

II

(Non-legislative acts)

DECISIONS

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***(notified under document C(2014) 3634)***(Only the German text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE**1.1. FORMAL INVESTIGATION**

- (1) Between 2002 and 2012, Germany undertook a number of support measures regarding the German race track Nürburgring, including support measures relating to the construction of a leisure park, hotels and restaurants as well as the organisation of Formula 1 races. The Nürburgring complex was owned by State-owned companies Nürburgring GmbH ('NG'), Motorsport Resort Nürburgring GmbH ('MSR') and Congress- und Motorsport Hotel Nürburgring GmbH ('CMHN').
- (2) In July 2010, Eifelpark GmbH ('Eifelpark'), an owner of a leisure park in the German Eifel region informed the Commission about alleged State aid involved in the so-called 'Nürburgring 2009' project and concerning the financing of the construction of leisure facilities at the Nürburgring racetrack. In April 2011, the Commission received a second State aid complaint by the German motorsport association 'Ja zum Nürburgring e.V.'. The latter was concerned that the — allegedly loss-making — Nürburgring 2009 project puts the activities of the racetrack itself into jeopardy.
- (3) By letter dated 21 March 2012 ('the decision of 21 March 2012'), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the aid measures 1-17 described in Section 2 of the present decision ('the formal

⁽¹⁾ Case SA.31550 (2012/C) (OJ C 216, 21.7.2012, p. 14) and case SA.34890 (2012/C) (OJ C 333, 30.10.2012, p. 1).

investigation procedure⁽²⁾. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested parties to submit their comments on the measures.

- (4) On 15 May 2012, Germany granted new support measures (measures 18 and 19) described in Section 2 below and notified them on 25 May 2012. By letter dated 7 August 2012 ('the decision of 7 August 2012'), the Commission informed Germany that it had decided to extend the formal investigation procedure in respect of the new aid measures ⁽⁴⁾. The Commission decision to extend the procedure was published in the *Official Journal of the European Union* ⁽⁵⁾. The Commission invited interested parties to submit their comments on the new measures.
- (5) The Commission received comments from Germany on 23 April 2012, 15 June 2012, 18 July 2012, 20 July 2012, 17 August 2012, 7 September 2012 and 18 January 2013. Concerning the decision of 21 March 2012, nine interested parties provided the Commission with comments between 9 August 2012 and 18 October 2012. On 18 October 2012 and 23 October 2012, the Commission forwarded the comments of the interested parties to Germany. Germany replied on 15 November 2012. In relation to the decision of 7 August 2012, comments from three interested parties were received by the Commission between 5 November 2012 and 30 November 2012. On 3 December 2012, the Commission forwarded the comments of the interested parties to Germany. Germany replied on 2 January 2013.
- (6) The Commission requested further information from Germany on 29 January 2013, 4 June 2014 and 5 June 2014, to which Germany replied on 15 April 2013, 4 June 2014 and 6 June 2014, respectively.

1.2. INSOLVENCY PROCEEDINGS AND SALE OF ASSETS

- (7) On 24 July 2012, the local court in Bad Neuenahr-Ahrweiler ordered a preliminary own administration of the assets ('*vorläufige Eigenverwaltung des Vermögens*') of the companies owning the Nürburgring, i.e. NG, MSR and CMHN. Insolvency proceedings in the form of own administration of the assets ('*Eigenverwaltung des Vermögens*') were eventually launched by the local court on 1 November 2012. The business of NG, MSR and CMHN has been managed since by the managing director under insolvency law ('*Eigenverwalter*' or '*Sanierungsgeschäftsführer*') and the insolvency administrator ('*Sachwalter*') (hereunder both referred to as 'the insolvency administrators') that are both not bound by instructions of the shareholders. NG, MSR and CMHN retained KPMG AG ('KPMG') to act on their behalf as the exclusive financial advisor to the sale of their assets in the insolvency proceedings, and to handle all contacts with the interested bidders.
- (8) Since October 2012, the Commission has been discussing with Germany and the insolvency administrators the State aid issues that could arise in the sale of the assets of NG, MSR and CMHN.
- (9) Since 1 November 2012, the whole complex has been operated by Nürburgring Betriebsgesellschaft mbH ('NBG'), a 100 % subsidiary of NG, established by the insolvency administrators. NBG replaced the previous operator Nürburgring Automotive GmbH ('NAG') ⁽⁶⁾.
- (10) In the context of the insolvency of NG, MSR and CMHN, the insolvency administrators have undertaken a sale of their assets since May 2013. On 15 May 2013, a tender process for the sale of those assets was launched. By two letters dated 23 May 2013, the Commission services provided to Germany and the insolvency administrator an opinion on the various options for selling the assets that would be compliant with the State aid rules ⁽⁷⁾.

⁽²⁾ A corrigendum of the decision of 21 March 2012 was sent to Germany by Commission decision of 20 June 2012.

⁽³⁾ OJ C 216, 21.7.2012, p. 14.

⁽⁴⁾ On 22 August 2012, case SA.34890 (2012/C), opened by the decision of 7 August 2012 extending the formal investigation procedure, was administratively merged with case SA.31550(2012/C).

⁽⁵⁾ OJ C 333, 30.10.2012, p. 1.

⁽⁶⁾ On the basis of the settlement agreement ('*Vergleichsvertrag*') concluded between NG, NAG and NBG on 27 November 2012.

⁽⁷⁾ In particular, the Commission services advised that (1) in case of an exclusion of the racetrack from the tender procedure, the presence of further state aid for the buyer and a transfer of 'old' aid could not be ruled out; (2) the imposition of general public access to the racetrack — with the exception of the use of the Nürburgring race track for commercial purposes, such as testing by the automotive industry — could under certain conditions be regarded as a neutral element in the pending state aid procedure; (3) in view of an employment guarantee for the employees until the end of 2016, the Commission decision in the SERNAM case (Commission decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*) should be taken into account; (4) the sale should not a priori lead to a transfer of state aid potentially subject to recovery from the owners of the assets to any purchaser(s) of the assets.

- (11) As regards the sale of assets of NG, MSR and CMHN, Germany provided information by submissions of 10 April 2013, 15 April 2013, 30 April 2013, 9 October 2013, 27 February 2014 and — following Commission's requests for information of 13 March 2014, 23 May 2014, 4 July 2014 and 7 July 2014 — on 23 April 2014, 26 May 2014 and 10 July 2014, respectively. Meetings between the Commission, Germany and the insolvency administrators took place in Brussels on 18 October 2012, 7 March 2013, 11 October 2013 and 26 February 2014. The Commission also received further submissions from interested parties.
- (12) On 23 December 2013, 'Ja zum Nürburgring e.V.' ('complainant 1') ⁽⁸⁾ and on 2 January 2014, the German automotive club ADAC e.V. ('complainant 2'), the latter automotive club participating in the sale process, submitted letters claiming that the ongoing sale of the Nürburgring assets was carried out by the insolvency administrators in breach of the State aid rules. On 4 February 2014, complainant 1 asked the Commission to suspend the sales process and provided new information. Following a letter from the Commission of 13 January 2014, Germany sent its comments on the claims raised by the two complainants by letter dated 10 February 2014. Complainant 1 submitted further comments on 8 July 2014, on which Germany submitted its comments on 14 July 2014.
- (13) On 10 April 2014, [Bidder 3], Inc. ('complainant 3' or '[Bidder 3]'), participating in the sale process, lodged a complaint on that process with the Commission. On 17 April 2014, Mr Meyrick Cox ('complainant 4'), a member of the consortium [Bidder 2], participating in the sale process and consisting of [Bidder 2] European Capital Partners LLP, Mr Meyrick Cox, Mr Marcus Graf von Oeynhausen-Sierstorff and Wadell & Reed, Inc. ('[Bidder 2]'), filed a complaint on that process with the Commission. These complaints were forwarded to Germany on 16 April 2014 and 17 April 2014, respectively. As for the complaint filed by complainant 4, Germany sent its comments on 25 April 2014. As for the complaint filed by complainant 3, Germany sent its comments on 5 May 2014. Complainant 3 sent additional arguments on 19 May 2014. Germany sent its comments to these additional arguments on 22 May 2014. Complainant 3 submitted a further piece of information on 23 May 2014, on which Germany submitted its answer on 10 July 2014, and sent further comments on 16 June 2014 and 7 July 2014, on which Germany sent its comments on 11 July 2014. The German authorities submitted further information on 29 July 2014, 20 August 2014, 8 September 2014 and 12 September 2014, which also covered comments submitted by complainants 3 and 4 on 3 September 2014, 21 August 2014 and 12 September 2014. Finally, two meetings between the Commission services and the German authorities, the insolvency administrators and KPMG took place on 22 July and 5 September 2014 in Brussels.
- (14) In view of a potential conclusion of the formal investigation procedure by a negative Commission decision requesting the recovery of incompatible aid, Germany has requested the Commission to confirm that a recovery obligation imposed on NG, MSR and CMHN would not concern the buyer of the assets sold or its subsidiary being an operating company, and that that recovery obligation would not hinder the operation of the Nürburgring by NRG during the season of 2014, following which a liquidation of the latter company is foreseen.

2. DESCRIPTION OF THE AID MEASURES

2.1. THE AID DONORS

- (15) Five entities have granted funding: (1) the Land Rhineland-Palatinate ⁽⁹⁾ ('the Land'); (2) Investitions- und Strukturbank Rheinland-Pfalz GmbH ('ISB'), fully owned by the Land; (3) Rheinland-Pfälzische Gesellschaft für Immobilien und Projektmanagement GmbH ('RIM'), fully owned by ISB; (4) the district ('Landkreis') of Ahrweiler; and (5) NG ⁽¹⁰⁾.

2.2. THE ALLEGED BENEFICIARIES

- (16) Until 30 April 2010, the Nürburgring complex ⁽¹¹⁾ was owned and managed by NG.

⁽⁸⁾ Following the termination of the business lease contract between NG and NAG in February 2012, complainant 1, one of the two initial complainants, dropped its negative position to the state aid to the race ring by arguing that the measures notified as rescue aid in 2012 should be approved, that the race ring itself had not received aid and it should therefore be taken out from the investigation, and that the operation of the Nürburgring is a service of general economic service ('SGEI').

⁽⁹⁾ 'Land Rheinland-Pfalz'

⁽¹⁰⁾ NG's business objective includes the support of the car sector and motor sport as well as promotion of tourism in the Eifel region. NG is 90 % owned by the Land and 10 % by the district of Ahrweiler. NG's supervisory board represents the Land and the district of Ahrweiler as NG's shareholders.

⁽¹¹⁾ For a description of the Nürburgring complex, please refer to Section 2.1 of the decision of 21 March 2012.

- (17) On 1 May 2010, a restructuring of the ownership and management of the Nürburgring complex took place. NG remained the owner of the race track and the leisure park and acquired indirect ownership of the hotels and restaurants via the 93,3 % ownership of MSR ⁽¹²⁾ and the indirect 93,3 % ownership of CMHN ⁽¹³⁾ (MSR and CMHN remained the direct owners of the hotels and restaurants). The operation of the race track, the leisure park, hotels and restaurants was granted to NAG ⁽¹⁴⁾ on the basis of a business lease contract (*'Betriebspachtvertrag'*), see measure 10 ⁽¹⁵⁾.
- (18) As described above, the beneficiaries NG, MSR and CMHN are subject to insolvency proceedings. Further beneficiaries for which a liquidation procedure has been launched are IPC Gesellschaft für internationale Projektcoordination mbH ('IPC') ⁽¹⁶⁾, Weber Projektierungs- und Realisierungs GmbH ('Weber') ⁽¹⁷⁾ and Cash Settlement and Ticketing GmbH ('CST') ⁽¹⁸⁾.
- (19) The beneficiaries which still operate and are not in an insolvency procedure are Mediinvest GmbH, renamed to Return Projektmanagement GmbH in the meantime ('Mediinvest') ⁽¹⁹⁾, Geisler & Trimmel General Contractor GmbH ('Geisler & Trimmel') ⁽²⁰⁾, NAG and Fahrsicherheitszentrum am Nürburgring GmbH & Co. KG ('FSZ') ⁽²¹⁾. The beneficiaries which do not exist any longer are Erlebnispark Nürburgring GmbH & Co. KG ('EWN') ⁽²²⁾, Motorsport Akademie Nürburgring GmbH & Co. KG ('MAN') ⁽²³⁾, Test & Training International GmbH ('TTI') ⁽²⁴⁾, Bike World Nürburgring GmbH ('BWN1') ⁽²⁵⁾, BikeWorld Nürburgring Besitz ('BWNB'), BikeWorld Nürburgring GmbH ('BWN2'), Camp 4 Fun GmbH & Co. KG ('Camp4Fun') ⁽²⁶⁾ and MI-Beteiligungs- und Verwaltungs GmbH ('MIB') ⁽²⁷⁾.
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- ⁽¹²⁾ The business objective of MSR is the project development or the construction of real property, vacation facilities, hotels and resorts as well as the participation in undertakings which are in connection with the project development of Nürburgring. Since 25 March 2010 MSR is 93,3 % owned by NG and 6,7 % owned by RIM. Until 25 March 2010 the shareholders of MSR were Mediinvest GmbH (49,5 %), Geisler & Trimmel General Contractor GmbH (33,8 %), NG (10 %) and Weber Projektierungs- und Realisierungs GmbH (6,7 %).
- ⁽¹³⁾ The business objective of CMHN is the construction and operation of hotels, vacation real property and resorts. CMHN is 100 % owned by MSR.
- ⁽¹⁴⁾ NAG's business objective is the operation of the race tracks, hotels, safety driving centre, driving school, multifunctional halls, *ringwerk* as well as all the other destinations at Nürburgring. Mediinvest GmbH and Lindner Unternehmensgruppe GmbH & Co Hotel KG hold each 50 % shares of NAG.
- ⁽¹⁵⁾ The hotels and the restaurants were managed by Lindner Hotels AG due to a contract with NAG.
- ⁽¹⁶⁾ The liquidation of IPC was registered in the trade register on 4 December 2008. The conclusion of the liquidation has not yet been notified to the trade register.
- ⁽¹⁷⁾ Weber carried out the construction of the hotels and the restaurants. On 23 November 2010, the liquidation of Weber was launched.
- ⁽¹⁸⁾ The business objective of CST was the operation of a cash free payment system allowing the customers to pay for their visit to any attraction of the complex with a card (*ringcard*). CST was 50 % owned by NG and 50 % owned by MIB until 1 November 2012. On 19 December 2012 NG as 100 % owner started the liquidation. The assets were transferred to NG. Pursuant to Germany, the elimination of the company from the trade register was filed on 22 May 2014.
- ⁽¹⁹⁾ The business objective of Mediinvest is mediation of conclusion of contracts regarding land and buildings, project development as well as the construction of real property, vacation facilities and resorts. Mediinvest is 100 % owned by Mr Kai Richter. On 18 June 2013, Mediinvest was renamed to Return Projektmanagement GmbH.
- ⁽²⁰⁾ Geisler & Trimmel carried out the construction of the hotels and the restaurants.
- ⁽²¹⁾ The business objective of FSZ is the construction, the ownership and the operation of a driving safety centre. It was 41 % owned by NG. The majority owners terminated the participation of NG in October 2013.
- ⁽²²⁾ The business objective of EWN was the operation of the '*Erlebniswelt*' with motor sport related attractions at Nürburgring. The company was renamed to *ringwerk* GmbH & Co. KG on 31 March 2011 and it was 100 % owned by NG until 24 August 2011 when its property accrued to NG and its elimination without formal liquidation was registered in the trade register.
- ⁽²³⁾ The business objective of MAN was the support of the German motor sport through the operation of an educational facility. NG was the only owner. The company was liquidated, the elimination of the company was registered in the trade register on 11 December 2013. All assets were transferred to NG.
- ⁽²⁴⁾ The business objective of TTI was the support, launch, construction and operation of driving safety centres. NG owned 26 % of the company, the remaining 74 % were owned by Brands Hatch Leisure Group Limited, Fawkham Longfield, Kent, UK (26 %), Test & Training Gesellschaft mbH, Teesdorf/Austria (26 %) and Tilke GmbH, Aachen (22 %). The company was liquidated. The elimination of the company was registered in the trade register on 4 December 2007.
- ⁽²⁵⁾ The business objective of BWN was trade with new and used motor bikes and the promotion of motor bike tourism in the region. With effect on 6 September 2005, Bike World Nürburgring GmbH ('BWN1') merged with BikeWorld Nürburgring Besitz GmbH ('BWNB'). The name of the acquiring company BWNB was subsequently changed into BikeWorld Nürburgring GmbH ('BWN2'). On 15 May 2007, NG sold its 49 % of the shares in the latter company to Mr Norbert Brückner and Mr Jörg Jovy and waived the repayment of its loans. BWN2 ceased operations at the Nürburgring in 2008, Pursuant to Germany, BWN2 was renamed to BikeWorld GmbH and changed the company's seat to St. Ingbert in the German Land Saarland.
- ⁽²⁶⁾ The business objective of Camp4Fun was the operation of an off-road-park. The company was 100 % owned by NG until 18 October 2010 when its property accrued to NG and its elimination without formal liquidation was registered in the German trade register.
- ⁽²⁷⁾ The business objective of MIB was the participation in other undertakings and the takeover of their business management. MIB was 80 % owned by Mr Kai Richter and 20 % owned by Mr Klaus König. On 18 June 2013, MIB merged with NAG.

2.3. DESCRIPTION OF THE MEASURES

- (20) The current investigation concerns the financing of the construction and operation of the facilities linked to the race track and the facilities for tourism before the 'Nürburgring 2009' project, of the construction of all such facilities under the 'Nürburgring 2009' project and of the organisation of Formula 1 races. The project 'Nürburgring 2009' intended to provide the race track with various attractions in order to increase its attractiveness over the whole year. The 'Nürburgring 2009' project consisted of part I (mainly tribune and entertainment facilities) and part II (mainly accommodation facilities) ⁽²⁸⁾.

(a) Measures covered by the decision of 21 March 2012

- (21) Measure 1 (provision of capital by the Land and the district of Ahrweiler to NG in the form of transfers to the capital reserve and increases of own capital): Capital in the form of transfers to the capital reserve ('*Einstellungen in die Kapitalrücklage*') ⁽²⁹⁾ was granted by the Land to NG in the amounts of EUR 2 179 000 ⁽³⁰⁾ on 1 May 2002 and EUR 22 839 241 ⁽³¹⁾ on 21 December 2004. In addition, the Land and the district of Ahrweiler carried out the increases of own capital ('*Kapitalerhöhung*') of NG of EUR 4 887 000 ⁽³²⁾ on 31 August 2004 and EUR 10 000 000 on 4 September 2007. In total, the Land and the district of Ahrweiler provided to NG capital amounting to EUR 39 905 241 between 2002 and 2007.
- (22) Measure 2 (shareholder loans of NG to its subsidiaries before the 'Nürburgring 2009' project): Independently from the 'Nürburgring 2009' project, NG granted to its subsidiaries the shareholder loans in the total amount of EUR 11 176 953,14, listed in Tables 1-4. The interest rate was agreed at 6 % and no collaterals were provided.

Table 1

Loans granted by NG to EWN, FSZ, MAN, TTI and Camp4Fun

Beneficiary	Date of contract	Amount (in EUR)	Interest rate (%)
EWN (*)	1.1.2006	4 853 553,04	6
EWN	30.6.2006	350 000	6
EWN	22.12.2006	350 000	6
EWN	4.7.2007	450 000	6
EWN	17.3.2009	182 313,24	6
EWN	29.4.2009	9 303,74	6
FSZ (**)	12.4.2002	[...] (****)	6

⁽²⁸⁾ For a more detailed description of part I and part II of the Nürburgring project, please refer to Section 2.2 of the decision of 21 March 2012.

⁽²⁹⁾ Capital reserve (capital surplus) is a deposit of a shareholder which is not subscribed capital. This term frequently appears as a balance sheet item as a component of shareholders' equity. Capital reserve is used to account for the amount that a firm raises in excess of the par value (nominal value) of the shares (common stock). Taken together, common stock issued and paid plus capital reserve represent the total amount actually paid by investors for shares when issued.

⁽³⁰⁾ The transfer of EUR 2 179 000 to the capital reserve through a waiver of interest due in 1999 for a loan taken over by the Land from the Federal Republic of Germany in 1981 ('*Altdarlehen Bund*').

⁽³¹⁾ The transfer of EUR 22 839 241 to the capital reserve through a waiver of claims from a loan taken over by the Land from the Federal Republic of Germany in 1981 ('*Altdarlehen Bund*').

⁽³²⁾ The amount of EUR 4 887 000 consists of a contribution by the Land through a waiver of claims from a loan taken over by the Land from the Federal Republic of Germany in 1981 ('*Altdarlehen Bund*') of EUR 4 398 300 and of a contribution by the district of Ahrweiler through liquidity of EUR 488 700.

Beneficiary	Date of contract	Amount (in EUR)	Interest rate (%)
FSZ	21.3.2003	[...]	6
FSZ	4.3.2008	[...]	6
MAN (***)	10.12.2002	100 000	6
TTI	15.8.2002	25 000	6
Camp4Fun (****)	26.5.2009	100 000	6
Camp4Fun	22.7.2009	100 000	6
Camp4Fun	2.11.2009	50 000	6
Camp4Fun	2.11.2009	50 000	6
Camp4Fun	18.12.2009	150 000	6
TOTAL		[...]	

(*) Since 2002, the loans to EWN were repaid in the amount of EUR 722 264,49.

(**) Since 2002, the loans to FSZ were repaid save the amount of EUR [...] that was settled in the context of a compensation payment of EUR [...] in connection with the exclusion of NG from Fahrsicherheitszentrum am Nürburgring Verwaltungs GmbH and the termination of the participation of NG in FSZ.

(***) MAN repaid the loan fully on 28 November 2005.

(****) Camp4Fun repaid the loans fully on 18 December 2003.

(*****) [...]: the information in brackets is covered by the obligation of professional secrecy.

Table 2

Loans granted by NG to BWNB before its renaming

Date of contract	Amount of loan (EUR)	Interest rate (%)
17.10.2003	300 000,00	6
4.2.2004	100 000,00	6
27.10.2004	100 000,00	6
Total	500 000,00	

Table 3

Loans granted by NG to BWN1 before its merger with BWNB

Date of contract	Amount of loan (EUR)	Interest rate (%)
4.2.2004	100 000,00	6
12.3.2004	200 000,00	6
27.4.2004	200 000,00	6
24.11.2004	110 000,00	6

Date of contract	Amount of loan (EUR)	Interest rate (%)
5.1.2005	200 000,00	6
7.1.2005	150 000,00	6
19.1.2005	100 000,00	6
22.2.2005	75 000,00	6
28.2.2005	75 000,00	6
21.4.2005	150 000,00	6
13.6.2005	100 000,00	6
30.6.2005	50 000,00	6
18.7.2005	50 000,00	6
22.7.2005	100 000,00	6
Total	1 660 000,00	

Table 4

Loans granted by NG to BWN2 after its merger with BWNB and BWNB's renaming

Date of contract	Amount of loan (EUR)	Interest rate (%)
20.9.2005	200 000,00	6
4.10.2005	50 000,00	6
2.11.2005	100 000,00	6
1.12.2005	50 000,00	6
2.1.2006	200 000,00	6
20.1.2006	200 000,00	6
28.2.2006	50 000,00	6
30.6.2006	20 000,00	6
15.8.2006	100 000,00	6
6.9.2006	130 000,00	6
15.1.2007	150 000,00	6
27.2.2007	100 000,00	6
4.4.2007	250 000,00	6
Total	1 600 000,00	6

- (23) Measure 3 (loans provided by the Land to NG via the liquidity pool): This measure consists of loans from a so-called liquidity pool ⁽³³⁾ of the Land provided by the latter to NG. In connection with the Formula 1 races and the 'Nürburgring 2009' project ⁽³⁴⁾, NG had been included in the cash pooling of the Land since 2003 and 2008, respectively ⁽³⁵⁾. ISB is also included in that liquidity pool. The aim of the cash pooling is to optimise the use of liquidity within the different holdings, foundations and public undertakings of the Land. The participation of the different undertakings and foundations in the cash pooling is based on a memorandum of understanding between the undertaking/foundation concerned and the Ministry of Finance of the Land. In the event that within the cash pooling, the liquidity demand exceeds the available funds, the liquidity gap is financed on short term basis on the capital market. From 30 June 2003 to 11 May 2010, the Land granted to NG loans totalling EUR 399 805 370 (including the loans granted by the Land to NG of EUR 53 443 493 for Formula 1 racing from 30 June 2003 to 30 June 2009, and the loans of EUR 170 million given by the Land to NG for the 'Nürburgring 2009' project from 23 June 2008 to 30 June 2010) ⁽³⁶⁾. The aid beneficiary is NG. For details, see Table 5.

Table 5

Loans paid out from the liquidity pool of the Land to NG (*)

Date	Amount paid out (EUR)	Purpose	Repayment of the loans (EUR)	Average interest rate/year (%)
30.6.2003	7 000 000	Formula 1 fee		2,40
4.8.2003			– 1 000 000	
19.9.2003			– 1 000 000	
28.10.2003			– 1 000 000	
1.1.2004	1 361 877	Interests for shareholder loans		2,06
30.6.2004	6 016 931	Formula 1 fee		
18.2.2005			– 1 400 000	2,10
27.5.2005	2 000 000	Formula 1 fee		
8.5.2006	10 000 000	Formula 1 fee		2,88
9.5.2006			– 8 000 000	
23.6.2006			– 2 000 000	
23.7.2007	13 000 000	Formula 1 fee		

⁽³³⁾ In the context of the 'Nürburgring 2009' project, the amounts of EUR 285 265 000 on 30 July 2010, EUR 5 million on 30 September 2010, EUR 5 million on 31 December 2010, EUR 5 million on 31 March 2011, EUR 5 million on 31 May 2011 and EUR 10 million on 31 July 2011 were put at the disposal of ISB by the Land. In total, between 31 July 2010 and 31 October 2011, ISB used an amount of EUR 315 265 000 from the liquidity pool of the Land for the refinancing of its loan to NG, MSR and CMHN of EUR 325 265 000 (measure 8). Until the full repayment of the loans in November 2011, the interest rate was set daily. The interests totalled EUR 2 326 680 and they were always repaid in time at the end of the following month.

⁽³⁴⁾ The 'Nürburgring 2009' project consisted of part I and part II: Part I includes *tribune*, *welcome center*, *ring arena* (for up to 5 100 visitors), *access facilities*, *ring boulevard* (shopping mall with the largest multitouch-video-wall in the world), the *Warsteiner event centre* (for up to 1 500 visitors), *Autoworld* ('*Autowelten*', sale spaces for car producers), *ring werk* (indoor attractions such as a multi-media theatre, historical exhibition, interactive applications and *ring racer*, the fastest roller coaster in the world) as well as *ring kartbahn* (an indoor kart track). Part II includes two hotels (including one casino), 100 vacation houses, five restaurants, discotheque and merchandising shop.

⁽³⁵⁾ For problems in the management and financing of the liquidity pool, see the 2011 annual report of the Court of Auditors of the Land, part II, pages 7 to 15, available at <http://www.rechnungshof-rlp.de/jahresberichte/>

⁽³⁶⁾ The loans from the liquidity pool were fully repaid, see Table 6. The interest totalling EUR 5 059 174,46 was paid.

Date	Amount paid out (EUR)	Purpose	Repayment of the loans (EUR)	Average interest rate/ year (%)
23.6.2008	4 000 000	Nürburgring 2009 project		3,87
21.7.2008	6 500 000	Nürburgring 2009 project		
22.8.2008	2 500 000	Nürburgring 2009 project		
26.8.2008	6 000 000	Nürburgring 2009 project		
23.9.2008	80 000 000	Establishment of 'Bardepot'		
25.9.2008	6 000 000	Nürburgring 2009 project		
13.10.2008	10 000 000	Nürburgring 2009 project		
19.11.2008	10 000 000	Nürburgring 2009 project		
8.12.2008			– 80 000 000	0,68
19.1.2009	10 000 000	Nürburgring 2009 project		
5.3.2009	95 000 000	Establishment of 'Bardepot'		
26.3.2009	15 000 000	Nürburgring 2009 project		
16.4.2009	10 000 000	Nürburgring 2009 project		
5.5.2009	15 000 000	Nürburgring 2009 project		
22.5.2009	15 000 000	Nürburgring 2009 project		
29.6.2009	10 000 000	Nürburgring 2009 project		
30.6.2009	15 426 562	Formula 1 fee		
13.7.2009			– 95 000 000	
24.7.2009	20 000 000	Nürburgring 2009 project		
2.10.2009	15 000 000	Nürburgring 2009 project		

Date	Amount paid out (EUR)	Purpose	Repayment of the loans (EUR)	Average interest rate/year (%)
24.3.2010	6 000 000	Nürburgring 2009 project		0,38
11.5.2010	9 000 000	Nürburgring 2009 project		
30.6.2010			– 170 000 000	
11.1.2011			– 40 405 000	
13.1.2011			– 370	

(*) Payments were based on a contractual agreement on the liquidity pool between the Land and NG of 20 February 2003. The interest for the respective loan was based on the daily rate provided to the Land on the market. The calculation of interests was carried out specifically for each day (actual/360).

- (24) Measure 4 (loan by NG to MSR): In the context of the 'Nürburgring 2009' project, NG granted a loan of EUR 300 000 to MSR with the interest rate of 7 % on 27 December 2007. No collaterals were provided.
- (25) Measure 5 (loans, letter of comfort and subordination of claims by NG to CST): From 27 August 2008 to 18 April 2011, NG provided to CST loans of the total amount of EUR 11 032 060 with an interest of 6 % ⁽³⁷⁾.

Table 6

Loans granted by NG to CST

Beneficiary	Date of the loan	Amount (in EUR)	Interest rate (%)
CST	27.8.2008	50 000	6
CST	9.10.2008	100 000	6
CST	30.1.2009	1 000 000	6
CST	18.3.2009	1 000 000	6
CST	17.4.2009	1 476 830,88	6
CST	22.6.2009	1 000 000	6
CST	20.7.2009	1 000 000	6
CST	28.10.2009	2 250 000	6
CST	10.2.2010	1 723 169,12	6

⁽³⁷⁾ The amount of EUR 3 589 297,04 was repaid on 31 December 2010. For problems in the management and financing of the CST, see the 2011 annual report of the Court of Auditors of the Land, part II, pages 16 to 21, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>

Beneficiary	Date of the loan	Amount (in EUR)	Interest rate (%)
CST	12.10.2010	250 000	6
CST	13.10.2010	150 000	6
CST	5.11.2010	150 000	6
CST	30.10.2010	250 000	6
CST	9.2.2011	500 000	6
CST	18.4.2011	132 060	6
Total		11 032 060	

- (26) In order to prevent the insolvency of CST, on 23 December 2009, NG provided a letter of comfort (*'Patronatserklärung'*) to CST committing itself until 31 December 2011 to take measures that are necessary for preventing insolvency of CST. The letter of comfort was acted upon. On 13 December 2010, NG declared subordination of its claims in the amount of EUR 10,4 million (*'Rangrücktritt'*) against CST.
- (27) Measure 6 (service fee paid by NG to IPC, and loan to MSR through PNG as intermediary): Between 2006 and 2008, IPC received a total amount of EUR 640 000 from NG as consideration for its services consisting in searching for private investors. In addition, NG granted a loan of EUR 3 million to Pinebeck Nürburgring GmbH (*'PNG'*) with the interest rate of 6 % on 15 October 2008. On 15 October 2008, PNG used this loan for granting a loan of EUR 3 million to MSR with the interest rate of 6 % whereas PNG disbursed the loan only up to an amount of EUR 2 941 000 ⁽³⁸⁾. Both loans had collaterals in favour of NG in the value of EUR 3 million.
- (28) Measure 7 (cession of claims of MIB to NG): On 17 April 2009, MIB ceded its claims from loans taken by CST as borrower of EUR 1 476 830,88 ⁽³⁹⁾ to NG. For these loans, NG paid to MIB the amount of EUR 1 476 830,88. This transaction allowed MIB to be fully repaid by NG who in turn became the creditor of CST ⁽⁴⁰⁾.
- (29) Measure 8 (ISB loan to NG, MSR and CMHN): In order to save financing costs and to safeguard a long-term financing, a full restructuring of funding arrangements took place on 28 July 2010. The liabilities regarding the liquidity pool of the Land (measure 3), a loan of EUR [...] granted by Bank für Tirol und Vorarlberg AG to CMHN ⁽⁴¹⁾, a loan of EUR [...] granted by Kreissparkasse Ahrweiler to MSR ⁽⁴²⁾ and the loans of RIM to MSR worth EUR 85 512 000, granted in the form of the silent participations of RIM in Mediinvest and subsequent loans of Mediinvest to MSR (measure 11) were restructured in one loan of EUR 325 265 000 given by ISB to NG, MSR and CMHN, upon an instruction by the Land ⁽⁴³⁾. The restructuring of the funding arrangements in question constitutes a separate measure, additional to the underlying loans. This results to a new loan in favour of NG, MSR and CMHN. The loan was given in four tranches: tranche 1 of EUR 96 574 200 to NG for infrastructure, tranche 2 of EUR 113 590 800 to NG for other investments ⁽⁴⁴⁾, tranche 3 of EUR 92 000 000 to MSR for other investments and tranche 4 of EUR 23 100 000 to CMHN for other investments. Tranche 1 relating to the facilities of the ring does not bear interest. Tranches 2 to 4 relate to the measures for promotion of tourism (for the interest rate see Table 7 below). Furthermore, the level of the collateralisation of the ISB loan in the form of mortgages equals EUR 93 658 000 EUR whereas the collateralisation of tranches 2 to 4 has priority over the collateralisation of tranche 1. Table 7 summarises the conditions of the ISB loan and the at that time applicable base lending rate.

⁽³⁸⁾ The loan was fully repaid on 22 January 2009, the interests of EUR 48 500 were paid. However, Germany stated that the loan was repaid to NG by Geisler & Trimmel, not by MSR to PNG and by PNG to NG.

⁽³⁹⁾ EUR 1 450 000 plus interests of EUR 26 830,88.

⁽⁴⁰⁾ In 2010, NG offset the loan with its liabilities towards CST in the amount of EUR 1 439 297,04. The remaining liability of CST towards NG in the amount of EUR 37 533,84 was eliminated in the context of the liquidation of CST and the transfer of its assets to NG.

⁽⁴¹⁾ On 25 May 2008, Bank für Tirol und Vorarlberg AG granted a loan of EUR [...] to CMHN.

⁽⁴²⁾ On 18 January 2010, Kreissparkasse Ahrweiler provided a loan of EUR [...] to MSR.

⁽⁴³⁾ Based on the loan request by the Land, ISB did not carry out usual checks of the loan.

⁽⁴⁴⁾ As regards tranche 2, NG did not use an amount of EUR 4 735 000 of the loan contracted in the amount of EUR 118 325 800 and the Land paid to NG therefore an amount of EUR 113 590 800; in this context NG paid to ISB a compensation of EUR 141 835,54.

Table 7

Financing conditions of the loan granted by ISB

Tranche No	Beneficiary	Amount paid out (EUR)	Date of contract	Interest rate ⁽¹⁾
1	NG	96 574 200	28.7.2010	0 %
2	NG	113 590 800	28.7.2010	until 31.12.2012: EONIA plus 0,64 % = 1,121 % from 1.1.2013: Commission reference rate
3	MSR	92 000 000	28.7.2010	until 31.12.2012: EONIA plus 0,64 % = 1,121 % from 1.1.2013: Commission reference rate
4	CMHN	23 100 000	28.7.2010	until 31.12.2012: EONIA plus 0,64 % = 1,121 % from 1.1.2013: Commission reference rate

⁽¹⁾ For the average EONIA rate as of 28 July 2010, see <http://www.global-rates.com/interest-rates/eonia/2010.aspx>

- (30) Measure 9 (guarantee of the Land to ISB concerning measure 8: ISB loan granted to NG, MSR and CMHN): On 28 July 2010, the Land provided an unconditional and irrevocable guarantee and indemnification statement (100 % coverage of liabilities) towards ISB for the NG, MSR and CMHN's fulfilment of all the liabilities from the ISB loan (measure 8). NG, MSR or CMHN did not pay any fee for the guarantee. Similarly to the ISB loan (measure 8), the guarantee relates both to the facilities of the ring and the measures for promotion of tourism.
- (31) Measure 10 (business lease of the Nürburgring complex to NAG): As part of the 2010 restructuring process, from 1 May 2010, NG, EWN, Nürburgring Adventure GmbH ⁽⁴⁵⁾, Camp4Fun, MSR and CMHN let on the basis of a business lease contract the race circuit, the leisure park and other facilities to NAG ⁽⁴⁶⁾ for the period of 20 years ⁽⁴⁷⁾, without organising an open selection procedure. The lease related to the facilities and operation of the ring and the measures for the promotion of tourism. However, the organisation of Formula 1 races was the subject of a separate concession agreement (measure 17) and it was thus excluded from the lease. The minimum annual rent was fixed at EUR 0 from 1 May 2010 to 30 April 2011, EUR 5 million from 1 May 2011 to 30 April 2012, EUR 11,5 million, if deficiencies in construction defects have been removed until 30 April 2012, or otherwise EUR 10 million from 1 May 2012 to 30 April 2013, and 15 million as from 1 May 2013 EUR ⁽⁴⁸⁾. For the lease from 1 May 2010 to 31 October 2012 NAG actually paid EUR [...] ⁽⁴⁹⁾. The lease contract was terminated retroactively as of 31 October 2012 by the settlement contract ('Vergleichsvertrag') concluded between NG, MSR, CMHN, CST, NBG and the insolvency administrator on the one side and NAG, Mediinvest and other companies on the other side on 27 November 2012.

⁽⁴⁵⁾ Nürburgring GmbH was the sole shareholder of Nürburgring Adventure GmbH on the date of the conclusion of the business lease contract concerned. On 25 October 2010, Nürburgring Adventure GmbH merged with NG.

⁽⁴⁶⁾ On 25 March 2010, when the business lease contract was concluded, NAG's name was GrundKapital Management GmbH.

⁽⁴⁷⁾ With a unilateral option of NAG to extend the duration of the lease contract twice by 5 years.

⁽⁴⁸⁾ The lease contract foresees: (a) a minimum rent; and (b) a rent dependent on the earnings before interest, taxes, depreciation, and amortisation (EBITDA) of the lessee (EBITDA rent): from 1 May 2010 to 30 April 2011 90 % of EBITDA of the lessee, from 1 May 2011 to 30 April 2012 90 % of EBITDA of the lessee, but at least EUR 5 million, from 1 May 2012 to 30 April 2013 85 % of EBITDA of the lessee, but at least EUR 11,5 million, if deficiencies in construction defects have been removed until 30 April 2012, or otherwise 90 % of EBITDA of the lessee, but at least EUR 10 million, and as from 1 May 2013 annually 85 % of EBITDA of the lessee, but at least EUR 15 million. For a critical analysis of the level of the rent, see the 2012 annual report of the Court of Auditors of the Land, pages 98 to 102, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>

⁽⁴⁹⁾ EUR [...] as rent, plus EUR [...] based on the settlement contract.

- (32) Measure 11 (loans granted by RIM to MSR through Mediinvest as intermediary and in case of one loan also through PNG as intermediary): Between 29 May 2008 and 7 July 2009, RIM granted to Mediinvest eleven loans in the total amount of EUR 85 512 000 in the form of silent participations ('*stille Beteiligungen*') to finance part II (hotels) of the 'Nürburgring 2009' project ⁽⁵⁰⁾. During the same period of time, Mediinvest, which acted as an intermediary between RIM (granting authority) and MSR (beneficiary), used these funds to provide loans to MSR with an increased interest (see below) ⁽⁵¹⁾. The silent participations were provided with a fixed remuneration plus a variable remuneration of 2 % which would in principle depend either on the sale of Mediinvest's share of MSR or on the profits made by Mediinvest in 2009. In addition, collaterals were provided. These silent partnerships are summarised in Table 8:

Table 8

Silent participations of RIM in Mediinvest

	Date of contract	Amount (EUR)	Interest rate (%)
1	29.5.2008	[...]	[...]
2	29.9.2008	[...]	[...]
3	12.11.2008	[...]	[...]
4	22.12.2008	[...]	[...]
5	30.4.2009	[...]	[...]
6	14.5.2009	[...]	[...]
7	26.5.2009	[...]	[...]
8	9.6.2009	[...]	[...]
9	23.6.2009	[...]	[...]
10	30.6.2009	[...]	[...]
11	7.7.2009	[...]	[...]
TOTAL		[...]	

- (33) Between 27 May 2008 and 7 July 2009, Mediinvest provided nine loans to MSR in the total amount of EUR 75 484 000; they contained the interest rate of 7 % (or 5,1 % backdated as from 1 November 2009) and no collaterals were provided. These loans are summarised in Table 9:

Table 9

Loans granted by Mediinvest to MSR

	Date of contract	Amount (EUR)	Interest rate
1	27.5.2008	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.
2	22.12.2008	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.

⁽⁵⁰⁾ The loans from the silent participations were fully repaid by Mediinvest to RIM on 30 July 2010. In total, Mediinvest paid to RIM the interests of EUR [...]. Germany did not clarify whether MSR repaid the loans granted to it by Mediinvest.

⁽⁵¹⁾ According to the Court of Auditors of the Land, the advantages from the increased interests in favour of Mediinvest equal EUR [...] (Opinion of the Court of Auditors of the Land of 15 June 2010, part II, page 20).

	Date of contract	Amount (EUR)	Interest rate
3	30.4.2009	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.
4	15.5.2009	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.
5	26.5.2009	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.
6	9.6.2009	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.
7	23.6.2009	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.
8	30.6.2009	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.
9	7.7.2009	[...]	[...] p.a.; from 1.11.2009: [...] % p.a.
TOTAL		75 484 000	

- (34) In addition, on 12 November 2008, Mediinvest granted one loan of EUR 10 million to PNG with the interest rate of 6 % (until 31 December 2009) whereas the latter company granted a loan of the same amount and same interest rate to MSR on the same date.
- (35) Measure 12 (guarantee of the Land to ISB concerning measure 11: silent participations of RIM in Mediinvest): In the context of loans granted by ISB to RIM, used for loans of RIM granted to Mediinvest (measure 11), the Land provided vis-à-vis ISB a guarantee for liabilities up to EUR 140 million (100 % coverage of liabilities) ⁽⁵²⁾. No guarantee fee was paid. The Commission considers that the beneficiary of the measure in question was MSR, as that company was the beneficiary of measure 11.
- (36) Measure 13 (revenues from tax on gambling provided by the Land to NG): In February 2009, an amendment to the Gambling Act of the Land was adopted, enabling the transfer of revenues from a tax on gambling to NG. The transferred tax proceeds were intended to be used to promote tourism. The amounts were EUR 1,6 million on 29 December 2009, EUR 3,2 million on 29 October 2010 and EUR 3,2 million on 29 March 2011, i.e. EUR 8 million in total.
- (37) Measure 14 (shareholder loans by the Land to NG and debt subordination for the 'Nürburgring 2009' project): For the preparation and implementation of the 'Nürburgring 2009' project, NG received from the Land interest-free loans with no fixed maturity of EUR 20 million on 21 August 2007, EUR 10 million on 22 December 2009, EUR 4,65 million on 28 December 2010 and EUR 3,2 million on 26 April 2011 ⁽⁵³⁾. In addition, on 9 December 2011, the Land provided to NG a loan of EUR 4,95 million. Moreover, the Land declared debt subordination ('Rangrücktritt') in relation to the afore-mentioned loan of EUR 20 million on 29 August 2007 in order to avoid insolvency of NG, ranking its claims against NG in the last position of all creditors' claims against NG.
- (38) Measure 15 (transfer of shares of MSR from Mediinvest and Geisler & Trimmel to NG and from Weber to RIM): With the share purchase agreement dated 25 March 2010, the shares of MSR held by Mediinvest (49,5 %) and Geisler & Trimmel (33,8 %) were transferred to NG which already held 10 % of these shares. The shares of MSR held by Weber (6,7 %) were transferred with the same agreement to RIM. The purchase price amounted to EUR 1 per transaction (i.e. EUR 3 in total) ⁽⁵⁴⁾.

⁽⁵²⁾ The guarantee of up to EUR 50 million of 28 August 2008 was increased to EUR 80 million on 17 December 2008 and subsequently, to EUR 140 million on 26 May 2009.

⁽⁵³⁾ The declared purpose of the loans of 28 December 2010 and 26 April 2011 is the coverage of negative cash flow for the mid-term planning of NG for the period of 2010 to 2030 as indicated in the report by Ernst & Young of 9 September 2010.

⁽⁵⁴⁾ NG and RIM therefore currently hold 93,3 % and 6,7 % of shares in the MSR, respectively. Through the sale contract, the sellers were not released from their liability, and neither NG nor RIM took over financial obligations.

- (39) Measure 16 (shareholder loan and grant by the Land to NG for Formula 1 races): Furthermore, an interest free loan with no fixed maturity of the Land to NG of EUR 40 405 000 for the offsetting of liabilities related to Formula 1 under the liquidity pool was provided on 11 January 2011. In addition, in July 2011, the Land provided to NG a grant of EUR 13,5 million for the organisation of Formula 1 races in 2011.
- (40) Measure 17 (Formula 1 concession): On 13 December 2010, a concession agreement regarding the organisation of Formula 1 race events was concluded between NG and NAG ⁽⁵⁵⁾. In this concession agreement, NG asked NAG to organise the Formula 1 races and committed itself to provide compensation ⁽⁵⁶⁾. Pursuant to Germany, on the basis of this agreement, NAG was supposed to receive financial means which would not be taken into account for the calculation of the rent under the business lease contract concluded between NG and NAG, but no payments were actually made between NG and NAG. On the basis of the settlement contract concluded between NG, MSR, CMHN, CST, NBG and the insolvency administrator on the one side and NAG, Mediinvest and other companies on the other side on 27 November 2012, the concession was terminated.

(b) Measures covered by the decision of 7 August 2012

- (41) Measure 18 (rescheduling of interest payments agreed by ISB in favour of NG, MSR and CMHN): On 15 May 2012, ISB made a deferral of interests due on 30 April 2012 until 15 November 2012 in the amount of EUR 2,98 million (including a deferral of compensation in the amount of EUR 48 913,78 for an unspent part of the loan). For the rescheduled amounts, an interest rate of 8,17 % per annum was charged. The exact distribution of the deferral of interests to the individual companies is EUR 1,473 million for NG, EUR 1,205 million for MSR and EUR 303 000 for CMHN.
- (42) Measure 19 (debt subordination and guarantee): On 15 May 2012, the Land declared debt subordination regarding loans amounting up to EUR 254 million granted by ISB to NG, MSR & CMHN as part of the loan of EUR 325 265 000 (measure 8). Furthermore, as regards repayment of those loans from 2014 on, in case NG, MSR and CMHN should not be able to pay, on 15 May 2012, the Land declared that these companies will be released from their obligation to pay and that the Land would honour its guarantee previously given to ISB (measure 9).

2.4. GROUNDS FOR INITIATING AND EXTENDING THE FORMAL INVESTIGATION PROCEDURE

- (43) In the decision of 21 March 2012 and the decision of 7 August 2012, the Commission reached the preliminary conclusion that all nineteen measures qualified as State aid, and it expressed doubts as regards their compatibility with the TFEU.

2.5. THE TENDER PROCESS AND THE SALE OF ASSETS

- (44) The tender process was announced on 14 May 2013 with a press release issued by the insolvency administrator. A call for tenders was published by KPMG in the Financial Times, Handelsblatt and on the Nürburgring website

⁽⁵⁵⁾ For a critical analysis of the level of the compensation, see the 2012 annual report of the Court of Auditors of the Land, pages 103 to 107, available at <http://www.rechnungshof-rlp.de/Jahresberichte/>

⁽⁵⁶⁾ The contractually agreed compensation to NAG included a flat fee from the sold tickets of EUR [...] million, [...] % of revenues from the sale of those tickets which are sold after the first [...] thousand tickets, and the revenue from [...] tickets sold in 2011 or from [...] thousand tickets sold in the following years. For the Formula 1 races in 2011, the compensation was at least EUR [...]; if the ticket revenues were below EUR [...], the compensation was reduced by EUR [...] for each EUR [...] of decrease of the revenues below EUR [...] (e.g. if the ticket revenues were EUR [...] million, the compensation was EUR [...] million); however, the minimum compensation was EUR [...]. The fees to Formula 1 organisers and drivers as well as the maintenance of the track under the grade 1 licensing of Fédération Internationale de l'Automobile ('FIA') are paid fully by NG and they did not fall under the commitments of NAG.

on 15 May 2013. The process involved around 300 investor contacts that were handled by KPMG on behalf of the sellers. In the tender process, the interested parties were invited to submit an expression of interest (around 70 entities expressed their interest) and after being provided with various documentation on the Nürburgring they were requested to submit an indicative offer until 26 September 2013. With letter dated 19 July 2013, all interested investors were informed by the sellers that: 'All parties that intend to participate in next stage of the process are invited to submit an Indicative Offer by 5:00 pm (CET) on 12 September 2013. Offer handed in after the deadline will also be considered' ⁽⁵⁷⁾. The above deadline of 12 September 2013 for the submission of indicative offers was extended to 26 September 2013 by letter of 12 September 2013 by indicating that: 'The Vendors have decided to extend the deadline for Indicative Offers, in order to enable potential investors to complete their analysis of the provided material. The updated deadline now ends at 5 p.m. CET on 26 September 2013. Offers handed in after the deadline will also be considered' ⁽⁵⁸⁾. By letter dated 17 December 2013, the deadline for the submission of confirmatory bids was postponed by the sellers from 11 December 2013 to 17 February 2014 by indicating that: 'In order to enable potential investors to complete their analysis of the provided information material and to provide a final offer that fully reflects the value potential of the Nürburgring, the timeline which used to end at 5 p.m. CET on 11 December 2013 now ends at 5 p.m. CET on 17 February 2014. For the sake of clarity, offers handed in after that timeline will, in principle, also be considered provided that the terms of the offer qualify for the further process. Any disadvantage caused by the delay will not be compensated for and will have to be fully borne by the investor. Please note that the Vendors may choose the parties which will qualify for the further process shortly after the updated timeline ends' ⁽⁵⁹⁾.

- (45) The insolvency administrators decided and implemented the following sales structure for the sale of assets of NG, MSR and CMHN.

- (46) For the tender process, the assets of NG, MSR and CMHN were split in 11 individual asset clusters ⁽⁶⁰⁾. According to the published call for expression of interest: 'The Vendors intend to sell the assets to one or more investors ("Project RING"). Investors will have the opportunity to acquire all assets, defined asset clusters ("Proposed Asset Clusters") or individual assets. The Proposed Asset Clusters have been defined based on the separability of assets and related costs. It is intended that the transaction will be structured as an asset deal. All third party and financing liabilities will remain with the insolvent legal entities allowing a new start on a clean balance sheet' ⁽⁶¹⁾. Also, according to the letter sent to the interested investors on 19 July 2013: 'Investors will have the opportunity to acquire the assets of the Vendors in either their entirety, or in defined asset clusters ("Proposed Asset Clusters"), or in individual assets. Proposed Asset Clusters have been defined based on the severability of assets of the Nürburgring and related costs' ⁽⁶²⁾.

- (47) The insolvency administrators did not establish any conditions as regards the future use of the assets. Any limitations of that use stem from existing national construction and environmental law and the public access to the Nürburgring which is guaranteed by the relevant act of the Land.

- (48) According to the tender's Selection Criteria, as defined in the letters sent to the interested investors on 19 July 2013 and 17 October 2013, the investors would be selected based on: (a) a maximisation of the total proceeds for all of the assets; and (b) the expected transaction security ⁽⁶³⁾. These criteria were described in detail as follows: 'Value for the assets in scope of the respective offer; Potential value implications for those assets that are not included in the respective offer, if any; Costs for further separation of the assets in scope of the respective offer, if any; Costs to fulfil key assumptions and conditions of the respective offer; Closing probability'. It was

⁽⁵⁷⁾ Letter of 19 July 2013 titled 'Project RING — information and procedures for the submission of an indicative offer', page 3, section 'Indicative Offer'.

⁽⁵⁸⁾ Letter of 12 September 2013 titled 'Project RING — Extension of the timeline for the submission of indicative offers', page 1, section 'Extension of the Deadline for the Indicative Offers'.

⁽⁵⁹⁾ Letter of 17 December 2013 titled 'Project RING — Extension of the timeline for the submission of final offers', page 1, section 'Extension of the timeline for the final offers'.

⁽⁶⁰⁾ 1A. Grand-Prix track; 1B. Northern track; 2. 4-star hotel; 3. Eiffel village 'Green Hell' with 3-star hotel; 4. Holiday parc Dreeses; 5. Right of construction on land Dorint; 6. Off-road park; 7. Personnel house Adenau; 8. Apartment building Balkhausen; 9. House Licht; 10. Other land.

⁽⁶¹⁾ Section 'Disposal of the assets of the Nürburgring' of the call for expression of interest.

⁽⁶²⁾ Letter of 19 July 2013 titled 'Project RING — information and procedures for the submission of an indicative offer', page 1, section 'Proposed Transaction'.

⁽⁶³⁾ Selection Criteria set in page 4 of the letter of 19 July 2013 titled 'Project RING — information and procedures for the submission of an indicative offer', and in page 6 of the letter of 17 October 2013 titled 'Project RING — procedures for the submission of a final offer'.

further explained that: 'the closing probability will be assessed by taking into consideration the (i) outstanding due diligence requirements; (ii) secured financing for the transaction, supported by confirmation of financing partners; (iii) required steps for the regulatory clearance; (iv) required internal approval steps until the transaction could be consummated; and (v) strategic rationale for the acquisition or future plans for the assets of the NG, MSR and CMHN and the likelihood of their realisation'. It is noted that environmental considerations were not part of the criteria for selecting the final offer.

- (49) By letters of 17 October 2013 and 17 December 2013, the bidders that submitted qualified offers were informed that: (a) indicative or final, respectively, offers would be considered even if submitted after the expiry of the respective deadlines, provided that the terms of the offers qualify for the further process; (b) disadvantages caused by late submission would be fully borne by the bidder in question; and (c) the sellers could choose the qualified bidders shortly after the expiry of the deadline. According to the insolvency administrators, the bidders were informed by the sellers that they could improve an offer or submit a new offer between the deadline and the conclusion of the sales contract.
- (50) 24 candidates ⁽⁶⁴⁾ sent an indicative bid until the beginning of February 2014. Of these candidates, 18 were allowed to proceed to the due diligence stage ⁽⁶⁵⁾, and 13 bidders submitted confirmatory offers for all or individual asset clusters or individual assets, including offers for all assets from four bidders: (1) Capricorn Automotive GmbH and Capricorn Holding GmbH ('Capricorn'); (2) [Bidder 2]; (3) [Bidder 3]; (4) [Bidder 4]. The bids were considered on the basis of: (a) maximisation of the total proceeds for all of the assets; and (b) the expected transaction security ⁽⁶⁶⁾. The bids which fulfilled these criteria were considered in the final stage of evaluation; those were bids for all asset clusters. Of those bidders, Capricorn and [Bidder 2] submitted confirmations of their access to the funding necessary for the purchase: on 7 March 2014, [Bidder 2] submitted a binding letter dated 24 February 2014, informing KPMG of its financial capabilities; and on 11 March 2014, Capricorn submitted to the sellers a binding letter by [...] dated 10 March 2014, addressed to Capricorn, informing the latter that [...] was willing to underwrite a loan of EUR 45 million to Capricorn for the purpose of the acquisition of the assets in question. On the basis of their offers, contracts were negotiated in parallel and notarised, with [Bidder 2] on 7 March 2014 and with Capricorn on 10 March 2014.
- (51) On 11 March 2014, the Creditors' Committee of the insolvent companies approved the sale to Capricorn (specifically to capricorn NÜRBURGRING Besitzgesellschaft GmbH), as the one with the highest offer including a proof of financing. In particular, the offer of Capricorn was at a price of EUR 77 million, whereas the offer of [Bidder 2] was at a price of EUR [47-52] million. The sales contract with Capricorn was signed by NG, MSR and CMHN on 11 March 2014 and by the insolvency administrator on 13 March 2014 ⁽⁶⁷⁾.
- (52) Following the tender process described above, the assets of NG, MSR and CMHN (all tangible and intangible assets including all land, buildings, trademarks and internet domain rights), but not any liabilities and financial assets, were bought by Capricorn. The shareholders of Capricorn are capricorn HOLDING GmbH ⁽⁶⁸⁾ with 67 % of the shares and GetSpeed GmbH & Co KG ⁽⁶⁹⁾ with 33 % of the shares.

⁽⁶⁴⁾ Nine offers related to all asset clusters, three concerned the race track and 11 offers related to other asset clusters or individual assets.

⁽⁶⁵⁾ The offer for all assets with the highest price scored 100 %. In total, there were 6 indicative offers for all assets that offered more than 25 % of the best offer. The offers for all assets that did not reach 25 % of the best offer, were not taken into account any further because of their price level. The same was valid for offers for the race track and the offers for other assets because they altogether did not reach 25 % of the best offer. 5 out of the 6 qualified offers for all assets did not clarify their financing at the moment of the submission of the indicative offer, and they were therefore asked to present their ability to finance the purchase of the assets.

⁽⁶⁶⁾ See footnote 60 above.

⁽⁶⁷⁾ According to Germany, the repartition of the sales price of EUR 77 million to the three insolvent companies will be made in line with the national insolvency and tax law.

⁽⁶⁸⁾ The Capricorn group is a German business group internationally active in manufacturing racing automotive assemblies, testing racing cars and maintaining historical racing cars. capricorn HOLDING GmbH's shares are all owned by Mr Robertino Wild.

⁽⁶⁹⁾ GetSpeed GmbH & Co KG is a German motor sport undertaking active in the maintenance of cars, the organisation of race events and the stress level monitoring of drivers. 99 % of the shares of this company are owned by Mr Axel Heinemann and the other 1 % by Mr Adam Osieka.

- (53) The transfer of the employment contracts associated with the tendered asset clusters follows from German law ⁽⁷⁰⁾ and German labour courts jurisprudence ⁽⁷¹⁾, which foresee that the employees are automatically transferred to the buyer of the assets, but that in an insolvency context the buyer can request from the insolvency administrator to terminate employment contracts. In the case at hand, the sales contract foresees that NBG (the current operator of the Nürburgring complex) would in 2014 terminate employment contracts upon request of Capricorn. Indeed, the latter concluded that, in order to achieve an economically viable operation of the acquired assets, it would need 253 of the total 297 employees (as of beginning of 2014), and thus requested NBG to terminate the employment contracts of 44 employees. As a result, 85 % of the total staff of the insolvent companies will be transferred to Capricorn on 1 January 2015 (date when Capricorn will start operating the acquired assets).
- (54) The parties to the sales contract are obliged to implement it only upon the existence of a Commission decision declaring that neither the buyer nor its operational company are beneficiaries of the aid under assessment subject to recovery, and: (a) either the delays to bring a legal challenge against the Commission decision have expired without an appeal; or (b) in case of an appeal, a not further challengeable court judgment has been rendered confirming the Commission decision. This condition aimed at covering the discrepancy between the assets' price of EUR 77 million and the financial risk they carried, stemming from the possible liability from a State aid recovery of EUR 456 million based on the Commission decisions of 21 May 2012 and 7 August 2012 to open and extent, respectively, the formal investigation procedure.
- (55) The business in the season 2014 will be run by NBG. Afterwards, a liquidation of this company is foreseen. The 2014 cash flow of NBG (EUR 6 million) is cashed in by the seller. It represents, in form of a flat-fee, a part of the sales price in order to facilitate the handling of the contract. As regards the beneficiaries NG, MSR and CMHN, in the context of their insolvency proceeding, they have definitely ceased all activities and do not employ any personnel. At the same time, the insolvency administrators are entrusted with legal proceedings under German bankruptcy law, aiming at the arrangement of all the claims and obligations of the companies in insolvency proceedings. Once those claims and obligations are settled, and the insolvency court approves the final liquidation, the companies can be erased from the company registries.
- (56) In order to run the business in the season of 2015, the buyer (Capricorn) will establish the operating company capricorn NÜRBURGRING GmbH ('OpCo') that will conclude contracts for the season 2015. With a view to ensuring that the aid beneficiaries will definitively disappear from the market, the Commission was informed of the following measures. If there is no non-challengeable Commission decision at the beginning of 2015, the sold assets will be transferred before 1 January 2015 to a new company ('NewCo') in which 95,1 % of the shares will be owned by the buyer and 4,9 % by an independent trustee. The trustee will be acting in the interests of the creditors and not of the insolvent beneficiaries of State aid, but will not be subject to instructions by the creditors. Furthermore, a lease contract will be concluded between NewCo and OpCo, terminating on the date of entry into force of the sales contract. The business of the OpCo will be run under its name, on the basis of its own business plan and with the workforce of its own choice (see recital 53 above). There will be a lease fee of totally EUR [4,6-5,1] per year to be paid to NewCo, which will serve the liquidation mass of the Nürburgring companies (all payments in favour of the insolvency estate are transferred to the trust accounts of the insolvency administrators, solely in order to be distributed to the creditors). When the decision of the Commission becomes effective, the trustee will transfer all his shares in NewCo to the buyer. On the other hand, if the buyer does not fulfil its contractual payment obligations, the trustee will be able to sell the assets. In addition, should an annulment of the Commission decision take place, the assets will return to the insolvency administrators in order to be sold immediately, since the liquidation obligation of German insolvency law continues to exist even in such case. There is no option of continuing the business of the Nürburgring companies by NewCo. The Commission notes that this arrangement does not change the basic conditions of the sale, including the sales price and payment terms, which remain the same ⁽⁷²⁾.

⁽⁷⁰⁾ § 613 a of the German Civil Code ('Bürgerliches Gesetzbuch').

⁽⁷¹⁾ BAG, Judgement of 19 December 2013 — 6 AZR 790/12; BAG, Judgement of 20 March 2003 — 8 AZR 97/02.

⁽⁷²⁾ The insolvency administrators and the buyer agreed on 13 August 2014 that the second instalment of the purchase price is to be paid on 31 October 2014 instead of 31 July 2014, with interest of 8 % and pledges (replacing the cash collateral of EUR [4,6-5,1] million) on: (a) shares in Capricorn of Mr Robertino Wild, shareholder of Capricorn; (b) all claims between companies of the Capricorn group; (c) claims resulting from a sales contract regarding the 'Campus' project (to be concluded); and (d) the art collection of Mr Robertino Wild. The Land was not involved in the decision-making process for the above agreement.

3. COMMENTS FROM GERMANY

3.1. FIRM IN DIFFICULTY

- (57) In their comments to the formal investigation procedure, Germany argued that NG was not a firm in difficulty as of 1 July 2008 ⁽⁷³⁾ or at the moment of granting the ISB loan of EUR 325 265 000 on 28 July 2010 ⁽⁷⁴⁾. As regards the situation of NG, MSR and CMHN in the period from May 2012 to July 2012 and the extension of the formal investigation procedure, Germany claims that the Commission had not taken into account the insolvency of NG, MSR and CMHN as a non-reversible consequence of its decision not to approve the rescue aid in the preliminary proceedings ⁽⁷⁵⁾ and it has thus breached the principle of proportionality ⁽⁷⁶⁾. Germany also argues that NG carried out the construction of the infrastructure and particularly the organisation of Formula 1 and Superbike race events on behalf of the public sector ⁽⁷⁷⁾, and that they therefore cannot be taken into account for analysis of its economic situation, the classification of an undertaking in difficulty and the application of the 'one-time' principle ⁽⁷⁸⁾.

3.2. STATE RESOURCES AND IMPUTABILITY

- (58) For the measures carried out by NG, Germany acknowledges that the resources are imputable to the state ⁽⁷⁹⁾.

3.3. ECONOMIC ACTIVITY

- (59) Pursuant to Germany, the construction of the tribune, the multifunctional halls, the access structures and the attractions offering education and entertainment (Part I ⁽⁸⁰⁾ of the Nürburgring 2009 project) is no economic activity as the Leipzig/Halle judgment ⁽⁸¹⁾ cannot be applied to the construction of the general (regional and sport) infrastructure ⁽⁸²⁾, the construction concerns facilities for which the criteria of the 2007 White Book on

⁽⁷³⁾ The German scheme approved by Commission decision of 19 February 2009 in case C 38/2009 *Federal Framework for low interest loans* ('the Temporary Framework') applies to firms which were not in difficulty on 1 July 2008. Aid may be granted to firms that were not in difficulty at that date but entered in difficulty thereafter as a result of the global financial and economic crisis.

⁽⁷⁴⁾ Germany claims that NG did not meet the hard criteria according to point 10 of the R&R guidelines, the development of soft criteria set in point 11 of the R&R guidelines was heterogeneous, and the general clause in point 9 of the R&R guidelines was also not met.

⁽⁷⁵⁾ Germany argues that the extension of the formal investigation procedure went against the objective of the concept of rescue aid, that the aid should have led to the avoidance of the imminent insolvency of the NG, MSR and CMHN to give them six months to prepare a restructuring plan, that the shareholders were ready to agree on concrete objectives of the restructuring plan, including the sale of the assets and the following liquidation of NG, MSR and CMHN, that no recovery decision was so far taken against NG and that the criteria of the Deggendorf jurisprudence were thus not fulfilled, and that in view of the unique constellation of the case, an approval of the rescue aid would not create a precedent for other cases.

⁽⁷⁶⁾ Germany refers to GC T-237/99, 2000, II-3849, point 37 — BP Netherlands and others; T-111/01, 2001, II-2335, point 26 — Saxonia Edelmetalle. CoJ, 56/89, 1989, 1693, point 39 — Publishers Association; GC, T-29/92 (R), 1992, II-2161, point 38 and following — SPO and others.

⁽⁷⁷⁾ Germany refers to CoJ T-20/03 KAHLA/Thüringen Porzellan GmbH, point 124 and following. Germany claims that from the State aid point of view, these measures should be regarded as special effects, not as a regular business of NG, that both the shareholders and business management saw NG as an vehicle to keep the sport infrastructure in public ownership and to organise non-profitable sport events which would not be offered without the coverage of losses by the public funding, that absent this understanding neither the shareholders nor the business management of NG would allow the development of liabilities, and that the costs of these special effects could not therefore be included in the financial assessment.

⁽⁷⁸⁾ For the meaning of the 'one-time' principle, see Section 3.3 of the R&R Guidelines.

⁽⁷⁹⁾ The measures concerned required an approval of the NG' supervisory board whose members were appointed only by public authorities.

⁽⁸⁰⁾ The investment volume of Part I equals EUR 215 million (EUR 185 million from the liquidity pool, EUR 30 million through a shareholder loan of the Land).

⁽⁸¹⁾ Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen, Flughafen Leipzig/Halle et al v Commission* [2011] ECR II-1311, upheld on appeal, see Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* [2012] ECR I-0000.

⁽⁸²⁾ Germany argues that such change in Commission decisional practice goes against the 2007 White Book on sport of the Commission and the principles of legal certainty. Such change could apply only to future cases, not to the construction of the sport infrastructure at Nürburgring already completed in 2011. A State aid prohibition of financing the construction and operation of sport infrastructure would qualify as a change in the repartition of competences between the EU institutions and the Member States and it would not be in line with the subsidiarity principle.

sport of the Commission (multifunctional use, non-discriminatory access, etc.) are met, no private investor would carry out such project and racetracks are regularly not privately constructed for insufficient profitability ⁽⁸³⁾.

- (60) As regards the Formula 1 events, in the view of Germany, they are in principle structurally deficit making, these events cannot be considered as normal business of NG as they led even with the public support to a negative result for NG, this company would not organise these events without the expectation of public financing and the public authorities decided to finance the Formula 1 events through NG at arm's length for regional-policy grounds ⁽⁸⁴⁾. Therefore, Germany claims that the organisation of these events cannot be considered as an economic activity of NG. If it was aid, Germany claims that the SGEI criteria are met.

3.4. SELECTIVITY

- (61) Germany argues that even if the financing of the measures was an economic activity, it is not selective because the criteria of the 2007 White Book on sport are met (no single user; non-discriminatory access; multifunctional use and lease under reasonable market-based prices; the infrastructure is not provided by the market because it would not be economical; responsibility of public authorities).

3.5. ADVANTAGE

(a) Measures covered by the decision of 21 March 2012

- (62) Germany admits that it had not found a long-term private investor who would invest in the Nürburgring 2009 project.
- (63) **For measure 1** (payments in capital reserve and capital increases in August 2004, December 2004 and September 2007), Germany argues that the question of an advantage does not matter, because the target of the measure was not an economic activity.
- (64) As regards **measure 2**, Germany argues that the level of the interest of NG's loans granted to its subsidiaries (6 %) does not constitute an advantage to the subsidiaries as it is comparable to the interest of loans on the market.
- (65) Regarding **measure 3**, pursuant to Germany, the measures financed by the liquidity pool in the amount of EUR 170 million ⁽⁸⁵⁾ were carried out on market-based terms, since: (a) the pool is used by the Land similarly to a market-based holding ⁽⁸⁶⁾; (b) NG paid the interests ordinarily; and (c) the funds were fully paid back in connection with measure 8. Germany also indicated that the loans granted by the liquidity pool of the Land to ISB served exclusively to the refinancing of ISB for its own loans to NG (see also recital 70) and that the market conditions of the Land from the transactions of the liquidity pool were not passed on to NG as debtor.
- (66) For **measure 4** (loan granted by NG to MSR), Germany states that the interest rate of 7 % seems to be market conform.
- (67) Concerning **measure 5** (support provided by NG to CST), Germany puts forward that it is market conform: after the initial financing of the project by NG and MIB under parity conditions, the MIB was later unable to provide the necessary shareholder loans in the same amount as NG. Since a withdrawal of NG from the project would

⁽⁸³⁾ Germany states that out of 11 racetracks, 8 were constructed with state monies worldwide between 1999 and 2011, referring to Communication & Network Consulting, Formula Money 2011, page 145.

⁽⁸⁴⁾ Germany claims that the Formula 1 has substantial macroeconomic effects in the countries of the organisers (ratio between subsidies and the said effects is allegedly 1:5).

⁽⁸⁵⁾ Germany states that the use of the liquidity pool for the project constitutes an exceptional case that does not correspond to the usual use of the liquidity pool and that the financing through the liquidity pool took place temporarily for the preliminary financing of the running project until the takeover through a long-term private investor would take place.

⁽⁸⁶⁾ Germany states that the aim of the liquidity pool is to optimise the cash flow between the Land and its subsidiaries in an economically reasonable manner, particularly to reduce the financing costs of the holding, that short-term needs are satisfied by the Land on the capital market, that the interest rates for the monies from the liquidity pool correspond to the daily rates of the Land on the market, that the Land does not incur any interest costs, that the market conditions are transferred 1:1 to the participants to the liquidity pool and that the Ministry of Finance of the Land is only an implementation platform.

compromise the timely provision of the ticket system, as well as make worthless in all probability the previous investment of NG, it was preferable for the NG to stick to the planned project under changed conditions, especially as the business plan allowed for expectations for a reasonable return and NG received collaterals from NG.

- (68) In respect of **measure 6** (consideration paid to IPC, and the loan to MSR through PNG as intermediary), Germany argues that the recipients received the respective payments as remuneration to services and as a loan to market equivalent conditions.
- (69) With regard to **measure 7** (cession of MIB's claims against CST to NG), Germany does not deal with questions concerning a potential advantage.
- (70) As regards **measure 8** (ISB loan to NG, MSR and CMHN), Germany indicates that ISB has not acted independently (at arm's length) as a (separate) undertaking, but as a support bank receiving explicit instruction from the administration of the Land and being part thereof ⁽⁸⁷⁾. Pursuant to Germany, the principles of the Agreement II are applicable to the refinancing of the ISB loan ⁽⁸⁸⁾ through the participation of ISB in the liquidity pool and this participation constitutes therefore no aid in favour of ISB ⁽⁸⁹⁾.
- (71) Regarding **measure 9** (guarantee of the Land to ISB concerning measure 8), Germany states that the guarantee in question deals with the share of risk in an internal relationship between ISB and the Land and it provides no advantage to the beneficiaries of the loan (NG, MSR and CMHN), because it did not lead to improved terms of their loan ⁽⁹⁰⁾.
- (72) As regards **measure 10** (business lease contract concluded on 25 March 2010), Germany submitted an expert opinion of 29 September 2011, commissioned by the Land on the rent for the business lease of the Nürburgring, which established a range of minimum and maximum market conform annual rents. Germany claims that according to that expert opinion, the expected rent is 20 % above the maximum market level and it would cover the lessor's construction costs of EUR 330 million and a reasonable profit ⁽⁹¹⁾.
- (73) As regards loans under **measure 11** (loans granted by RIM to MSR with Mediinvest and PNG as intermediaries), by which Part II of the 'Nürburgring 2009' project was financed, Germany argues that they are conform with the market economy investor principle and that they do not involve an advantage, since the interest rates applied are above the applicable reference rates (apart from two loans of 12 November 2008 and 22 December 2008).

⁽⁸⁷⁾ In view of point 137 of the decision of 21 March 2012, Germany states that in case of support banks ('Spezialkreditinstitute'), beneficiaries could be at two levels: (1) special banks; and (2) enterprises financed by special banks, that advantages of special banks are covered by Agreement II ('Verständigung II') from 2002 and that the decision of 21 March 2012 suggests that special banks can grant loans only in situations in which the debtor would not receive any loan under the same conditions on the market. Germany however argues that support banks can grant loans under market conditions (special credit institutes are not limited to granting aid) and that a state aid assessment must be made in each individual case.

⁽⁸⁸⁾ As regards specifically the ISB loan (measure 8), Germany suggests that the advantage encompasses at maximum the difference in the interest between the interest paid on the market and the interest actually paid, but not the total amount of the loan, and that an expert opinion should be commissioned if the Commission doubts this.

⁽⁸⁹⁾ Germany claims that in view of the Agreement II, the Commission agreed to advantages stemming from guarantees in favour of legally separate special credit institutes as long as their activity is limited to a precisely defined public task, and that under these conditions, for instance, the use of special types of guarantees such as *Gewährträgerhaftung*, *Anstaltslast* and *Refinanzierungsgarantien* is compatible with the State aid rules. Germany also states that the Commission acknowledged in its decision of 16 June 2004 in case N179/04 Finnish municipal guarantees that special credit institutes do not constitute undertakings as long as they benefit from public funding only in relation to their public task.

⁽⁹⁰⁾ Germany states that the terms of the loan are completely and independently stipulated for in the instruction of the Land to grant the loan; the ISB had therefore no room for manoeuvre; the decision on granting the loan and related risks remained with the Land and that on top of that, due to its loan instruction the Land stands security for the loan on the basis of the German Civil Code.

⁽⁹¹⁾ Germany also states that it is not important whether or not the construction costs are covered by the rent because the investment costs constitute sunk costs which have no impact on future decisions of a rationally acting investor. In addition, Germany indicated that even if the rent had to amortise the investment costs, the basis would be the planned investments, without unforeseen cost increases, whereas the planned costs of the project were initially EUR 215 million (EUR 135 million for part I of the 'Nürburgring 2009' project and EUR 80 for part II of the 'Nürburgring 2009' project), but the actual costs were EUR 330 million (EUR 215 million for part I of the 'Nürburgring 2009' project and EUR 115 million for part II of the 'Nürburgring 2009' project), and that this being taken into account, even the minimum rent in the amount of around EUR 280 million would amortise the planned investments.

- (74) For **measure 12** (guarantee of the Land to the loans of RIM to MSR with Mediinvest as intermediary under measure 11), Germany states that the guarantee of the Land only leads to an advantage to the recipients of the loans, but not to an advantage to ISB or RIM, because that guarantee was a requirement for the granting of the loans.
- (75) As regards **measures 13 and 14** (grants from gaming tax for tourism promotion ⁽⁹²⁾ and loans by the Land), Germany does not claim their compliance with the market economy investor principle. Concerning the gaming tax, Germany describes the measure as a compensation for infrastructural costs in connection with the promotion of tourism. Concerning the debt subordination, Germany argues that it has merely a declaratory effect as every shareholder loan is subordinated in the insolvency proceedings anyway, that that subordination led therefore only to a potential effect on the public budget and that it does not therefore constitute an advantage ⁽⁹³⁾.
- (76) As regards **measure 15** (takeover of MSR shares by NG and RIM), Germany claims that it does not constitute an economic advantage for Mediinvest, Geisler & Trimmel and Weber, because: (a) it was carried out at the symbolic price of EUR 1 per share; (b) it did not involve any other advantages such as the cancellation of shareholder loans or guarantees of the shareholder; (c) NG and RIM took over the shares in MSR as to compile the ownership of Part II with that of Part I of the 'Nürburgring 2009' project and to enable a united business concept; and d) the question whether MSR was in difficulty at the moment of the transfer has no impact on this assessment, as MSR is a company with limited liability, thus the liability of the shareholders is in any event limited to the capital of the company.
- (77) As far as **measure 16** (financing of the losses of NG from the Formula 1 races by the Land) is concerned, Germany states that it is not an economic activity and that the financing of Formula 1 events is generally not profitable.
- (78) For **measure 17** (Formula 1 concession contract), Germany claims that it is linked to the conditions of the business lease contract. Germany argues that in view of the rent being considerably ([...] %) over the market level, both contracts have to be considered balanced in their totality (including the benefits of the NAG from the concession contract) ⁽⁹⁴⁾.

(b) **Measures covered by the decision of 7 August 2012** ⁽⁹⁵⁾

- (79) Regarding **measure 18** (debt rescheduling), Germany states that it was necessary to avoid the imminent insolvency and that it would have been implemented also by a private shareholder.
- (80) Concerning **measure 19** (debt subordination and guarantee), Germany argues that it does not constitute even a potential burden to the public budget, that it would be implemented also by a private shareholder, and that the debt subordination had no consequences for the shareholders because there were no further substantial creditors.

3.6. DISTORTION OF COMPETITION AND EFFECT ON TRADE

- (81) Germany claims that the measures in favour of hotels and restaurants have no potential effect on trade between Member States ⁽⁹⁶⁾.

⁽⁹²⁾ Germany points out that the subsidies should cover the losses of NG from the investments for the increase of the touristic attractiveness of the Nürburgring through the Nürburgring 2009 project, and that the aim was to increase the attractiveness of the Nürburgring over the whole year and by this to promote the structurally weak region through the strengthening of tourism.

⁽⁹³⁾ Germany refers to C-72/91 Sloman Neptun.

⁽⁹⁴⁾ Germany also argues that this system aimed to attract as many visitors as possible, to maximise the positive macroeconomic effects and to cover the substantial costs of NG (licence fee, FIA grade 1 licensing of the racetrack).

⁽⁹⁵⁾ Germany states that the assessment of the Commission of NG as an undertaking in difficulty as of 1 July 2008 was inappropriate, that in the context of the notified rescue aid the application of the 'one-time' principle was erroneous, that the extension of the formal investigation procedure was not proportional and that the measures are aid-free.

⁽⁹⁶⁾ Germany argues that the international guests are attracted by the racetrack, not by the accommodation facilities or restaurants. Germany thus concludes that the measures concerned have no impact on tourism flows.

3.7. COMPATIBILITY

(a) Facilities of the race ring

- (82) Germany claims that the Nürburgring is crucial for the economy and employment in the region, that it is an important facility dedicated predominantly to amateur sport, that it is part of the German motorsport history and German culture and thus also part of the cultural heritage of the Union, that it has an impact on traffic safety in the whole world, as cars tested on that track are exported worldwide, that its driving centre offers a safe driving training, and that the investigated measures do not relate to the racetrack as such, but rather to the sport and non-sport infrastructure other than the racetrack and to the organisation of Formula 1 races.

(b) Compatibility of aid under 107(3)(c) TFEU

Objective of common interest

- (83) Germany argues that the construction of sport facilities can be regarded as a common interest in view of Article 165 TFEU ⁽⁹⁷⁾ and that measures enabling access to sport could be supported ⁽⁹⁸⁾. The Nürburgring features not only few professional events but also amateur events and motorsport training of youth. Nürburgring is used also for other sport events such as cycling (Rad&Run), running (Fisherman's Friend StrongmanRun) and triathlon (Green Hell Triathlon).

Necessity and proportionality of the measures

- (84) Germany states that the measures are necessary for the following reasons: Out of [...] event days, Nürburgring is used for professional sport only on [...] days, for amateur sport on [...] days and for both amateur and professional sport on [...] days. The amateur sportsmen represent more than [...] ([...] professionals versus [...] amateurs). Non-amateur events are Formula 1, German Touring Car Championship, Superbike World Championship, the music event Rock am Ring and the test driving of the car manufacturers. Amateurs can go for a ride with their own cars. At weekends, amateur competitions of large German motorsport associations (such as ADAC) are organised. During the week individual clubs use the tracks for training or amateur competitions. In motorsport, there is no separate infrastructure for professional and amateur sport. Moreover, the measures under investigation serve to the elimination of a market failure. A return on investment cannot be expected. In contrast to multifunctional arenas, only one or two series of a competition take place every year. No private investor would construct and finance such infrastructure. The participation of private enterprises in the financing of Part I of the 'Nürburgring 2009' project failed. Public engagement had thus also an incentive effect. Without the explicit political will of the Land government, NG would not implement the modernisation and expansion of the sport infrastructure in the same extent. In addition, Germany argues that the financing of the measures is proportional. The aims could not have been reached with a lower funding by the public sector. The installations were old and required modernisation. There was no duplication of infrastructures. In contrast to the Commission cases on multifunctional arenas ⁽⁹⁹⁾, the measures under investigation do not concern new infrastructure or substantial extension of capacity.

Effects on trade and competition limited to necessary extent

- (85) According to Germany, effects on trade and competition are small and do not contradict the common interest. As stated by the Koblenz court ⁽¹⁰⁰⁾, the Nürburgring with the Nordschleife is unique. The location of international and national events has a long history, and the support to the sport infrastructure at the Nürburgring does not therefore lead to a transfer of events to the Nürburgring. There are only few international events at the Nürburgring.

⁽⁹⁷⁾ Germany refers to Commission decision in case SA.33728 Financing of new multi-arena in Copenhagen, point 33.

⁽⁹⁸⁾ Germany refers to Commission decisions in cases SA.31722 Supporting the Hungarian sport sector via tax benefit scheme, points 86 and following, and SA.33952 Kletteranlagen des Deutschen Alpenvereins, point 68.

⁽⁹⁹⁾ Germany refers to SA.33168 Uppsala arena and SA.33728 Financing of new multi-arena in Copenhagen.

⁽¹⁰⁰⁾ Judgment in case U 73/12 Kart of 13.12.2012, Oberlandesgericht Koblenz.

(c) Compatibility of aid under 107(3)(d) TFEU

- (86) Germany claims that the Nürburgring — as the longest permanent racetrack and the oldest pit lane worldwide — is part of the cultural heritage of the Union ⁽¹⁰¹⁾. Parts of the ringwerk (mixture of museum and science centre) have a museum character. The measure for the support of the culture of the motorsport was necessary as it creates a common cultural identity in Germany and the Union, and the private financing of Part I of the 'Nürburgring 2009' project failed. The measure was also proportional because no overcompensation of that measure took place. The trade and competition conditions in the field of cultural facilities are not affected by the support to an extent contrary to the common interest. The cultural facilities at the Nürburgring are in competition with other regional or national cultural facilities, so that the market share of the former facilities is limited.

(d) Compatibility of aid under 107(3)(b) TFEU

- (87) Germany also claims that the drawing of loans of NG from the liquidity pool and the participation of ISB in the liquidity pool (measure 3) is compatible under 107(3)(b) TFEU as taking a loan from the real economy was almost impossible at the time because of the breakdown of the interbank market.

(e) Compatibility of aid under 106(2) TFEU

- (88) Germany claims that part of the investment measures for the promotion of tourism met the SGEI requirements that were in force at the time ⁽¹⁰²⁾ and that no manifest error of appreciation is evident. More concretely, Germany indicates that parts of ringwerk (particularly motorsport exhibition, Green Hell multi-media theatre, ringmeister and testcentre) have a museum character and serve to the public interest of (cultural) education, Warsteiner Event Centre serves as a multifunctional congress, trade fair and conference facility and the parking house is not fully used at days without big events. Germany argues that an enterprise acting under normal market conditions would not make the investments in the above three facilities without public financing and that the failed private financing of Part I of the 'Nürburgring 2009' project shows that there is no market for the installation of such measures.
- (89) Germany claims that the organisation of Formula 1 events is considered a SGEI as they are publically funded also in other countries and they have an enormous prestige and macroeconomic and identity effects to the respective Member State as well as to the whole Union.

(f) Temporary Framework

- (90) Germany claims that tranches 2 to 4 of the ISB loan (measure 8) are compatible with the internal market under the Commission communication — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis ⁽¹⁰³⁾, and that even if the Commission concluded that NG was an undertaking in difficulty as of 1 July 2008 and the Temporary Framework could not be applied to tranches 2 to 4 of the ISB loan, the aid in favour of NG, MSR and CMHN would equal to the difference between the interest rate to be paid on the market and the interest rate actually paid, but not to the whole amount of the loan ⁽¹⁰⁴⁾.

⁽¹⁰¹⁾ Germany refers to N 158/2010 Fussballmuseum Dortmund and N 164/2010 Leipziger Reit- und Rennverein Scheibenzentrum. However, Germany does not demonstrate that the race ring is protected as a cultural monument under the German law.

⁽¹⁰²⁾ Germany claims that the public interest was in macroeconomic/regional-economic effects and the promotion of sport and culture, there was a market failure since the measures were not possible without State support, the turnover was below EUR 100 million during the three years preceding the measures, the aid was below EUR 30 million annually, the entrustment act was constituted by the statutes of NG and the approval by the supervisory board of NG covered by a decision of the government of the Land and the calculation parameters could be deduced from the updated business plans. Germany also argues that the SGEI package entered into force only at the end of 2006, that for the period before, there were therefore no additional provisions about the form of the entrustment act, and that for the period after, the qualification as existing aid is appropriate.

⁽¹⁰³⁾ OJ C 6, 11.1.2011, p. 6

⁽¹⁰⁴⁾ In this context, Germany refers to Commission decisions in cases C 38/2005 Biria Gruppe, point 93; C 51/06 Arcelor Huta Warszawa, point 111 and following; C 43/2001 Chemischen Werke Piesteritz, point 107 and following; and judgment of the General Court in case T-102/07 and T-120/07 Freistaat Sachsen/Commission, point 218.

3.8. SALE OF ASSETS

- (91) In its submissions, Germany maintains that the sales structure does not involve State aid to the buyer of the assets. In addition, Germany argues that the sales process interrupted the economic continuity of the NG, MSR and CMHN. Thus, in its view, if the formal investigation procedure concluded with a negative Commission decision requesting the recovery of incompatible aid, a recovery obligation imposed on NG, MSR and CMHN would not concern the buyer of the assets in question. Finally, with regards to the condition which foresees that the sale of the Nürburgring assets is final only upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets, Germany argues that this condition does not constitute an obstacle to the liquidation of the aid beneficiaries and that it is not a continuation of their business, or an advantage to the buyer.
- (92) As regards the interruption of economic continuity, Germany pointed to the following elements:
- (a) The sale was carried out through an open, transparent, non-discriminatory and non-conditional tender procedure to the bidder submitting the highest bid including a proof of its financing;
 - (b) The economic logic of the sale is determined by the insolvency proceedings, which serve to satisfy jointly the creditors by the sale of the assets of the Nürburgring and the distribution of the proceeds among them;
 - (c) The opening of the insolvency proceedings and the takeover of the business by NBG from NAG as well as the sale of the assets to Capricorn with the subsequent placing of the assets in the control of a separate trustee constituted economic breaks, as the business models of NAG, NBG and Capricorn vary in the use of the assets substantially;
 - (d) Neither Capricorn nor the new owner of the assets has any economic or corporate link to NG, MSR or CMHN as of January 2015;
 - (e) The buyer has acquired only the assets but not the shares or the obligations of the sellers. The shares of NBG are not transferred to the buyer, either;
 - (f) The significant contracts for the operational business will be terminated predominantly after the 2014 season. The new contracts for the period from 1 January 2015 will be negotiated and concluded by the operating company founded by the buyer. Any transfer of employment contracts associated with the tendered assets would be governed by the applicable provision of German law, i.e. the purchaser of the insolvent assets would be free to decide on engaging personnel;
 - (g) As regards timing, the assets were sold before any Commission decision;
 - (h) The date of the transfer is determined by the requirements set by insolvency law that are to be considered in the context of the best possible sale of the assets. Given the nature of the motorsport business and the tendered assets, Germany considered that any successful buyer(s) would be engaged in activities similar to NG, MSR and CMHN's. However, any new owner(s) would have the possibility to manage their activities under different operating conditions than NG, MSR and CMHN's and would apply their own business model. For the racetrack, Capricorn foresees a different utilisation concept based on a new business plan. Besides, the buyer will itself be more active as an event organiser at the Nürburgring in the future. Furthermore, the Nürburgring will convert from a tourism attraction to a technology site according to the plans of the buyer.
- (93) With regards to the condition which foresees that the sale of the Nürburgring assets is final only upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets, Germany argues the following:
- (a) no potential investor or financial partner would accept to acquire the assets without such a condition precedent;

- (b) according to the German insolvency law ⁽¹⁰⁵⁾, the insolvency administrators' obligation is to ensure that the debtor's assets are liquidated at the best possible rate or alternatively to reach an arrangement in an insolvency plan which however would result in further State aid to the Nürburgring companies;
 - (c) the lessee will operate the leased assets under its own name, on the basis of its own business plan and with the workforce of its own choice; and
 - (d) [Bidder 2] had a similar condition in its offer, which foresaw that its offered prices would only be payable upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets. [Bidder 3] had a condition stipulating that it could withdraw from the sale if there was no positive Commission decision in place until 31 December 2014.
 - (e) The structure by which, in case there is no non-challengeable Commission decision at the beginning of 2015 the sold assets will be transferred before 1 January 2015 to a new company, in which 95,1 % of the shares will be owned by the buyer and 4,9 % by an independent trustee (see recital 56 above), will not lead to a continuation of the beneficiaries' business but will ensure their definitive exit from the market.
- (94) In conclusion, Germany argues that through this process there is no economic continuity between NG, MSR and CMHN and the assets sold under the tender process. Thus, any potential incompatible State aid to NG, MSR and CMHN would have to be recovered from these companies, following a relevant Commission decision, and would not concern the buyer of the assets under sale. Germany also argues that the condition precedent of the sales contract between the sellers and the buyer does not put an obstacle to the liquidation of the Nürburgring companies and the recovery of the past aid from them. The aid beneficiaries will disappear from the market definitively. Should ever the sale with Capricorn be annulled, the assets will still be sold and the sellers liquidated.
- (95) Germany informed the Commission about the sales structure, in order to obtain legal certainty that the sale of the assets would not involve State aid and that any successful buyer(s) would not be held liable for recovery of incompatible State aid.
- (96) Germany also undertook the commitment to provide to the Commission reports regarding the implementation of the sales procedure. The reports were submitted on a regular basis. The reports confirmed that the sales process was executed following the principles discussed with the Commission. They also provided information to the Commission about the bidders, their tenders, the final sales price and other relevant issues.

4. COMPLAINTS ON THE SALE OF ASSETS

4.1. COMPLAINT FROM JA ZUM NÜRBURGRING e.V. (COMPLAINANT 1)

(a) Complaint

- (97) Complainant 1 claims that the design of the tender process for the sale of the assets of NG, MSR and CMHN (i.e. the sale of racetrack, accommodation facilities and leisure park altogether) was not suitable for remedying competition distortions in the relevant markets, because it aimed at an unchanged operation of the complex and a transfer of the majority of employees of NG, MSR and CMHN to the buyer of the assets. Complainant 1 further complains that in the insolvency proceedings in the own administration (*Eigenverwaltung*) the insolvent companies carry out the sale themselves, under the mere supervision of an insolvency administrator (*Sachwalter*) ⁽¹⁰⁶⁾, that the bidders are not required to submit separate offers for each asset cluster and that offers for the totality of assets are acceptable.
- (98) Complainant 1 also argues that aid would be transferred to the buyer of the assets because all the assets, around 300 employees and the operational business of NBG would be transferred to one bidder and there would thus be

⁽¹⁰⁵⁾ Section 1 of the German Insolvency Code.

⁽¹⁰⁶⁾ Complainant 1 submitted a letter of the competent local court of 29 January 2014, in which the said court stated that in case of the own administration, the insolvency court and the insolvency administrator do not carry out the sale of assets, but they only supervise that sale, and in which the court found thus no basis for an intervention in the sale of the assets.

economic continuity between the old and new owner/operator. Complainant 1 also alleges that in consequence of the criterion of the maximisation of value of all assets, offers for the totality of assets were preferred by the sellers, whereas offers for individual assets were discriminated.

- (99) Furthermore, complainant 1 alleges that there is a lack of transparency as regards the award criteria and the financial data about the profits of NG, and that there is discrimination among the bidders, in particular because the access to the virtual data room was limited to five bidders. Complainant 1 also states that the sellers communicated the extension of the deadline for the submission of binding offers until the mid of February 2014 only to the bidders for all the assets who qualified for the access to the virtual data room; the bidders that tendered only for individual asset clusters such as complainant 2 were not notified of the extension of the deadline. Furthermore, complainant 1 states that the Land and Capricorn were represented by the same law office.
- (100) Complainant 1 requests the suspension of the tender process and its re-launch with clear award criteria, the qualification of the racetrack as an SGEI and its separation from the sale of the accommodation facilities and the leisure park.
- (101) In addition, complainant 1 alleges that NBG has received new non-notified aid incompatible with the internal market because it was provided capital for the operation of the business at the Nürburgring from the insolvent NG of EUR 2 239 243 in the form of a transfer in the capital reserve (*'Kapitalrücklage'*), that the operation is based on a new lease contract between NG, MSR, CMHN and NBG that was not tendered out, that NBG does not pay any rent and that NBG does not aim at increasing turnover and saving costs, because it keeps all the personnel and has born the costs for the organisation of Formula 1. Complainant 1 also claims that a takeover by NBG of employment contracts of NAG employees, based on a contract concluded between NBG and the trade union ver.di on 26 July 2013, sets out that, through the takeover, no economic, social or legal disadvantages can be created to the employees, and it shows that a business model which was built up with unlawful aid has been maintained.

(b) Comments from the insolvency administrators sent by Germany

- (102) Pursuant to the insolvency administrators, the complaint should be refused because it does not make evident that the sale process deviated from a usual acquisition process.
- (103) In an open, unconditional and transparent bidding process, offers for all assets cannot be excluded from the outset. If such offer is higher than the sum of the combined offers for individual assets, an owner behaving in a market-conform manner would conclude the contract with the offer for all assets. Under these circumstances, only the latter offer is a market price ⁽¹⁰⁷⁾. The exclusion of such offers from purchases in insolvency proceedings would equal to a breach of the business freedom and the ownership right of the insolvency creditors guaranteed by the Charter of fundamental rights of the European Union.
- (104) A preferential treatment of offers for all assets did not take place. The non-qualification of complainant 2 for the access to the data room was caused only by the insufficient amount of its price offer.
- (105) The bidding process had been done in stages. The bidders qualify for a next stage only if there is a sufficient closing probability. The advantage of this approach is that sensible business data are not accessible to more bidders than necessary and that the cost of the due diligence can be reduced for both the seller and the bidders that offer an insufficient price. The bidders were provided sufficient information in each stage of the process.
- (106) The award criteria were defined unambiguously. The award criterion is the total proceeds weighted in view of the closing probability, which is further defined by sub-criteria.
- (107) The data room was not limited to five tenders for technical reasons. The number of accesses was the result of the evaluation of offers.

⁽¹⁰⁷⁾ The insolvency administrators refer to the judgment of the Court of 16 December 2010 in case C-239/09 Seydaland, recital 34.

- (108) According to the insolvency administrators, NBG was established by them as a vehicle for a temporary operation of the assets during the insolvency until the sale of assets. Previously, the operational business was carried out by NAG. Since the lease of the Nürburgring to NAG, the companies NG, MSR and CMHN were mere owner companies without operational business. Pursuant to the insolvency administrators, NG, MSR and CMHN could not be considered for the take-over of the operational business. First, a split of the operational business between the three companies would require separate concepts. Second, that split would not correspond to asset clusters that would lead to an economically meaningful use of the real property. Third, the conclusion of contracts with insolvent companies does not comply with internal compliance rules of many companies, and the operational business had thus to be continued via a non-insolvent subsidiary as an acceptable contractual partner to the customers of the Nürburgring. The employees could also not be required to change from NAG to insolvent companies. NBG was not established and equipped as a long-term solution. In contrast to the assets managed by NAG, the latter company was not for sale. Moreover, the insolvency administrators state that the provision of capital to NAG was carried out by the insolvency administrators in view of the sale (avoidance of lower revenues in case of non-operation) only according to economic considerations, that the assets of NG were increased by NAG, not decreased ⁽¹⁰⁸⁾, that the said provision of capital does not provide an advantage to NAG, and that the establishment and equipment of NAG is not imputable to the State, but to the insolvency administrators.
- (109) Pursuant to the insolvency administrators, also the contract between NAG and the trade union ver.di was concluded in order to allow the continuation of the operational business of NAG until the sale, and not to keep the Nürburgring as an economic entity thereafter. That contract was concluded by NAG, not the sellers. The employment contracts were transferred from NAG to NAG according to § 613a of the German Civil Code, and not on the basis of the said contract. In view of Article 7 and 9 TFEU and Council Directive 2001/23/EC ⁽¹⁰⁹⁾, competition related considerations cannot lead to the circumvention or decrease of the social standard. It was important for NAG as a temporary solution that the employees necessary for the operational business that were employed by NAG (predominantly) and NG (20 employees) are transferred to NAG. NAG had to avoid that the remaining qualified employees have to be replaced during the transitional period. Between the beginning of 2011 and the end of 2012 the personnel was reduced by 114 full-time equivalents (from 402 to 288 full-time equivalents). At the beginning of the 2013 season, 290 were employed. The bidders were informed that they have the possibility to adjust the scope of the transaction to their business concept. The transfer of employees is no indicator for the maintenance of a business model.
- (110) Germany considers as not required by the State aid rules and as not acceptable in view of the European social model that a buyer of assets of a company in insolvency should be required to avoid the transfer of employment contracts and to conclude new employment contracts under the threat of recovery of aid granted previously to that company.

4.2. COMPLAINT FROM ADAC e.V. (COMPLAINANT 2)

(a) Complaint

- (111) According to complainant 2, he was notified by the sellers that his offer could not be taken into account in the next stage of the sale, as the price offered by him was substantially lower than the price included in other offers, and related only to part of the assets, while maximisation of value was sought through all assets.
- (112) Complainant 2 claims that the sale process aims at economic continuity of the activities and the market position of the Nürburgring in its current form, and it is therefore not suitable for the avoidance of a transfer of an advantage from the aid already granted to the buyer of the assets. He points out that only a sale to several bidders can breach the economic continuity, that offers for the totality of assets were preferred by the sellers compared to offers for individual assets, the latter being allowed but de facto without any chance, and that there are no criteria for the evaluation of offers for part of the assets in relation to offers for the totality of assets and that only the latter offers qualified for the second stage of the process.

⁽¹⁰⁸⁾ NAG closed the business year 2013 successfully and made EBITDA (before rent) in the amount of EUR 2 920 000. As a rent, NAG paid EUR 2 661 000 for 2013.

⁽¹⁰⁹⁾ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

- (113) Complainant 2 also states that the sale process was carried out by the insolvency administrator in breach of the State aid rules, including a lack of transparency and non-discrimination, and it is therefore not suited to achieve a market price. Complainant 2 claims that data on the financial situation of NG relevant for the price offers were missing in the tender documentation, which led to excessive indicative offers, which would probably be decreased after the process stage allowing access to the data room. Complainant 2 states that the profits were substantially decreased compared to the expected profits for 2013 previously communicated to the bidders, without giving them a possibility for a new analysis of the financial data. Complainant 2 also alleges that the information about the financial situation of NBG and the necessary mid-term and long-term investments was not sufficiently disclosed and that the tender documentation implies long-term contractual relationships, although the contracts with complainant 2 were extended only by one year (2014). In addition, the criterion of a secure financing was not sufficiently taken into account, otherwise the bidder La Tene Capital Limited could not access the data room with an unrealistically high offer and without a confirmation of the financing.

(b) Comments from the insolvency administrators sent by Germany

- (114) Comments from the insolvency administrators contained in recitals 101 to 105 apply also to the complaint from complainant 2.

4.3. COMPLAINT FROM [BIDDER 3] (COMPLAINANT 3)

(a) Complaint

- (115) Complainant 3 claims that the sales contract was not awarded to the bidder with the highest offer, but to a preferred local bidder. Pursuant to complainant 3, non-economic considerations such as regional objectives or reasons of industrial policy that would not be accepted by an investor acting in accordance with market economy principles may not be taken into consideration for a lower price but point to a case of State aid⁽¹¹⁰⁾. Complainant 3 claims that it offered a purchase price in the amount of EUR 150 million⁽¹¹¹⁾, and that Capricorn was thus awarded with the contract although complainant 3's offer was substantially higher. Complainant 3 further supports that an exceptional decision for the lower bid may only be made if it is obvious that the sale to the highest bidder is not possible (transaction security), i.e. if the purchaser is not able to pay the purchase price⁽¹¹²⁾. According to complainant 3, this was not the case, because: (1) complainant 3 submitted a binding financing commitment by a private equity fund in the amount of EUR 30 million; and (2) it was not possible to receive the binding commitment for the further tranches of the purchase price due to a delay and lack of documentation by the sellers. Complainant 3 claims to have informed the sellers that the pending financing commitments could be submitted by 31 March 2014. Complainant 3 also supports that as of the date of the complaint (10 April 2014), it could provide a financing commitment over EUR 110 million, whereas complainant 3 submitted to the Commission a Letter of Intent addressed by Jupiter Financing Group, Inc. ('Jupiter Financial Group') to complainant 3, dated 26 March 2014, informing complainant 3 of a binding proposal by Jupiter Financial Group for the financing of the acquisition of the Nürburgring assets (for the financial components of this proposal, see footnote 105). The financing proposal was subject, among other conditions, to the completion of due diligence satisfactory to Jupiter Financial Group.
- (116) Complainant 3 also claims that, of the total of EUR 77 million that Capricorn offered as a purchase price for Nürburgring, EUR 6 million would be paid from the 2014 season and a further EUR 11 million only during the years 2015 to 2018, and that this results in an actual cash purchase price in the amount of EUR 60 million and thus in a difference of EUR 50 million compared to the cash purchase price of EUR 110 million offered by complainant 3. According to complainant 3, if one takes further future cash payments into account, the difference between the offers of Capricorn and complainant 3 is EUR 73 million. Finally, complainant 3 alleges

⁽¹¹⁰⁾ Complainant 3 refers to Commission decision of 30 April 2008 in case *Bank Burgenland* and to the judgment of the Court of 24 October 2013 in case C-214/12P, C-215/12, C-223/12P (not yet published in the ECR)

⁽¹¹¹⁾ According to complainant 3, the claimed offer consisted of: (1) EUR 90 million to be paid as cash payment upon closing; (2) EUR 20 million payable by 31 March 2014; and (3) the maximum amount of EUR 40 million to be paid as earn-out in the amount of 20 % of the respective annual EBITDA of the Nürburgring complex after the acquisition by complainant 3. On top of that, complainant 3 claims to have committed to set up a development fund of EUR 200 million for the local communities surrounding the Nürburgring.

⁽¹¹²⁾ Complainant 3 refers to Commission decision of 30 April 2008 in case *Bank Burgenland*.

that there is aid in favour of Capricorn which amounts to at least EUR 73 million, i.e. the difference between the purchase price offered by complainant 3 as the bidder with the highest bid and the price offered by the successful bidder. In this regard, according to complainant 3, when taking into account the support in favour of the local communities, the aid amount is raised by EUR 200 million, to an overall EUR 273 million.

- (117) Complainant 3 also claims that Capricorn's offer was not unconditional, since it was subject to a non-contestable decision by the Commission making clear that there is no extension of the recovery order. According to complainant 3, this constitutes a deviation from the announced principles of the sales procedure, which caused a violation of the tender procedure since other parties like complainant 3 were not informed about the adjustments.
- (118) Furthermore, complainant 3 argues that the sale of assets has not been made in the course of an open, transparent and unconditional selection process. Specifically, complainant 3 alleges that:
- (a) The fact books provided by the sellers were materially incorrect and misleading; particularly the suggested 'clean balance sheet' transaction structure was unrealisable. Immediately after the due diligence process began, complainant 3 found out that the transaction structure proposed by the sellers did not accommodate the factual circumstances resulting from the operation of the Nürburgring and could thus not be implemented ⁽¹¹³⁾.
 - (b) Throughout the process, the sellers delayed the finalisation of the asset purchase agreement.
 - (c) The sellers failed to communicate an unambiguous time limit for ending the bidding process and indicated that the process ends at the end March 2014. Complainant 3's exchange of communication with the sellers and a press release by the sellers implied that the submission of complainant 3's bid until the end of March is possible. Moreover, Capricorn was allegedly given a preferential treatment since it was allowed to provide its binding financing commitment after 17 February 2014 ⁽¹¹⁴⁾.
 - (d) Material contracts such as the third party operational contracts of NBG were not provided at all or only with substantial delay. Furthermore, the bidders were allegedly provided with decisive information on the key financial figures of NBG in the data room only in German only one working day before the expiry of the deadline for the submission of the final offer or even on that day. In particular, material information such as the audited annual accounts of NBG as at 31 December 2012 was allegedly only provided on the evening of the last working day before the date set for the submission of the final offer.
 - (e) The sellers discriminated the other bidders by allegedly granting Capricorn preferential access to major third party suppliers. In particular, complainant 3 claims that there must have been negotiations between Capricorn, the sellers as well as the brewery Bitburger already weeks before the winning bidder was announced on 11 March 2014 ⁽¹¹⁵⁾.

⁽¹¹³⁾ Complainant 3 claims that based on the information provided by the sellers in the process, he assumed that the acquisition of the assets and the start of the business would be possible on the basis of 'a clean balance sheet', i.e. without any past and ongoing liabilities or obligations arising from existing contractual relationships, that he aimed at negotiating new agreements with customers and sponsors on new terms in order to partly refinance his investment, that it then turned out that all material agreements for the operation of Nürburgring were concluded by a third party (i.e. NBG) on the basis of a business lease contract with the sellers, that this meant in essence that the complainant — after being awarded with the assets — would have been forced to take over the business lease contract as well as some agreements concluded between NBG and third parties, that other agreements entered into by NBG did not transfer automatically but had to be effectively honoured by complainant 3, particularly since allegedly the sellers wanted to force complainant 3 to assume full financial responsibility for damage claims (resulting from NBG's failure to provide the ring facilities), and that consequently, complainant 3 allegedly had to change his initial business concept: whereas initially — partly — complainant 3 planned to secure the interim financing of the Nürburgring acquisition by concluding adjusted agreements with the customers and sponsors of Nürburgring, now it was forced to take the existing agreements into account or at least to economically honour them.

⁽¹¹⁴⁾ Complainant 3 claims that on the one hand, there is reasonable doubt that Capricorn was able to provide a binding financing commitment for the entire purchase price on the date of the expiry of the deadline on 17 February 2014 and the decision on the successful bidder was held back just until Capricorn had fulfilled all formal requirements, whereas on the other hand complainant 3 was, as announced in the final offer, able to provide a binding financing commitment over EUR 90 million.

⁽¹¹⁵⁾ Complainant 3 adds that other bidders like complainant 3 were provided with false information, that complainant 3 intended to start negotiations with its own favourite suppliers in spring 2014 in order to fine-tune its financial offer for the ring assets, and that however, complainant 3 was told by the sellers that for example the beer supply could not be changed in 2014 since otherwise complainant 3 would be forced to take over liability for any damage claims resulting from NBG's failure to fulfil its contractual obligations to the existing beer supplier anymore. Pursuant to complainant 3, the change of the beer supplier from Warsteiner to Bitburger proves that the information provided to complainant 3 was false and that complainant 3 as a bidder was deliberately misled.

- (f) The notarisation of the asset purchase agreement between the sellers and Capricorn must have taken place before 11 March 2014. The award of the contract was already communicated to Capricorn before a decision by the committee of creditors was made, and a press release by Capricorn dates from 9 March 2014 and was thus made 2 days before the decision of the committee of creditors on 11 March 2014.
 - (g) Without informing the other bidders the sellers deviated from the process letter of 17 October 2013 by waiving the requirement to provide a financing guarantee for the entire purchase price to the sole benefit of Capricorn ⁽¹¹⁶⁾.
 - (h) The sellers violated the conditions of the process letter by not providing individual bidders with an agreed and internally approved mark-up of the asset purchase agreement prior to the submission date of the final offer thus rendering the finalisation of the financing significantly more difficult.
 - (i) The sellers based the award of the assets also on environmental criteria and assumed — without further liaising with complainant 3 — that the company would not be able to meet such criteria, although no explicit environmental conditions were introduced by the sellers ⁽¹¹⁷⁾.
 - (j) Capricorn was given preferential treatment as the company sought State aid advice from the law firm McDermott, who had already advised the sellers and the Land on the same matter prior to advising Capricorn.
- (119) Complainant 3 claims that the sale represents resources imputable to the State ⁽¹¹⁸⁾, that new State aid in favour of Capricorn is present, and that any recovery order with respect to State aid granted to the sellers of the assets must be extended to Capricorn ⁽¹¹⁹⁾. Finally, complainant 3 claims that the sales contract is invalid due to the violation of the standstill obligation of Article 108(3) TFEU.
- (120) Finally, complainant 3 claims that Capricorn failed to pay the second instalment of the purchase price that was due at the end of July, which according to complainant 3 provides an indication that Capricorn did not provide a fully financed offer. Complainant 3 further claims that, subsequently to the above, the financing conditions for the acquisition of the Nürburgring assets were changed to the benefit of Capricorn and in clear deviation from the rules set by the sellers and the process letter given to the bidders, which may constitute further aid to the benefit of Capricorn.

(b) Comments from the insolvency administrators sent by Germany

- (121) Pursuant to the insolvency administrators, complainant 3 had not submitted any binding financing commitment for EUR 30 million neither along with its confirmatory bid of 17 February 2014 (that referred to a binding financing commitment of [...] in the amount of EUR 30 million) nor along with the complaint, and the complainant 3's claim that the evidence of financing could be submitted at a later stage was even not demonstrated by non-binding statements of third parties. In contrast to the confirmatory offers of Capricorn and [Bidder 2], the confirmatory offer of complainant 3 did not meet the financing requirements set in the process letter of 17 October 2013. On 11 March 2014, the sellers had therefore no ground to award the contract to complainant 3. For the sellers, the risk that waiting for complainant 3's evidence of financing may lead to the reduction of the bidders to one or zero was not acceptable, since: (a) [Bidder 2] consortium insisted on the implementation of the transfer of ownership as of 3 April 2014; and (b) there was lack of progress in the substantiation of complainant 3's offer, despite the fact that the latter had handed in its expression of interest on 17 May 2013 and its indicative offer already on 30 September 2013, therefore the likelihood of closing the

⁽¹¹⁶⁾ Complainant 3 claims that the process letter of 17 June 2013 requires a guarantee for the payment of the purchase price payable upon first demand and issued by a reputable European Bank, that Capricorn was not able to provide a full guarantee which covers the entire purchase price, and that the sellers must have altered its own payment conditions in order to bring the award in line with its announced process terms.

⁽¹¹⁷⁾ Complainant 3 claims that he had submitted its bid in full awareness and compliance with noise emission regulations under statutory law.

⁽¹¹⁸⁾ Complainant 3 refers to the judgment of the Court in case C-482/99 *Stardust Marine*, recitals 54-55, and to Commission decisions in case *Gerogsmarienhütte* (OJ C 199, 14.7.2001, p. 4) recital 27, in case *Flughafen Dortmund* (OJ C 217, 15.9.2007, p. 25), recitals 54-55, and in case N 510/2008 *Alitalia*.

⁽¹¹⁹⁾ Complainant 3 refers to Commission decisions in case CDA of 16 December 2000, recital 117, and in case *Biria Group* of 14 December 2010, recitals 79-80, to the judgments of the Court in case T-415/05 *Olympic Airways*, recital 157, and in case T-123/09 *Alitalia*, recital 135.

transaction with complainant 3 was reduced. The alleged financing commitment of Jupiter Financial Group dated 26 March 2014 was not submitted to the sellers, while a later non-signed letter of investment bank and advisory firm [...], dated 31 March 2014, is conditional on the satisfactory conclusion of the due diligence. The development fund for the municipalities surrounding Nürburgring, in the amount of EUR 200 million, was to no benefit of the sellers.

- (122) According to the insolvency administrators, the bidders were informed that the selection of the successful tenderer maybe carried out shortly after the deadline for the submission of offers on 17 February 2014. The information provided by the sellers could not give an expectation that the process would be extended. The press release quoted by complainant 3 states that the insolvent administrators intend to conclude the contract in the first quarter of 2014. The insolvency administrator states that it is not true that he had publically stated that it is aimed to take a decision at the end of March, that Capricorn was informed already before the meeting of the creditors' committee about the award of the contract and that a press release was published by Capricorn on 9 March 2014.
- (123) The insolvency administrators state that the transaction structure (sale of individual assets, asset clusters or all assets, without transfer of shares or liabilities) had not changed during the bidding process. The term 'clean balance sheet' stands for nothing else than the exclusion of the transfer of liabilities with the sale. The fact that the sellers are owner companies and that the operation business is carried out by NBG, was communicated to all interested parties already in the teaser that was sent to complainant 3 on 17 May 2013. According to the insolvency administrators, if complainant 3 became aware of the activity of NBG indeed only during the due diligence, as alleged, it can be concluded that complainant 3 dealt unsatisfactorily with the extensive information put at the disposal before the submission of indicative offers. At no moment in time, the sellers had required that the buyer takes over the contracts of NBG. A take-over of the lease contract between the sellers and NBG by the buyer was not considered by the insolvency administrators, because of the special situation of NBG in view of the transfer of assets sought from the outset. The insolvency administrators claim that complainant 3 had realised very late that in case of a take-over of the assets as of 1 January 2014, it would have a predominantly 'empty' Nürburgring, and the new contracts with customers and sponsors would lead to (increased) revenues only in the 2015 season due to the planning time of (racing) events. Moreover, the sellers had repetitively stressed that the bidders could define the subject of the purchase.
- (124) As regards the claims for damages of third parties, the sellers informed complainant 3 that it would be hardly possible for it to conclude new contracts with the customers of NBG under terms for the customer worse than the running contract, insofar as the issue of a compensation of damages for the non-fulfilment of the contracts with NBG is not clarified. It was necessary to address the risk that the buyer and the contractual partners conclude a new contract that leads to a situation where the contractual partner pays a high consideration, asks for a compensation of the difference with the old amount of consideration and pays in the later years, for which there was no contract with NBG, a substantial lower consideration. The requirement of the sellers for such exclusion is not unusual for asset deals that lead to business close-down and allows to guarantee the best sale in the interest of the creditors.
- (125) Pursuant to the insolvency administrators, the deadline for the submission of the confirmatory offers was extended by letter of 17 December 2013 because also other bidders had not yet submitted a satisfactory offer. It was repetitively made clear to the bidders that NBG took over the operative business only after the 2012 season, that it had therefore to fulfil largely the contracts of NAG and that a reliable accounting for the operational business did thus not (yet) exist. According to the insolvency administrators, it is up to the potential buyers to take account of the related risks.
- (126) The insolvency administrators indicate that on 6 March 2014, complainant 3 submitted a mark-up to the asset sale agreement to its confirmatory offer. The draft asset purchase agreement negotiated on 13 February was from the sellers; it was therefore clear that the next draft would be produced by complainant 3.
- (127) According to the insolvency administrators, all the bidders that qualified to the respective phase of the selection process had the same documents at their disposal in the data room. The documents identified in the complaint were not available to the sellers and particularly to other bidders earlier, all tenderers had the same chance to view the documents in the data room, and other tenderers concluded the due diligence with the same documents.

All the bidders were informed early enough that the accounting of the companies had deficiencies. Almost all documents of the sellers and NBG were put in German in the data room, and the sellers were not obliged to provide all documents in English.

- (128) In addition, the insolvency administrators bring forward that the deadline for the submission of offers and evidence of financing was satisfactory. Complainant 3 had 10 months (8 April 2013, as the date of the first contact between [Bidder 3] and the sellers, until 17 February 2014) for the submission of evidence of financing and almost four months (23 October 2013 until 17 February 2014) for the due diligence. The insolvency administrators state that they exceeded the requirements that can be deduced from the decisional practice of the Commission ⁽¹²⁰⁾.
- (129) The negotiations for the new contract on the supply of beer and with 'Rock am Ring' were not negotiated by Capricorn but by NBG, and the corresponding documents were put in the data room. There is no link to Capricorn claimed by complainant 3.
- (130) The sellers had not introduced any environmental criteria in the tender process for selecting the final offer. The only criteria of the tender process for selecting the final offer were: (a) the maximisation of the total proceeds for all of the assets; and (b) the expected transaction security. Complainant 3's offer could not be selected because it was missing the latter criterion, i.e. it did not have transaction security, because complainant 3 had not submitted a proof of financing with its confirmatory offer. At the same time, the sellers carried out discussions with [Bidder 2] and the final stage of the purchase agreement's negotiation with [Bidder 2] and Capricorn, in view of [Bidder 2]'s offer of EUR [32-39] million (see Table 10 below) and the negotiation between Capricorn and [...] resulting in the latter bank's financial commitment dated 10 March 2014. Therefore, based on the absence of proof of financing with the confirmatory offer of complainant 3, there was a high risk of non-conclusion of the contract with complainant 3. Furthermore, the insolvency administrators tried to estimate the chances of complainant 3 to secure the financing by assessing further indicators of complainant 3's business model that could speak for the implementation of the transaction. The business model of complainant 3 was based on [...] and on the [...]. As the noise requirements valid for Nürburgring do not allow for [...] and a [...] does not exist, the implementation of the concept in a short term could not be expected. The concept of complainant 3 was therefore evaluated as an indicator for a substantial risk in view of the conclusion of the contract or at least for a substantial time and negotiation requirements. The compliance of the concept with the noise requirements at Nürburgring was not an award criterion.
- (131) With regards to complainant 3's claim that Capricorn's offer was not unconditional, since it was subject to a non-contestable decision by the Commission making clear that there is no extension of the recovery order, the insolvency administrators and Germany argue that complainant 3 had conditions in its mark-up contract with a similar effect. According to the provisions included in the relevant parts of those mark-up contracts, as submitted by the insolvency administrators and Germany, the purchaser and/or the seller had the right to withdraw from the contract if no positive decision of the Commission had been issued by 15 July 2014 (as stipulated in draft contract of 14 January 2014) or 31 December 2014 (as stipulated in draft mark-up contract of 14 February 2014).
- (132) According to the insolvency administrators, the fact that none of the two bidders that submitted a qualified confirmatory offer met fully the requirement of a secured financing (guarantee regarding the price amount or payment of that amount to an escrow account), and that the sellers had therefore allegedly waived that requirement *de facto*, without having informed complainant 3, is no proof of an non-transparent process. Complainant 3 was not affected because it did not submit any confirmatory offer with proof of financing. Informing all bidders about the alleged waiver would not influence the tender process. Moreover, the waiver is not a causal for the non-submission of financing confirmations by complainant 3, and it corresponds to the behaviour of a hypothetical private seller.
- (133) The insolvency administrators argue that the measures taken by the insolvency administrators or the committee of creditors are not imputable to the State, and that no advantage to Capricorn is evident as the sellers implemented the selection process according to the standard of an operator acting on market conditions.

⁽¹²⁰⁾ The insolvency administrators refer to Commission decision of 30 April 2008 in case C 56/06 *Privatisation of Bank Burgenland*, to Commission decision of 19 June 2013 in case SA.36197 *Privatisation of ANA — Aeroportos de Portugal* as well as to the Commission's communication on land sales.

- (134) Finally, as regards the claim that Capricorn did not provide a fully financed offer because it failed to pay the second instalment of the purchase price, and that there may be further aid to Capricorn because, subsequently to the above, the financing conditions for the acquisition of the Nürburgring assets were changed to the benefit of Capricorn, the German authorities argue: (a) there was no benefit for Capricorn, since the second instalment was rescheduled with interest of 8 % and pledges (see footnote 72); (b) there is no State aid involved in the second payment's rescheduling since the decision for the latter is not imputable to the State, because the second payment's rescheduling was decided solely by the insolvency administrator, without the involvement of the Land; and (c) there was no deviation from the rules set by the sellers and the process letter given to the bidders, because in the bidding procedure the sellers made no fixed requirements to the bidders regarding purchase price instalments before closing, therefore also a possible request of a bidder to replace cash collaterals by other valuable collaterals to secure the purchase price would have had no impact on the evaluation of the bids.
- (135) According to the insolvency administrators, the complaint should be refused as unjustified. The unsubstantiated hints of complainant 3 regarding financing are not compatible with the behaviour of a prudent market player or insolvency administrator.

4.4. COMPLAINT FROM MR MEYRICK COX (COMPLAINANT 4)

(a) Complaint

- (136) Complainant 4 claims that Capricorn was awarded the contract not for the most economically advantageous offer, but because it is a German undertaking and the sellers did not want to sell to a private equity led consortium. It further alleges that the offer from Capricorn was lower than the offer from [Bidder 2] across multiple criteria. Specifically, complainant 4 claims that:

- (a) The financing of the offer from Capricorn was less secure than that of [Bidder 2] ⁽¹²¹⁾.
- (b) [Bidder 2]'s offer foresaw higher up-front payments ⁽¹²²⁾.
- (c) The execution risk was higher in case of Capricorn than in case [Bidder 2]'s offer would be accepted ⁽¹²³⁾.
- (d) [Bidder 2] has more experience and capability than Capricorn ⁽¹²⁴⁾.
- (e) [Bidder 2] will invest further EUR 25 million in the Nürburgring with a higher probability than Capricorn.

⁽¹²¹⁾ Complainant 4 mentions that several entities were allegedly contacted by Capricorn in the process to seek help with financing its bid, that Capricorn has misrepresented its financing support to the sellers at an early stage of the process, that the ownership structure of GetSpeed, one-third shareholder of Capricorn consortium, is not entirely clear, that the creditors' committee was not fully-informed about [...] financing of the Capricorn's bid, and that Capricorn had admitted publicly that they do not have the financing for their announced EUR 25 million of investment in the Nürburgring assets. Moreover, the creditors' committee had not sufficient time to verify the conditions of the confirmation of [...] about the provision of financing to Capricorn.

⁽¹²²⁾ Complainant 4 states that [Bidder 2]'s bid contained an upfront payment of EUR 32,5 million in early April 2014, whereas Capricorn's bid contained only the upfront payments of EUR 5 million in March 2014, EUR 5 million in July 2014 and EUR 5 million in December 2014.

⁽¹²³⁾ Complainant 4 claims that its offer foresaw a closing already in April 2014, that [Bidder 2]'s payments are guaranteed or based on the profitability of the business, that [Bidder 2]'s members are substantial, well-funded entities, with a significant track record in the field of mergers and acquisitions, whereas Capricorn's bid has an effective date no earlier than 1 January 2015, that further payments from Capricorn are not due until, inter alia, Commission review of existing State aid is completed and any EU Court process is completed, that the sellers accepted that if the Commission review is not completed by 1 January 2015, that Capricorn would have the option to lease the Nürburgring assets from then until such review is completed, that Capricorn is a small company with little in the way of capital and that Capricorn has little history in the field of mergers and acquisitions and a recent history of uncompleted projects.

⁽¹²⁴⁾ Complainant 4 indicates that [Bidder 2] has experience of owning and operating several major circuits, operating of hotel and leisure facilities, operating festivals, and that [Bidder 2] is the largest investor in Formula One and an investor in major auto manufacturers and leisure businesses, whereas Capricorn have no experience in circuit operations, hotel operations, festival management, race promotion or managing product launches.

- (f) The bidders were treated differently in the tender process and that Capricorn was given better treatment in the process ⁽¹²⁵⁾.
- (137) Complainant 4 also claims that Capricorn failed to pay the second instalment of the purchase price that was due at the end of July and that the EUR 25 million as well as the 8 % interest rate penalty for late payment were waived in favour of Capricorn, resulting in further State aid in favour of Capricorn. According to complainant 4, the above also raise questions around the information provided by KPMG and the insolvency administrators to the Creditors Committee in the context of the tender procedure, and demonstrate that Capricorn's financial ability was not properly presented.
- (138) Furthermore, complainant 4 supports that there was never a signed agreement between [...] and Capricorn for the latter's financing, but only a term sheet, therefore at the time of the creditors' committee, Capricorn had no funding agreed.
- (139) Finally, complainant 4 concludes that the information put forward by him makes it clear that an advantage was granted to Capricorn in the sale of the Nürburgring assets, that that advantage stems from a decision that is inconsistent with the manner in which a commercial seller would have run the process and have assessed the bids against the award criteria, that such a commercial seller could not have concluded that the Capricorn bid was overall more economically advantageous than [Bidder 2]'s bid and that a new process needs to be run in which a consistent set of criteria are applied in order to provide for an open, fair and unconditional tender, a clear timetable is set out and adhered to, and the identity of the bidders is shielded from the creditors' committee.

(b) Comments from the insolvency administrators sent by Germany

- (140) The insolvency administrators state that complainant 4 as member of the [Bidder 2] consortium is affected only indirectly. Moreover, they propose to refute the complaint, because the tender process was open, transparent and unconditional, and the assets were sold to the bidder submitting an offer that leads to the highest proceeds.
- (141) The insolvency administrators reject that the members of the creditors' committee agreed to the sale to Capricorn because the latter company is a German company and it is not a private equity led consortium.
- (142) According to the insolvency administrators, the bid from Capricorn leads to a substantially higher revenue from the sale in comparison to the bid from [Bidder 2], and there are no decisive differences in the transaction security of both bids that would justify the award to the substantially lower bid (for both bids the transaction security was satisfactory, but not the highest possible). [Bidder 2] was also not ready to provide a bank guarantee for the price amount, or transfer the price amount to an escrow account, required by the process letter of 17 October 2013. In spite of several requests, [...] ([Bidder 2] consortium's member that should have facilitated the provision of external capital) or any other member of [Bidder 2] had provided no legally binding declaration by which they would be obliged to provide the necessary funding. In contrast, Mr Robertino Wild, shareholder of Capricorn, has provided significant securities, and the Capricorn's external financing was demonstrated by a business-usual financing confirmation of Deutsche Bank. That financial confirmation was verified by the insolvency administrators, and they reported to the creditors' committee about the result of that verification, namely that the financial confirmation contains no unusual disclaimers or conditions. The own financing of EUR [14-17] million as well as the external financing of EUR [41-49] million are secured by a contractual penalty in the amount of EUR [22-27] million, which the buyer must pay, if the sellers withdraw from the contract for outstanding payments. That contractual penalty is also secured. The creditors' committee followed the assessment of the insolvent administrators.
- (143) As regards the up-front payments, the insolvent administrators state that [Bidder 2]'s offer had advantages (by 31 March 2014, payment of EUR [30-33] million in case of [Bidder 2] against EUR [4,6-5,4] million in case of Capricorn) and disadvantages: apart from an amount of EUR [7,1-7,6] million, the money provided by [Bidder 2] would be kept in a blocked account and transferred to the sellers either upon the existence of a non-challengeable Commission decision or if the buyer did not withdraw from the contract despite there being no such enforceable

⁽¹²⁵⁾ Complainant 4 points out that [Bidder 2] was afforded a poorer level of engagement with the sellers than it was made available to Capricorn, that the final bid deadline was extended firstly from 11 December 2013 to 17 February 2014 and then cut off on 11 March 2014, hours after Capricorn's bid arrived, and that [Bidder 2] had not been given the chance to increase or modify its bid.

Commission decision by 31 March 2015 (the possibility to extend the period for the withdrawal right was not excluded). In any case, if a non-challengeable Commission decision exists in 2014, the sellers would have access to EUR [30-33] million in case of [Bidder 2] or EUR [58-63] million (plus around EUR 6 million of cash flow of NBG) in case of Capricorn.

- (144) A comparison of the offers from Capricorn and [Bidder 2] shows that the offer from Capricorn is the highest nominal purchase price and it leads to the best economic result:

Table 10

Comparison of offers from Capricorn and [Bidder 2]

Offer Capricorn		Offer [Bidder 2]	
Amounts in million EUR			
1st sales price instalment 31.3.2014	[4,6-5,1]	1st sales price instalment 31.3.2014	[7,1-7,6]
2nd sales price instalment 31.7.2014	[4,6-5,1]	2nd sales price instalment 31.3.2014	[22-27]
3rd sales price instalment 20.12.2014	[4,6-5,1]	3rd sales price instalment in 2016	[2,3-2,6]
Cash flow NBG 2014 (*)	6,0	'earn-out' for 2015 in 2016 (*)	[2,3-2,6]
4th sales price instalment at closing	[41-49]	'earn-out' for 2016 in 2017 (*)	[4,6-5,1]
Remaining sales price	[10,5-11,5]	'earn-out' for 2017 in 2018 (*)	[7,1-7,6]
Total sales price	77,0		[47-52]
Decrease of personnel/Restructuring	- 2,5		- 3,0
Termination of management contracts Lindner	- 1,0		- 1,0
		neg. cash flow NBG 1st Q 2014	- 1,6
		Balance payments	- 1,3
Economic result	[70-77]		[41-45]
(*) The Capricorn cash flow of the NBG for the year 2014 (EUR 6 million) and [Bidder 2] the 'earn-out' — payments for the years 2015-2017 (EUR 15 million) depend on the success of the respective operational business. In case of [Bidder 2], the sellers cannot, differently than in the case of Capricorn, affect this business			

- (145) The good track record of the [Bidder 2] members and their larger experience with transactions in the field of mergers and acquisitions could not justify an award to an offer for a substantially lower sales price. The competence of the [Bidder 2] members was not disputed by the sellers, but it was not an award criterion. The amount of investments into the Nürburgring after the sale was not an award criterion, either.
- (146) The insolvency administrators claim that they had not discriminated any bidder, and that it is not clear from the complaint which of their actions would lead to a price offer by [Bidder 2] lower than the price offer by Capricorn. The insolvency administrators refute the complainant's arguments about the unavailability of the persons involved and the protraction of the sale process in order to allow Capricorn the submission of a bid. [Bidder 2] was explicitly informed that further negotiations with other bidders would take place until the meeting of the creditors' committee on 11 March 2014.

- (147) Furthermore, the insolvency administrators point out that their measures or the agreement of the creditors' committee cannot be imputable to the State, and that there is no advantage in the sale process, because it corresponds to the market-based behaviour.
- (148) As regards complainant 4's allegation that there was never an agreement between [...] and Capricorn for the latter's agreement, the German authorities submitted that [...] guaranteed its financing after an extensive legal and financial due diligence and never cancelled its financing guarantee.
- (149) Finally, regarding complainant 4's claims on Capricorn's alleged failure to pay the second instalment of the purchase price, the German authorities argue the same as presented in paragraph (134) above.

5. ASSESSMENT OF THE MEASURES

- (150) This decision addresses as a preliminary point the issue of whether NG and its subsidiaries MSR and CMHN were firms in difficulty in the sense of the *Community guidelines on State aid for rescuing and restructuring firms in difficulty* ⁽¹²⁶⁾ ('R&R Guidelines') at the time of granting measures 1 to 19. Subsequently, the Commission will assess whether the measures under scrutiny constitute State aid to the beneficiaries in the meaning of Article 107(1) TFEU and finally whether such aid might be compatible with the TFEU.

5.1. DIFFICULTIES OF NG, MSR AND CMHN

- (151) If measures 1 to 19 constitute State aid and if NG, MSR and CMHN were firms in difficulty at the time of aid granting, these measures should be assessed with regard to their compatibility under Article 107(3)(c) TFEU and in particular under the R&R Guidelines. One of the main questions is therefore whether NG, MSR and CMHN were firms in difficulty. The Commission's conclusion is that they were in economic difficulties at the time of aid granting and so would have not been able to have access to the private credit market.
- (152) The following assessment is based on points 9-11 of the R&R Guidelines. The Commission recalls its assessment in recitals 202-206 of the decision of 21 March 2012, where it was not excluded on a preliminary basis that NG could be considered a firm in difficulty within the meaning of the R&R Guidelines on 1 July 2008 (see also recitals 46-47 of the decision of 7 August 2012). In addition, in recitals 6-13 of the decision of 7 August 2012, the Commission found that NG, MSR, and CMHN are undertakings in difficulty.
- (153) The Commission considers that it must assess each company as a whole, without leaving out any part of its business. It is not acceptable that Germany eliminates the loss making Formula 1 activities or the 'Nürburgring 2009' project from the assessment of financial data. It is also clear that the companies did not have access to external financing.
- (154) NG's key financial data during the period 2001-2011 were as follows:

Table 11

NG's key financial data 2001-2011 (EUR million)

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Turnover	34,3	38,3	34,2	28,7	27,1	27,8	29,9	22,0	33,3	5,1	7,0
EBT (*)	0,6	- 0,5	0,6	- 9,9	- 9,6	- 40,1 (**)	- 2,4	- 0,8	- 9,9	4,6	- 16,2

⁽¹²⁶⁾ OJ C 244, 1.10.2004, p. 2.

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Registered capital	5,1	5,1	5,1	10,0	10,0	10,0	13,3	16,7	20,0	20,0	20,0
Own equity	15,2	18,6	19,1	37,3	27,6	- 12,6	- 10,2	- 9,9	- 15,8	- 10,9	- 27,4
Total Debt	—	45,6	43,4	19,7	19,5	27,8	46,8	99,1	234,2	263,2	290,4
Debt/Equity (ratio) (%)	—	250	230	50	70	- 270	- 460	- 1 000	- 1 480	- 2 410	- 1 060
Debt/Turnover (ratio) (%)	—	119	127	69	72	100	156	450	703	5 160	4 150

(*) Earnings before taxes ('EBT')

(**) Increase of losses mainly due to significant increase of expenses for events ('Aufwendungen für Veranstaltungen') from EUR 21,2 million in 2005 to EUR 44,0 million in 2006.

- (155) Point 10(a) of the R&R Guidelines stipulates that a company is in difficulty in the case of a limited liability company when 'more than half of registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'. This provision reflects the assumption that a company experiencing a massive loss in its registered capital will be unable to stem losses that will almost certainly condemn it to go out of business in the short or medium term (as stipulated in point 9 of the R&R Guidelines).
- (156) The Commission also notes that in accordance with point 11 of the R&R Guidelines, a firm may be considered to be in difficulty 'where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value'. In this respect, according to the General Court, 'the existence of negative own capital [...] may be considered to be an important indicator that an undertaking is in a difficult financial situation [...]' ⁽¹²⁷⁾.
- (157) According to the financial statements of NG for the years 2001-2011, the registered capital of the company was not lost by more than half. However, in the period 2006-2011 the company's own equity was negative. In previous cases the Commission has considered that where a company has negative equity, this implies in fact that the entire registered capital of that company has been lost and there is an *a priori* assumption that the criteria of point 10(a) of the R&R Guidelines are met ⁽¹²⁸⁾.
- (158) In the case of NG, the Commission considers that the only reason why the registered capital does not appear to have been lost by more than half is that the company did not adopt appropriate measures. Such appropriate measures would aim at turning the company's own equity from negative to positive and, at the same time, at increasing it to an adequate level. Such appropriate measures could be either the capitalisation of losses or a capital increase or both.
- (159) In this respect, the Commission considers that a capitalisation of losses would have resulted in the loss of the entire registered capital of the company, since the accumulated losses were higher than the registered capital. For this reason the Commission considers that the criteria of point 10(a) of the R&R Guidelines are met in this case since 2006.

⁽¹²⁷⁾ Joined Cases T-102/07 *Freistaat Sachsen v Commission* and T-120/07 *MB Immobilien and MB System v Commission* [2010] ECR II-585, para. 106.

⁽¹²⁸⁾ Commission Decision in case C 38/2007 *Arbel Fauvet Rail* (OJ L 238, 5.9.2008, p. 27), as upheld by the General Court, see joint cases T-267/08 and T-179/08, ECR 2011 II-1999, point 141; Commission Decision in case C 27/2010 *United Textiles* (OJ L 279, 12.10.2012, p. 30).

- (160) In addition, on the basis of point 11 of the R&R Guidelines, the Commission considers NG to have been in difficulty already since 2002, because: (a) NG's annual turnover decreased by 80 % in that period, at a total amount of EUR 89,4 million, and the company had annual losses for most part of the same period; (b) during the whole period NG had excessive debt, which increased from 119 % of turnover in 2002 to 4 150 % of turnover in 2011; (c) even in 2004 and 2005, when the company's debt fell below 100 % of its turnover, that debt remained at significantly high levels of around 70 % of turnover, and also during the same years the company had reduced sales and annual losses; and (d) NG had negative equity for the most part of the same period (2006-2011).
- (161) MSR's key financial data during the period 2007-2011 were as follows:

Table 12

MSR's key financial data 2007-2011 (EUR million)

	2007	2008	2009	2010	2011
Turnover	0,0	4,4	3,4	2,2	0,9
EBT	- 0,1	- 0,5	- 4,0	- 4,8	- 8,6
Registered capital	0,05	0,05	0,05	0,05	0,05
Own equity	0,08	0,6	4,6	3,3	11,9
Total Debt	2,5	28,3	95,6	96,5	103,8
Debt/Equity (ratio) (%)	3 130	4 720	2 080	2 920	870
Debt/Turnover (ratio) (%)	—	643	2 810	4 380	11 500

- (162) CMHN's key financial data during the period 2008-2011 were as follows:

Table 13

CMHN's key financial data 2008-2011 (EUR million)

	2008	2009	2010	2011
Turnover	0,0	2,6	1,2	0,2
EBT	- 0,8	- 2,5	- 3,6	0,0
Registered capital	0,03	0,03	0,03	0,03
Own equity	0,8	3,3	6,9	6,9
Total Debt	6,5	13,3	36,9	35,3
Debt/Equity (ratio) (%)	810	400	530	510
Debt/Turnover (ratio) (%)	—	510	3 070	17 650

- (163) The Commission notes that it has not received any document of MSR or CMHN which would demonstrate their prospects for viability.
- (164) On the basis of point 11 of the R&R Guidelines, the Commission considers MSR and CMHN to have been in difficulty already since 2007 and 2008, respectively, because they had minimal revenue, significant annual losses and mounting debt, which exceeded significantly their annual turnover.
- (165) The Commission does not agree to the argument of Germany that NG, MSR and CMHN were not in difficulty, because the construction of infrastructure and the organisation of Formula 1 and Superbike race events were carried out on behalf of the public sector and they cannot be therefore taken into account for analysis of their financial situation.
- (166) Firstly, the Commission finds that the construction of infrastructure for motorsport, leisure activities, accommodation and dining and the organisation of motorsport events are not special effects outside the regular business of NG, MSR and CMHN. These were the core activities within the business remit of these companies. Even if both their shareholders and business management saw NG, MSR and CMHN as vehicles to keep the sport infrastructure in public ownership and to organise non-profitable sport events which would not be offered without the coverage of losses by the public funding, these shareholders and business management should not allow the development of liabilities in the non-efficient and loss-making manner demonstrated by the above financial data of these companies without a sound and realistic business plan. The above activities shall be therefore included in the financial assessment.
- (167) Secondly, the Commission considers that the fact that the construction of infrastructure for the said purpose and the organisation of motorsport events may well have contributed to NG, MSR and CMHN's difficulties does not in itself mitigate the finding that NG showed the usual signs of a firm being in difficulty already before the 'Nürburgring 2009' project was launched. A healthy firm would need to adapt its costs to such activities in order to survive. In the years 2008 and 2009, NG, MSR and CMHN had losses and increasing debt (increase by 537 % between 2002-2011, 4 052 % between 2007-2011 and 443 % between 2008-2011, respectively). Although the Nürburgring 2009 project was implemented in 2010, the subsequent financial results of NG, MSR and CMHN indicate that their difficulties persisted.
- (168) In light of the above, the Commission has reached the conclusion that NG, MSR and CMHN were firms in difficulty within the meaning of the R&R Guidelines at the time when measures 1 to 19 were provided, and that their difficulty was so severe that they would not find any financing in the market.

5.2. EXISTENCE OF STATE AID

- (169) Article 107(1) TFEU provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(a) State resources and imputability

- (170) Part of measure 1 (increases of own capital) taken by the Land and the district of Ahrweiler as well as another part of measure 1 (transfers to the capital reserve), measures 3, 9, 16 and 19 taken by the Land alone amount manifestly to State resources imputable to the State.
- (171) For the measures carried out by NG (measures 2, 4, 5, 6, 7, 10, 12, 13, 14, 15 as regards the transfer of shares of MSR to NG, 17), Germany accepts explicitly that the resources are imputable to the State. It is also noted that NG's supervisory board represented the Land and the district of Ahrweiler as NG's shareholders. In this context,

in the meeting of the supervisory board of 28 August 2005, its vice-president declared that the award of the project to private investors can take place only if the risk for the Land is small ⁽¹²⁹⁾. Also, in a workshop of the supervisory board on 20 December 2005, its vice-president stated that a decision about an investment of NG must be taken in the new cabinet after the elections in the parliament of the Land ⁽¹³⁰⁾. Moreover, the government of the Land informed about the investment *Erlebnisregion Nürburgring* in the government declaration of 30 May 2006 and the Council of Ministers took note on 19 September 2006 of the intention of the supervisory board of NG to implement the project under substantial participation of a private third party ⁽¹³¹⁾. In addition, the Ministry of Economy, Transport, Agriculture and Wine as well as the Finance Ministry of the Land provided on a continuous basis opinions, comments or instructions regarding the 'Nürburgring 2009' project ⁽¹³²⁾, which was presented by the Land to the public on 2 December 2009. The Commission considers that also the loan granted by NG to MSR through PNG as an intermediary (measure 6) is a measure carried out by NG and thus imputable to the State.

- (172) As regards the ISB loan (measure 8) and the rescheduling of interests (measure 18), Germany has acknowledged that the Land instructed ISB to grant the loan. Concerning the loans granted by RIM to MSR through Mediinvest and PNG as an intermediaries (measure 11) and the transfer of shares of MSR to RIM (part of measure 15), the Commission notes that RIM is a public institution with the mission of supporting the Land's policy in economic and structural development ⁽¹³³⁾. Therefore, for the purpose of the above-mentioned measures, ISB and RIM constitute instruments of the State in the application of its policy, which demonstrates the imputability of ISB and RIM's actions to the State insofar as these measures are concerned. Resources imputable to the State are therefore involved in all the measures.

(b) Economic activity

- (173) By analogy with the Leipzig/Halle judgment ⁽¹³⁴⁾, the construction of infrastructure can be considered an economic activity if it is intrinsically linked to a commercial exploitation of the infrastructure, which is the case here.
- (174) The operation of sport facilities (including race tracks and off-road parks), leisure parks ⁽¹³⁵⁾, accommodation facilities, restaurants, safety driving centres, driving schools, multifunctional halls, and cash free payment systems, and their lease to professional or non-professional users ⁽¹³⁶⁾, are an economic activity for both the owner and operator. Consequently, the construction or renovation of infrastructure which is indissolubly linked to these activities is also an economic activity. By contrast, non-economic activities include the use of a sport facility at the level of non-professional users ⁽¹³⁷⁾ and the training of youngsters by professional sport clubs if accounts are separated from the accounts for the economic activities ⁽¹³⁸⁾. In view of the indissoluble link between the infrastructure and the economic activity for which it is used the construction, upgrade or operation of Nürburgring sport and tourism infrastructure are thus economic activities for the investors and operators, even if the revenues from the operation of the infrastructure do not cover the costs of its construction and if more than 90 % of sport activities at Nürburgring qualify as amateur sport. The latter fact plays a role only at the level of users: non-professional users are not undertakings. Indeed, the Nürburgring sport and tourism infrastructure is not general infrastructure, such as a public road which is made available for public use. The financing of the construction of the infrastructure at stake (through the loans from the liquidity pool and shareholders' loans, or later through the ISB loan) is thus subject to the State aid rules.
- (175) The organisation of Formula 1 or other motorsport races is a provision of services on the market of professional sport which considerably benefits from broadcasting rights. Financing of Formula 1 or other motorsport events

⁽¹²⁹⁾ Opinion of the Court of Auditors of the Land of 15 June 2010, part I, page 14.

⁽¹³⁰⁾ See footnote above.

⁽¹³¹⁾ Opinion of the Court of Auditors of the Land of 15 June 2010, part I, page 15.

⁽¹³²⁾ Opinion of the Court of Auditors of the Land of 15 June 2010, parts I and II.

⁽¹³³⁾ See the description of RIM at: <http://test.isb.rlp.de/de/die-isb/beteiligungen/rheinland-pfaelzische-gesellschaft-fuer-immobilien-und-projektmanagement/>

⁽¹³⁴⁾ Joint Cases T-443/08 and T-455/08 *Freistaat Sachsen, Flughafen Leipzig/Halle et al v Commission* [2011] ECR II-1311, upheld on appeal, see Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* (not yet published in the ECR).

⁽¹³⁵⁾ C53/2002 *Space Park Development*.

⁽¹³⁶⁾ SA.35440 *Arena Jena*. For professional sport infrastructure see SA.31722 *Hungarian tax benefit scheme*. For the operation of sport centres for general public against a fee see SA.33952 *German Alpine Association*.

⁽¹³⁷⁾ SA.33618 *Uppsala arena*, SA.35135 *Arena Erfurt*, SA.35440 *Arena Jena*.

⁽¹³⁸⁾ N118/2000 *Support to professional sport clubs*.

is not exempt from the remit of State aid law for the mere reason that they are run with a structural deficit or implement the objectives of regional policy. The Commission thus considers that Formula 1 and other motorsport racing is an economic activity.

- (176) Promotion of tourism, project development, the construction of real property, business management and trade with cars or motor bikes also qualify as economic activities.

(c) Selectivity

- (177) The Commission considers that the measures have a selective character at the level of the operator (NG for measures 1, 3, 8, 9, 13, 14, 16, 18 and 19; EWN, FSZ, MAN, TTI, BWN, BWNB, Camp4Fun for measure 2; MSR for measures 4, 5, 8, 9, 11, 12, 18 and 19; CST for measure 5; MIB for measure 7; CMHN for measures 8, 9, 18 and 19; NAG for measures 10 and 17; Mediinvest, Geisler & Trimmel and Weber for measure 15), as they reserve favourable treatment for that operator. Furthermore, the entrustment to construct and operate the infrastructure was not transparent, non-discriminatory and in line with procurement rules. However, the measures are not selective at the level of the user, since transparent and non-discriminatory access for amateur sport clubs and the general public is guaranteed.

(d) Distortion of competition and effect on trade

- (178) With regard to measures 1 to 19, there is a distortion of competition in the markets of the operation of race tracks, off-road parks, leisure parks, accommodation facilities, restaurants, safety driving centres, driving schools, multifunctional halls, cash free payment systems, promotion of tourism, project development, the construction of real property, business management and trade with cars or motor bikes, since the aid to the Nürburgring infrastructure and the Formula 1 activities promotes the use of this infrastructure. The organisation of Formula 1 racing and other motorsport events promotes the access of customers to those events.
- (179) The measures in question enabled NG, MSR and CMHN to continue operating so that they did not have to face, as other competitors having financial difficulties, the consequences normally deriving from their difficult financial results. This distorts competition as other companies active in the same markets need to operate without such State support.
- (180) As regards the effect on trade between Member States, Nürburgring with its Formula 1 and the German Touring Car Championship competes with other race tracks in the Union organising top motorsport competitions and it cannot be excluded that the Nürburgring leisure park could attract visitors from Belgium (its border with Germany is around 50 km far from the Nürburgring). It has to be recalled that a complaint has been received from the competing leisure park operator Eifelpark (cf. recital 2). It can also not be excluded that there is an effect on trade between Member States in respect of the operation of off-road parks, accommodation facilities, restaurants, safety driving centres, driving schools, multifunctional halls, cash free payment systems, as well as in respect of promotion of tourism, project development, the construction of real property, business management and trade with cars or motor bikes.

(e) Advantage

- (181) According to the settled practice of the Commission and as confirmed by the case law, the criterion for assessing whether a transaction between a public body and an undertaking amounts to State aid is the market economy investor principle⁽¹³⁹⁾. It follows from this principle that, when the State acts in a market as a commercial operator, it must do so in a way comparable to a private operator. If the State does not do so, State aid could be involved. In other words, when the market economy investor principle is applicable, the benchmark for

⁽¹³⁹⁾ See, e.g. Case C-305/89 *Italy v Commission* ('ALFA Romeo') [1991] ECR I-1603, paragraphs 18 and 19; Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 51; Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* [1999] ECR II-17, paragraph 104; Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012] ECR II-0000, paragraph 48.

appreciating whether a transaction involves State aid is whether a private operator placed in a similar situation would have behaved in the same way. In applying this principle, non-economic considerations cannot be taken into account as reasons for granting support measures. As established by relevant jurisprudence, the provision of the measures by the State cannot be seen in isolation, but will have to be considered in the context of other aid measures ⁽¹⁴⁰⁾

- (182) In order to assess whether an advantage was conferred to the owners or the operators (NG, MSR and CMHN until 30 April 2010, and also NAG from 1 May 2010 to 31 October 2012), the market economy investor principle shall therefore be applied. First of all, measures 1 to 19 are not *pari passu* transactions ⁽¹⁴¹⁾ because Germany had not found a private investor who would invest under comparable conditions (for instance, in Part I of the 'Nürburgring 2009' project). There were two loans provided by private operators, but their amounts were small taking account of the amounts of public investment, these loans related only to Part II of the 'Nürburgring 2009' project (i.e. mainly to hotels) ⁽¹⁴²⁾, and they were granted only to CMHN or MSR, but not to NG or another aid beneficiary:

Table 14

Loans granted by private financial institutions to CMHN/MSR

Financial institution	Year	Beneficiary	Amount (EUR million)	Interest rate	Collaterals (EUR million)
Bank for Tirol and Vorarlberg	2008	CMHN	[...]	[...] % + [...] % fee	[...] (mortgage) pledging shares of MSR
Kreissparkasse Ahrweiler	2010	MSR	[...]	[...]	

- (183) In any case, Germany acknowledges that also for Part II no long-term private investor was found.
- (184) Furthermore, for the period from 2006 to 2010, the Commission received business plans for the 'Nürburgring 2009' project and for NG as such:

Table 15

Business plans for the Nürburgring 2009 project (EUR million)

Relevant entity/activity	Date	Costs	Turnover (2009-2020)	Result EBT (2009-2020)
Nürburgring 2009 project	12/2005	113 (*)	281	22
Nürburgring 2009 project	3/2006	113 (*)	181	- 59
Nürburgring 2009 project	3/2006	113 (*)	281	22
Nürburgring 2009 project	8/2006	113 (*)	281	22

⁽¹⁴⁰⁾ Joined Cases C-399/10 P and C-401/10 P *Bouygues SA, Bouygues Télécom SA v Commission* (not yet published in the ECR) and *BP Chemicals v Commission*, judgment in case T-11/95 [1998], para. 171.

⁽¹⁴¹⁾ A '*pari passu*' transaction is a transaction that is carried out under the same terms and conditions (and therefore with the same level of risk and rewards) by public bodies and private operators who are in a comparable situation.

⁽¹⁴²⁾ The loans of the two minority shareholders of MSR (Geisler & Trimmel: EUR [...] million; Weber: EUR [...] million; both with an interest rate of [...] % with no collaterals) to MSR are not relevant because they carried out the construction of the infrastructure and as parties with own interests in the project; they cannot be taken into consideration.

Relevant entity/activity	Date	Costs	Turnover (2009-2020)	Result EBT (2009-2020)
Nürburgring 2009 project	11/2007	135	279	45
Nürburgring 2009 project	12/2008	140	283	40
Nürburgring 2009 project	3/2009	159	287	28
Nürburgring 2009 project	8/2009	195	331 (**)	67 (**)
Nürburgring 2009 project	10/2009	200	260 (**)	– 17 (**)
Nürburgring 2009 project	12/2009	200	254 (**)	– 35 (**)
NG, MSR, CHMN consolidated (***)	7/2010	—	283	– 769 (****)
NG, MSR, CHMN consolidated (***)	9/2010	—	283	– 269 (****)
NG, MSR, CHMN consolidated (***)	9/2010	—	—	59 (****)

(*) The project was called 'Erlebnisregion Nürburgring' and it included a hotel.

(**) Base case (not worst or best case).

(***) Results for the period 2010-2030.

(****) Worst case

(185) From Table 15, it is obvious that the estimated costs were increasing constantly during the preparation of the 'Nürburgring 2009' project while the latter's profits (EBT) were decreasing significantly, from profits of EUR 22 million in December 2005 to losses of EUR — 35 million in December 2009. A private investor would not accept such a sharp increase of the costs and a significant decrease of profits during the preparation of the project between December 2005 and December 2009 (based on available information, the main financing of the construction had been granted from May 2008 to June 2010).

(186) In any case, when considering the business plans in question, which the Commission has taken into account while carrying out the market economy investor test, the Commission notes the following:

(a) Part of measures 1, 2 and 3 were applied before the first plan of December 2005. Therefore those measures cannot be considered as having been decided on the basis of the business plans in question.

(b) Also as regards the first business plan (December 2005), part of measures 2 and 3 were granted at the same time with it. In this regard, the Commission notes that those measures were granted in a context of continuous public support, which had started already earlier (in 2002 or earlier), without any private support and in favour of a firm in a worsening financial situation. Thus, the part of measures 2 and 3 in question cannot be taken in isolation from the ones granted prior to them (part of measures 1, 2 and 3), but they form a continuity of the latter and therefore the part of measures 2 and 3 at hand has to be considered as granting a further advantage.

(c) Part of measures 2 and 3 was applied at a time when already the first three business plans, of December 2005, March 2006 and August 2006, had been issued. However, the Commission notes that those plans' forecasts for NG's future sales and profits remained identical, despite the significant worsening of NG's actual results in the same period (negative equity, significant increase of debt, reduction of sales, annual losses). On

this basis, the business plans in question cannot be considered as realistic and acceptable, since they disregarded the company's bad recent historic data and kept the same forecasts as before.

- (d) The first six business plans (December 2005, March 2006, August 2006, November 2007 and December 2008) did not concern the future operations of NG as a whole but only partially, because they did not take into account the Formula 1 activity. On this basis, the business plans in question cannot be considered as a reliable basis for deciding financial support to NG.
 - (e) The business plans of March 2009-December 2009 included forecasts also for the Formula 1 activity. However, for the whole period 2009-2020, the Formula 1 activity was forecasted to bring losses, with sales which were forecasted to remain stable and at the same level as before 2009, therefore it appears that the Formula 1 activity was not foreseen to be restructured. In the same vein, the Commission notes that those plans forecasted earnings which were significantly lower than the ones foreseen by the previous business plans (EUR 7-9 million, by contrast to EUR 22-40 million). The above facts would reduce the validity of the business model presented in the plans of the period March 2009-December 2009.
 - (f) Two business plans from July 2010 and September 2010 foresaw losses until 2030, under the worst case scenario, therefore, the activity was not foreseen to be viable.
 - (g) Finally, one plan of September 2010 foresaw earnings between 2016 and 2030, however, that plan did not include sensitivity analysis (i.e. worst case scenario results). In any case, that plan's forecasts ignored the significant worsening of NG's actual results in the same period (negative equity, significant increase of debt, reduction of sales, annual losses). On this basis, the business plan in question cannot be considered as realistic and acceptable, since it disregarded the company's bad recent historic data.
- (187) On the basis of the above, the Commission cannot consider that any public support to NG as a firm in difficulty (see Section 5.1 above), which aimed at financing its operations at the time (operation of race ring) or in the future (operation of race ring together with new hotels), would be deemed as market conform on the basis of the business plans in question.
- (188) As for the market economy investor principle, the following can be stated for the individual measures:

Measures covered by the decision of 21 March 2012

- (189) For **measure 1** (provision of capital by the Land and the district of Ahrweiler to NG in the form of payments in capital reserve and capital increases), the Commission notes that the analysis presented above for the submitted business plans is relevant. No private investor would have provided capital to NG in 2004 and in the following years. Therefore, the capital provided by the Land to NG on 1 May 2002 (amounting to EUR 2 179 000) and on 21 December 2004 (amounting to EUR 22 839 241), as well as the capital provided by the Land and the district of Ahrweiler on 31 August 2004 (amounting to EUR 4 887 000) and 4 September 2007 (amounting to EUR 10 000 000) involve aid which is equal to the full amount of capital provided.
- (190) As regards **measure 2** (shareholder loans by NG before the 'Nürburgring 2009' project), on the basis of the financial data submitted by the German authorities, the Commission notes that EWN, Camp 4 Fun and TTI had annual losses and negative equity when each of them received its part of measure 2 (see Tables 1-4 above). At the same time BWN1, BWNB and BWN2, which received loans in the period 2004-2007, had annual losses during that whole period and also negative equity in 2005, 2006 and 2007. Finally, MAN had both accumulated and annual losses when it received its part of measure 2. Therefore, on the basis of point 11 of the R&R Guidelines, the Commission considers that those companies were in difficulty at the time of measure 2. On the other hand, on the basis of the financial data submitted by the German authorities, the Commission notes that FSZ was not in difficulty when it received its part of measure 2, because its financial data did not demonstrate any of the signs of point 11 of the R&R Guidelines. The provision of loans to companies in such difficulties that no private investor would have financed at any rate, especially since those companies belonged to a company which itself was in severe financial difficulty (NG), involves an advantage to these companies, which is equal to the amount of the loans. Therefore, the loans granted by NG to its subsidiaries, namely EWN (EUR 6 195 170,02), BWN/BWNB (EUR 3 760 000), Camp4Fun (EUR 450 000), MAN (EUR 100 000) and TTI (EUR 25 000) are not compliant with the market economy investor principle. In this context, it is noted that the loans granted to MAN and TTI

are below the *de minimis* threshold, but Germany has neither argued nor provided that all the conditions of the Commission Regulation (EC) No 1998/2006 ⁽¹⁴³⁾ were fulfilled; that Regulation could be applied in the recovery phase if Germany demonstrates that all the conditions of the Regulation are met. Furthermore, the Commission notes that the loans granted to FSZ (EUR 646 738,12) did not confer an advantage to the latter, since they were granted at the interest rate of 6 % which is at market level because it corresponds to the sum of Germany's base rate at the time of the granting of the loans (5,06 % in April 2002, 4,8 % in March 2003 and 5,19 % in March 2008) ⁽¹⁴⁴⁾ and the basis points to be added for FSZ's financial condition (100 basis points) taking into account that it did not present any of the signs of point 11 of the R&R Guidelines when it received those loans ⁽¹⁴⁵⁾. On this basis, the above loans granted to FSZ do not constitute State aid.

- (191) Regarding **measure 3** (loans granted to NG from the liquidity pool of the Land), Germany does not put forward any evidence to demonstrate that NG did not benefit from interest rates that were more advantageous compared with the conditions of its competitors. In addition, it is difficult to accept that there would be any financing available in the market for a company in NG's financial difficulties, at any interest rate. Finally, the eventual repayment of the funds and the corresponding interest is an *ex post* event, unknown at the time of the granting of the measures; therefore it cannot be taken into account for the market economy investor test. Therefore, the measures financed by the liquidity pool were not performed on market terms. The provision of loans to a company in such difficulties that no private investor would have financed it at any rate involves an advantage to the company which is equal to the amount of the loans. In sum, the granting of loans by the Land to NG between 30 June 2003 and 11 May 2010 (see the list of loans in Table 5) involves aid of EUR 399 805 370.
- (192) Under the same test as above, the Commission concludes the same for **measure 4** (loan granted by NG to MSR). Indeed, it cannot be accepted that at the time of the measure (December 2007), there would be any financing available in the market for a company in MSR's financial difficulties (see Table 12 and recital 155), at any interest rate. The provision of a loan to a company in such difficulties that no private investor would have financed it at any rate involves an advantage to the company, which is equal to the amount of the loan. Therefore, the advantage granted by NG to MSR through the loan of EUR 300 000 on 27 December 2007 is equal to EUR 300 000.
- (193) The support provided by NG to CST (**measure 5**) does not comply with the market economy investor principle. Indeed, on the basis of the financial data submitted by the German authorities, the Commission notes that CST had annual losses and negative equity in the period 2008-2011, and also entered into liquidation in 2009. Therefore, on the basis of point 11 of the R&R Guidelines, the Commission considers that CST was in difficulty when it received each loan of measure 5 (in years 2008-2011, see Table 6 above). The provision of loans to a company in such difficulties that no private investor would have financed at any rate, especially since CST belonged to a company which itself was in severe financial difficulty (NG), involves an advantage to the company, which is equal to the amount of the loan. Therefore the advantage granted by NG to CST through the loans of a total amount of EUR 11 032 060 provided to it between the 27 August 2008 and the 18 April 2011 is equal to the amount of the loans.
- (194) As regards the letter of comfort, the Commission notes that it was granted by NG to CST on 23 December 2009 and constituted a commitment of NG, by which it would fund the repayment of financial obligations of CST, which CST itself was unable to repay. The funding of such financial obligations would take place through loans by NG to CST, with an interest rate of 6 %. The commitment also included a subordination of the claims of NG stemming from those loans, funded by NG on the basis of the comfort letter of 23 December 2009, which foresaw that NG's relevant claims against CST would rank in the last position of all creditors' claims against CST. In this context, the Commission considers that a market economy creditor would not commit to fund unpaid loans of a firm in severe difficulty or to subordinate materialised claims against a firm in severe difficulty, since such measure would amount to the actual loss of the claims. On this basis, the Commission finds that the letter of comfort, which included the above commitment for the funding of unpaid loans and subordination of subsequent claims, constitutes an advantage. The Commission also considers that the letter of comfort constitutes a measure additional to the loans of 2008-2011 (see recital 182 above), since: (a) it was not granted at the same moment with those loans; (b) it was not foreseen or imposed by the underlying loans' contracts; and (c) it was discretionally decided by NG in order to avoid the insolvency of CST. As regards the amount of the measure, it

⁽¹⁴³⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

⁽¹⁴⁴⁾ See http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

⁽¹⁴⁵⁾ See the communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

is equal to the total amount of loans funded by NG on the basis of the comfort letter of 23 December 2009, however the Commission is not in possession of the relevant amount.

- (195) Finally, as regards the subordination of claims, the Commission notes that it was agreed between NG and CST on 13 December 2010 and contractually referred to the loans granted until 30 November 2010 totalling EUR 10,4 million (i.e. the 13 first loans of Table 6 above, out of the total 15). The Commission further notes that the subordination in question resulted in the ranking of NG's claims against CST in the last position of all creditors' claims against CST. In this context, the Commission considers that a market economy creditor would not accept such a subordination of materialised claims against a firm in severe difficulty, since such measure would amount to the actual loss of the claims. On this basis, the Commission finds that the subordination constitutes an advantage. The Commission also considers that the subordination of 2010 constitutes a measure additional to the underlying loans, since: (a) it was not decided at the same moment with those loans; (b) it was not foreseen or imposed by the underlying loans' contracts; and (c) it was discretionally decided by NG in order to avoid the insolvency of CST. As regards the amount of the measure, it is equal to the total amount of the subordinated loans, i.e. EUR 10,4 million.
- (196) Concerning the consideration paid by NG to IPC (**measure 6**), the Commission notes that the Land's Court of Auditors found that a prudent entrepreneur would not choose those particular companies for the provision of services, and that NG did not check with the necessary prudence the previous work of those companies, in order to assess their appropriateness and to examine whether the conditions for the financing of the Nürburgring 2009 project offered by them were realistic ⁽¹⁴⁶⁾. In this context, the Commission considers that the choice of IPC for the provision of those particular services conferred an advantage to those companies. Thus, the measure constitutes State aid to IPC, in the amount of the total payment to those companies, i.e. EUR 640 000.
- (197) In addition, as regards the EUR 3 million loan granted by NG to PNG and the EUR 2 941 000 loan granted by PNG to MSR, the Commission considers that the two loans constitute one measure, where PNG was only an intermediary, who received a fee of EUR [...]. The beneficiary of the measure was MSR, who ultimately received the loan, at the time when it was in such a financial difficulty that it would not be able to find any financing in the market. The provision of a loan to a company in such difficulties that no private investor would have financed it at any rate involves an advantage to the company, which is equal to the amount of the loan. Therefore, the advantage granted by NG to MSR through the loan of 15 October 2008 is equal to EUR 2 941 000.
- (198) Under **measure 7**, MIB ceded to NG its claims against CST, who was the borrower of the loans concerned, and NG paid a nominal price plus interest to MIB. As CST was in difficulty (see recital 184), the Commission notes that it is not probable that MIB would receive its claims against CST. On this basis, this measure benefitted MIB who received its claims and was replaced by NG who became the creditor of a firm in difficulty. In the absence of a viability plan of CST, which would demonstrate its return to viability and therefore its prospects for repaying its debts, this measure does not comply with the market economy investor principle. Therefore, the cession by MIB to NG of claims amounting to EUR 1 476 830,88 involves aid equal to the amount of the sales price EUR 1 476 830,88.
- (199) As regards **measure 8** (loan of EUR 325 265 000 granted by ISB to NG, MSR and CMHN), without a related guarantee (measure 9), the provision of a loan to companies in such difficulties that no private investor would have financed them at any rate could involve an advantage to the companies, which would be equal to the amount of the loans. In this particular case, however, the aid consists only in the guarantee (measure 9) and not in the loan (measure 8), as the Commission cannot exclude that a private creditor could grant to NG, MSR and CMHN loans under comparable terms because of the guarantee provided by the Land (measure 9).
- (200) Regarding **measure 9**, i.e. the guarantee for the ISB loan of EUR 325 265 000 (measure 8), the measure in question was not conform with the market economy investor principle. Indeed, policy of regional development is pursued by public authorities, whereas market economy investors would not undertake relevant measures in favour of firms in difficulty, to the substantial detriment of their own financial interests. In addition, the

⁽¹⁴⁶⁾ See the 2009 annual report of the Court of Auditors of the Land, pages 3 and 4, available at <http://www.landtag.rlp.de/landtag/drucksachen/4741-15.pdf>

Commission notes that policy of regional development does not aim at bringing firms in difficulty back to viability. Moreover, the Commission considers that the conditions that would rule out the existence of State aid, as described in the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ⁽¹⁴⁷⁾ ('Guarantee Notice'), are not fulfilled. Indeed, the beneficiaries were firms in difficulty, the guarantee covered 100 % of the loan and there was no guarantee premium for the State reflecting the risk of default for the guaranteed loan. Given the severe financial difficulties of the beneficiaries (NG, MSR and CMHN) at the time of the granting of the guarantee in question (see Tables 11-13), the Commission considers that no market creditor would have provided the beneficiaries with a guarantee under those conditions. The Commission does not have any information indicating that the guarantee has been triggered. On this basis, the Commission considers that measure 9 qualifies as State aid. The aid amounts granted by the guarantee to NG, MSR and CMHN by the Land are equal to the amounts of the respective loans (measure 8), i.e. EUR 96 574 200 and EUR 113 590 800 to NG, EUR 92 000 000 to MSR and of EUR 23 100 000 to CMHN.

- (201) As regards **measure 10** (the business lease of the Nürburgring complex to NAG), the Commission notes that a tender procedure can in general rule out an advantage granted to a lessee. However, in the present case, no tender procedure was organised for the selection of the operator of the upgraded complex. Nevertheless, apart from the first three years of the lease (i.e. from 1 May 2010 to 30 April 2013), the minimum rent under the lease contract is within the range of minimum and maximum market-conform annual rents identified in the expert opinion of 29 September 2011. The EBITDA rent is even higher than the maximum annual market-conform rent identified in that expert opinion, apart from the second year of the lease. The Commission therefore notes that the expert opinion of 29 September 2011 demonstrates that the minimum rent of EUR 15 million as from 1 May 2013 could have been market-conform, since it was within the range representing market-level rents, and therefore would have not involve a selective advantage to NG. Nonetheless, the actual duration of the lease was only between 1 May 2010 and 31 October 2012. The minimum rent set by the expert opinion and by the lease contract for the first three years of the lease is included in Table 16:

Table 16

Minimum rent for the lease of the Nürburgring

	1.5.2010-30.4.2011	1.5.2011-30.4.2012	1.5.2012-30.4.2013
expert opinion	EUR 1,6 million	EUR 12 million	EUR 12,3 million
lease contract	EUR 0	EUR 5 million	EUR 11,5 million

In view of the above, the Commission considers that the annual rent applied in the period from 1 May 2010 to 31 October 2012 involved a selective advantage to NAG, equal to the difference between: (a) the rent which should have been charged, in view of the expert opinion; and (b) the rent which was set in the lease contract. The Commission concludes that there is aid of an amount of EUR 9 million, i.e. the difference between points (a) and (b) above (for the third year only half of that difference is calculated, as the lease terminated on 31 October 2012, i.e. in the middle of the third year) ⁽¹⁴⁸⁾.

- (202) As regards **measure 11** (loans granted by RIM to MSR through Mediinvest and in case of one loan also through PNG as intermediaries), by which part II of the 'Nürburgring 2009' project was financed, Germany itself states that it was not possible to find private investors financing for Part II of the project. In addition, the opinion of the Land's Court of Auditors implied that the potential investors did not see the project as viable under market terms. Indeed, several private operators of leisure parks rejected their engagement in the project. Without a related guarantee (measure 12), the provision of a loan to companies in such difficulties that no private investor

⁽¹⁴⁷⁾ OJ C 155, 20.6.2008, p. 10.

⁽¹⁴⁸⁾ The aid amount is equal to (in EUR million): $1,6 + 12 + (12,3/2) - [0 + 5 + (11,5/2)] = 9$.

would have financed them at any rate could involve an advantage to the companies, which would be equal to the amount of the loans. In this particular case, however, the aid consists only in the guarantee (measure 12) and not in the loans (measure 11), as the Commission cannot exclude that a private creditor could grant to MSR loans under comparable terms because of the guarantee provided by the Land (measure 12). The Commission notes that Mediinvest and PNG were not the actual receivers of the aid but only provided their services as intermediaries, in order for the loans of RIM to reach MSR. Also, for the provision of the above service, only Mediinvest realised a profit, corresponding at most to an interest rate difference of 4,3 % (between the loans that it received from RIM and the loans that it granted to MSR), whereas PNG did not profit from any difference of interest rates (PNG had the same interest rate in the loan that it received from Mediinvest and the loan that it granted to MSR). In addition, the Commission cannot conclude in view of the data included in recitals 32-34 and Table 14 above that Mediinvest and PNG charged market non-conform interest rates for their services, or that the difference of interest rates that they received (at most 4,3 % for Mediinvest, 0 % for PNG) went beyond market levels. On the basis of the above, the Commission considers that Mediinvest and PNG were not beneficiaries of measure 11.

- (203) Concerning **measure 12**, i.e. the guarantee by the Land to ISB for the silent participations of RIM in Mediinvest (measure 11), the Commission considers that the set-up aimed at allowing MSR getting the loans described as measure 11. Moreover, at the time of the loans, MSR was in a very bad financial situation. No private investor would have provided a guarantee to a company in such a bad financial situation. The Commission does not have any information indicating that the guarantee has been triggered. On this basis, the Commission considers that measure 12 qualifies as State aid. The aid amount granted by the guarantee to MSR by the Land is equal to the amount of the loans concerned (measure 11), i.e. EUR 85 484 000.
- (204) As regards **measure 13** (grants from gaming tax for tourism promotion granted by the Land to NG), the Commission considers that tourism policy is an objective pursued by public authorities, whereas market economy investors would not undertake relevant measures in favour of firms in difficulty, to the substantial detriment of their own financial interests. In addition, the Commission notes that tourism policy does not aim at bringing firms in difficulty back to viability. Thus, taking into account NG's bad financial situation, the Commission considers the whole amount of the measures at hand to constitute an advantage to NG. In sum, the tax proceeds amounting to EUR 1,6 million in 2009 and EUR 3,2 million per year in 2010 and 2011 transferred from the Land to NG constitute aid in favour of NG.
- (205) As regards **measure 14** (loans by the Land to NG and debt subordination), the explanations given for measure 13 regarding tourism policy also apply. In addition, the provision of a loan to companies in such difficulties that no private investor would have financed them at any rate involves an advantage to the companies, which is equal to the amount of the loan. Therefore, the loans of EUR 20 million on 21 August 2007, EUR 10 million on 22 December 2009, EUR 4,65 million on 28 December 2010 and EUR 3,2 million on 26 April 2011 and a further loan of EUR 4,95 million on 9 December 2011 granted to NG by the Land involve aid, which is equal to the amount of the loans.
- (206) Concerning the debt subordination, the Land declared it in relation to the afore-mentioned loan of EUR 20 million on 29 August 2007 in order to avoid insolvency of NG, ranking its claims against NG in the last position of all creditors' claims against NG. On this basis, the Commission finds that the subordination (part of measure 14) constitutes a separate advantage to the loan of EUR 20 million of measure 14, since it significantly reduced the possibility of collection of its claims against NG. As regards the amount of the measure, it is equal to the amount of the subordinated loan, since it allowed NG to avoid repaying the amount of the subordinated loan, i.e. EUR 20 million.
- (207) As regards **measure 15** (takeover of MSR shares by NG and RIM), MSR was in difficulty at the time of the measure, which means that it had loss making operations. In turn, this means that the amount resulting from its operations and put at the disposal of its shareholders was negative. In this sense, the value reflected by MSR's operations in each of its shares was negative. In other words, a potential investor in MSR would actually require to be paid an amount corresponding to MSR's losses, stemming from its operations and reflected in each of its shares. By buying MSR, NG and RIM clearly intended to support it. However, the change of owner, as such, does not involve aid to MSR. It is the measures that might follow the change of ownership (e.g. loans from NG to MSR) which would involve aid to MSR. The legal form of the company MSR is such that the shareholders are not liable for the company's liabilities, and the sale of MSR by its previous owners to NG and RIM, as such, only involves a symbolic price paid to the sellers equal to the amount of the sales price, i.e. EUR 3. On this basis, the Commission considers that the price of EUR 1 per share does not constitute an economic advantage to the sellers of MSR's shares, i.e. Mediinvest, Geisler & Trimmel and Weber.

- (208) **Measure 16** involves a shareholder loan and a subsidy by the Land to NG for Formula 1 races. Through the liquidity pool, the Land provided to NG EUR 24 978 808 between 2003 and 2007 and EUR 15 426 562 in 2009 (measure 3). To refinance these amounts, the Land granted an interest-free loan of EUR 40 405 000 to NG in 2011. NG also received a subsidy from the budget of the Land in the amount of EUR 13,5 million in July 2011. As far as these public subsidies are concerned, the advantage in favour of NG is obvious, as NG is relieved from a burden which it should normally bear. For the loan, the market economy investor test is not met. The provision of a loan to a company in such difficulties that no private investor would have financed it at any rate involves an advantage to the company, which is equal to the amount of the loan. Therefore, the advantage granted by the Land to NG through the loan of EUR 40 405 000 on 11 January 2011 is equal to EUR 40 405 000. The advantage granted by the Land to NG through the subsidy of EUR 13,5 million in July 2011 is equal to EUR 13,5 million.
- (209) For the Formula 1 concession contract (**measure 17**), Germany has claimed that the organisation of Formula 1 racing constitutes an aid measure that is compatible under the SGEI rules. However, Germany does not claim that the measure was aid-free compensation as meeting all requirements set out in the Altmark jurisprudence. Finally, Germany has not provided evidence demonstrating that the concession fee was set at market level on the basis of any expert opinion or market report, or that it tendered out the concession. Therefore, in the absence of the elements that would demonstrate that the measure is market-conform, the Commission considers that the concession contract grants an advantage to NAG. For this measure, the aid amount would in principle equal to the difference between the concession fee and the market value of the concession. However, the Commission notes that, since no payments were made under the contract, as stated by Germany, the State aid involved was not materialised, therefore no aid amount can be established.

Measures covered by the decision of 7 August 2012

- (210) In contrast to the opinion of Germany, the Commission considers that the rescheduling of interest payments (**measure 18**) is not conform with the market economy investor principle and therefore constitutes an economic advantage, particularly in view of NG's, MSR's and CMHN's financial situation. Indeed, NG, MSR and CMHN were in a very bad financial position at the moment of the measure, as outlined above. The rescheduling of interest payments relating to a loan to a company in such difficulties, that no private investor would have granted at any rate, involves an advantage to the company, which is equal to the amount of the outstanding amount of the rescheduled loan. Therefore, the rescheduling agreed by ISB on 15 May 2012, amounting to EUR 1,473 million for NG, EUR 1,205 million for MSR and EUR 303 000 for CMHN, involves aid to these companies which is equal to the amount of the rescheduled outstanding loans.
- (211) As regards the State guarantee and the debt subordination (**measure 19**): (a) for the State guarantee of 2012 covering claims of up to EUR 254 million (for a loan of EUR 325 265 000), the Commission notes that it was granted, by declaration of the Land, in order to avoid insolvency of NG, MSR and CMHN, while the latter were in severe difficulty. On this basis, the Commission considers that the measure did not fulfil the conditions of the Guarantee Notice, therefore provided an advantage to the beneficiaries, and thus constituted State aid; (b) the 2012 subordination of the Land's claims, stemming from the above guarantee, resulted in the ranking of the Land's claims in the last position of all creditors' claims against NG, MSR and CMHN. In this context, the Commission notes that a market economy creditor would not accept such a subordination of materialised claims against firms in severe difficulty, since such measure would amount to the actual loss of the claims. On this basis, the Commission finds that the subordination constitutes an advantage. The Commission also considers that the guarantee and subordination of 2012 constitute a measure additional to the guarantee of 2010. Indeed, the adoption of the 2012 guarantee and subordination was not foreseen or imposed by the 2010 guarantee, but discretionally decided by the authorities, in order to avoid the insolvency of NG, MSR and CMHN in 2012. As regards the amount of the measure, it is equal to the amount of the debt linked to it, i.e. EUR 254 million which was covered by the 2012 guarantee and subordination.
- (212) The Commission considers that the above measures relate to the operation of a complex which does not classify as general infrastructure, and that the measures were not triggered by expectations that the state contribution would yield a market-conform return. The Commission thus considers that there is State aid for the construction and operation of the above facilities, which benefits their operator, i.e. NG in particular.

- (213) The Commission also considers that the State aid element is the difference between the appropriate market price of the loan or guarantee and the actual price paid for that measure, whereas the aid beneficiaries were in so severe difficulties that they would not find any financing in the market and hence the advantage from the aid is equal to the full amount of the measures in question.

(f) Conclusion on existence of State aid

- (214) In light of the above, the Commission considers that part of measure 2 (loans granted by NG to FSZ), as well as measures 8, 11 and 15 do not constitute State aid, whereas measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 to 10, 12 to 14, and 16 to 19 constitute State aid within the meaning of Article 107(1) TFEU.

5.3. UNLAWFUL AID

- (215) Measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 to 10, 12 to 14, and 16 to 19 constituting aid have been granted in breach of the notification and stand-still obligations established in Article 108(3) TFEU. Thus, the Commission considers that these measures qualify as unlawful State aid.

5.4. COMPATIBILITY OF THE AID

- (216) Inasmuch as certain measures constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in light of the exceptions laid down in paragraphs 2 and 3 of that Article.
- (217) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met ⁽¹⁴⁹⁾.
- (218) Given that the measures constitute State aid, and since NG, MSR and CMHN have been firms in difficulty since 2002, 2007 and 2008, respectively, the Commission observes that the measures in question should be assessed with regards to their compatibility only under Article 107(3)(c) TFEU and in particular under the R&R Guidelines. Indeed, according to point 20 of the R&R Guidelines, 'a firm in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. Consequently, the Commission considers that aid to firms in difficulty may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the Community interest only if the conditions set out in these Guidelines are met.' Contrary to what Germany claims, the exception laid down in Article 106(2) TFEU is not applicable in the case at hand, because the supported operations cannot be considered as services of general economic interest, since they manifestly constitute operations of commercial nature offered in sectors which are subject to competition. The exception laid down in Article 107(3)(b) TFEU is not applicable either, since the project and the companies supported through the measures under scrutiny cannot be considered as an important project of common European interest, and Germany was not facing a serious disturbance in its economy. Finally, the exception laid down in Article 107(3)(d) TFEU is not applicable either, because the aided activities are obviously not related to culture or heritage conservation.
- (219) In the case at hand, the relevant conditions of the R&R Guidelines (Sections 3.1 and 3.2) for rescue and/or restructuring aid are not fulfilled. Indeed, the measures were not terminated after 6 months and Germany did not notify a restructuring plan within the meaning of the R&R Guidelines. Finally, there is no evidence that the aid was limited to the minimum necessary, notably through a significant own contribution of the aid beneficiary. The authorities did not provide a liquidation plan either.
- (220) The Commission has not identified any other possible compatibility grounds for the measures ⁽¹⁵⁰⁾. Indeed, in the case at hand, the beneficiaries were in difficulty at the time of the granting of the measures, and therefore they are excluded from the application of any compatibility basis other than the R&R Guidelines.

⁽¹⁴⁹⁾ Case C-364/90, *Italy v Commission* [1993] ECR I-2097, para.20.

⁽¹⁵⁰⁾ In this context, Landkreis Ahrweiler is also not an assisted area according to the EU aid map 2007-2013.

- (221) In light of the above, the Commission considers measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 to 10, 12 to 14, and 16 to 19 as incompatible with the TFEU.

5.5. RECOVERY

- (222) According to the TFEU and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ⁽¹⁵¹⁾. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽¹⁵²⁾. In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽¹⁵³⁾.
- (223) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 ⁽¹⁵⁴⁾ laid down that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary [...].'
- (224) Thus, given that the measures at hand were not notified to the Commission in violation of Article 108 TFEU and are, therefore, to be considered as unlawful and incompatible aids, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aids were put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery.
- (225) The Commission notes that certain aid beneficiaries (NG, MSR, CMHN, CST ⁽¹⁵⁵⁾, IPC) are in insolvency proceedings ⁽¹⁵⁶⁾. In line with a well-established case-law, the fact that a beneficiary is insolvent or subject to bankruptcy proceedings has no effect on its obligation to repay unlawful and incompatible aid ⁽¹⁵⁷⁾. At the same time, in the majority of cases involving an insolvent aid beneficiary, it is not possible to recover the full amount of unlawful and incompatible aid (including interests), as the beneficiary's assets are insufficient to satisfy all creditors' claims. Consequently, it is often not possible to fully re-establish the *ex ante* situation in the traditional manner. Since the ultimate objective of recovery is to end the distortion of competition, the European Court of Justice has stated that the liquidation of the beneficiary can be regarded as an acceptable option to recovery in such cases ⁽¹⁵⁸⁾. The Commission is therefore of the view that a decision ordering the Member State to recover unlawful and incompatible aid from an insolvent beneficiary may be considered to be properly executed either when full recovery is completed or, in case of partial recovery, when there is an appropriate registration of the liability relating to the payment of the aid in the schedule of liabilities and the company is liquidated and its assets are sold under market conditions, which implies a definitive cessation of its activities. More in general it should be ensured that no operator will benefit from the illegal and incompatible aid after the disappearance of the beneficiary.
- (226) Recovery shall also concern beneficiaries not in the insolvency procedure (NAG, and BikeWorld GmbH for BWN1, BWNB and BWN2, since BWN1 merged with BWNB, subsequently the name of the acquiring company BWNB was changed into BWN2, and the latter company was subsequently renamed to BikeWorld GmbH.
- (227) The Commission notes that certain aid beneficiaries no longer exist at the moment of this decision (EWN, MAN, TTI, Camp4Fun, MIB).

⁽¹⁵¹⁾ See Case C-70/72 *Commission v Germany* [1973] ECR 00813, paragraph 13.

⁽¹⁵²⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.

⁽¹⁵³⁾ See Case C-75/97 *Belgium v Commission* [1999] ECR I-030671 paragraphs 64-65.

⁽¹⁵⁴⁾ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

⁽¹⁵⁵⁾ Pursuant to Germany, the elimination of the company from the trade register was filed on 22 May 2014.

⁽¹⁵⁶⁾ NG, MSR and CMHN are in the liquidation/insolvency procedure since 1 November 2012. Under German law, at the moment of the launch of the liquidation/insolvency procedure, the business objective of the company changes from a full activity in a pure implementing company, which is eliminated on the basis of German law, but as long as the insolvency/insolvency proceedings have not been completed, the company as an implementing company must use the total assets in compliance with the principle of sound financial management.

⁽¹⁵⁷⁾ Case C-42-93, *Spain v Commission* ('Merco') [1994] ECR I-4175.

⁽¹⁵⁸⁾ Case C-52/84, *Commission v Belgium* [1986] ECR p. 89.

- (228) EWN, MAN, and Camp4Fun were dissolved on 6 September 2011, 29 August 2013 on 1 March 2010, respectively. There was no formal liquidation. For those three aid beneficiaries, there is economic continuity, between them as aid beneficiaries and their remaining shareholder, i.e. NG. Indeed, since NG is the remaining shareholder of these aid beneficiaries, it is responsible for their debts, including the debts resulting from State aid. Since NG is in liquidation, then it should be ensured that there is an appropriate registration of the liability relating to the payment of the aid in the schedule of NG's liabilities, and that there is a definitive cessation of NG's activities. It should also be ensured that no operator will benefit from the incompatible aid after the disappearance of NG. Thus, the Commission concludes that NG as the economic successor of the beneficiaries has to be subject to the recovery of the State aid granted to them. Since NG is the aid grantor as well as the economic successor of the aid beneficiaries, recovery must be implemented in such circumstances by the State.
- (229) MIB was not liquidated, but merged with NAG on 6 September 2013, and therefore also no longer exists as a legal entity. In consequence, NAG is the economic successor of MIB, on the basis of § 2 paragraph 1 of the German Transformation Act ('*Umwandlungsgesetz*'), as indicated in the German trade register. Therefore, NAG as the economic successor of MIB must pay back the aid.
- (230) TTI was liquidated under German Limited Liability Companies Act on 4 December 2007. TTI was a limited liability company ('*Gesellschaft mit beschränkter Haftung*'). By a resolution of the shareholders about liquidation, the company was dissolved. The only remaining purpose of TTI was the implementation of liquidation. Pursuant to § 70 of the Limited Liability Companies Act, the liquidator had 'to quit the current business, to fulfil liabilities of the dissolved company, to collect the claims of the same company and to convert the company's assets in money ...'. The remaining cash assets were then distributed to the shareholders. At that moment in time, the company was dissolved. Pursuant to Germany, there was no legal succession in the sense of economic continuity, because at most, cash went to the shareholders, there was no economic activity anymore, and a transfer of the business or a take-over of liability by the shareholders was not carried out. Germany also indicated that the assets of TTI were not sold in a tender process, since on 12 March 2004 as the date of the opening of the liquidation of TTI, these assets were only the account balance of EUR 19 777,39, tax refund claims of EUR 1 222,01 and interests from a bank account of EUR 30,69. As TTI was liquidated as mentioned above, it had no economic successor, especially since there was no economic activity run by anybody after liquidation, and the shareholders did not receive assets or any operational elements of TTI but only a very limited amount of cash. In this context, since there was no transfer of the business of TTI to anybody, the Commission considers that the State aid stemming from the measure at hand was not passed to anybody else. In such case, the company has already been fully liquidated, and recovery becomes without object because the aid beneficiary no longer exists and has no economic successor.

6. ASSESSMENT OF ECONOMIC CONTINUITY BETWEEN THE INSOLVENT COMPANIES AND THE BUYER OF THE ASSETS

6.1. EXISTENCE OF STATE AID BENEFITING THE BUYER OF THE ASSETS

- (231) In the event of a negative Commission decision regarding the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 TFEU, the Member State in question is required to recover the incompatible aid. The recovery obligation may be extended to a new company, to which the company in question has transferred or sold part of its assets, where that transfer or sale structure will trigger the conclusion that there is economic continuity between the two companies. State aid for the buyer could also result from the sale of the assets under their market value (even in the absence of economic continuity).
- (232) In order to decide on whether there is State aid benefiting the buyer(s) of the assets, the Commission needs to confirm: (a) that the sale of any assets takes place at their market price; and (b) other criteria addressed below.
- (233) According to the Court decision on *Italy and SIM 2 v Commission* ⁽¹⁵⁹⁾, on which the Commission founded its decisions on *Olympic Airlines*, *Alitalia* and *SERNAM* ⁽¹⁶⁰⁾, the assessment of economic continuity between the 'old'

⁽¹⁵⁹⁾ Judgment of the Court of 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA v Commission of the European Communities*, Joined cases C-328/99 and C-399/00, ECR 2003 I-4035.

⁽¹⁶⁰⁾ Commission Decision of 17 September 2008, State aid N 321/2008, N 322/2008 and N 323/2008 — Greece — *Vente de certains actifs d'Olympic Airlines/Olympic Airways Services*; Commission decision 12 November 2008 State aid N 510/2008 — Italy — *Sale of assets of Alitalia*; Commission decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*.

entity and the new structures is established based on a set of indicators. The following factors may be taken into consideration: the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), the sale price, the identity of the buyer(s), the moment of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision) and the economic logic of the operation. This set of indicators was confirmed by the Court in its decision of 28 March 2012 *Ryanair v Commission* ⁽¹⁶¹⁾, which confirmed the *Alitalia* decision.

6.1.1. Scope of assets sold

- (234) The Commission observes that the assets taken over by Capricorn represent all of the assets of the insolvent NG, MSR and CMHN, and they relate to the main activities of these companies. However, the Commission notes that, in the context of the tender process, the assets of NG, MSR and CMHN were split in 11 individual asset clusters and all bidders were allowed to bid for individual assets, as well as for one, several or all asset clusters (see point 2.5). Those clusters were formed with a view on the expected economic use of the assets, the expected investors' interest as well as the costs of separating the assets. Furthermore, the insolvency administrators did not establish any conditions as regards the future use of the assets. The Commission notes that the decision that all the assets were sold to one single company was made by the market, i.e. the economic operators bidding for the assets, not by the insolvency administrators or Germany. Indeed, all the bidders had the possibility to bid for one of the 11 individual clusters of assets, their totality, or specific assets. For market driven reasons, the value of the bids for individual assets or clusters of assets did not reach the value of the highest bid for the totality of assets. This seems to be the consequence of the economic interdependence of the various clusters of assets: without the race track, the hotels would not be viable; without the hotels, a profitable exploitation of the race track with professional races, rock concerts and other activities with a large catchment area would be more difficult.
- (235) As regards the employees, the tender specifications or the sales contract do not include any specific obligation, e.g. an employment guarantee, to transfer employment contracts to the new owner, apart from what is required by relevant national legislation. Under German law, the employees are automatically transferred to the buyer of the assets. However, under German labour courts jurisprudence ⁽¹⁶²⁾, in an insolvency context the buyer can request from the insolvency administrator to terminate employment contracts. Hence in principle the buyer could take a fresh decision on which personnel it wished to offer new employment. In the case at hand, in order to achieve an economically viable operation of the acquired assets, Capricorn assessed its needs, in order to achieve viability of its operations, and chose not to receive the entirety of the employees of the sellers but 85 % of them, i.e. 253 of the total 297 employees, on 1 January 2015 (date when Capricorn will start operating the acquired assets). It is maintained however, that since Capricorn could take an independent decision to engage or not existing personnel, the confirmed hiring of existing personnel does not lead to continuity of operations. In addition, the management structure and staff is planned to be completely reorganised in 2014.
- (236) Furthermore, the Commission notes that the vast majority of the contracts on the organisation of events significant for the operational business will be terminated after the season 2014. New contracts for the period as from 1 January 2015 will be negotiated and concluded with the customers and suppliers by the operational company established by the buyer. In this respect, also new contractual partners will be approached. Capricorn itself plans to organise a number of events instead of renting out the race ring to external organisers.
- (237) Finally, the Commission notes that the scope of activities to be carried out by Capricorn will be to a considerable extent different in comparison with the activities of the Nürburgring group, as demonstrated below (see in particular point 6.1.5).

6.1.2. The sale price

- (238) In order to avoid economic continuity, the assets under the tender process have to be sold at their market price.
- (239) The market price is the price, which could be set by a private investor acting under market conditions ⁽¹⁶³⁾.

⁽¹⁶¹⁾ Judgment of the General Court of 28 March 2012 in Case T-123/09, *Ryanair Ltd v Commission*, ECLI:EU:T:2012:164.

⁽¹⁶²⁾ BAG, Judgement of 19 December 2013 ù 6 AZR 790/12; BAG, Judgement of 20 March 2003 — 8 AZR 97/02.

⁽¹⁶³⁾ Judgment of the Court of 16 December 2010 in Case C-239/09 *Seydaland*, paragraph 34.

- (240) Germany has sold the assets through an open, transparent, non-discriminatory and non-conditional tender process to the bidder submitting the highest bid with secured financing.
- (241) Firstly, the invitation to submit an expression of interest for the Nürburgring assets did not present any limitation as to the parties that could submit offers, therefore any entity could submit an offer in the tender process.
- (242) Secondly, as regards the principle of transparency, the sellers provided all bidders with enough time and all the necessary and detailed information, in order to allow them to carry out a proper valuation of the assets. According to the letter of KPMG titled 'Project RING — procedures for the submission of a final offer', sent to the interested investors on 17 October 2013, the tenderers providing proof of secured financing for the price included in their indicative offers would be granted full access to an electronic data room, they could participate in a meeting with the management of NBG, and they would receive the opportunity to participate in a structured question and answers process. On the other hand, tenderers who would not submit the above assurance and proof of necessary financing would only be granted limited access to the electronic data room and to the financial fact book of the sellers, and would be able to meet with the members of the team that prepared the financial fact book, take part in a site visit and meet for the pre-discussion of the draft purchase agreement for the assets.
- (243) Furthermore, there was constant communication throughout the tender process between the sellers (KPMG) and all bidders who qualified for the respective step of the tender process, for the purpose of providing those bidders with all relevant information and clarifications, with letters and e-mails exchanged in the period July 2013-April 2014. In this context, those bidders were provided with the answers to their questions or allegations, and with all information regarding the tender's further steps. For example, in the above context, the following letters and e-mails were sent by KPMG to the bidders: (a) letter of 19 July 2013 informing the bidders of the procedures for the submission of an indicative offer; (b) letter of 12 September 2013 informing the bidders of the extension of the deadline for the submission of indicative offers; (c) e-mail of 19 September 2013 providing one of the bidders (ADAC) with an update on the financial performance of the Nürburgring; (d) letter of 17 October 2013 informing one of the bidders ([Bidder 3]) of the procedures for the submission of a final offer; (e) e-mail of 28 October 2013 informing one of the bidders ([Bidder 2]) of the preliminary timings for the meetings with stakeholders; (f) letter of 3 December 2013 informing one of the bidders ([...]) that its Indicative Offer was no longer considered due to the fact that parties who supported that offer had withdrawn and there had been no presentation of alternative financing partners, therefore the offer's financing was considered as not secured and its closing probability was evaluated as insufficient; (g) letter of 11 December 2013 providing one of the bidders ([Bidder 3]) with comprehensive and clear explanations to the concerns and allegations that that bidder had raised in a letter of 9 December 2013 (two days earlier); (h) letter of 18 December 2013 providing one of the bidders ([Bidder 3]) with comprehensive and clear explanations to concerns and allegations that that bidder had raised in a letter of 11 December 2013 (seven days earlier); (i) e-mail of 18 February 2014 requesting one of the bidders ([Bidder 3]) for specific clarifications and confirmations regarding the latter's final offer as provided with an e-mail of 17 February 2014 (one day earlier), in particular requesting that bidder, among other things, to submit proof and evidence of its binding financing commitment e.g. in the form of a binding financing commitment letter, to provide more detail on the specific timing envisaged by that bidder for obtaining the outstanding financing commitments, and to submit an estimation on the time required to finalise the submitted offer with regard to its commercial terms; and j) e-mail of 9 April 2014 informing one of the bidders ([Bidder 3]) that KPMG had not yet received details on that bidder's envisaged financing structure or written confirmation from third party financing sources to support that bidder's offer, as an answer to that bidder's e-mail of 2 April 2014 (seven days earlier).
- (244) Thirdly, the evidence submitted by Germany shows that there was no discrimination between the tenderers at any stage of the tender process. Indeed, as is also obvious from the above in recital 235, all bidders received information and clarifications on the tender's selection criteria, rules and procedures, on the deadlines for the submission of indicative and final offers, on the extension of such deadlines, on the financial situation of the Nürburgring, on elements missing from the bidders' indicative or final offers, and on possible queries of the bidders. At the same time, bidders who fulfilled the tender's selection criteria, in particular the submission of confirmation of the financing of their offers from third party financial partners, were not excluded from the negotiations. The Commission also notes that no bidders were offered exclusivity in the negotiations, but the latter were kept, to the reasonable extent in time, also with bidders who had not submitted the above financial confirmation in their final offers, in view of future submission of such financial confirmation.
- (245) Furthermore, as described in recital 54 above, the sales contract includes a clause according to which its parties are obliged to implement it only if: (1) the Commission takes a non-challengeable decision implying that neither

the buyer nor its operational company are beneficiaries of the aid under assessment subject to recovery; and (2a) either the delays to bring a legal challenge against the Commission decision have expired without an appeal; or (2b) in case of an appeal, a not further challengeable court judgment has been rendered confirming the Commission decision. Germany has explained that this clause was the result of the bidders' unwillingness to take the risk of being liable for a claw-back of State aid, that the sellers accepted that clause in order to be able to sell the assets, and that from the beginning of the tender process, as also stated in the first asset purchase agreement, the sellers advised the bidders that they were willing to discuss the implications of the State aid procedure with the bidders ⁽¹⁶⁴⁾. In addition, Germany has stated that a Commission decision on the State aid to the Nürburgring was a condition in the asset purchase agreements mark ups provided by Capricorn, [Bidder 2] and [Bidder 3].

- (246) Fourthly, apart from limitations stemming from the legal framework, no conditions were set upon the tenderers, as clearly demonstrated in the tender's invitation to submit an expression of interest and the various letters sent to the bidders by KPMG.
- (247) It results that this selection process as such is sufficient for safeguarding that the price of the assets sold to the buyer corresponds to the market price. Thus, the Commission concludes that the sale of the assets through an open, transparent, non-discriminatory and non-conditional tender process to the bidder submitting the highest bid including a guaranteed financing leads to the market price.

6.1.3. *The identity of the buyer*

- (248) The Commission has to establish that the new owner of the assets will not have any link with NG, MSR and CMHN, in order to avoid that the new owner will be liable for any recovery of incompatible State aid.
- (249) Capricorn is not an entity having a corporate law or personal direct or indirect link with NG, MSR, CMHN or their shareholders, or the previous lessees of the Nürburgring. There is therefore no link between the Nürburgring group and its shareholders on the one hand and the new owner and its shareholders on the other hand.
- (250) Thus, the Commission concludes that the buyer is an independent entity from NG, MSR and CMHN.

6.1.4. *The moment of the sale*

- (251) The Commission needs to assess whether the moment of the tender process may lead to a circumvention of a decision by the Commission to recover incompatible State aid.
- (252) In this case, the Commission observes that following the extension of the main investigation to the measures notified to the Commission as rescue aid, the insolvency procedure was launched and the insolvency administrators were appointed by the competent local court in 2012. The sale of the assets was launched by the insolvency administrators in May 2013, prior to any Commission decision regarding the conclusion of the formal investigation procedure. As the buyer insists on its transfer being made only once a final Commission decision cannot be challenged in court, the sales contract will enter into effect and the insolvency procedure will be closed only after the adoption of the present decision ordering recovery. The payment of the first instalment of the price took place before the adoption of the present decision. Pursuant to the sales contract, the transfer of the assets is effective as of the date on which the present decision becomes non-challengeable.
- (253) In the present case, the Commission considers that the fact that the sale was launched by the insolvency administrators appointed by the competent local court and that the decision about the transfer of the assets has taken place before the adoption of the present decision is less conclusive in terms of economic continuity than a

⁽¹⁶⁴⁾ The relevant text of the first draft of the asset purchase agreement states: 'the bidder is aware of the fact that currently an investigation procedure is pending at the European Commission, the subject-matter of which is the admissibility of State aid which has been granted to the Nürburgring and the possible recovery of aid. The Sellers are in regular contact with the relevant service of the European Commission and strive to achieve a formal decision which indicates that the European Commission shall not order any recovery of the granted aid from the purchaser. They are open to a constructive discussion with the bidder as to how the parties shall proceed with regard to these circumstances in connection with the sale of any or all assets of the Nürburgring and of a possible transition period until a final decision has been rendered by the Commission.'

situation where the decision to sell would be taken by the aid beneficiaries themselves or where the sale process would be launched only after the adoption of the present decision.

6.1.5. *The economic logic of the operation*

- (254) The criterion of economic logic aims at assessing whether the buyer of the assets will employ them in the same way as the previous owner or whether it will use them to establish a different activity or strategy.
- (255) The Commission considers that the new owner will have the possibility to manage its activities under different operating conditions than NG, MSR and CMHN's and will apply its own business model.
- (256) The business concept of the sellers will not be taken over by the acquirer. The two existing race tracks (Grand-Prix track, Northern track) shall be used [...] in the future, allowing [...]. To this end, Capricorn intends to construct additional facilities and to equip the [...]. Part of facilities build under Part II of the Nürburgring 2009 project will be turned down (e.g. [...]). The ring racer will be sold. The ring card as payment system will be dropped. In the ring boulevard, the [...].
- (257) Furthermore, according to the plans of the acquirer, Nürburgring will be transformed from a touristic attraction to a technology cluster and industry pool. [...] should become one of the core activities at the race tracks. Through [...] should be established. [...] should be [...] at Nürburgring. The acquirer itself will be more active as [...].
- (258) The buyer of the assets will thus not use the assets in the same way as the insolvent companies. On the contrary, Capricorn will integrate the acquired assets in its own business strategy, realising synergies, which justify its interest in buying the assets. In comparison with the current operation model, Capricorn has developed a new concept of the exploitation of the assets. Moreover, the operation of some of the assets has been structurally deficit making and it could therefore require further restructuring and optimisation.
- (259) The afore-mentioned elements demonstrate that the economic logic of the Capricorn's offer does not consist in a continuation of an economic activity of the Nürburgring group, but in an integration of certain assets and a part of the workforce of the Nürburgring group in a group which pursues its own economic logic.
- (260) Thus, the Commission concludes that the economic logic of the operation is to allow the new owner to use the assets of NG, MSR and CMHN under different conditions and not to continue the strategy of these companies.

6.1.6. *Conclusion on the economic continuity of NG, MSR and CMHN through the sale of assets*

- (261) The assets have been sold at their market price, as established through an open, transparent, non-discriminatory and non-conditional tender process, to the bidder submitting the highest bid including its guaranteed financing. Germany has informed the Commission that the buyer has not an economic or corporate link to NG, MSR or CMHN. The decision on the sale was taken prior to any potential negative Commission decision regarding the formal investigation procedure. Finally, the new owner will use the assets under different conditions and according to a different business model than NG, MSR and CMHN, and the scope of the buyer's activities will be to a considerable extent different in comparison with the activities of the Nürburgring group
- (262) In light of the above, the Commission concludes that there is no economic continuity between NG, MSR and CMHN and Capricorn, the buyer of the assets, or its operating company, which are therefore not liable for any State aid to be recovered from the beneficiaries.

6.1.7. *The conditionality of the sale finalisation upon a Commission decision*

- (263) The sales contract between the sellers and Capricorn includes a condition that foresees that the sale of the Nürburgring assets is final only upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets. As already described in recital 56 above, if there is

no non-challengeable Commission decision at the beginning of 2015, the sold assets will be sold before 1 January 2015 to NewCo, in which 95,1 % of the shares will be owned by the buyer and 4,9 % by an independent trustee. The trustee will be acting in the interests of the creditors and not of the insolvent beneficiaries of State aid, but will not be subject to instructions by the creditors. Furthermore, a lease contract will be concluded between NewCo and OpCo, terminating on the date of entry into force of the sales contract. The business of the OpCo will be run under its name, on the basis of its own business plan and with the workforce of its own choice. There will be a lease fee of totally EUR [4,6-5,1] per year to be paid by OpCo to NewCo, which will serve the liquidation mass of the Nürburgring companies (all payments in favour of the insolvency estate are transferred to the trust accounts of the insolvency administrators, solely in order to be distributed to the creditors). When the decision of the Commission becomes final, the trustee will transfer all his shares in NewCo to the buyer. On the other hand, if the buyer does not fulfil its contractual payment obligations, the trustee will be able to sell the assets. In addition, should an annulment of the Commission decision take place, the assets will return to the insolvency administrators in order to be sold immediately, since the liquidation obligation of German insolvency law continues to exist even in such case. There is no option of continuing the business of the Nürburgring companies by NewCo.

(264) The Commission notes that with this construction:

- (a) a real sale of the assets of the beneficiaries will take place within four months after the adoption of the present Decision;
- (b) even if the closing of the operation takes place later, in the meantime, the buyer already controls the society which will own the assets by an overwhelming majority and the remaining part of the assets is owned by a trustee, which is independent from the beneficiaries of the aid and does not receive instructions from their creditors;
- (c) recovery is not suspended; and
- (d) the beneficiaries irreversibly exit the market and will not have any activity or receive any stream of money. They will be liquidated as soon as their claims and obligations are settled and the necessary formalities are performed (see recital 55).

(265) Also, the Commission notes that other bidders who reached the final stage of the tender procedure or close to it had similar conditions in their offers ⁽¹⁶⁵⁾. On the basis of the above, the Commission concludes that there is no purpose or risk of circumvention of recovery and that the construction in question merely exists with the purpose of an orderly liquidation of the business.

6.2. COMPLAINTS ON THE SALE OF ASSETS

6.2.1. *Complaints from complainant 1 and 2*

- (266) Based on the information provided by the insolvency administrators and complainants 1 to 4, the Commission does not consider the claims raised by complainant 1 and complainant 2 to be justified. The Nürburgring assets were split in eleven individual assets. Based on the evidence submitted by the insolvency administrators and complainants 1 to 4, the Commission has found that in an open, transparent and non-discriminatory selection process, the bidders could make offers for one, more or all assets. Even the fact that all of the assets were eventually awarded to Capricorn as the buyer submitting the highest bid including its secure financing, this does not as such demonstrate economic continuity (see also Section 6.2.7 above). The Commission also assumes that the underlying aim of complainants 1 and 2 was to avoid a transfer of the racetrack to a private investor.
- (267) The bidders that tendered only for individual asset clusters such as complainant 2 were not notified of the extension of the deadline for the submission of binding offers until 17 February 2014, because their indicative bids did not qualify to the second stage of the selection process in view of their low price offers; however, the Commission does not consider this to be a breach of the principle of transparency, since such bidders had been informed that they could increase their indicative offer any time before the award of the contract, and if they

⁽¹⁶⁵⁾ In particular, [Bidder 2]'s offer foresaw that its offered price would only be payable upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets. [Bidder 3]'s offer foresaw that the buyer could withdraw from the sale, in spite the existence of a Commission decision, to its own discretion.

went for such a price increase, it can be presumed that the insolvency administrators would notify them of the extension of the deadline concerned in compliance with the principle of equal treatment.

- (268) The Commission finds it reasonable and efficient that only the bidders that made a sufficiently high price bid were allowed access to the detailed information about the assets (on the basis of which among others the need for future investment could be assessed by the bidders). In view of the information given to them in the various stages, the Commission also considers that the bidders were provided with information sufficient for making their offers. On top of this, complainants 1 and 2 have identified no concrete piece of information that would hinder them from bidding.
- (269) As regards the long-term contractual relationships allegedly implied in the tender documentation, the Commission notes that in the present case of an asset deal, the employment and lease contracts are transferred only in the cases foreseen by law, that the contracts for the organisation of events can in principle be maintained only if both contractual parties agree so, and that the latter contracts do not necessarily have a major economic significance for the asset deal. As regards the question whether new aid was granted by the operation of NBG, the Commission notes that NBG was established by the insolvency administrators on a temporary basis, until the end of 2014, as a vehicle for the operation of the assets only during the insolvency and the tender process. Running the operational business through a temporary subsidiary of an insolvent company during the insolvency proceedings is allowed by national law and cannot be forbidden to insolvency administrators. In the present case, the insolvency administrators also justified the economic rationale of the existence of NBG for NG, MSR and CMHN, since, according to them, the creation of NBG increased the value of the assets of NG, MSR and CMHN, thus increasing the liquidation subject-matter. However, the Commission notes the circumstances of NBG's establishment, i.e. that NBG is a subsidiary of the aid beneficiaries NG, MSR and CMHN, is their economic successor since it has received their full assets and liabilities, it has received those assets and liabilities without consideration and outside the scope of any tender or valuation report, employs the exact same personnel as they did and carries on their own business. On this basis, the Commission concludes that there is economic continuity between NBG and the beneficiaries NG, MSR and CMHN, therefore any incompatible State aid in favour of NG, MSR and CMHN is to be recovered also from NBG.
- (270) The Commission considers that also the contract between NBG and the trade union ver.di was concluded in order to enable the operational business of NBG until the sale of assets, and not to maintain the economic continuity of the Nürburgring after that sale. The employment contracts are transferred from NBG to Capricorn by force of German labour law, and not due to the contract with the trade union. For the lack of economic continuity between the sellers and Capricorn, the Commission considers only relevant that Capricorn itself has the full discretion to decide which of the employment contracts of NBG it will not take over, and that Capricorn plans not to take over around 20 % of these employment contracts.
- (271) The Commission therefore rejects the complaints from complainants 1 and 2 as unjustified because the assets in question have been sold to the bidder who submitted the highest bid including a proof of its financing, following an open transparent, non-discriminatory and unconditional tender process.

6.2.2. *Complaint from complainant 3*

- (272) The Commission notes that the indicative and the final offers from complainant 3 were not supported by evidence of its financing; this was communicated by the sellers to complainant 3 by letters dated 17 October 2013, 11, 17 and 18 December 2013 and by e-mails dated 18 February 2014 and 9 April 2014. Indeed, until the award of the sales contract by the committee of creditors on 11 March 2014, and even after that date, complainant 3 did not provide evidence for the financing of its offer, which could justify that the sellers do not award the contract to either of both bids for which there was evidence of their financing, but that they wait for the submission of evidence for the offer from complainant 3. In particular: (a) in its e-mail of 21 February 2014, complainant 3 stated its confidence to have all binding financial commitments within the next two to five weeks; (b) in its letter dated 11 March 2014, complainant 3 indicated that it would be able to submit all binding financial commitments until 31 March 2014; and (c) in a non-signed letter dated 31 March 2014 by the investment bank and advisory firm [...], submitted by complainant 3 to KPMG on 2 April 2014, it is stated that one prospective investor will provide financing of EUR [...] million to complainant 3 for the purchase of the Nürburgring assets; however that alleged financing was subject to completion of satisfactory due diligence by all parties and execution and delivery of definitive documentation, and did not name the prospective buyer in

question. On the basis of the above, the Commission notes that, even after the award of the Nürburgring assets to Capricorn, complainant 3 did not provide the sellers with a first-hand commitment by a specific financial partner for the financing of the purchase of the Nürburgring assets. Instead, complainant 3 only provided the sellers with: (a) a final offer which made reference to a commitment for EUR 30 million but did not contain the proof of that commitment e.g. in the form of a binding financing commitment letter by the particular financial partner, and did not include details on the specific timing envisaged by complainant 3 for obtaining the outstanding financing commitments and for finalising the offer with regards to its commercial terms; (b) a non-signed letter, referring to financing by an unnamed investor, still conditional on the satisfactory conclusion of the due diligence execution and the delivery of definitive documentation (letter of [...] dated 31 March 2014). The Commission also notes that there is no demonstration that the alleged financing commitment of Jupiter Financial Group dated 26 March 2014 was ever submitted to the sellers. The Commission further notes that the sellers did not extend the deadline for the submission of a proof of the financing of the complainant 3's bid, because there was a high chance that [Bidder 2] would withdraw its bid in case of such extension. For example, with an e-mail of 13 January 2014, sent by the representative of [Bidder 2] to KPMG, [Bidder 2] declared that all requirements for the sale to be concluded should be fulfilled before 3 April 2014, otherwise [Bidder 2] would withdraw from the tender. In addition, it was considered by the sellers that the value of the assets could drop later in time also in view of a decreasing buyer's influence on the business in the upcoming 2014 season and of the necessity to start the booking of contracts for 2015. The Commission points out that complainant 3 was not hindered to submit the proof of the financing of his confirmatory bid in the final stage in the process, as long as no definite asset purchase agreement had been signed. In view of the above, the Commission considers the behaviour of the sellers as corresponding to the behaviour of a market economy vendor. The evaluation of the bid of complainant 3 is therefore market-conform.

(273) At the same time, the Commission notes that the sellers carried out discussions with [Bidder 2] and the final stage of the purchase agreement's negotiation with [Bidder 2] and Capricorn, in view of [Bidder 2]'s offer of EUR [32-39] million (see Table 10) and a confirmed negotiation between Capricorn and [...] resulting in the latter bank's financial commitment dated 10 March 2014. Regarding the evaluation of the offer of Capricorn, the Commission notes that Capricorn submitted a commitment by its financial partner, [...], for a loan in the amount of EUR [41-49] million. This commitment, dated 10 March 2014, was submitted to the sellers on 11 March 2014, i.e. on the date scheduled for the meeting of the Creditors' Committee, in which the latter intended to decide on the award of the Nürburgring assets. The commitment offered by Capricorn was higher than the one of [Bidder 2], since the latter amounted to EUR [32-39] million. The Commission also notes that Capricorn's total offer was equal to EUR 77 million, therefore higher than the one of [Bidder 2] which equalled to EUR [47-52] million. EUR [30-33] million of [Bidder 2]'s total offer was foreseen to be paid in 2014, however with EUR [22-27] million foreseen to remain in a blocked account until March 2015 and the rest EUR [16,5-18] million foreseen to be paid in 2016, 2017 and 2018.

(274) Furthermore, as regards the condition in the sales contract between the sellers and Capricorn which foresees that the sale of the Nürburgring assets is final only upon the existence of a non-challengeable Commission decision declaring that the aid would not be recovered from the buyer of the assets, the Commission notes that, according to the provisions included in the relevant parts of complainant 3's mark-up contracts, as submitted by the insolvency administrators and Germany, the purchaser and/or the seller had the right to withdraw from the contract if no positive decision of the Commission had been issued by 15 July 2014 (as stipulated in draft contract of 14 January 2014) or 31 December 2014 (as stipulated in draft mark-up contract of 14 February 2014). It is also noted that there was no time limit as to exercising such withdrawal right.

(275) As regards further allegations made by complainant 3, the Commission notes the following:

(a) The Commission does not consider that complainant 3 was required to assume the existing contracts or obligations of NBG (with the exception of contracts that transfer automatically by operation of law, such as certain employment or rental contracts). This fact was indicated clearly to complainant 3 by the sellers in KPMG's letter dated 11 December 2013. The Commission also considers that to the extent complainant 3 would like to assume these contracts was in its own discretion and would be subject to its business and usage concept of the Nürburgring. Moreover, the Commission has not found evidence that there had been an alteration in the transaction concept during the tender process, or that except for complainant 3 another

bidder has complained about an alleged change of the transaction structure. In fact, the latter absence of complaints by other bidders was communicated to complainant 3 with KPMG's letter of 11 December 2013.

- (b) The duration of the tender process was not excessively long.
- (c) By letter of 17 December 2013, complainant 3 was informed by the sellers about the deadline of 17 February 2014 for the submission of a confirmatory bid. Complainant 3 was also informed that the sellers might choose the parties qualified for the further process shortly after the end of that extended deadline. The qualified bidders were not hindered from amending their confirmatory bids or to submit the proof of their financing even after that deadline, as long as no definite asset purchase agreement had been signed ⁽¹⁶⁶⁾. The deadline of 17 February 2014 was thus effectively extended to allow all bidders to amend their bids, provide proof of their financing, or submit new bids. As this procedural change was known to every qualified bidder, there was no breach of the principles of transparency and equal treatment.
- (d) As all available information was provided by the sellers to all bidders at the same time, and at least three weeks before the final decision of the Creditors' Committee to award the assets to Capricorn, there was sufficient time for the preparation and finalisation of the bidders' offers, and the principle of transparency had been complied with. The Commission also finds that complainant 3 was informed sufficiently about the rules of the tender process in advance by letters of the sellers dated 19 July 2013, 17 October 2013 and 17 December 2013. There was also no breach of the principle of equal treatment between the bidders in the access to the relevant information, as a same amount of information was provided to the bidders that qualified for the process stage concerned.
- (e) There is no evidence that Capricorn negotiated with a beer supplier or with 'Rock am Ring' before the conclusion of the asset purchase agreement. According to the insolvency administrators, it was NBG which conducted all relevant negotiations.
- (f) The notarisation of the asset purchase agreement by the two best bidders (Capricorn and [Bidder 2]) carried out before the meeting of the creditors' committee of 11 March 2014 is not an indicator of a breach of the principles of transparency and equal treatment. There is no evidence that Capricorn was notified of the result of the tender process before the meeting of the creditors' committee took place on 11 March 2014.
- (g) None of the bidders has provided a financing guarantee for the entire purchase price. The sellers have therefore not breached the principle of equal treatment by making *de facto* the requirement of secure financing less strict during the tender process.
- (h) The provision of a mark-up of the asset purchase agreement was part of commercial negotiation and is not a matter relevant from the State aid point of view.
- (i) The considerations of environmental aspects of complainant 3's offer by the sellers were carried out only in respect to the fact that complainant 3 had not submitted a proof of the financing of his bid. Such considerations were not part of the criteria for the selection of the successful bidder. These considerations therefore had no impact on the result of the tender process.
- (j) Regarding complainant 3's allegation that, in the context of the tender process in question, Capricorn and the sellers received State aid advice from the same law firm ([...]) and in particular one lawyer of that firm, the Commission notes that, according to the statement of the German authorities, that law firm and its lawyers: (a) did not provide any advice to the sellers of the tender procedure (including the insolvency administrators and the Creditors' Committee); (b) did not have any access to any information contained in the bids of other interested investors; (c) only had access to the information concerning the tender procedure which was available in the data room and in the press; and (d) did not provide the sellers or the Creditors' Committee with any recommendation. Regarding the particular lawyer of that law firm, to which complainant 3 has referred in its complaint, Germany has also explained the following: (a) that lawyer worked for the Land from May 2012 until April 2013, i.e. before the initiation of the tender process in June 2013; (b) that lawyer was not in any contact with the Land or the Federal Republic of Germany during the tender process; (c) that lawyer never advised the Land or the sellers in relation to the bidding process; and (d) the same lawyer only participated as an independent expert in the hearing of the Land's parliament on 20 June 2013 concerning the law for the public access to the Nürburgring racetrack. Furthermore, Germany has explained that the State aid aspects of the tender, i.e. the fact that the tender process had to be open, transparent, unconditional

⁽¹⁶⁶⁾ The respective part of letter of 17 December 2013 reads as follows: 'For the sake of clarity, offers handed in after that timeline will, in principle, also be considered provided that the terms of the offer qualify for the further process. Any disadvantage caused by the delay will not be compensated for and will have to be fully borne by the investor. Please note that the Vendors may choose the parties which will qualify for the further process shortly after the updated timeline ends.'

and non-discriminatory, in order for the buyer not to be liable for any recovery of incompatible State aid to the sellers of the Nürburgring assets, were already made aware to all bidders, as follows: (a) through the Commission decisions to open the formal investigation procedure on 21 March 2012 and to extend it on 7 August 2012; (b) by the sellers, with all relevant documents provided in the tender's data room, including communications exchanged between the Commission and Germany on this matter; and (c) by the relevant case practice of the Commission.

- (276) The Commission therefore rejects the complaint from complainant 3 as unjustified because the assets in question have been sold to the bidder who submitted the highest bid including a proof of its financing, following an open, transparent, non-discriminatory and unconditional tender process.

6.2.3. *Complaint from complainant 4*

- (277) According to the comparison included in Table 10, the bid from Capricorn leads to a higher revenue from the sale in comparison to the bid from [Bidder 2]

- (278) As regards the allegations made by complainant 4, the Commission notes the following:

- (a) The Commission takes note of the insolvency administrators' statement that the financing of the two offers submitted by [Bidder 2] and Capricorn was sufficiently secure for the sellers, even though none of both offers reached the highest possible level of security. By letter dated 24 February 2014, [Bidder 2] informed the sellers about the financial capability of the [Bidder 2] group, indicating that around EUR [930-1030] million are available for investment. The Commission also notes that by its financing commitment dated 10 March 2014 [...] established a loan facility with an aggregate maximum debt commitment equal to the amount of EUR [41-49] million to the benefit of Capricorn.
- (b). As regards the up-front payments, if a non-challengeable Commission decision exists in 2014, the sellers would have access to EUR [30-33] million in case of [Bidder 2] or EUR [58-63] million (plus around EUR 6 million of cash flow of NBG) in case of Capricorn.
- (c) Taking account of the comments made by complainant 4 and the insolvency administrators, on balance, it is not evident that the execution risk was higher for Capricorn's offer compared to [Bidder 2]'s offer.
- (d) In view of the selection criteria indicated in recital 48, the capability of the bidders as such was not a selection criterion.
- (e) In view of the selection criteria indicated in recital 48, the amount of investment to be made after the sale was not a selection criterion.
- (f) The sellers communicated with [Bidder 2] to an acceptable standard during the tender process. [Bidder 2] was not hindered from increasing or modifying his bid until the meeting of the creditors' committee took place on 11 March 2014.

- (279) The Commission has thus not found evidence proving that [Bidder 2] was discriminated in the tender process. The claim about a worse treatment of [Bidder 2] in comparison to other bidders including Capricorn is unjustified. It has to be noted that [Bidder 2] submitted a confirmatory offer, it negotiated the terms of the contract, and as the second best bidder with secured financing, [Bidder 2] was allowed to sign the final version of the draft contract. In addition, as regards the condition of a non-enforceable Commission decision, apart from an amount of EUR [7,1-7,6] million, the money provided by [Bidder 2] would be kept in a blocked account and transferred to the sellers either upon the existence of a non-challengeable Commission decision or if the buyer did not withdraw from the contract despite there being no such enforceable Commission decision by 31 March 2015 (the possibility to extend the period for the withdrawal right was not excluded)

- (280) The Commission therefore rejects the complaint from complainant 4 as unjustified because the assets in question have been sold to the bidder who submitted the highest bid including a proof of its financing, following an open, transparent, non-discriminatory and unconditional tender process.

6.2.4. Conclusion

- (281) For the reasons set out above, on the basis of the available information, the Commission has not found evidence of a breach of the principles of an open, transparent, non-discriminatory and non-conditional tender process with regards to the sale of the assets of NG, MSR and CMHN, or of any offer with a higher price bid with secured financing compared to the price bid made by Capricorn.

7. CONCLUSION

- (282) The Commission finds that part of measure 2 (loans granted to FSZ), as well as measures 8, 11 and 15 do not constitute aid within the meaning of Article 107(1).
- (283) The Commission finds that Germany has unlawfully implemented measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 and 10, 12 to 14, and 16 to 19 in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (284) The Commission has concluded that measure 1, part of measure 2 (loans granted by NG to EWN, MAN, TTI, Camp4Fun, BWN1, BWNB and BWN2), as well as measures 3 to 7, 9 and 10, 12 to 14, and 16 to 19 in favour of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH, Congress- und Motorsport Hotel Nürburgring GmbH, Cash Settlement and Ticketing GmbH, Nürburgring Automotive GmbH, Erlebnispark Nürburgring GmbH & Co. KG, Motorsport Akademie Nürburgring GmbH & Co. KG, Test & Training International GmbH, Bike World Nürburgring GmbH, BikeWorld Nürburgring Besitz GmbH, BikeWorld Nürburgring GmbH, Camp 4 Fun GmbH & Co. KG, IPC Gesellschaft für internationale Projektcoordination mbH and MI-Beteiligungs- und Verwaltungs GmbH, respectively, constituted State aid within the meaning of Article 107(1) and are incompatible with the internal market, because the relevant conditions of the R&R Guidelines are not met and no other compatibility basis was identified.
- (285) The Commission has also concluded that:
- The sale of assets of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH does not constitute State aid,
 - The sale of assets of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH does not lead to economic continuity between Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH and capricorn NÜRBURGRING Besitzgesellschaft GmbH, the new owner of the assets, or its subsidiaries. Thus, any potential recovery of incompatible State aid will not concern capricorn NÜRBURGRING Besitzgesellschaft GmbH, the buyer of the assets sold following the tender process, or its subsidiaries,

HAS ADOPTED THIS DECISION:

Article 1

The following measures which Germany has implemented do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union:

Part of measure 2

- the loans in the total amount of EUR 646 738,12 granted by Nürburgring GmbH to Fahrsicherheitszentrum am Nürburgring GmbH & Co. KG between 12 April 2002 and March 2008,

Measure 8

- the loans granted by Investitions- und Strukturbank Rheinland-Pfalz GmbH to Nürburgring GmbH on 28 July 2010 in the amounts of EUR 96 574 200 and EUR 113 590 800, to Motorsport Resort Nürburgring GmbH in the amount of EUR 92 000 000 and to Congress- und Motorsport Hotel Nürburgring GmbH in the amount of EUR 23 100 000,

Measure 11

- the loans in the total amount of EUR 85 484 000 granted by Rheinland-Pfälzische Gesellschaft für Immobilien und Projektmanagement GmbH to Motorsport Resort Nürburgring GmbH between 27 May 2008 and 7 July 2009,

Measure 15

- the transfer of 49,5 % of shares of Motorsport Resort Nürburgring GmbH from Mediinvest GmbH to Nürburgring GmbH for the price in the amount of EUR 1 carried out on 25 March 2010,
- the transfer of 33,8 % of shares of Motorsport Resort Nürburgring GmbH from Geisler & Trimmel General Contractor GmbH to Nürburgring GmbH for the price in the amount of EUR 1 carried out on 25 March 2010,
- the transfer of 6,7 % of shares of Motorsport Resort Nürburgring GmbH from Weber Projektierungs- und Realisierungs GmbH to Rheinland-Pfälzische Gesellschaft für Immobilien und Projektmanagement GmbH for the price in the amount of EUR 1 carried out on 25 March 2010.
- The sale of assets of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH does not constitute State aid.

Article 2

The following State aid, unlawfully put into effect by Germany through the measures listed below, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market:

The State aid granted in the form of:

Measure 1

- the capital in the form of transfers to the capital reserve granted by the Land Rhineland-Palatinate to Nürburgring GmbH in the amounts of EUR 2 179 000 on 1 May 2002 and EUR 22 839 241 on 21 December 2004,
- the capital in the form of increases of own capital provided to Nürburgring GmbH by the Land Rhineland-Palatinate in the amounts of EUR 4 398 300 on 31 August 2004 and EUR 9 000 000 on 4 September 2007 and by the district of Ahrweiler in the amounts of EUR 488 700 on 31 August 2004 and EUR 1 000 000 on 4 September 2007,

Part of measure 2

- the loans granted by Nürburgring GmbH to Erlebnispark Nürburgring GmbH & Co. KG in the total amount of EUR 6 195 170,02 between 1 January 2006 and 29 April 2009,
- the loans granted by Nürburgring GmbH to Motorsport Akademie Nürburgring GmbH & Co. KG in the amount of EUR 100 000 on 10 December 2002,
- the loans granted by Nürburgring GmbH to Test & Training International GmbH in the amount of EUR 25 000 on 15 August 2002,
- the loans granted by Nürburgring GmbH to Camp 4 Fun GmbH & Co. KG in the total amount of EUR 450 000 between 26 May 2009 and 18 December 2009,
- the loans granted by Nürburgring GmbH to BikeWorld Nürburgring Besitz GmbH in the total amount of EUR 500 000 between 17 October 2003 and 27 October 2004,

- the loans granted by Nürburgring GmbH to Bike World Nürburgring GmbH in the total amount of EUR 1 660 000 between 4 February 2004 and 22 July 2005,
- the loans granted by Nürburgring GmbH to BikeWorld Nürburgring GmbH in the total amount of EUR 1 600 000 between 20 September 2005 and 4 April 2007,

Measure 3

- the loans in the total amount of EUR 399 805 370 granted by the Land Rhineland-Palatinate to Nürburgring GmbH from 30 June 2003 to 11 May 2010,

Measure 4

- the loan in the amount of EUR 300 000 granted by Nürburgring GmbH to Motorsport Resort Nürburgring GmbH on 27 December 2007,

Part of measure 5

- the loans in the total amount of EUR 11 032 060 granted by Nürburgring GmbH to Cash Settlement and Ticketing GmbH from 27 August 2008 to 18 April 2011,
- the letter of comfort provided by NG to CST on 23 December 2009, committing NG until 31 December 2011 to take measures that are necessary for preventing insolvency of CST,
- the subordination of NG's claims against CST in the amount of EUR 10,4 million declared by NG on 13 December 2010,

Measure 6

- the service fees in the total amount of EUR 640 000 paid by Nürburgring GmbH to IPC Gesellschaft für internationale Projektcoordination mbH for its services consisting in searching for private investors;
- the loan in the amount of EUR 2 941 000 granted by Nürburgring GmbH to Motorsport Resort Nürburgring GmbH on 15 October 2008

Measure 7

- the consideration in the amount of EUR 1 476 830,88 provided by Nürburgring GmbH to MI-Beteiligungs- und Verwaltungs GmbH for the cession of claims of MI-Beteiligungs- und Verwaltungs GmbH, from loans taken by Cash Settlement and Ticketing GmbH as borrower, to Nürburgring GmbH carried out on 17 April 2009,

Measure 9

- the guarantee provided by the Land Rhineland-Palatinate on 28 July 2010, in the amounts of EUR 96 574 200 and EUR 113 590 800 to Nürburgring GmbH, EUR 92 000 000 to Motorsport Resort Nürburgring GmbH and of EUR 23 100 000 to Congress- und Motorsport Hotel Nürburgring GmbH, for the fulfilment of liabilities of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH from the loans granted as measure 8,

Measure 10

- the fixing of rent below market rate by Nürburgring GmbH resulting in a benefit of EUR 9 million for Nürburgring Automotive GmbH from 1 May 2010 to 31 October 2012,

Measure 12

- the guarantee provided by the Land Rhineland-Palatinate towards Investitions- und Strukturbank Rheinland-Pfalz GmbH, allowing Motorsport Resort Nürburgring GmbH to receive loans in the amount of EUR 85 484 000,

Measure 13

- the grants provided by the Land Rhineland-Palatinate to Nürburgring GmbH from revenues of the Land Rhineland-Palatinate from a tax on gambling in the amounts of EUR 1,6 million on 29 December 2009, EUR 3,2 million on 29 October 2010 and EUR 3,2 million on 29 March 2011,

Measure 14

- the loans granted by the Land Rhineland-Palatinate to Nürburgring GmbH in the amounts of EUR 20 million on 21 August 2007, EUR 10 million on 22 December 2009, EUR 4,65 million on 28 December 2010, EUR 3,2 million on 26 April 2011 and EUR 4,95 million on 9 December 2011,
- the subordination of its claims from the loan of 29 August 2007 declared by the Land Rhineland-Palatinate towards Nürburgring GmbH in the amount of EUR 20 million,

Measure 16

- the loan in the amount of EUR 40 405 000 granted by the Land Rhineland-Palatinate to Nürburgring GmbH on 11 January 2011,
- the grant in the amount of EUR 13,5 million provided by the Land Rhineland-Palatinate to Nürburgring GmbH in July 2011,

Measure 17

- the compensation granted by Nürburgring GmbH to Nürburgring Automotive GmbH on the basis of the Formula 1 concession from 13 December 2010 to 27 November 2012,

Measure 18

- the rescheduling of interest payments in the amount of EUR 1,473 million granted by Investitions- und Strukturbank Rheinland-Pfalz GmbH to Nürburgring GmbH on 15 May 2012,
- the rescheduling of interest payments in the amount of EUR 1,205 million granted by Investitions- und Strukturbank Rheinland-Pfalz GmbH to Motorsport Resort Nürburgring GmbH on 15 May 2012,
- the rescheduling of interest payments in the amount of EUR 303 000 granted by Investitions- und Strukturbank Rheinland-Pfalz GmbH to Congress- und Motorsport Hotel Nürburgring GmbH on 15 May 2012;

Measure 19

- the debt subordination of its claims from measure 8 declared by the Land Rhineland-Palatinate towards Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH on 15 May 2012, in the outstanding amount of the subordinated claim, up to an amount of EUR 254 million, at the time when the decision for the debt subordination was adopted,
- the guarantee provided by the Land Rhineland-Palatinate on 15 May 2012 for the fulfilment of liabilities of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH from the loans granted as measure 8, in the amount of EUR 254 million.

Article 3

1. Germany shall recover the incompatible aid granted and as referred to in Article 2 from the beneficiaries, including Nürburgring Betriebsgesellschaft mbH as the economic successor of Nürburgring GmbH, Motorsport Resort Nürburgring GmbH and Congress- und Motorsport Hotel Nürburgring GmbH.
2. Any potential recovery of incompatible State aid will not concern capricorn NÜRBURGRING Besitzgesellschaft GmbH, the buyer of the assets sold following the tender process, or its subsidiaries.
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery. Germany shall provide the exact dates of aid provided by the State which are not indicated in the present decision.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁶⁷⁾ and with Commission Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004 ⁽¹⁶⁸⁾.
5. Germany shall cancel all outstanding payments of the aid referred to in Article 2 with effect from the date of adoption of this decision.

Article 4

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Germany shall submit the following information:
 - (a) the total amount (principal and recovery interests) to be recovered from each beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 2014.

For the Commission
Joaquín ALMUNIA
Vice-President

⁽¹⁶⁷⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹⁶⁸⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).