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Court of Justice of the European Union

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Judgment in Cases C-647/19 P and 665/19 P
Ja zum Nürburgring and NeXovation v Commission

The Commission must re-examine whether the sale of the Nürburgring in 2014 entailed a grant of State aid

In the same year, it wrongly ruled out the presence of doubts as to the possible existence of an advantage conferred on the buyer and decided not to open a formal investigation procedure

On appeal by Ja zum Nürburgring eV, a German motorsport association for the reinstatement and promotion of a race track at the Nürburgring, and NeXovation, a company established in the United States whose bid for the Nürburgring complex ('the Nürburgring') was rejected during the tender process, the Court of Justice finds that the Commission wrongly decided, in 2014, that the sale of the Nürburgring assets to the German company Capricorn Nürburgring Besitzgesellschaft GmbH at the end of the tender process did not constitute a grant of State aid, without opening the formal investigation procedure.

In that regard, the Court of Justice sets aside the judgments of the General Court of the European Union of 19 June 2019¹, in which the General Court confirmed that assessment by the Commission, and the Commission decision of 1 October 2014². For the remainder, the Court of Justice dismisses the appeals.

The Nürburgring, located in the *Land* of Rhineland-Palatinate (Germany), consists of a motor-car race track, a leisure park, hotels and restaurants. Between 2002 and 2012, the public undertakings owning Nürburgring ('the sellers') were the beneficiaries of aid, mainly from the *Land* of Rhineland-Palatinate. In 2011, the appellant, a German motorsport association, lodged a first complaint with the Commission about that aid. In 2012, the Commission initiated a formal investigation procedure with regard to that aid. In the same year, the Amtsgericht Bad Neuenahr-Ahrweiler (Local Court of Bad Neuenahr-Ahrweiler, Germany) found that the sellers were insolvent and it was decided to proceed to the sale of their assets. A tender process was initiated and concluded with the sale of those assets to Capricorn. In 2013 and 2014, Ja zum Nürburgring and NeXovation lodged further complaints with the Commission, on the ground that the tender process had not been open, transparent, non-discriminatory and unconditional and that the sale of the Nürburgring assets had not achieved a market price.

According to the appellants, Capricorn thus received new aid and ensured the continuity of the sellers' economic activities, such that the decision on recovery of the aid received by the sellers had to be extended to Capricorn. NeXovation claims that Capricorn's offer was lower than its own offer and Capricorn was therefore preferred. Capricorn was thus granted aid corresponding to the difference between the purchase price and the market price. -

In its decision of 1 October 2014, the Commission found, first, that certain support measures in favour of the sellers were unlawful and incompatible with the internal market. However, it stated that any potential recovery of the aid to the sellers would not concern Capricorn or its subsidiaries ('the first decision at issue'). -

¹ Judgments of the General Court of 19 June 2019, *NeXovation v Commission*, [T-353/15](#), and *Ja zum Nürburgring v Commission*, [T-373/15](#), see also PR [77/19](#).

² 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).

Second, the Commission determined that the sale of the Nürburgring assets to Capricorn did not constitute State aid ('the second decision at issue'; a decision adopted after the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, rather than after a formal investigation procedure). The Commission took the view, in that regard, that the tender process had been conducted in an open, transparent and non-discriminatory manner, that that procedure had resulted in a sale price consistent with the market and that there was no economic continuity between the sellers and the buyer. -

Both Ja zum Nürburgring and NeXovation brought actions before the General Court, which were, however, dismissed by judgments of 19 June 2019.

By today's judgments, the Court of Justice partially upholds the appeals brought by Ja zum Nürburgring and NeXovation against the judgments of the General Court, and annuls them to the extent that they confirm the second decision at issue of the Commission. Then, ruling on the merits, the Court annuls that decision.

The Court notes in that regard, inter alia, that one of the factors taken into consideration for the purposes of selecting the buyer of the Nürburgring assets was the proof of financing of its offer. - Only two offers were considered to have secured financing, namely Capricorn's offer and that of one other tenderer. However, since both the amount of secured financing available to that other tenderer and the sale price it offered were lower than those of Capricorn, Capricorn's bid was ultimately successful. -

However, the Commission wrongly took the view that there were no doubts as to whether the financing of Capricorn's bid had been secured by Deutsche Bank, as the General Court had also considered. The Court of Justice notes in particular in this respect that, contrary to the reading given by the Commission and the General Court, a letter from that bank of 10 March 2014 clearly did not contain a binding financing commitment. -

That error is such as to call into question the non-discriminatory nature of the tender process, since it could show that Capricorn had received preferential treatment and its bid was not rejected, unlike NeXovation's higher offer, which was rejected on the basis lack of evidence of guaranteed financing. -

The Court concludes that the assessment of whether the sale of the Nürburgring assets to Capricorn implied the grant to Capricorn of aid incompatible with the internal market raised doubts which should have led the Commission to initiate the formal investigation procedure in that regard. (-

However, the Court dismisses the appeals in so far as they seek annulment of the first of the Commission's decision at issue concerning aid to the sellers.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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