

Comment: The ECJ decisions in brief



On September 2, 2021, the European Court of Justice (ECJ) pronounced its rulings in the two proceedings relating to the Nürburgring. With its decision, the ECJ overturned a substantial part of the judgment of the European General Court (EGC) and declared the corresponding portion of the decision of the European Commission (COM) null and void.

So far the official news. But what does that mean for the Nürburgring? As far as possible at this point in time, we would like to clarify the situation.

What did the ECJ decide?

In a very simplified way, the ECJ found two things:

- When the Nürburgring was sold to capricorn Besitzgesellschaft mbH, a so-called financing confirmation issued by Deutsche Bank was presented. The ECJ has now finally determined that this letter did not contain any financing commitment.
- The ECJ also found that the COM had information and documents at its disposal before its decision that should have aroused doubts about the sales process and the bid.

On the basis of these findings, the ECJ overturned part of the judgment of the first instance (EGC) and declared part of the decision of the COM to be null and void. In both cases, these were the parts in which it was determined that the sale had been conducted legitimately. The COM now has to open a formal investigation procedure in order to re-examine and assess the sale.

How things continue at the Nürburgring will depend on the result of this test procedure.

Is there a realistic chance of another change of ownership?

After the decision of the ECJ, we consider a change of ownership to be possible. Should the COM decide in the investigation procedure that is now beginning that the sale was questionable under the law on state aid, this may lead to the nullity of the existing purchase contract.

In such an event, NeXovation would be in a good position to re-close in its own favor. JzN recognized this danger early on and, through its own lawsuit, ensured that this bidder was not the only winner.

There is no easy way to the foundation we favor, but at least there is a way to go. The association “Ja zum Nürburgring” will continue to monitor developments very closely and also participate in the new investigation procedure.

The aim of the association was and remains a long-term stable solution for the Nürburgring.

What is the goal of “Ja zum Nürburgring”?

For decades, Otto Flimm always had sustainable support of the Nürburgring in mind. The Nürburgring should be there for everyone:

- as a structural support measure, it serves the region in its development
- as a race track, it promotes motorsport, and here especially the idea of grassroots sports
- as a test track, it supports industry in the development of new technologies

This perspective has not changed after Otto Flimm's death. The association represents overarching interests to protect long-term, good perspective for the Nürburgring. Traditionally, the association's

board of directors is made up of representatives from motorsport, politics and the region who support the association's direction.

The Nürburgring was built so that the region, motorsport and industry should benefit from it. This has been successful for more than 90 years, and JzN has made a significant contribution to this with the construction of the GP track. The Nürburgring should not serve to enrich individuals, it should bring benefits to many people.

For this reason, we still favor a foundation solution in which the racetracks are to be incorporated so that they can be operated without the intention of generating profits.

What is the background of the court decisions?

The state government had driven the Nürburgring into bankruptcy through its continual wrong decisions. Oversized new buildings were built without secure financing, and a subsequent lease also fell apart. The methods used led to final convictions of the then managing director Walter Kafitz for breach of trust and the Finance Minister Deubel for breach of trust and false statements. The racetracks were drawn into the disaster through no fault of their own.

The Nürburgring became the plaything of the now appointed insolvency administrators. In a sales process marked by unspeakable events (ousting the bidders JzN and ADAC, who are firmly anchored at the Nürburgring, falling into La Tene, the pseudo-company of a well-known impostor), capricorn was then preferred as the bidder with the help of the state government. The day before the signing there was no financing commitment, the offer was smoke and mirrors. Nevertheless, KPMG and the insolvency administrators urged the creditors' committee to accept capricorn as a buyer. This submitted "financing commitment" was the letter from Deutsche Bank that has now been finally canceled by the ECJ. Reinhold Schüsseler, the local mayor of Nürburg at the time, was the only one who did not allow himself to be run over on the committee of creditors. He alone voted against the sale.

After the sale on March 11, 2014, things continued lively: shortly after the signing, the buyer stumbled and was unable to make the necessary partial payments on the purchase price. The purchase contract threatened to collapse. Another contract should then bring the security that the purchase price would actually be paid. All of this was known to the Commission, which was still in the examination phase.

In the end, Capricorn could not afford the purchase price, a new investor was sought who would bring in the required capital in place of Robertino Wild.

Nevertheless, on October 1, 2014, the COM decided not only about the aid itself, but also that the sale had proceeded properly. This second part of the decision has now been annulled.

The association "Ja zum Nürburgring" has criticized the approach of the state government and the insolvency administrators from the start and has repeatedly shown constructive alternatives. We pointed out early on that the processes surrounding the sale would result in legal proceedings, which is what happened.

The task of the European Commission (COM)

At the time, the COM found that almost € 500 million in unlawful aid had flowed to the Nürburgring companies. These subsidies distorted competition in the region, e.g. the new hotels were built with these funds while other hoteliers had to pay for everything out of their own pocket.

Once such aid has been identified, this distortion of competition must disappear from the market. In the simplest case, this is done by paying back the sum, which was not possible in this case. It was decided to sell the complex. To ensure that competition law was complied with, the sale had to follow strict rules. Compliance with these rules determines whether the COM can consider the sale to be unobjectionable under state aid law.

The COM's first attempt to evaluate the sale is now obsolete. So now it has to check again, this time thoroughly. Was the first positive decision a rather casual one, the COM now has to start a formal investigation process in which all details will be examined.

However, it is now the case that the ECJ has taken very deep action with its decision. It leaves no doubt and explains very clearly that capricorn has never had financial security. This means that the COM will no longer be able to rate the letter from Deutsche Bank as sufficient after re-examining it.

It is not foreseeable what result the COM will reach with its investigation. But the result will determine how things will continue afterwards.

Why is the financing letter so important?

At the time of the award, there were still three bidders: H.I.G, NeXovation, and capricorn. All other bidders had previously been sorted out by the insolvency administrators.

The aim of the insolvency administrators was to put capricorn in a position that was ready for a decision. Bidder H.I.G., who had made a smaller bid but had funding, was led to believe that their prospects were good. They were so good that H.I.G. already started to found their own companies with the Nürburgring being part of their name. NeXovation was pushed aside because they could not provide evidence of secured funding. And so, there was then a period of a few days in which capricorn was able to present the highest offer with a financing confirmation, and this offer was submitted to the creditors' committee with some pressure and pushed through on the same day.

But now the capricorn's financing confirmation has dissolved in smoke. This leaves the question of why other bidders with higher bids were disadvantaged, even though they were no worse off than capricorn. All of this was already evident then, and it was just as obvious that other bidders would not put up with such a preference.

This is now the starting position for the renewed investigation of the COM: Bidders were rejected because they could not prove financing, but the buyer also had no money, which he then impressively demonstrated shortly afterwards.

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