Inside story – The Nürburgring and state aid

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In July 2012 the Nürburgring GmbH, 90% owned by the state of Rhineland-Palatine and 10% owned by the district of Bad Neuenahr-Ahrweiler, and two of its subsidiaries, filed for insolvency administration in accordance to sec 270 et. seqq German Insolvency Code (InsO).

The Chief Restructuring Officer (CRO) is Prof. Dr. Dr. Thomas B. Schmidt (Trier, Germany). The court of Bad Neuenahr-Ahrweiler appointed Jens Lieser (Koblenz, Germany) first as preliminary insolvency administrator, later as permanent insolvency administrator.

The Nürburgring GmbH founded in 1927 is owner of the world famous racetrack Nordschleife, constructed in 1925, a state-of-the-art Grand Prix circuit and its associated infrastructure. The two subsidiaries own accommodation and F&B facilities next to the race tracks. All three companies were and are until today property-holding companies without operations and access to cashflow. At the beginning of the insolvency proceedings only eight employees worked on administrative issues.

Under a business lease agreement dating from April 2010, Nürburgring GmbH and its subsidiaries have leased all assets and operations to a privately owned company. The lessee was not controlled by the Nürburgring GmbH or the local state. The lessee had nearly 300 employees who dealt with all the operations. For several reasons the lease agreement was terminated in Spring 2012 and was disputed by the lessee. When insolvency proceedings started in July 2012 the situation was very unclear.

First of all, the insolvency administration had to end the "outsourcing" of the operation to gain access to cashflows and business information, and to be able to utilize the assets. The insolvency administrator had to retain the event organizers who, because of the unclear situation, were already on their way out. It is impossible to substitute big events in a short time, but the insolvency administration had to calm down the public interest and the local stakeholders.

State-aid

Apart from these relatively big challenges, attention was drawn quickly to a state-aid investigation by the European Commission which was pending since March 2012. This investigation certainly opened a Pandora's box.

Once a state-aid investigation (according to Art. 108 TFEU) is triggered, it cannot be stopped. For the Nürburgring this meant that a formal decision was expected by September 2013. Claims for illegal grants could be filed with the insolvency administrator. These claims cannot rank as senior to the general unsecured claims. In the Nürburgring case they are even partly subordinated, according to sec 39 InsO. Hence, repayment was no option and this had quite severe consequences. Under EU Law, the grants are either paid back within four months after the formal decision or all activities must be closed down. A sale of the assets does not solve the problem as all assets are tainted by the state-aid. There is a high risk that the state-aid in an asset deal will be transferred to the acquirer, a consequence of the legal concept of an undertaking as an economic unit in EU competition law. Only a sales process compliant to EU law cuts off illegal grants and can therefore prevent a shut down, as well as transfer, of the state-aid to the acquirer.

To sum it up: The only option for the insolvency administration was to start a sales process compliant with EU law as soon as possible.

Therefore, such a sales process must be "open, fair, undiscriminating and transparent". These principles are rather not very concrete. Only an open and fair dialogue with the European Commission puts one in a position to access sufficient information to get an idea what is feasible and what is not.

The sales process started in May 2013 by announcements in several newspapers and ended in March 2014 with the signing of the asset purchase agreement.

Discontinuity

To cut off the grants it was necessary to match one more EU law principle, the principle of discontinuity.

The transfer of assets was allowed, because they were sold at the market price. However, employment contracts were transferred by virtue of Law sec. 613a BGB. To make the discontinuity clearer seemed to be helpful because the future employee structure is deviating from the situation before the deal.

Customer contracts were not to be transferred, to match the discontinuity requirement. The seller OpCO, a private solvent company founded after settlement with the original operater and controlled 100 % by the Nürburgring GmbH, operates the 2014 season and will terminate all contracts by the end of 2014. The acquirer OpCo will therefore negotiate a new contract with every customer for 2015 onward. But the insolvency administration had to find a solution in case the closing goes beyond December 2014, because the seller OpCo would then have no more contracts and, on the other side the acquirer OpCo will have no access to the operations. The solution was a lease agreement.

The next question was how to handle the state-aid risk in the asset purchase agreement. It was absolutely clear that no acquirer will take the risk of repayment of up to €500 million. Only a legally binding EU decision could offer enough predictability on this issue.

Now, there are two possible ways to solve the problem of the asset purchase agreement: not closing before such a binding EU decision is taken or imposing a cancellation right for the acquirer, in the event that no EU decision is taken in his favor. Neither way is ideal. As long as waiting for the closing and also waiting for the payment is compliant with EU law, this is less harmful because the risk of a legally binding EU decision has to be taken by the seller in any case.

After the approval of the creditor’s committee, the CRO and the insolvency administrator signed the asset purchase agreement in March 2014. Closing will take place after a positive and legally binding decision is taken by the EU commission.

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