

AVAS

Aspects of the privatization process
and of the state aid

Case Study

June 7, 2007, Bucharest

Case study Gröditzer Stahlwerke

Background

- Gröditzer Stahlwerke GmbH and its subsidiaries (Gröditzer) are based in the former RDG
- Steel producer (ECSC Treaty, enforceable– strict rules regarding the state aid)
- After the reunification of Germany the shares were held by Treuhandanstalt and its successor Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) which ensured the privatization process
- It may be regarded as a company in difficulty
- 720 employees
- The privatization took place on January the 1st, 1997
- The privatization was accomplished by two investment banks, based on an offer procedure which involved state aid

Ref: OJ L 292 13.11.1999; ECJ C-334/99; OJ L 105 20.4.2002 și Competition Policy Newsletter nr 2 – Summer 2003

Case study Gröditzer Stahlwerke

State aid prior to the privatization process

- Before the privatization (1992 –1996) Gröditzer received state aid EUR 155 Mio.
 - Investment loans;
 - Social measures (compensatory wages and training courses)
 - Loans from the shareholders
 - Loans guaranteed by the banks

Case Study Gröditzer Stahlwerke

Public Aid within the privatization context

- Privatization costs (1997) amounting to EUR 170 Mio. (negative sale prices)
 - Loan investments
 - Social measures (compensatory wages and training courses)
 - Sinking the shareholders' debts
 - Loans secured by the banks
- Of EUR 170 Mio., EUR 30 Mio. is “fresh” money (brought as direct investment)

Case Study Gröditzer Stahlwerke

Arguments – the privatization was carried out without the state aid

1. The privatization proved to be a better solution than the liquidation
2. The privatization was based on a transparent, open and unconditioned offer.

Germany: Thus, the state aid was not involved

Case study Gröditz Stahlwerke

European Commission (EC) – The privatization took in the state aid

1. Privatization proved not to be a better solution than liquidation :

- The privatization costs amounted up to EUR 170 Mio.
- The value of the assets was EUR 48 Mio. – these are the liquidation costs
- EC did not approve of the following liquidation costs:
 - Sinking the shareholders' debts
 - taking over the guarantees for the banking loans
 - Allowance for various expenses including the cost for closing down the site.
- The shareholders' loans must not be taken into consideration but even if they were taken into consideration as the equivalent in shares, the liquidation costs stay lower.

EC: A private investor would have chosen liquidation to
privatization

Case Study Gröditz Steel Works

European Commission (EC) – Privatization took in state aid.

2. Privatization did not occur as a result of a transparent, open and unconditioned offer

- The procedure was conditioned because it involved the takeover of the employees, certain investments and forecasted financing, including the state aid
- The procedure was not transparent because the offers were not based on clear criteria.

EC: Privatization involved incompatible state aid, amounting to EUR 124 Mio which must be recovered

Case study Gröditz Stahlwerke

The European Court of Justice (ECJ) – C-334/99 Germany ./ CE

Six pleas; the latest plea on the authenticity of the EC assertions

“...it is necessary to establish whether, under similar circumstances, a private investor of similar importance as the authorities that run the public sector would have been able to be persuaded of the capital contribution of similar importance regarding the said takeover or if he had chosen to liquidate it.”
(paragraph 133)

→ Implement the private investor’s test (PIT) in order to establish whether a private investor would have opted either for the company’s liquidation or for its selling.

In order to put PIT into effect , *“...do not consider losses as a result of state aid granting*

Case study Gröditzter Stahlwerke

The European Court of Justice (ECJ) – C-334/99 Germany ./. CE

CEJ confirmed the decision taken by the EC and the fair appreciation of the liquidation costs

- CEJ did not approve the following liquidation costs:
 - Sinking the shareholders' debts
 - Taking over the guarantees of the banking credits
 - The amounts agreed on for various expenses, including the costs triggered by the closing down

CEJ alleges that the sale at a negative price and the failure to fulfil the private investor's test are enough reasons for establishing that the sale includes state aid elements.

Case study Gröditzter Stahlwerke

Negative decision; negative verdict – Is this the end?

- Gröditzter Stahlwerke entered insolvency
- Administered by the very same company which intended to purchase it
- A new sale procedure for an asset, transparent and unconditioned was carried out and reported to EC.
 - The experts assessed the value of the assets
 - Options for due diligence
 - Offer for a single asset
 - Negotiation based on final offers
 - There were not anticipated state aid measures

EC adopted a fair decision
Recovery request without merit

Conclusions

Privatization and state aid

- Losses offset and the capital increase the state aid level for the buyer if they are not included in the sale price
- The public authority should analyse which option would be to the best advantage if there are used low costs:
 - Sale
 - Liquidation
 - Continuing the business

A negative sale price does not automatically trigger a state aid

This is the reason why the loss of the amounts invested can be a better option than the liquidation or the business continuity.

General Comments

Privatization and State Aid

- **The private investor' test,**
- **The private creditor' test** and
- **The test of the private seller** are members of the same group which should establish whether the state had acted the same way the market would have done it.
- Would the market have invested /injected capital?
 - Would the market have cleared the debts in order to facilitate the sale?
 - Would the market have offered guarantees?
 - Would the market have continued to incur the losses?

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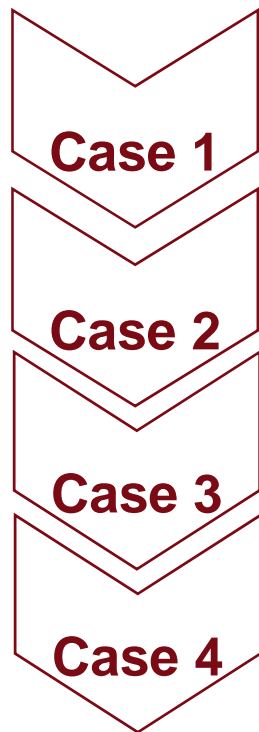
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Other Case Studies

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Another 4 case studies



Court of First Instance (CFI): T-152/99 HAMSA ./ EC

CEJ: C-390/98 H.J. Banks & Co Ltd. ./Coal Authority

CEJ: C-404/04 Technische Glaswerke Ilmenau ./ EC and
CFI: T-198/01

CFI: T-318/00: Freistaat Thüringen ./ EC



Aspects of the privatization process and of the state aid

Case 1: CFI: T-152/99 HAMSA ./ EC

Object: Swapping the debts into shares vs. liquidation

Solution: Applying the test of the private creditor

Private creditor: of similar importance, with long-term perspectives; debt recovery plan

Key elements:

Relationship between the public debt and the private debt does not stand for a state aid indicator.

Both in case of liquidation and debt reschedule, all the creditors have to compare their state of affairs; the liabilities are of high importance.

Privatisation and State aid issues

Case 2: CEJ: C-390/98 H.J. Banks & Co Ltd. ./Coal Authority

Object: Company benefited from state aid;

Solution: Sale by open offer

Key elements:

The notion of state aid is larger than the notion of subsidy because it also comprises “negative costs”.

The acquisition that follows an open and competitive offer procedure, consistent with the market conditions “...suggests that the state aid issue ...does not exist in relationship with the private takeover that resulted from the offer acquisition” (paragraph 77).

The state aid issue was assessed at the market value and included in the sale price.





Privatisation and State aid issues

Case 3: CEJ: C-404/04 Technische Glaswerke Ilmenau ./.
CE and CFI: T-198/01

Object: Lowering the sale price as part of the privatization process

Solution: Putting into effect the test of the private creditor

Private creditor: of similar importance, with long-term perspectives; debt recovery plan.

Key elements:

Both in case of liquidation and debt reschedule, all the creditors have to compare their state of affairs;

Lowering the sale price did not constitute an issue for the private investor but for the private creditor's.

The costs for closing down the site can not be taken into consideration in computing the liquidation costs.



Privatisation and State aid issues

Case 4: CFI: T-318/00: Freistaat Thüringen ./ CE

Object: Privatization; company in difficulty

Solution: Putting into effect the test of the private investor

Key elements:

The private investor should take into consideration as whether the company faces difficulties and allocate a discount at the asset value.

The purchase price of the assets can be paid by taking over the liabilities.