



## INSIDE STORY – OCTOBER 2015 – GERMANY

### DAF Deutsches Anleger Fernsehen AG

*Christian Köhler-Ma writes on the recent case in the German media industry*

#### Background

**DAF** was the last in a line of cases in the German media industry in which the recently reformed German insolvency law was used to restructure a media business. It followed in the wake of the restructuring of **joiz GmbH**, a television station specializing in programs for a younger audience, and **Suhrkamp AG**, a literary publishing house.

DAF's focus was providing information to small investors in the German stock market via TV broadcasts. In addition DAF produced short reports from the German stock exchange and about companies, which DAF then sold to other TV stations or to the subject companies themselves. However, DAF had suffered constant losses over a period of eight years which had been covered by its shareholder, the owner of a business publishing house, who eventually withdrew his support.

The losses were caused by a particular feature of the German television market. Here advertising income depends entirely on a measurement of viewership which is based on a sample of households whose viewing patterns are observed. Meaningful income can only be generated if in this system large numbers of viewers are measured regardless of the composition of this viewership. As a result television commercials are not particularly targeted – car commercials are shown during football games, women's fashion commercials during love dramas, pet food commercials during animal shows. Advertisers are only willing to pay significant fees if a program reaches a large audience in which such unspecified advertising can be hoped to reach a reasonable number of interested viewers. This puts stations at a disadvantage who can measure many specific demographics of their audience and potentially make marketing efforts much more effective but who basically do not show up in the measurements of viewership at large. This was both a problem of DAF and joiz, a youth channel, whose viewership watched it in teenagers' rooms while viewership was measured in the parent's living room. In contrast the costs of sending out a television signal for terrestrial or cable broadcast are substantial. On top of this the technical broadcasters and cable providers require long-term contracts from their customers because of their need to plan maintenance and development of their technical infrastructure.

## **Insolvency plan procedure**

In both the cases of DAF and joiz under traditional German insolvency law this would have led to a liquidation of the companies with substantial losses for all parties involved. However, in 2012 a major reform of the German law came into force which strengthened debtor in possession proceedings and an alternative to liquidations, the insolvency plan procedure. We outlined to the shareholders of both companies the advantages of using such a procedure and in both cases they decided to go that route, i.e. in possession proceedings combined with a plan. In the case of joiz we acted as counsel, in the case of DAF Christian Köhler-Ma took on the role of CRO and guided the company through the proceedings.

Both companies availed themselves of one particular feature of the German insolvency regime, the so-called insolvency payments to employees. This means that the payroll of the company is being covered by a public insurance system for the period of up to three months, with the insurer becoming an unsecured creditor in the insolvency later on. Furthermore, both used the option to terminate long-running contracts especially with the technical broadcasters and cable providers who also became unsecured creditors with the remaining claims from the unfulfilled contracts. Finally, the total amount of the payroll was reduced by half by using simplifications of German labor law which are only available in insolvency. At the same time the business model of both companies was changed to focus on internet/mobile content production and internet/mobile marketing channels.

While these measures brought the operations of both entities to future profitability the creditors were taken care of by the use of an insolvency plan. The existing shareholders in each case injected a moderate amount which was held in trust in a separate account to be released for a dividend payment if the creditors accepted an insolvency plan. The creditors were grouped based on relevant features – secured/unsecured, small/large, et cetera – and in each group a simple majority of creditors per capita and creditor amounts was needed. If a group would vote against the plan its objection would be ignored if the plan demonstrated that these creditors were not worse off under the plan than they would be without the plan and a majority of groups had voted for it. Since liquidation costs would have led to no dividend to be paid it was clear that even a small dividend from the cash injection made the creditors better off. Therefore, any objection could have been overruled. However, this was not necessary since the creditors overwhelmingly voted for the plan because they preferred to get a small payment rather than obtaining nothing. Thus in the case of DAF the company was returned to its shareholder modestly profitable and with all old debt removed. In the case of joiz the existing shareholders even negotiated an agreement with a new investor from traditional publishing who took up a stake and injected fresh cash for future development now that he could be certain that no monies would be needed to pay past creditors. The proceedings were finished in about eight months from beginning to end.

As these cases demonstrate insolvency in Germany can be a very useful tool to restructure a company and make it an interesting target for future investment. It had been the intention of German legislator to make German insolvency law a competitive instrument for restructurings when it put into force the reforms of 2012. DAF and joiz show that this aim has been achieved. The task remains to make international investors aware of this fact so that they will consider insolvency in Germany as an option for ailing investments made in the past or for new investments which at first sight appear problematic.

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