is no aid, taken after the preliminary examination stage

110 It should be made clear at the outset that Article 108(3) TFEU and Article 4 of Regulation No 659/1999 provide for a stage at which the aid measures notified undergo a preliminary examination, the purpose of which is to enable the Commission to form an initial view as to whether the aid notified is compatible with the internal market. On completion of that stage, the Commission is to make a finding either that the measure does not constitute aid or that it comes within the scope of Article 107(1) TFEU. In the latter case, it may be that the measure does not raise doubts as to its compatibility with the internal market; on the other hand, it is also possible that the measure may raise such doubts (judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 43).

111 When, after the preliminary examination stage, the Commission adopts a decision whereby it finds that a State measure does not constitute aid that is incompatible with the internal market, it also implicitly refuses to initiate the formal investigation procedure. That principle applies both where the decision is taken on the ground that the Commission considers that the aid is compatible with the internal market, under Article 4(3) of Regulation No 659/1999, namely 'a decision not to raise objections', and where it is of the opinion that the measure does not come within the scope of Article 107(1) TFEU and

thus does not constitute aid pursuant to Article 4(2) of Regulation No 659/1999 (see, to that effect, judgments of 17 July 2008, *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraph 52, and of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 68).

112 According to the case-law, where an applicant seeks the annulment of a decision declaring that the measure at issue is not State aid or of a decision not to raise objections, it essentially contests the fact that the Commission adopted the decision in relation to the aid at issue without initiating the formal investigation procedure, thereby acting in breach of the applicant's procedural rights. In order to have its application for annulment upheld, the applicant may invoke, for the purpose of safeguarding the procedural rights available to it in the context of the formal investigation procedure, any plea capable of showing that the assessment of the information and evidence that was available to the Commission during the phase of preliminary examination of the measure at issue should have raised doubts as to its classification of that measure as State aid or its compatibility with the internal market (judgments of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 60, and of 25 November 2014, *Ryanair* v *Commission*, T-512/11, not published, EU:T:2014:989, paragraph 31), bearing in mind that the information 'available' to the Commission includes that which seemed relevant for the assessment to be carried out and which could have been obtained, upon request by the Commission, during the preliminary examination stage (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71).

113 Proof of the existence of doubts may be furnished by, inter alia, reference to a body of consistent evidence: the question of whether or not a doubt exists requires, with regard to a decision finding the measure at issue not to constitute State aid, investigation of both the circumstances in which that decision was adopted, inter alia the duration of the preliminary examination, and its content, comparing the assessments upon which the Commission relied in that decision with the information available to it when it took a view on the classification of the measure in question as State aid (see, to that effect, judgment of 24 January 2013, *3F* v *Commission*, C-646/11 P, not published, EU:C:2013:36, paragraph 31).

114 Thus, the Commission is required to initiate the formal investigation procedure if, in the light of the information obtained or available to it during the preliminary examination stage, it still faces serious difficulties in assessing the measure under consideration. That obligation follows directly from Article 108(3) TFEU, as interpreted by the case-law, and is confirmed by Article 4 of Regulation No 659/1999, when the Commission finds, after a preliminary examination, that the measure at issue raises doubts as to its classification as aid or its compatibility with the internal market (see, to that effect, judgments of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraphs 30 to 33, and of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 328). In such a case, the Commission may not, therefore, refuse to initiate the formal investigation procedure in reliance upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative or political convenience (judgment of 10 February 2009, *Deutsche Post and DHL International* v *Commission*, T-388/03, EU:T:2009:30, paragraph 90).

115 At the litigation stage, review by the EU Courts must focus on whether, in the light of the arguments put forward and the evidence adduced by the applicant in the case concerned, the assessments on which the Commission relied in finding that there is no aid gave rise to such difficulties as to raise doubts and, accordingly, justify the initiation of the formal investigation procedure (see, to that effect, judgments of 19 May 1993, *Cook* v *Commission*, C-198/91, EU:C:1993:197, paragraph 31, and of 15 June 1993, *Matra* v *Commission*, C-225/91, EU:C:1993:239, paragraph 34).

(b) Preliminary observations on the subject matter of the action

116 It is settled case-law that it is not for the Court to interpret an action brought by an applicant to challenge exclusively the merits of an aid assessment decision as such as seeking, in fact, to safeguard the procedural rights available to the applicant under Article 108(2) TFEU, where the applicant has not expressly raised a plea to that effect. In such circumstances, the interpretation of the plea would be tantamount to re-defining the subject matter of the action (see judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 55 and the case-law cited).

117 Nonetheless, that limit on its jurisdiction to construe pleas in law does not have the effect of preventing the Court from examining arguments which the applicant has put forward regarding the substance, in order to ascertain whether strands of those arguments additionally support a plea, also raised by the applicant, which expressly alleges the existence of serious difficulties justifying initiation of the procedure under Article 108(2) TFEU (judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 56 to 58)

118 In the present case, the applicant raises nine pleas, eight of which are in support of its action in so far as it seeks annulment of the second contested decision. It is recalled that the seventh plea of the application initiating proceedings, whereby the applicant submits that, by adopting the first contested decision, the Commission failed to assess its comments, was directed only against the first contested decision, in respect of which the applicant was found to have no standing.

119 The fifth and eighth pleas expressly allege breach of the applicant's procedural rights, in that the Commission refrained from initiating the formal investigation procedure, laid down in Article 108(2) TFEU, despite the fact that the sale of the Nürburgring assets at a price lower than their market price should have led it to the conclusion that aid had been granted to the buyer.

120 In addition, the first plea alleges errors made by the Commission in establishing the relevant facts, as regards, primarily, the tender process. The second plea alleges errors made by the Commission in assessing the proof of financing of the buyer's offer. The third plea alleges errors made by the Commission as regards, inter alia, the assessment of whether the sale of the Nürburgring assets constituted new State aid in favour of Capricorn. In the context of that plea, the applicant expressly submits that the Commission should have initiated a formal investigation procedure. In addition, in the context of the fifth and eighth pleas, alleging breach of its procedural rights, the applicant refers explicitly to the third part of the third plea as making it possible to establish that, after the preliminary examination stage, the Commission ought to have had doubts as to the compatibility with the internal market of the sale price paid by the buyer. Lastly, the fourth plea alleges errors made by the Commission in assessing the transparent and non-discriminatory nature of the tender process.

121 In order to be able to rule on the fifth and eighth pleas, it is thus appropriate, in accordance with the case-law cited in paragraph 117 above, to examine all the other pleas put forward by the applicant seeking annulment of the second contested decision and that might be considered to show difficulties which should have required the Commission to initiate the formal investigation procedure laid down in Article 108(2) TFEU.

122 In that respect, first, it is appropriate to examine the arguments concerning the transparent and non-discriminatory nature of the tender process, namely the second part of the first plea and the fourth plea, and those concerning the financing of Capricorn's offer, namely the first and third parts of the first plea and the second plea.

123 Then, the Court will turn to the fifth part of the first plea, alleging the continuation of the sales process beyond the award of the Nürburgring assets to Capricorn on 11 March 2014, and to the third part of the third plea, alleging that the sale of the Nürburgring assets constitutes new State aid in favour of Capricorn.

124 Lastly, the Court will examine the sixth and ninth pleas, alleging other breaches of the applicant's procedural rights, which may also have had an impact on the Commission's finding, in the second contested decision, that there were no such serious difficulties in assessing the measure concerned as to justify the initiation of the formal investigation procedure laid down in Article 108(2) TFEU. The sixth plea alleges breach of the obligation to state reasons. The ninth and last plea alleges breach of the right to sound administration.

(c) Joint reading of the fifth and eighth pleas, alleging breach of Article 108(2) TFEU and of Article 4(4) of Regulation No 659/1999 as well as of the applicant's procedural rights, and of the first, second, third and fourth pleas

125 By its fifth plea the applicant submits that, by finding that the tender process did not result in the granting of new State aid to the buyer and, thus, by refusing implicitly to initiate a formal investigation procedure, the Commission acted in breach of Article 108(2) TFEU and of Article 4(4) of Regulation No 659/1999.

126 By its eighth plea, the applicant claims that, by refusing implicitly, in the second contested decision, to initiate the formal investigation procedure, the Commission acted in breach of its right to submit comments, provided for in Article 20(1) of Regulation No 659/1999, and of essential procedural requirements.

127 According to the applicant, the Commission ought to have had doubts as to the compatibility with the internal market of the sale price paid by the buyer.

128 The Commission disputes that line of argument.

129 As stated in paragraphs 121 to 123, in order to be able to rule on the fifth and eighth pleas, it is appropriate to examine whether the first, second, third and fourth pleas make it possible to establish that, after the preliminary examination stage, the Commission was facing difficulties that required the initiation of a formal investigation procedure.

(1) The first three parts of the first plea in law and the second and fourth pleas in law, alleging the existence of aid granted to Capricorn during the sale of the Nürburgring

130 By the first three parts of the first plea and by the second and fourth pleas, the applicant submits, in essence, that the Commission erred in law in finding that the tender process had been open, transparent, non-discriminatory and unconditional.

131 Moreover, the applicant submits that the requirement for transaction security was not applied, since the letter from Deutsche Bank of 10 March 2014 did not constitute proof of financing of Capricorn's offer.

132 It is necessary to ascertain, in view of those two main claims, whether the examination carried out by the Commission with regard to the proper conduct of the tender process was of such a kind as to rule out such serious difficulties in assessing the measure concerned as to justify the initiation of a formal investigation procedure.

133 According to consistent case-law, where an undertaking that has benefited from aid that is incompatible with the internal market is bought at the market price, that is to say, at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, the aid element is assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be regarded as having benefited from an advantage in relation to other market operators (see, to that effect, judgment of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 80 and the case-law cited).

134 If, on the contrary, the assets of State aid beneficiaries are sold at a price lower than the market price, undue advantage could be conferred on the buyer (see, to that effect, judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 161).

135 For the purposes of checking the market price, the form of the transfer of a company, in particular, for example, public tendering, deemed to ensure that a sale takes place under market conditions, may be taken into consideration. It follows that, where an undertaking is sold by way of an open, transparent and unconditional tender procedure, it can be presumed that the market price corresponds to the highest offer, provided that it is established, first, that that offer is binding and credible and, secondly, that the consideration of economic factors other than the price is not justified (see, to that effect, judgments 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 93 and 94, and of 16 July 2015, BVVG, C-39/14, EU:C:2015:470, paragraph 32).

136 According to the case-law, the question whether a tender procedure has been open and transparent is determined on the basis of a body of evidence specific to the circumstances of each case (see judgment of 7 March 2018, *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2018:165, paragraph 68 and the case-law cited).

137 It is in the light of the case-law referred to in paragraphs 133 to 136 above that it is appropriate to examine, in the present case, the merits of the applicant's two claims, while bearing in mind that, in that context, the Court cannot rule directly on the very lawfulness of the tender process.

(i) The claim that the tender process was non-transparent and discriminatory

138 By its fourth plea the applicant submits that the Commission erred in law in finding that the tender process had been open, transparent, non-discriminatory and unconditional, in view, in particular, of the lack of transparency of the financial data, the lack of transparency and the discriminatory nature of the assessment criteria and the application thereof as well as the continuation of the sales process after the sale of the Nürburgring assets to the buyer.

139 It claims, in particular, that the tender process did not provide for specific assessment criteria for the purpose of comparing offers, in particular when comparing offers for all assets and offers for individual assets or asset clusters.

140 By the second part of the first plea, the applicant asserts that interested investors had not been informed, prior to submitting their offers, of the fact that the offer had to correspond to at least 25% of the highest offer for all assets in order to be considered in the following stages of the process.

141 The Commission disputes that line of argument.

142 It is appropriate to note that, as set out in the letter from KPMG of 19 July 2013 addressed to interested investors, the latter were invited to submit an indicative offer for the assets in their entirety, for defined asset clusters or for individual assets (see fourth indent of paragraph 10 above). As set out in that letter, the offers were to be assessed, inter alia, on the basis of the price offered for the assets, according to the scope of the offer.

143 As set out in the letters from KPMG of 19 July and 17 October 2013 addressed to interested investors, the latter were, inter alia, to be selected on the basis of a criterion relating to the maximisation of the total proceeds for all assets (see ninth indent of paragraph 10 above). The application of that criterion, in practice, led the sellers to consider, in the final stage of the tender process, only offers for all assets, as is apparent from recital 50 of the final decision. According to the Commission, the reason therefore was that, in view of the offers submitted, the sale *en bloc* of the Nürburgring made it possible to secure a higher price than the sale of each asset separately.

144 Footnote 65, inserted under recital 50 of the final decision, states that six indicative offers for all assets, offering more than 25% of the best offer, were submitted, that the offers for all assets that did not reach 25% of the best offer were not taken into account any further because of their price level and that the same was valid for the offers for the Nürburgring race track, which, together with the individual offers for the other assets, altogether did not reach 25% of the best offer.

145 It follows that interested investors were free to define the subject of their purchase offer in the light of the information given to them as to the criterion relating to the maximisation of the total proceeds for all assets. As to the 25% criterion, as the Commission submitted, it was only intended to give a practical content to the criterion relating to the maximisation of the total proceeds for all assets and, being set to depend on the value of the offers actually submitted, it could be determined specifically only *ex post*.

146 The applicant's arguments in support of the abovementioned claim thus do not make it possible to establish that the Commission ought to have had doubts as to the transparent and non-discriminatory nature of the tender process.

(ii) The claim as to the financing of Capricorn's offer

147 By the first part of the first plea and by the second plea, the applicant submits that, contrary to what is apparent from the final decision, the letter from Deutsche Bank of 10 March 2014, which was to support Capricorn's offer approved on 11 March 2014, did not amount to binding proof of financing.

148 Furthermore, according to the applicant, the Commission's finding in that respect conflicts with the conclusion, in recital 272 of the final decision, that the offer submitted by Bidder 3 lacked the required proof of financing.

149 By the third part of the first plea, the applicant disputes, more generally, the Commission's finding, set out in the final decision, that Capricorn's offer could rely on 'secured financing'.

150 The Commission disputes that line of argument.

151 In that respect, it is appropriate to note that the letter from KPMG of 17 October 2013 to interested investors specified that the latter would, inter alia, be selected on the basis of the probability of closing the transaction, which would be assessed by taking into consideration, inter alia, the secured financing of their offer, supported by confirmation of financing partners (see ninth indent of paragraph 10 above). It is therefore necessary to ascertain whether the examination carried out by the Commission, reflecting the German authorities' analysis, was of such a kind as to rule out any doubt as to the binding nature of the letter from Deutsche Bank of 10 March 2014.

152 First of all, the letter from Deutsche Bank of 10 March 2014 states that the latter was willing to underwrite a loan of EUR 45 million to the buyer. The conditions governing that financing are described in detail, which, as the Commission rightly submits, suggests careful analysis by Deutsche Bank and an exchange of information between the latter and the buyer.

153 Second, the letter from Deutsche Bank refers several times to Deutsche Bank's commitment in respect of Capricorn under that letter. Deutsche Bank thus considered itself bound by that letter.

154 In that regard, as the Commission rightly points out, a comparison of the letter from Deutsche Bank of 10 March 2014 with two non-binding preparatory letters from Deutsche Bank of 17 and 25 February 2014 confirms the binding nature of the letter from Deutsche Bank of 10 March 2014. Thus, the letter of 17 February 2014 states that it does not constitute a commitment on the part of Deutsche Bank, unlike the letter from Deutsche Bank of 10 March 2014, which refers to Deutsche Bank's commitment in respect of Capricorn under that letter.

155 Lastly, the letter from Deutsche Bank of 10 March 2014 specifies that Deutsche Bank's commitment is subject to three conditions. However, those conditions (execution of the transaction, no material change to the assets purchased, no illegality or unlawfulness) did not allow Deutsche Bank to withdraw its commitment unless the acquisition failed to be carried out in accordance with the conditions stipulated.

156 In the light of the foregoing, it does not appear that the Commission ought to have had doubts as to the binding nature of the letter from Deutsche Bank of 10 March 2014.

157 Conversely, and as the Commission noted in recital 272 of the final decision, neither the indicative offer nor the final offer from Bidder 3 were supported by proof of its financing. In that recital, the Commission noted that the sellers had pointed this out to Bidder 3 by letters from KPMG of 17 October and of 11, 17 and 18 December 2013 as well as by emails from KPMG of 18 February and 9 April 2014, but that Bidder 3 had provided no proof of financing of its offer, whether before the award of the Nürburgring assets to Capricorn by the committee of creditors on 11 March 2014 or thereafter. The applicant submitted no evidence suggesting that those findings were incorrect.

158 As is apparent from the foregoing, the buyer, whose offer was successful, had, first, two preparatory letters from Deutsche Bank of 17 and 25 February 2014, and then the letter from Deutsche Bank of 10 March 2014, in respect of which it does not appear that the Commission ought to have had doubts as to its binding nature, whereas Bidder 3, whose offer was not successful, at no time provided any proof of financing. Consequently, the applicant's arguments in support of the abovementioned claim do not make it possible either to establish that the Commission ought to have had doubts as to whether the tender process had been non-discriminatory, with regard in particular to the requirement for binding proof of financing.

159 In view of the foregoing, it cannot be found that the Commission, in the light of the matters of fact and of law put forward by the applicant, ought to have had doubts as to the possible existence of an advantage conferred on the buyer in the tender process due to the alleged non-transparent and discriminatory nature of that process.

160 In accordance with the case-law referred to in paragraphs 133 to 136 above, the examination carried out by the Commission was therefore of such a kind as to rule out any doubt as to whether or not there had been any undue advantage in favour of the buyer and, therefore, any State aid. Accordingly, it cannot be considered that the arguments put forward in support of the first three parts of the first plea and of the second and fourth pleas are indicative of serious difficulties in assessing the measure concerned that would have required the Commission to initiate the formal investigation procedure laid down in Article 108(2) TFEU.

161 It follows that the first three parts of the first plea in law and the second and fourth pleas in law, read in the light of the fifth and eighth pleas in law, must be rejected.

(2) The fifth part of the first plea in law, alleging the continuation of the sales process beyond the award of the Nürburgring assets to Capricorn on 11 March 2014

162 The applicant submits that the Commission ought to have found that the sales process had continued beyond the award of the Nürburgring assets to Capricorn on 11 March 2014.

163 The applicant submits that Capricorn was substituted by a sub-purchaser in the context of a non-transparent process for the resale of the Nürburgring assets. According to the applicant, the sellers and the property administrator concluded with Capricorn, on 13 August 2014, a collateral agreement whereby Capricorn was to sell all of its rights or claims arising from the agreement for the sale of the Nürburgring assets of 11 March 2014. The applicant argues that this resulted in a tender process that had not been open, transparent, non-discriminatory and unconditional.

164 The Commission disputes that line of argument.

165 In that respect, it must be noted that, in accordance with the case-law cited in paragraphs 133 to 136 above, and as the Commission argued, its examination was designed to ascertain whether the tender process had been carried out in an open, transparent, non-discriminatory and unconditional manner in order to determine whether or not the Nürburgring assets had been sold at their market price. Otherwise, those assets might have been sold at a price lower than the market price, and undue advantage might have been conferred on the buyer.

166 Consequently, it is appropriate to take the view that the aid, which, according to the applicant (see paragraph 11 above), should have been established by the Commission in the second contested decision and which would have corresponded to the difference between the price paid by Capricorn to purchase the Nürburgring assets and the market price of those assets, would have been granted to Capricorn on 11 March 2014, the date on which those assets were awarded to Capricorn and the sales agreement setting the purchase price for the assets owed by Capricorn was signed. It follows that the facts subsequent to that date, such as the transfer to a sub-purchaser, by Capricorn, of its shares in the acquisition vehicle for the Nürburgring assets, were not relevant in assessing whether aid might have been granted to Capricorn in the tender process.

167 Lastly, as the Commission rightly contended in its observations of 12 March 2018 in response to the questions put by the Court, had the applicant wished that the Commission also investigated whether new aid stemmed from the alleged continuation of the sales process, subsequent to the adoption of the second contested decision, it should have lodged a new complaint in that respect.

168 It follows that the arguments put forward in support of the fifth part of the first plea do not make it possible to establish that, after the preliminary examination stage, the Commission was facing difficulties in assessing the sale of the Nürburgring assets that would have required the initiation of a formal investigation procedure.

169 The fifth part of the first plea in law, read in the light of the fifth and eighth pleas in law, must therefore be rejected.

(3) The third part of the third plea in law, alleging that the sale of the Nürburgring assets to Capricorn constituted new State aid

170 According to the applicant, both the price agreed and the payment terms involved aid, since (i) EUR 6 million out of the gross operating surplus of the Nürburgring manager (see paragraph 7 above) were set against the sale price, although the manager had indicated in 2013 zero expected profits on the Nürburgring assets, (ii) payment of the second instalment of the sale price was postponed, (iii) the EUR 25 million penalty stipulated in the purchase agreement was not recovered and (iv) the Nürburgring assets were sold to a sub-purchaser in the context of a non-transparent process.

171 Moreover, the lease of the Nürburgring assets, in its view, was not itself subject to an open, transparent, non-discriminatory and unconditional tender process, with the result that the rent payments under that lease did not correspond to the market price and involved new aid. It follows from recital 56 of the final decision that that lease was concluded between a company independent of the sellers, operating in actual fact as trustee of those assets, and an operating company created by Capricorn for a period starting on 1 January 2015 with a view to structuring a temporary situation corresponding to the possible realisation of the condition to which the sale of the Nürburgring assets was subject, namely the adoption by the Commission of a decision ruling out any risk that the buyer of those assets might be required to reimburse the aid to the sellers. In that respect, according to the applicant, the sale price for the Nürburgring assets was reduced by the amount of the rent payments under that lease, which were set against that price until the sale became perfected.

172 The Commission disputes that line of argument by contending that, inter alia, the amounts paid as rent under the lease of the Nürburgring assets amounted to advance payments that reduced the remaining sale price owed for those assets and, therefore, the risk of insolvency of the buyer. Furthermore, the terms for the payment of the sale price of the Nürburgring assets, in its view, had no effect of the proceeds for those assets, which correspond to the price stipulated in the agreement.

173 For the reasons set out in paragraphs 138 to 158 above, it cannot be considered that the Commission ought to have had doubts as to whether the tender process had been transparent and non-discriminatory.

174 It also follows from those reasons that the examination carried out by the Commission that led to the adoption of the second contested decision was of such a kind as to rule out the presence of doubts as to the possible existence of an advantage conferred on the buyer in the context of the lease of the Nürburgring assets or the terms for the payment of the sale price of those assets.

175 It is therefore appropriate to reject the third part of the third plea in law, read in the light of the fifth and eighth pleas in law.

176 It follows from all the foregoing that the fifth and eighth pleas in law, examined by taking account of the arguments put forward by the applicant in the context of the first, second, third and fourth pleas in law, do not make it possible to establish that, after the preliminary examination stage, the Commission was facing difficulties that would have required the initiation of a formal investigation procedure. The fifth and eighth pleas in law must therefore be rejected.

(d) The sixth plea in law, alleging breach of the obligation to state reasons

177 According to the applicant, the Commission acted in breach of its obligation to state reasons under the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, by failing to provide an adequate statement of reasons for the main grounds on which the second contested decision is based.

178 The applicant questions, inter alia, the basis on which the Commission found, in recital 240 of the final decision, that the Federal Republic of Germany had sold the Nürburgring assets 'through an open, transparent, non-discriminatory and [un]conditional tender process to the bidder submitting the highest bid with secured financing'.

179 Moreover, the applicant raises the question of the basis on which it was decided that the sale of the Nürburgring assets to Capricorn did not constitute State aid as well as the reason why that decision appears in recital 285 of the final decision but is not mentioned in the operative part.

180 Lastly, the applicant claims that the Commission based the majority of its findings on information provided by the managing director and the property administrator of the sellers, which they received from the Federal Republic of Germany.

181 The Commission disputes that line of argument.

182 In accordance with the case-law, the statement of reasons of an act must provide an adequate explanation to enable the parties concerned to ascertain the reasons for the measure and must enable the EU judicature to carry out its review (see, as to State aid, judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraphs 88 and 89; of 22 April 2008, *Commission* v *Salzgitter*, C-408/04 P, EU:C:2008:236, paragraph 56; and of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraphs 48 and 49). As to the dismissal of a complaint on State aid, it has been explained, inter alia, that such a statement must provide the complainant with an explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 64, and 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 89).

183 In the present case, recitals 266 and 281 of the final decision, under the heading 'Complaints on the sale of [the Nürburgring] assets', include a detailed account of the reasons that led the Commission to decide that the Nürburgring assets had been sold through an open, transparent, non-discriminatory and unconditional process to the tenderer which submitted the highest offer with proof of its financing and, therefore, that the Nürburgring assets had not been sold to Capricorn at a price lower than the market price, with the result that that sale did not constitute State aid.

184 That explanation is adequate to satisfy the requirements laid down in the case-law cited in paragraph 182 above.

185 Moreover, the second contested decision, whereby the sale of the Nürburgring assets does not constitute aid, is not set out only in the first indent of recital 285 of the final decision but it also appears in the last indent of Article 1 of the final decision. The applicant's claim in this regard therefore has no factual basis.

186 Lastly, it is appropriate to recall that, in the context of State aid control, the Commission is under an obligation to carry out a diligent and impartial examination that requires, in particular, a careful examination of the information that will allow the Commission to take a decision on whether the measure at issue involves State aid, information which the Member State provides to the Commission (see judgment of 22 October 2008, *TV2/Danmark and Others* v *Commission*, T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457, paragraph 183 and the case-law cited).

187 It is in the light of both the information notified by the State concerned and that provided by any complainants that the Commission must form its assessment in the context of the preliminary examination instituted by Article 108(3) TFEU (judgment of 3 May 2001, *Portugal* v *Commission*, C-204/97, EU:C:2001:233, paragraph 35).

188 In recitals 266 to 271 of the final decision, the Commission examined and compared the comments of the administrators sent by the German authorities, set out in recitals 102 to 110 of the final decision, with those of the applicant, set out in recitals 97 to 101 of the final decision. The Commission included its own conclusions and observations concerning the relevant factors, in particular with regard to the question whether or not the tender process had been transparent and non-discriminatory.

189 The Commission thus, in the present case, did indeed examine and assess the information provided by both the applicant and the German authorities.

190 It is therefore appropriate to reject the applicant's claim in that regard and, therefore, the sixth plea in law in its entirety.

(e) The ninth plea in law, alleging breach of the right to sound administration

191 By its ninth plea the applicant submits that the Commission acted in breach of its right to sound administration, which derives from Article 41 of the Charter of Fundamental Rights. In its view, the Commission failed to take account adequately of all the relevant factors and the arguments put forward by the applicant, and to verify the explanations of the managing director and the property administrator of the sellers. The applicant is of the opinion that the principle of sound administration is an expression of its right to submit comments and that those comments be assessed, a right whose infringement it also invokes in the context of the seventh and eighth pleas.

192 The Commission disputes that line of argument.

193 The claim alleging breach of the principle of sound administration based on the failure to assess the applicant's comments overlaps with the seventh plea, whereby the applicant claims that, by adopting the first contested decision, the Commission failed to assess its comments. Since the action was declared inadmissible in so far as it seeks annulment of the first contested decision, both the seventh plea and the present claim are inadmissible.

194 The claim alleging breach of the principle of sound administration based on the breach of the applicant's right to submit comments overlaps with the eighth plea, alleging breach of the applicant's procedural rights due to the failure to initiate a formal investigation procedure, which has already been examined and rejected in paragraph 176 above.

195 It follows that the ninth plea in law must be rejected as inadmissible in part and unfounded as to the remainder.

196 Since all the pleas and heads of claim for annulment of the second contested decision directly alleging breach of the applicant's procedural rights and all the pleas and heads of claim for annulment of the second contested decision containing arguments relating to those pleas and heads of claim have been rejected, the application for annulment of that decision must be dismissed.

197 Inasmuch as the applicant has relied on various oral testimonies, it must be found that the latter do not appear necessary to the outcome of the dispute and, in particular, to ascertain whether the facts and indicia put forward by the applicant should have led the Commission to have doubts. The evidence offered is therefore rejected.

198 In the light of all the foregoing, the action must be dismissed as inadmissible in part and unfounded as to the remainder.

IV. Costs

199 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Orders that the application for a decision that there is no need to adjudicate on the action be dismissed;**

2. **Dismisses the action;**

3. **Orders Ja zum Nürburgring eV to bear its own costs and to pay those incurred by the European Commission.**

Pelikánová Valančius Nihoul

Svenningsen Öberg

Delivered in open court in Luxembourg on 19 June 2019.

[Signatures]

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