Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 29 April 2021 [1]

Case C-647/19 P

Ja zum Nürburgring eV
v

European Commission

(Appeal – State aid – Aid in favour of the Nürburgring complex – Sale of the assets of the beneficiaries of the State aid found to be incompatible – Open, transparent, non-discriminatory and unconditional tender process – No difficulties that would have required the initiation of a formal investigation procedure – Admissibility – Interested party – General Court's obligation to state reasons – Distortion of the clear sense of the evidence)

1. By its appeal, the subject of this Opinion, the association Ja zum Nürburgring eV ('the appellant) asks the Court to set aside the judgment of the General Court of 19 June 2019, *Ja zum Nürburgring* v *Commission* (T-373/15, EU:T:2019:432; 'the judgment under appeal'), by which the General Court dismissed its action for 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 ('the final decision'). [2]

2. This case raises questions concerning the scope of the concept of 'interested party' within the meaning of Article 1(h) of Regulation No 659/1999, [3] and the extent of the General Court's obligation to state the reasons on which its judgments are based.

I. Background to the dispute

3. The background to the dispute is set out in paragraphs 1 to 16 of the judgment under appeal, to which I refer. For the purposes of the present proceedings, I merely note the following.

4. 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.

[1] Original language: Italian.

[2] OJ 2016 L 34, p. 1.

[3] 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). This regulation has now been repealed and replaced by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

5. Between 2002 and 2012, the owners of the Nürburgring ('the sellers') 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.

6. Following a first complaint lodged by the appellant, that aid was the subject matter of a formal investigation procedure under Article 108(2) TFEU, initiated by the Commission in 2012.

7. 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 the sellers' assets ('the Nürburgring assets'). A tender process ('the tender process') was initiated and concluded with the sale of those assets to Capricorn Nürburgring Besitzgesellschaft GmbH ('Capricorn').

8. On 23 December 2013, the appellant lodged a second complaint with the Commission, alleging that the tender process had not been transparent and non-discriminatory. According to the appellant, the successful buyer (namely Capricorn) thus received new aid and ensured the continuity of the sellers' economic activities, so that the decision on recovery of the aid received by the sellers ought to have been extended to Capricorn.

9. On 1 October 2014, the Commission adopted the final decision. In the first place, the Commission found in that decision that some of the measures granted by Germany to the sellers were unlawful and incompatible with the internal market, and that Capricorn and its subsidiaries were not liable for the recovery of that aid [4] ('the first decision at issue').

10. In the second place, the Commission found in the final decision that the sale of the Nürburgring assets to Capricorn did not constitute State aid. [5] The Commission concluded that the sale had taken place by means of an open, transparent and non-discriminatory tender process, which had culminated in the sale of those assets at the market price ('the second decision at issue').

II. The procedure before the General Court and the judgment under appeal

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

12. In the judgment under appeal, the General Court first declared the action inadmissible to the extent that it sought the annulment of the first decision at issue. The General Court took the view that the appellant had failed to demonstrate that either it was or any of its members were individually concerned by the first decision at issue within the meaning of the fourth paragraph of Article 263 TFEU. [6]

13. As to the application for annulment of the second decision at issue, the General Court found that the parties had agreed that the second decision at issue was 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. [7] The General Court further ruled that the appellant, as an

4 See, respectively, Article 2 and Article 3(2) of the final decision.

5 See final indent of Article 1 of the final decision.

6 See paragraphs 70 and 71 of the judgment under appeal.

7 See paragraph 83 of the judgment under appeal.

'interested party', had standing to bring an action for the safeguard of the procedural rights available to it under Article 108(2) TFEU, as well as a legal interest in bringing an action.[8] It then examined the substance of the pleas in law put forward by the appellant in support of that application, dismissing them all and rejecting the action in its entirety.[9]

III. Forms of order sought

14. The appellant asks the Court to set aside the judgment under appeal and annul the first and second decisions at issue, or alternatively, to refer the case back to the General Court and order the Commission to pay the costs.

15. The Commission asks the Court to set aside the finding of the General Court, set out in paragraphs 73 to 94 of the judgment under appeal, that the action against the second decision at issue is admissible, to rule on that action itself and to declare it inadmissible, to dismiss the appeal brought by the appellant and to order it to pay the costs.

IV. Analysis of the appeal

16. The appellant relies on five grounds in support of its appeal.

17. The first and second grounds of appeal concern the part of the judgment under appeal relating to the first decision at issue. The appellant contends that the General Court erred in law by denying its standing to bring an action as a competitor in the first ground of appeal and as a trade association in the second.

18. The other three grounds of appeal concern the part of the judgment under appeal relating to the second decision at issue. Specifically, by its third ground of appeal, the appellant claims that the General Court erred in law by taking the view – for the same reasons as those for which it denied the standing to bring an action in respect of the first decision at issue – that it did not have the capacity to act as a competitor or as a trade association. By its fourth ground of appeal, the appellant submits that the General Court committed several errors of law and distorted facts and evidence in the analysis which led it to conclude that the Commission should not have initiated the formal investigation procedure. By its fifth ground of appeal, the appellant alleges errors of law in the assessment of whether the statement of reasons for the second decision at issue was adequate.

19. In its response, the Commission contests the admissibility of the application for annulment of the second decision at issue and asks the Court to review of its own motion the admissibility of that application and declare it inadmissible.

20. In accordance with the Court's request, I will focus my analysis on the question of the admissibility of the application for annulment of the second decision at issue and on the fourth and fifth grounds of appeal.

[8] See paragraph 93 of the judgment under appeal.

[9] See paragraphs 196 and 198 of the judgment under appeal.

A. The Commission's application to establish of its own motion the inadmissibility of the application for annulment of the second decision at issue

1. Arguments of the parties

21. The Commission submits that the General Court erred in declaring the action against the second decision at issue admissible and claims that the Court of Justice is required to give a ruling of its own motion on the question if it is relied upon. Specifically, the Commission contends that the General Court misinterpreted and misapplied the concept of 'interested party' within the meaning of Article 108(2) and (3) TFEU and Article 1(h) of Regulation No 659/1999 by taking the view that the appellant was entitled to claim that status.

22. In the first place, the Commission argues that it is clear from the case-law that the status of 'interested party' presupposes the existence of a competitive relationship which is distorted by the aid measures. Consequently, the General Court erred in law by categorising the appellant as an interested party, whereas it had previously found that the appellant was not present on the markets concerned by the measures in question. According to the Commission, the General Court performed its analysis on the basis of a partial reading of the relevant case-law.

23. In the second place, the General Court further erred in law by concluding that the interests of the appellant and its members had been affected by the granting of the aid measures.

24. On the one hand, the General Court provides no evidence for the assertion in paragraph 86 of the judgment under appeal that those interests had been affected by a possible sale of the Nürburgring assets to Capricorn allegedly not at a market price. On the other, the Commission submits that the General Court recognised the appellant as an 'interested party' by relying, in short, solely on the fact that the appellant could have had information potentially relevant to the Commission in the context of a formal investigation procedure. However, that interpretation of the concept of 'interested party' is too broad and ignores the fact that providing information that leads to a finding that State aid has been unlawfully granted does not automatically render the person who provided that information an 'interested party'.

25. The appellant disputes the Commission's arguments.

2. Legal assessment

26. The Commission asks the Court to rule of its own motion that the action at first instance is inadmissible in respect of the second decision at issue.

27. In that respect, I would observe that it is clear from settled case-law that the Court of Justice, hearing an appeal under Article 56 of the Statute of the Court of Justice of the European Union, is required to adjudicate, if necessary of its own motion, on the admissibility of an action for annulment and, consequently, on the plea alleging an absolute bar to proceeding arising from disregard of the condition, laid down in the fourth paragraph of Article 263 TFEU, that an applicant may seek the annulment of a decision not addressed to it only if it is of direct and individual concern to it. [10]

[10] See judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, not published, EU:C:2007:730, paragraph 18), and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission* (C-654/17 P, EU:C:2019:634, paragraph 44).

28. In paragraphs 78 to 89 of the judgment under appeal, the General Court examined the question of the admissibility of the appellant's action in respect of the second decision at issue, and in particular the question of its individual interest within the meaning of the fourth paragraph of Article 263 TFEU, recognising the appellant as an 'interested party' with regard to that decision and therefore its standing to bring an action for the safeguard of the procedural rights available to it, in that capacity, under Article 108(2) TFEU.

29. I would point out here that Article 1(h) of Regulation No 659/1999, essentially borrowing the definition already developed in the case-law of the Court,[11] defines the concept of 'interested party' as 'any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

30. As I recently pointed out,[12] according to case-law that definition does not rule out that an undertaking which is not a direct competitor of the beneficiary of the aid can be categorised as an interested party, provided that it demonstrates that its interests could be adversely affected by the grant of the aid.[13] While an undertaking in competition with the beneficiary of an aid measure is indisputably an 'interested party' for the purposes of Article 108(2) TFEU,[14] an undertaking that is not a competitor of the beneficiary of the aid can be categorised as an 'interested party' if it can demonstrate that its interests could be adversely affected by the grant of the aid, which, according to case-law, means demonstrating that the measure is likely to have a specific effect on its situation.[15]

31. It follows from that case-law that, contrary to the Commission's contention, the status of 'interested party' does not necessarily presuppose the existence of a competitive relationship which is distorted by the aid measures. Therefore, the General Court cannot be criticised for having erred in law for categorising the appellant as an interested party, where previously it had found that the appellant was not at all active in the markets affected by the measures in question.[16]

[11] See judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 41 and the case-law cited).

[12] See points 64 to 67 of my Opinion in Joined Cases *Scandlines Danmark and Others* v *Commission* (C-174/19 P and C-175/19 P, EU:C:2021:199).

[13] See judgment of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others* (C-47/10 P, EU:C:2011:698, paragraph 132 and the case-law cited).

[14] 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 50 and the case-law cited).

[15] See, in particular, judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex* (C-83/09 P, EU:C:2011:341, paragraph 65), and of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others* (C-47/10 P, EU:C:2011:698, paragraph 132). See also Opinion of Advocate General Szpunar in *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission* (C-817/18 P, EU:C:2020:255, point 36 et seq. and the case-law cited).

[16] Contrary to the Commission's contention, the General Court's analysis in this respect is not at odds with the judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex* (C-83/09 P, EU:C:2011:341), nor with the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission* and *Commission* v *Scuola Elementare Maria Montessori and Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873). In the first judgment, the Court of Justice recognised that an undertaking which is not a direct competitor of the beneficiary of the aid, but which requires the same raw material for its production process, can be categorised as an interested party, provided that that undertaking had demonstrated that its interests could be adversely affected by the grant of the aid and established, to the requisite legal standard, that the aid was likely to have a specific effect on its situation (see paragraphs 64 and 65). Contrary to the Commission's claim, however, the Court did not base its analysis on the fact that the two undertakings concerned were competing in an upstream market for the raw material in question. By contrast, paragraph 43 of the second judgment, relied on by the Commission, is not relevant here since, at that point in the judgment, the Court did not examine the question of recognition of the status of 'interested party'. Instead, this point concerns the possible direct impact on the legal situation of a complainant against a Commission decision which was without prejudice to the effects of national measures establishing an aid scheme which placed that complainant at a competitive disadvantage.

32. The Commission further considers that the General Court incorrectly recognised the appellant as an 'interested party' on the sole ground, in paragraphs 87 and 88 of the judgment under appeal, that it could have had information potentially relevant to the Commission in the context of a formal investigation procedure.

33. In that respect, I agree with the Commission that the mere fact that a person has information that could be relevant in the context of a formal investigation procedure is not sufficient to categorise that person as an 'interested party'. [17]

34. Such a broad interpretation of the concept of 'interested party' is incompatible with the definition and criteria set out in points 29 and 30 above, from which it is inferred that the recognition of that status depends on a possible injury to the interests of the person concerned resulting from the grant of the aid, and presupposes specific effects on its situation. It follows that, as the Commission rightly points out, the mere possibility of providing information that could lead to a finding that State aid has been unlawfully granted does not, of itself, automatically confer the status of 'interested party' on the person who provided that information.

35. I must point out here that it appears from paragraphs 86 to 88 of the judgment under appeal that the General Court did find that the appellant's interests might have been affected by the granting of aid to Capricorn on the ground that the appellant had information that could have been taken into account by the Commission in the course of the formal investigation procedure. In paragraph 86 of the judgment under appeal, the General Court refers – admittedly rather vaguely – to the non-profit-making objective of the appellant, stating that it is an association which pursues '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'. However, that reference is seemingly used to justify not so much the appellant's status as an 'interested party', but rather its possession of information which might be relevant to the Commission's assessment, which, as noted in the previous paragraph, is not in itself sufficient to grant it that status.

36. It is apparent from the case file that, in the action before the General Court, the appellant claimed to be an association which has been defending the interests of German motor sport for more than 40 years in relation *specifically* to the Nürburgring circuit, and that its fundamental objective is to ensure the operation of that circuit under economic conditions oriented towards the public interest so as to allow access to the circuit for sporting and other events. To that end, it has, inter alia, developed a concept of use of the circuit based on the public interest and has maintained contact and negotiated with the relevant State and Land authorities of Rhineland-Palatinate, as well as with other interested parties. The appellant further contended that Capricorn, the purchaser of the Nürburgring assets, was, by contrast, intent on maximising profits, which was entirely at odds with the appellant's own objectives.

37. In the light of those arguments – which, moreover, the Commission does not seem to have contested – the alleged granting of aid to Capricorn in connection with the acquisition of the Nürburgring assets is, to my mind, liable to affect the interests of the appellant, whose purpose and existence are specifically linked to the Nürburgring circuit, as well as those of its members, for whom the granting of the allegedly unlawful aid is likely to have specific effects.

[17] In my view, paragraph 12 of the order of the Vice-President of the Court of 6 October 2015, *Comité d'entreprise de la Société nationale maritime Corse Méditerranée (SNCM)* v *SNCM and Commission* (C-410/15 P(I), EU:C:2015:669), to which the General Court refers in paragraph 87 of the judgment under appeal, cannot be construed in the sense that simply being in possession of relevant information is sufficient to confer on the holder of that information the status of 'interested party'. To my mind, the Vice-President of the Court was actually referring at that point to the objective of recognising the party in question as an 'interested party'.

38. It follows from this that, in my view, the appellant should be granted the status of 'interested party' within the meaning of Article 1(h) of Regulation No 659/1999, and that the General Court therefore did not err in law by finding the application for annulment of the second decision at issue lodged by the appellant admissible, to the extent that the application sought to safeguard the procedural rights which, in view of that status, are available to the appellant under Article 108(2) TFEU.

B. The fourth ground of appeal, alleging errors in the analysis of the existence of serious difficulties justifying the initiation of the formal investigation procedure

39. By its fourth ground of appeal, which comprises five parts, the appellant complains that the General Court made several errors of law, distorted the evidence and failed to provide adequate reasons for its analysis. It thus concluded that it had not been established that, at the end of the preliminary examination stage, the Commission was facing difficulties that required the initiation of a formal investigation procedure.

40. Since the appellant has repeatedly claimed that the judgment under appeal is vitiated by the absence or inadequacy of the statement of reasons, before analysing the appellant's arguments in the fourth ground of appeal, it is worth recalling the principles developed in the case-law of the Court of Justice regarding the scope of the General Court's obligation to state reasons for its judgments.

1. The scope of the General Court's obligation to state the reasons on which its judgments are based

41. It is settled case-law that the General Court's obligation to state reasons under Article 36 of the Statute of the Court of Justice of the European Union, applicable to it pursuant to the first paragraph of Article 53 of that Statute and Article 117 of its Rules of Procedure, requires that the statement of the reasons on which the judgment under appeal is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review. [18]

42. It is also clear from the case-law that the plea alleging that the General Court failed to rule on arguments relied on at first instance amounts essentially to relying on a breach of the obligation to state reasons [19] and that the question whether the grounds of a judgment of the General Court are contradictory or inadequate is a question of law which is amenable, as such, to judicial review on appeal. [20] In that context, the purpose of review by the Court of Justice is inter alia to consider whether the General Court addressed, to the requisite legal standard, all the arguments raised by the appellant. [21]

[18] See, *ex multis*, judgments of 11 June 2015, *EMA* v *Commission* (C-100/14 P, EU:C:2015:382, paragraph 67 and the case-law cited), and of 26 May 2016, *Rose Vision* v *Commission* (C-224/15 P, EU:C:2016:358, paragraph 24).

[19] See judgments of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357, paragraph 37 and the case-law cited), and of 16 November 2017, *Ludwig-Bölkow-Systemtechnik* v *Commission* (C-250/16 P, EU:C:2017:871, paragraph 55).

[20] See, *ex multis*, judgment of 26 May 2016, *Rose Vision* v *Commission* (C-224/15 P, EU:C:2016:358, paragraph 26 and the case-law cited), and, most recently, judgment of 11 June 2020, *China Construction Bank* v *EUIPO* (C-115/19 P, EU:C:2020:469, paragraph 67 and the case-law cited).

[21] See judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357, paragraph 37 and the case-law cited), and order of 13 December 2012, *Alliance One International* v *Commission* (C-593/11 P, EU:C:2012:804, paragraph 27).

43. Nevertheless, it is also settled case-law that the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case, and that the General Court's reasoning may therefore be implicit, on condition that it enables the persons concerned to know why it has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review.[22] However, the General Court is not obliged to define its position on matters which are plainly of secondary importance or to anticipate potential objections.[23]

44. It follows from these principles that although, according to case-law, the General Court may, under the abovementioned conditions, discharge its obligation to state the reasons on which its judgments are based by means of an implicit statement of reasons, it may not fail 'tout court' to address, explicitly or implicitly, arguments raised before it which are not clearly irrelevant or distort their substance. Such an omission constitutes a failure to state reasons, contrary to the General Court's obligation to state reasons, and an infringement of the right to effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.[24]

2. The first part of the fourth ground of appeal, on the transparent and non-discriminatory nature of the tender process

(a) Arguments of the parties

45. In the first part of the fourth ground of appeal, the appellant submits that the General Court erred in concluding, in paragraph 146 of the judgment under appeal, that the appellant's arguments did 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. To that end, it relies on three sets of complaints.

46. In the first place, the appellant, referring specifically to paragraph 145 of the judgment under appeal, criticises the General Court for considering that it was possible to obtain, on the basis of the 'criterion relating to the maximisation of the total proceeds for all assets', an appropriate sale price for the Nürburgring assets under the State aid rules. According to the appellant, the General Court misinterpreted Article 107 and Article 108(2) TFEU. Moreover, the General Court failed to examine various arguments put forward by the appellant on this point, such that the judgment under appeal was vitiated by failing to provide an adequate statement of reasons.

47. The appellant submits that it set out at first instance the legal criteria to be taken into account when structuring a tender process so that the conditions for obtaining the market price can be met. As it pointed out before the General Court, it is clear from the case-law that competition had to be re-established in each of the relevant markets. Referring to case-law which states that the main aim of the reimbursement of unlawful State aid is to eliminate the distortion of competition caused by the payment of that aid, it argued before the General Court that the structure of the tender process was incapable of eliminating the distortion of competition caused by the payment of the unlawful aid, since it had been used to create a conglomerate of

[22] See, *ex multis*, judgments of 26 May 2016, *Rose Vision* v *Commission* (C-224/15 P, EU:C:2016:358, paragraph 25 and the case-law cited), and, most recently, judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357, paragraph 38 and the case-law cited).

[23] See, to that effect, judgment of 6 November 2012, *Éditions Odile Jacob* v *Commission* (C-551/10 P, EU:C:2012:681, paragraph 48 and the case-law cited).

[24] See also, to that effect, Opinion of Advocate General Kokott in *Bayer CropScience and Bayer* v *Commission* (C-499/18 P, EU:C:2020:735, point 89).

undertakings active in different markets. According to the appellant, it was thus necessary to require separate offers for each of the business units for sale. This would not have prevented a sale *en bloc*, but would have required each bidder to submit the highest price for each unit in the conglomerate. Only thus was it possible to compare offers.

48. In the second place, the appellant submits that the General Court erred in law by failing to take into account the fact that the criterion, mentioned in paragraphs 144 and 145 of the judgment under appeal, of 25% of the best offer ('the 25% criterion')[25] was not disclosed to the interested parties. Consequently, they were unable to factor this into their strategies, such that the tender process was not transparent and non-discriminatory. The statement in paragraph 145 of the judgment under appeal that, since the 25% criterion was set to depend on the value of the offers actually submitted, it could be determined specifically only *ex post*, is immaterial as regards the transparent and non-discriminatory nature of the tender process.

49. In the third place, the appellant claims that the General Court failed, in essence, to take into account its argument that Capricorn was a separate company from Capricorn Automotive GmbH and Capricorn Holding GmbH, which were the companies that had submitted the offer in the tender process. According to case-law, the acceptance of an offer not submitted by a candidate participating independently in a tender process does not meet the requirement for that process to be open and transparent.

50. The Commission submits that the first part of the fourth ground of appeal must be rejected as in part unfounded and in part inadmissible.

(b) Legal assessment

51. In the first part of the fourth ground of appeal, the appellant contests the General Court's analysis in paragraphs 138 to 146, in which it rejected its complaint alleging that the tender process was non-transparent and discriminatory.

(1) Brief summary of the judgment under appeal

52. In that part of the judgment under appeal, the General Court found that, during the tender process, investors had been invited to submit an indicative offer for the assets in their entirety, for defined asset clusters or for individual assets, that 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, and that investors were to be selected on the basis of a criterion relating to the maximisation of the total proceeds for all assets. The General Court also held that the application of that criterion, in practice, had led the sellers to consider, in the final stage of the tender process, only offers for all assets. This was due to the fact that, taking into account 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.

53. The General Court also found that six indicative offers for all assets, offering more than 25% of the best offer, were submitted, that the offers for all assets that had not reached 25% of the best offer had not been taken into account any further 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 had not reached 25% of the best offer.

[25] See point 53 below.

54. The General Court concluded that the 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 and that the 25% criterion 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*.

(2) The complaints relating to the 'criterion relating to the maximisation of the total proceeds for all assets'

55. In the context of the complaints relating to the 'criterion relating to the maximisation of the total proceeds for all assets', the appellant submits, first, that the General Court's analysis is vitiated by an error of law because, given that the aid in question was used to set up a conglomerate of business units, it was necessary to require separate offers for each of the business units making up the Nürburgring assets. This was the only way of eliminating the distortion of competition caused by the payment of the aid measures. The appellant further contends that the judgment under appeal is vitiated by an inadequate statement of reasons on this point.

56. In that regard, it should be noted first of all that it is settled case-law that the recovery of unlawful aid seeks to re-establish the previous situation, and that purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored. [26]

57. It follows that the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded. [27]

58. However, as the General Court rightly points out in paragraph 133 of the judgment under appeal, the Court has consistently held that where an undertaking that has benefited from unlawful State aid 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 was 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. [28]

59. In the present case, it is clear from paragraphs 142 to 145 of the judgment under appeal, reproduced in points 52 to 54 above, that the General Court found that, in the context of the tender process, interested investors were free to define the subject of their purchase offer and could submit an indicative offer for the assets in their entirety, for defined asset clusters or for individual assets. The various offers were then assessed in the light of a criterion relating to the maximisation of the total proceeds for all assets. The option of submitting separate offers for each of the business units that made up the conglomerate of undertakings of the Nürburgring

[26] See judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v Commission (C-357/14 P, EU:C:2015:642, paragraph 110).

[27] Judgment of 30 April 2020, *Nelson Antunes da Cunha* (C-627/18, EU:C:2020:321, paragraph 42 and the case-law cited).

[28] See judgments of 29 April 2004, *Germany* v *Commission* (C-277/00, EU:C:2004:238, paragraph 80), and of 1 October 2015, *Electrabel et Dunamenti Erőmű* v *Commission* (C-357/14 P, EU:C:2015:642, paragraph 112).

assets was not excluded, but was left to the discretion of each bidder. However the offer was made (whether as a blanket offer for all assets, or as a separate offer for each business), it would have been evaluated in the light of the criterion of maximising the value of all assets.

60. In that context, the use of a criterion for evaluating the offers aimed at maximising the value of all assets and its application as described above do not seem at all contrary to the requirements set out in the case-law referred to in points 57 to 59 above, in so far as the use of that criterion is aimed at, and seems capable of, securing the sale of the assets at the highest possible price, thereby ensuring, in accordance with that case-law, that the buyer has not enjoyed an advantage over other market operators. Therefore, the General Court's analysis in this respect is not, in my view, vitiated by any error of law.

61. As to the complaint alleging the failure to state reasons on this point, in my view, it is clear from paragraphs 142 to 145 of the judgment under appeal, and can be inferred from points 52 to 54 above, why the General Court took the view that in the present case the use of the criterion relating to the maximisation of the value of the assets was sufficient to enable those assets to be sold at the highest possible price and thus obtain the appropriate sale price under the State aid rules. To my mind, therefore, there was no breach of the General Court's obligation to state reasons on this point.

(3) The complaint alleging non-disclosure of the 25% criterion

62. The appellant further submits that the examination by the General Court in paragraph 145 of the judgment under appeal (summarised in point 54 above) of the 25% criterion is vitiated by an error of law, since that criterion was not disclosed to the interested parties, who were thus unable to factor it into their strategies.

63. I note that it is not disputed that the 25% criterion was applied on the basis of the value of the offers actually submitted. It therefore follows that, as the General Court held in paragraph 145 of the judgment under appeal, it could be determined specifically only *ex post*. However, it should also be pointed out that the *ex post* determination of that criterion in no way implies that it was impossible to mention it in the tender documents and thus disclose to the bidders that that criterion would be used to evaluate the offers submitted.

64. Despite this, I do not believe that the failure to mention or disclose this criterion is sufficient to call into question the open and transparent nature of the tender process. In paragraph 145 of the judgment under appeal, the General Court found that the criterion of maximising the sale value had been disclosed to the interested parties and that they were thus aware that, to win the contract, they had to structure their offer in accordance with that criterion.

65. In that context, it is unclear how the bidders' strategy would have been different had they been informed that only those offers that reached at least 25% of the best overall offer submitted would be examined at the next stage of the proceedings. Therefore, it has not been established that the failure to disclose this criterion, which can be determined only *ex post*, would have had any impact on the tender process. It follows that the General Court's analysis is not, in my view, vitiated by any error of law.

(4) The complaint alleging the change of bidder during the tender process

66. In the third place, the appellant claims that the General Court failed, in essence, to take into account its argument that Capricorn was a separate company from Capricorn Automotive GmbH and Capricorn Holding GmbH, which had submitted an offer in the tender process.

67. In that regard, I would point out that under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. The Court of Justice's jurisdiction in an appeal is, after all, limited to assessing the findings of law on the pleas argued at first instance. Consequently, a party cannot put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court since that would allow that party to bring before the Court of Justice, whose jurisdiction in appeal proceedings is limited, a wider case than that heard by the General Court.[29] New complaints not submitted to the General Court must therefore be declared inadmissible at the appeal stage.[30]

68. It is clear from the pleadings at first instance that the appellant did not lodge a complaint with the General Court alleging the change of bidder during the tender process. As the Commission rightly points out, in order to demonstrate that it relied on that complaint before the General Court, the appellant merely referred to its reply to a question put by the General Court, which concerned, moreover, the matter of whether there was a legal interest in bringing an action. In its reply to the Court of Justice, to support its assertion that it had relied on that complaint before the General Court, the appellant referred to paragraphs 17 and 77 et seq. of its action before the General Court. However, those paragraphs of the action at first instance reveal only that the appellant referred, incidentally, in paragraph 17, to the fact that Capricorn was a different entity from Capricorn Automotive GmbH and Capricorn Holding GmbH, without putting forward any argument in support of its application for annulment of the second decision at issue. It follows that, in my view, the complaint alleging the change of bidder during the tender process is inadmissible.

69. In the light of the foregoing, I consider that the first part of the fourth ground of appeal must be rejected.

3. The second part of the fourth ground of appeal, alleging distortion of Deutsche Bank's letter of 10 March 2014

(a) Arguments of the parties

70. In the second part of the fourth ground of appeal, the appellant challenges paragraphs 151 to 156 of the judgment under appeal and claims that, by interpreting a letter from Deutsche Bank dated 10 March 2014, produced in the course of the tender process in support of Capricorn's offer, to mean that that letter contained a binding commitment, the General Court distorted the substance of that letter and the judgment was thus vitiated by a distortion of the facts and evidence.

[29] To that effect, see, *ex multis*, the recent judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona* (C-362/19 P, EU:C:2021:169, paragraph 47 and the case-law cited).

[30] See, inter alia, judgment of 28 November 2019, *Brugg Kabel e Kabelwerke Brugg* v *Commission* (C-591/18 P, not published, EU:C:2019:1026, paragraph 70 and the case-law cited).

71. The appellant submits that, before the General Court, it stated that the last page of that letter contained a section entitled 'IMPORTANT NOTICE', which explicitly stated that: 'This term sheet is for discussion purposes only and is not intended to create any legal binding obligation between us.' [31] The non-binding nature of this letter is also confirmed by other sentences in the same document. [32]

72. Deutsche Bank has unequivocally and clearly stated that it did not feel bound by that letter. Therefore, by finding that Deutsche Bank considered itself bound by that letter, the General Court distorted its substance. Consequently, the finding in paragraph 156 of the judgment under appeal that 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 is incorrect. Since it is evident from the content of that letter that Deutsche Bank did not feel bound, the comparison with previous letters exchanged between Capricorn and that bank are not relevant for assessing its binding nature.

73. The Commission disputes the appellant's arguments.

(b) Legal assessment

74. In paragraphs 151 to 155 of the judgment under appeal, the General Court, replying to the argument put forward by the appellant that Deutsche Bank's letter of 10 March 2014 did not constitute proof of financing of Capricorn's offer, assessed 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 that letter.

75. In the first place, the General Court held that Deutsche Bank's letter of 10 March 2014 indicated that the bank was willing to underwrite a loan of EUR 45 million to Capricorn and that the fact that the conditions governing that financing were described in detail suggested careful analysis and an exchange of information between the bank and the buyer. In the second place, the General Court found that the letter in question referred several times to Deutsche Bank's commitment in respect of Capricorn under that letter. In the third place, the General Court considered that the comparison of that letter with two non-binding preparatory letters from Deutsche Bank of 17 and 25 February 2014 confirmed the binding nature of that letter. Lastly, the General Court held that Deutsche Bank's letter of 10 March 2014 specified that Deutsche Bank's commitment was subject to three conditions which allowed Deutsche Bank to withdraw its commitment only if the acquisition failed to be carried out in accordance with the conditions stipulated.

76. In that regard, it has been consistently held that where the General Court has established or assessed the facts, the Court of Justice has jurisdiction, under Article 256 TFEU, solely to review the legal characterisation of those facts and the conclusions in law drawn from them. The

[31] The original English version is as follows: 'IMPORTANT NOTICE: … This term sheet is for discussion purposes only and is not intended to create any legally binding obligation between us.'

[32] Those sentences read as follows: 'This document does not constitute advice, or an offer (of any type), invitation to offer or recommendation, to you. If after making your own assessment you independently decide you would like to pursue a specific transaction with us there will be separate offering or other legal documentation, the terms of which will (if agreed) supersede any indicative and summary terms contained in this document. We therefore do not accept any liability for any direct, consequential or other loss arising from reliance on this document.'

appraisal of the facts by the General Court does not therefore constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice. [33]

77. According to the settled case-law of the Court, the distortion must be obvious from the documents in the case file without there being any need to carry out a new assessment of the facts and the evidence. [34] Furthermore, although distortion of the evidence may consist of an interpretation of a document contrary to the content of that document, it must be obvious from the file before the Court of Justice, and it presupposes that the General Court has manifestly exceeded the limits of a reasonable assessment of that evidence. In that regard, it is not sufficient to indicate that a document could be open to a different interpretation from the one accepted by the General Court. [35]

78. In the present case, the Court is therefore called upon to determine whether the analysis of Deutsche Bank's letter of 10 March 2014 and the documents contained in the file clearly shows that the General Court altered the scope of that letter. However, I do not believe this to be the case.

79. It is clear from the letter that, as the General Court observed in paragraphs 152 and 153 of the judgment under appeal, Deutsche Bank states on several occasions its willingness and commitment to underwrite the financing for Capricorn. [36] The letter is signed by two senior executives (the director and executive director) of Deutsche Bank, which, to my mind, is also indicative of the bank's willingness to be bound by the content of the letter.

80. As the General Court observed in paragraph 154 of the judgment under appeal, the interpretation of that letter in the sense that it contains binding commitments is confirmed by an analysis of two other letters from Deutsche Bank, which preceded the letter of 10 March 2014 and are also in the file, one dated 17 February 2014 and the other 25 February 2014. First, an analysis of those letters reveals that they contain very different language from the letter of 10 March 2014, explicitly stating that Deutsche Bank is unwilling to commit itself. [37] A comparison between the wording of those letters and that of the letter of 10 March 2014 confirms the binding nature of the latter. Second, they show that Deutsche Bank's letter of 10 March 2014 marks the final stage in the negotiations between the bank and Capricorn. As the Court noted, the letter of 10 March 2014 states that Deutsche Bank's commitment is subject to three conditions, over which Deutsche Bank has no influence. [38]

[33] See, *ex multis*, judgment of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission* (C-466/19 P, EU:C:2021:76, paragraph 42 and the case-law cited).

[34] See, *ex multis*, judgment of 10 March 2021, *Ertico – ITS Europe* v *Commission* (C-572/19 P, EU:C:2021:188, paragraph 69 and the case-law cited).

[35] See judgment of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission* (C-466/19 P, EU:C:2021:76, paragraph 44 and the case-law cited).

[36] Thus, for example, the letter begins with the following sentence: 'We are pleased to confirm the terms and conditions on which Deutsche Bank … is willing to arrange and underwrite the financing …'. Section 1 of the letter, entitled 'Financing', contains the following sentence: 'We are pleased to confirm the terms on which […, Deutsche Bank …] is willing to underwrite … 100% of a loan facility.' Section 10 of the letter, entitled 'Commitment expiry', governs the start and end of the binding commitment contained in the letter.

[37] The letter of 17 February 2014 explicitly confirms the non-binding nature (as can be inferred from the unequivocal wording 'this letter does not constitute a commitment on the part of, or engagement of, DB or any of its affiliates'). This letter appears to be the first stage of the negotiations, as the following sentence implies: 'DB is pleased to inform you that … we … are confident in our ability to underwrite the Financing Transaction to finance, in part, the Transaction'. By contrast, the letter of 25 February 2014 seems to represent a more advanced stage of the negotiations, informing the buyer of the approval in principle of the underwriting of the financing by the credit committee (but of the need for other internal approvals), and of the fact that the due diligence process has not yet been completed.

[38] As is apparent from section 2 of that letter, those conditions are (i) execution of the transaction, (ii) no material change to the assets purchased and (iii) no illegality or unlawfulness of the financing.

81. Admittedly, as the appellant points out, the letter of 10 March 2014 contains an appendix ('Appendix A') entitled 'Term Sheet', also dated 10 March 2014. The first page of the appendix contains the word 'draft' and explicitly mentions its 'indicative' nature ('indicative terms and conditions'). It also refers to the important notice on the last page, as mentioned by the appellant and reproduced in point 71 above.

82. In my view, however, although the draft nature of the appendix to the letter and the boilerplate statement at the end might cause some confusion as to the binding nature of that appendix and thus of the terms and conditions of the financing referred to therein, they do not call into question the binding nature of the letter per se and Deutsche Bank's commitment to provide Capricorn with EUR 45 million in financing, as explicitly stated in the letter. Therefore, although the evidence adduced by the appellant may call into question the binding nature of the appendix, it does not call into question the binding nature of the commitment contained in the letter, especially in the light of the considerations set out in points 79 and 80.

83. Based on this analysis, it is not evident from the file before the Court that, as required by the case-law referred to in point 77 above, the General Court clearly exceeded the bounds of a reasonable assessment of Deutsche Bank's letter of 10 March 2014 in order to find that the contents of the document had been distorted. Accordingly, the second part of the fourth ground of appeal must, in my view, also be rejected as unfounded.

4. The third part of the fourth ground of appeal, alleging that Capricorn was insolvent

(a) Arguments of the parties

84. By the third part of the fourth ground of appeal, the appellant submits that the General Court failed to examine, in paragraphs 147 to 161 of the judgment under appeal, the arguments put forward by the appellant in its action at first instance concerning the precarious financial situation of the various companies in the group to which Capricorn belonged, as well as its owner. The appellant claims that those arguments prove that Capricorn never had secured financing, contrary to the Commission's finding in paragraphs 242, 247, 261 and 277 of the final decision.

85. The Commission disputes the appellant's arguments.

(b) Legal assessment

86. It is clear from the action at first instance that the appellant relied on a series of facts before the General Court intended to prove that the group to which Capricorn belonged and the parent company of that group had been in serious financial difficulty since 2012 – in other words, long before the award following the tender process.

87. The appellant relied on those facts to prove that the Commission had erred in the final decision as to Capricorn's ability to pay the price and thus meet the criterion of secured financing of the transaction laid down for the selection of investors interested in acquiring the Nürburgring assets. [39]

[39] See, in particular, recital 48 of the final decision.

88. In that respect, as the Commission itself acknowledged, it is clear from the judgment under appeal that the General Court did not reply explicitly to those arguments. According to the case-law referred to in point 43, an implicit statement of reasons could perhaps – admittedly with some degree of interpretation – be inferred from paragraph 158 of the judgment under appeal, in which the General Court, having held the letter from Deutsche Bank of 10 March 2014 to be binding, concluded that the appellant's arguments did not make it possible to establish that the Commission ought to have had doubts as to whether the requirement had been met for binding proof of financing under the transaction security criterion.

89. In any event, even if the General Court had failed to state the reasons on which the judgment was based, it should be borne in mind that, as is clear from settled case-law, even if the grounds of a judgment of the General Court reveal an infringement of Union law, but its operative part appears well founded on other grounds of law, the appeal must be dismissed. [40]

90. In this connection, it should also be borne in mind that the lawfulness of a decision concerning State aid falls to be assessed by the European Union judicature in the light of the information available to the Commission at the time when the decision was adopted. [41]

91. The Commission claimed both before the General Court and before the Court of Justice that, at the time of the adoption of the final decision, it did not have the information on which the appellant's complaint at first instance was based. The appellant has failed to prove otherwise to the Court.

92. In the light of this, I do not believe the third part of the fourth ground of appeal should be upheld.

5. The fourth part of the fourth ground of appeal, alleging the continuation of the sale process beyond the award of the Nürburgring assets to Capricorn on 11 March 2014

(a) Arguments of the parties

93. In the fourth part of the fourth ground of appeal, the appellant contests the General Court's reasoning by which the General Court, in paragraphs 162 to 168 of the judgment under appeal, rejected its argument that the sales process had continued beyond the award of the Nürburgring assets to Capricorn on 11 March 2014.

94. According to the appellant, by concluding that the Commission did not have to take that fact into account, the General Court seems to consider that the question of initiating a formal investigation procedure can only concern events occurring before the contract is awarded. That analysis is vitiated by errors of law. According to the appellant, the preliminary examination stage did not end with the award of the assets on 11 March 2014, but only with the adoption of the Commission's decision on 1 October 2014.

[40] See, to that effect, most recently, judgment of 25 February 2021, *Dalli* v *Commission* (C-615/19 P, EU:C:2021:133, paragraph 165 and the case-law cited). That case-law also applies to the failure to state reasons. See judgment of 19 March 2020, *ClientEarth* v *Commission* (C-612/18 P, not published, EU:C:2020:223, paragraphs 39 and 40).

[41] See judgment of 20 September 2017, *Commission* v *Frucona Košice* (C-300/16 P, EU:C:2017:706, paragraph 70 and the case-law cited).

95. The General Court views the formal award of the assets as a sort of 'caesura', after which the Commission no longer had to take into account the additional information in its possession until the adoption of the decision that concluded the preliminary examination procedure. Contrary to the General Court's contention, during the Commission's preliminary examination, the decisive factor is not whether, after its complaint of December 2013, it was able to lodge another complaint, but whether, as provided for in the case-law, the Commission had all the information it could objectively have at its disposal. The appellant further submits that the General Court also distorted the evidence adduced by it.

96. The Commission disputes the appellant's arguments.

(b) Legal assessment

97. By the fourth part of the fourth ground of appeal, the appellant contests the reasoning in paragraphs 165 to 168 of the judgment under appeal by which the General Court dismissed its complaint that the sales process had continued beyond the award of the Nürburgring assets to Capricorn on 11 March 2014.

98. In that part of the judgment under appeal, the General Court started from the premiss that the purpose of the Commission's examination was to ascertain whether the tender process had been open, transparent, non-discriminatory and unconditional, in order to establish whether the Nürburgring assets had been sold at their market price. The General Court inferred from this that the alleged aid, which should have been found by the Commission in the second decision at issue (corresponding, according to the appellant, to the difference between the price paid by Capricorn to purchase the Nürburgring assets and the market price of those assets), might 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.

99. Accordingly, the General Court concluded 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. The General Court then concluded its argument by stating that had the appellant wished that the Commission also investigate whether new aid stemmed from the alleged continuation of the sales process, subsequent to the adoption of the second decision at issue, it should have lodged a new complaint in that respect.

100. First, I believe that the complaint that the General Court distorted the evidence must be rejected. The appellant gives no indication of the grounds on which such a distortion is based.

101. As to the complaint concerning the incorrect analysis by the General Court, I would point out that, as mentioned in point 90 above, it is settled case-law that the lawfulness of a decision concerning State aid falls to be assessed by the EU judicature in the light of the information available to the Commission at the time when the decision was adopted.

102. It is worth noting that, as the appellant rightly points out, the preliminary stage of the State aid investigation procedure ends when the Commission adopts one of the decisions provided for in Article 4 of Regulation No 659/1999 and not before, such as at the end of the tender process by means of awarding the assets in question.

103. It is possible, therefore, that new and relevant facts that the Commission was previously unaware of could emerge after the end of the tender process, but before the adoption of the relevant Commission decision. In a case of this type, it is my view that the Commission is not spared from taking these relevant new facts into account in its analysis simply because it became aware of them after the closure of the tender process. It is also possible that the examination of those facts could lead the Commission to alter its assessment of whether or not the aid exists.

104. Consequently, it is not, in my view, legally correct to assume – as might be inferred from the last sentence of paragraph 166 of the judgment under appeal – that facts subsequent to the date of closure of the tender process and of the award of the assets which were the subject of that process can never be relevant in assessing whether aid might have been granted in the tender process.

105. I further note that, contrary to paragraph 167 of the judgment under appeal and the Commission's contention, the arguments put forward at first instance by the appellant in relation to events after the closure of the tender process were not intended to enable the Commission to investigate whether new aid stemmed from the alleged continuation of the sales process, but rather to call into question the transparent and non-discriminatory nature of the tender process which led to the sale of the Nürburgring assets to Capricorn.

106. To my mind, it follows that the judgment under appeal is vitiated by an error of law to the extent that the General Court rejected the arguments put forward by the appellant alleging the continuation of the sales process beyond the award of the Nürburgring assets to Capricorn on 11 March 2014, in view of the fact that they pertained to events subsequent to the closing date of the tender process.

107. Nevertheless, as inferred from the case-law cited in point 89 above, if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed.

108. In that respect, I note that the ground of appeal put forward by the applicant at first instance was based, in essence, on the fact that, following completion of the first sale, the buyer and the sellers signed a guarantee agreement for the payment of the sale price in instalments. Under the terms of that agreement, in the event of continued non-payment of the second instalment of the sale price, the assets would have to be resold, as proved to be the case.

109. It is my belief that this circumstance, which was subsequent to the award of the Nürburgring assets at the end of the tender process and could not have been known at the time of that award, in the absence of other evidence, cannot in itself be regarded as sufficient proof that the first process was non-transparent and discriminatory and that the assets were sold at the end of the tender process at a price that did not correspond to the market price.

110. It therefore follows that, in my view, the fourth part of the fourth ground of appeal must also be rejected.

6. The fifth part of the fourth ground of appeal, alleging failure to state grounds for the judgment under appeal

(a) Arguments of the parties

111. By the fifth part of the fourth ground of appeal, the appellant contests paragraphs 173 to 176 of the judgment under appeal, in which the General Court rejected the arguments put forward by the applicant at first instance and summarised in paragraphs 170 and 171 of that judgment. The appellant submits that the General Court merely summarised its arguments in paragraphs 170 and 171 of the judgment under appeal, without examining them or stating its reasons for rejecting them. As a result, the judgment under appeal is vitiated by a failure to state grounds, as well as a distortion of the evidence adduced by the appellant and an error of law when applying Article 107 and Article 108(3) TFEU.

112. The Commission contends that the fifth part of the fourth ground of appeal must be rejected. The Commission acknowledges that the General Court has given a succinct statement of reasons, but that that statement of reasons is sufficiently clear. All the complaints summarised in paragraph 170 of the judgment under appeal, as well as the signing of the lease referred to in paragraph 171, relate to events that occurred only after the conclusion of the sales agreement following the award of the contract, and are thus irrelevant for the analysis.

(b) Legal assessment

113. In paragraphs 170 to 175 of the judgment under appeal, the General Court examined the third part of the third ground of appeal submitted before it by the appellant, alleging that the sale of the Nürburgring assets to Capricorn constituted new State aid. In paragraph 170, the General Court summarised four arguments put forward by the appellant. In paragraph 171, it summarised one argument relating to the lease on the Nürburgring assets.

114. As the Commission itself acknowledged, the General Court did not reply to those arguments, but merely – in paragraph 173 of the judgment under appeal – referred to 'the reasons set out in paragraphs 138 to 158 above, [for which] it cannot be considered that the Commission ought to have had doubts as to whether the tender process had been transparent and non-discriminatory', adding, in the following paragraph, that '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'.

115. I doubt that that statement of reasons, based on a generic reference to other parts of the judgment and with no further explanation, is compatible – in the present case, at least – with the General Court's obligation to state reasons as defined by the case-law referred to in points 41 to 44 above. That statement of reasons does not explain, even implicitly, the General Court's reasoning, so as to allow the interested parties to know the grounds of the decision adopted and enable the Court of Justice to exercise its power of review.

116. As to the Commission's argument that the General Court implicitly rejected those arguments on the ground that they concerned events that took place after the conclusion of the sales agreement and therefore could not have had an impact on the determination of the relevant

sales price within the meaning of the case-law mentioned in point 58 above, I would point out, in the first place, that it is not at all clear from paragraphs 173 and 174 of the judgment under appeal that that is the reason for the General Court's rejection of those arguments. In the second place, I also note that, although the reason given by the Commission may possibly apply to the second, third and fourth arguments mentioned in paragraph 170,[42] it does not seem to apply to the first of those arguments, since the setting off of the amount of EUR 6 million appears to have been stipulated in the sales agreement itself. Nor does it apply to the arguments referred to in paragraph 171 of the judgment under appeal relating to the lease, which appears to have been negotiated before the sales agreement was concluded. In the third place, and in any event, as stated in paragraph 104 above, it is possible that facts subsequent to the closing date of the tender process and the award of the assets covered by that tender may be relevant for the State aid analysis. Therefore, the fact that certain events are subsequent to the end of the tender process is not in itself sufficient to render them completely irrelevant.

117. In the light of the foregoing, I take the view that the judgment under appeal is vitiated by a failure to state grounds and that, therefore, the fifth part of the fourth ground of appeal should be upheld.

C. The fifth ground of appeal, alleging that the grounds for the second decision at issue are inadequate

1. Arguments of the parties

118. By its fifth ground of appeal, the appellant contests the General Court's rejection, in paragraphs 182 to 189 of the judgment under appeal, of its plea alleging a breach of the Commission's obligation to state reasons.

119. According to the appellant, it is impossible to identify the reasons why the Commission concluded, in paragraphs 240 and 247 of the final decision, that the Federal Republic of Germany sold the Nürburgring assets through an open, transparent, non-discriminatory and non-conditional tender process to the bidder submitting the highest bid with secured financing. Nor is it clear why and on what legal basis the Commission came to the conclusion, in paragraph 285 of the final decision, that the sale of the Nürburgring assets does not constitute State aid. The only clear point is that this conclusion does not concern the sale covered by 'Measure 15', as defined in paragraph 38 of the final decision. That paragraph related, however, to other sales to other companies, which took place long before the tender process. It is unclear why the Commission's fundamental decision that the sale to Capricorn did not constitute State aid does not appear separately and expressly in the operative part of the final decision.

120. The Commission contends that the fifth ground of appeal must be set aside as inadmissible and, in any event, as unfounded.

[42] Namely the postponement of the payment of the second instalment of the sales price, the failure to recover the penalty and the sale of the assets to a sub-purchaser.

2. Legal assessment

121. With regard to the fifth ground of appeal, it is settled case-law that a ground of appeal that simply reproduces the pleas in law and arguments previously submitted to the General Court is inadmissible. [43]

122. In that respect, it should be noted that, in its appeal, the appellant simply resubmitted arguments raised at first instance on the failure to state grounds for the second decision at issue, without challenging the reasoning by which the General Court rejected those arguments in the judgment under appeal. I therefore consider that the fifth ground of appeal is inadmissible.

123. *Ad abundantiam*, I would also point out that I agree with the General Court's analysis contained in paragraphs 182 to 189 of the judgment under appeal, to which I refer, by which it rejected the abovementioned arguments raised by the appellant alleging the inadequate statement of reasons of the second decision at issue.

V. Conclusion

124. On the basis of all the foregoing considerations, I propose that the Court should:

– uphold the fifth part of the fourth ground of appeal submitted by Ja zum Nürburgring eV; and

– dismiss the remainder of the fourth ground of appeal and the fifth ground of the same appeal.

[43] See, to that effect, *ex multis*, order of 3 September 2019, *ND and OE* v *Commission* (C-317/19 P, not published, EU:C:2019:688, paragraphs 27 and 28 and the case-law cited).