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# German Federal Court of Justice (Bundesgerichtshof – BGH) Judgment of 2 February 2017, file number: I ZR 91/15 – Flughafen Lübeck (Airport Lübeck) –

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**Procedural History:**

Preceding judgment *Oberlandesgericht Schleswig, 8 April 2015, file number: 6 U 54/06*
Preceding partial verdict *Landgericht Kiel, 28 July 2006, file number: 14 O Kart. 176/04*

## Headnotes:

a) If an action seeks the provision of information, the fact of the main party granting the information subsequent to the sentence may not, as a rule, be understood as constituting an objection to the filing of an appeal on points of law only (*Revision*) by their Intervener.

b) After the opening decision on the main inspection proceedings regarding state aid has been handed down, German courts may not, as a matter of principle, deviate from the Commission's preliminary assessment of the state aid character; however, they are not absolutely and unconditionally obligated to concur with the Commission's preliminary assessment.

c) If German courts doubt the Commission's preliminary assessment, they may ask the Commission to transmit its opinion in accordance with Article 29 (1) of Regulation (EU) 2015/1589, or, in accordance with Article 267 of the TFEU, may make a request to the European Court of Justice for a preliminary ruling.

d) The reclaiming of a subsidy on the basis of a preliminary classification by the Commission as constituting state aid may prove to be disproportionate; the reasons for this include excessively long main inspection proceedings. Such review is

incumbent on the German courts concerned with the reclaim request in individual cases.

## Holding

In response to the appeal on points of law only of the Defendant's Intervener, the judgment of the 6th Civil Senate of Schleswig-Holstein Higher Regional Court of 8 April 2015 is herewith overturned insofar as the Defendant's appeal on points of fact and law (Berufung) against the partial verdict handed down by the Chamber of Commercial Matters I of Kiel Regional Court on 28 July 2006 has been remitted.

In response to the Defendant's appeal on points of fact and law, the partial verdict is herewith overturned insofar as the Regional Court granted the Plaintiff's request for information and the Plaintiff did not withdraw the motion in the appeal on points of fact and law with respect to "other payments or contributions".

The case is herewith remitted to the Regional Court for a fresh hearing and a ruling, also regarding the costs of the appeal on points of fact and law and of the appeal on points of law only.

## Facts

1 The Defendant is the legal successor of the former Defendant, Flughafen Lübeck GmbH, which was the operator of Lübeck-Blankensee commercial airport until 1 January 2013. The Defendant was initially the sole shareholder of Flughafen Lübeck GmbH, which, on the basis of a loss transfer agreement, had to compensate for the losses as stated in the annual financial statement of the Defendant according to the municipal budget plan. A private investor, I. Ltd., purchased 90% of the Flughafen Lübeck GmbH shares with retroactive effect as per 1 January 2005.

2 The Defendant's intervener (hereinafter: Intervener) had operated flights to and from Lübeck-Blankensee Airport since 2000 and ran a hub there.

3 The Plaintiff, the airline Air Berlin, claimed that, between 2000 and 2004, Flughafen Lübeck GmbH had granted aid to the Intervener in the shape of discounts and payments, as well as other contributions, on the basis of an agreement dated 29 May 2000, and had thus violated European law. In particular, they claim a violation of Article 108 (3), sentence 3, of the TFEU, in accordance with which the Member States may not grant aid prior to a final decision by the Commission on compatibility with the internal market.

4 To the extent that it is of significance for the appeal on points of law only, the Plaintiff asserted claims against the Defendant by way of an action by stages to obtain information regarding the detailed payments and contributions granted to the Intervener, and for them to be recovered in the amount established after the information had been provided, as well as for no such payments and contributions to be effected in future.

5 The Regional Court granted the motion for information by partial verdict, and sentenced the Defendant

> to disclose information to the Plaintiff regarding type, extent, amount, and time of the sum paid and the contributions rendered by the Defendant to the Intervener between 2000 and 2004 in the form of
>
> - "marketing support",
> - one-off incentive payments for establishing new flight connections,
> - providing/granting of preferential contributions/services in connection with the operation/check in and execution of flights, sales, administration and use of airport facilities,
> - contributions towards costs for
>   - the acquisition of equipment
>   - hotel and catering for personnel of the Intervener,
>   - recruitment and training of the Intervener's pilots and crew
> - further discounts on regular airport fees in contradiction of the Defendant's fee structure of 1 October 2002.

6 Once this judgment had been handed down, by notice of 10 July 2007, the European Commission initiated formal investigation proceedings on potential state aid in favor of Flughafen Lübeck GmbH and the Intervener (see OJ C 287, 29.11.2007, p. 29 – hereinafter: opening decision).

7 The court of appeal on points of fact and law dismissed the case in its first judgment on the appeal on points of fact and law, on grounds that the Plaintiff's claims were ill-founded (see Schleswig Higher Regional Court, ESW 2008, 470). The Senate rescinded this judgment in response to the Plaintiff's appeal on points of law only and remitted the matter to the court of appeal on points of fact and law for a fresh hearing and a ruling (see BGH, judgment of 10 February 2011 – I ZR 213/08, juris).

8 In the reopened appeal on points of fact and law proceedings, the court of appeal on points of fact and law asked the European Commission for an opinion, amongst other things, on the question of whether the measures designated in the Commission's opening decision constituted aid within the meaning of Article 108 (3), sentence 3, of the TFEU. By notice of 8 March 2012, referring to paragraphs 110 through 138 of the opening decision, the Commission answered that the agreement of 29 May 2000 between the Intervener and Flughafen Lübeck GmbH was an aid "prima facie". An "autonomous assessment under state aid law" by the court of appeal on points of fact and law was therefore dispensable.

9 By order of 14 January 2013, the court of appeal on points of fact and law submitted the following questions to the European Court of Justice for a preliminary ruling in accordance with Article 267 of the TFEU (Schleswig Higher Regional Court, SchiHA 2013, 415):

1. Does a national court which must rule on an action to reclaim contributions and to cease any future contributions have to assume that these contributions constitute measures which, in accordance with Article 108 (3), sentence 3, of the TFEU, may not be performed prior to a final decision by the Commission, if the Commission has initiated a formal state aid investigation in accordance with

Article 108 (2) of the TFEU with a decision that has not been contested, and correspondingly stated in the reasoning given in such decision that the contributions probably constituted state aid?

2. If question 1 is answered in the affirmative:

   Does this also apply if, in the reasoning given in its decision, the Commission furthermore correspondingly stated that it was unable to determine whether the party providing the contribution had acted as a private investor on the economic market when committing to the contribution?

3. If Question 1 or 2 is answered in the negative:

   May the national court stay its proceedings in this situation until the formal state aid investigation has been completed?

4. If Question 3 is answered in the affirmative:

   Is the national court obligated to stay its proceedings in this situation until the formal state aid investigation has been completed?

10 By decision of 4 April 2014 (see C-27/13 – Lübeck Airport/Air Berlin, juris), the European Court of Justice answered the first and second questions as follows:

> If, in application of Article 108 (3) of the TFEU, the European Commission has initiated the formal investigation under (2) of this Article with regard to a measure in progress that has not been announced, a national court dealing with the motion to cease performance of such measure and reclaim payments that have been effected is obligated to take all necessary actions to draw the conclusions from any potential violation of the obligation to stay the performance of these measures.
>
> To this end, the national court may decide to stay the performance of the respective measure and to order that the amount that has been paid be reclaimed. It may also decide to take provisional measures to safeguard the interests of the concerned parties and the practical effectiveness of the Commission's decision to initiate the formal investigation.

11 The European Court of Justice stated in response to the third and fourth questions that, in a situation such as that pertaining in the initial proceedings, a national court may not stay the proceedings until the formal investigation has been completed.

12 In its second judgment on the appeal on points of fact and law, the court of appeal on points of fact and law rejected the Defendant's appeal on points of fact and law against the partial verdict of the Regional Court, whilst imposing specific stipulations that are of no significance in the instant appeal on points of law only proceedings (OLG Schleswig, judgment of 8 April 2015 – 6 U 54/06, juris). The Defendant's Intervener disputes this with the appeal on points of law only, which has been admitted by the court of appeal on points of fact and law, and which the Plaintiff is moving to reject.

## Rationale

13 The court of appeal on points of fact and law held that the request for information was well founded. It held as follows in this regard:

14 In accordance with Sections 242, 823 (2), and Section 1004 (1), sentence 1, of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) in conjunction with Article 108 (3), sentence 3, of the TFEU, the

court stated that the Plaintiff was able to request the information sought. Flughafen Lübeck GmbH had granted to the Intervener special conditions for the use of the airport between 2000 and 2004, in derogation from the fee structure that was applicable at the time, and the Commission had not handed down a final decision on their compatibility with the internal market. According to the European Court of Justice's decision of 4 April 2014, the special conditions that had been granted to the Intervener must currently be considered to constitute aid. Therefore, without further examination of the parties' comprehensive pleadings with regard to the criteria applying to aid, it should be assumed that Flughafen Lübeck GmbH violated Article 108 (3), sentence 3, of the TFEU by granting the special conditions to the Intervener between 2000 and 2004. It was not possible to comply with the Plaintiff's suggestion to rule on the further parts of the action still pending before the Regional Court. The motions to sentence the Defendant to reclaim amounts and cease and to desist are said to not be ready to be ruled on in the Plaintiff's favor. Furthermore, for the preparation of asserting a reclaim, the court ruled that it appeared sufficient to grant the Plaintiff's claim to information.

15 B. The Intervener's appeal on points of law only is successful. It leads to the contested judgment being rescinded and the matter being remitted to the Regional Court.

16 I. The appeal on points of law only, lodged by the Intervener only, is admissible.

17 1. In accordance with Section 67 of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO), the third party intervening is entitled to assert means of challenge or defense and to effectively take all actions in the proceedings, provided that its declarations and actions are not in opposition to the declarations made and actions taken by the primary party. Accordingly, the Intervener is at liberty to file a remedy to which the primary party is entitled, even if the primary party refrains from so doing. The remedy is only inadmissible if the primary party objects to the filing of an appeal on points of law only (see BGH, judgment of 16 January 1997, - I ZR 208/94, NJW 1997, 2385 and 2386).

18 2. Contrary to the view taken in response to the appeal on points of law only, in the case at dispute, such an objection on the part of the primary party is not constituted by the Defendant having disclosed the information owed by letter of 5 May 2015, following the second judgment on appeal on points of fact and law –, even though the information was incomplete in the view of the Plaintiff.

19 However, the objection does not have to be declared explicitly. It may, rather, be declared by logical conduct effected by the primary party (see BGH, judgment of 14 December 1967, - II ZR 30/67, BGHZ 49, 183, 187), for instance by acknowledging the claim contained in the court action, or by reaching an out-of-court settlement (see Dresden Higher Regional Court, NJW-RR 1994, 1550; Weth in Musielak/Voit, ZPO, 13th ed., § 67 mn. 9). This is however not comparable to the performance of an enforceable claim by giving the information in a dispute. The court of appeal on points of fact and law declared the contested judgment provisionally enforceable without any collateral. Thereupon, the Plaintiff requested the Defendant by notice of 17 April 2015 to provide the full information ordered in the appeal judgment of first instance by 30 April 2015. If the Defendant does not prevent the enforcement of the information entitlement by providing collateral in the amount of € 300,000 as ordered by the court of appeal on points of fact and law, but instead provides the information, it will be deemed to have fulfilled the obligation as pronounced in the judgment. This is not equivalent to a voluntary acknowledgment or reaching a settlement with regard to the claim.

20 It is immaterial in this respect whether the request for the information contained the explicit threat of coercive enforcement, whether the information was explicitly provided in order to prevent the coercive enforcement, or whether the party claimed against would be able, as a matter of principle, to prevent the coercive enforcement by providing collateral. It is equally immaterial that information,

once provided, can naturally not be reversed. It is, in fact, exclusively decisive that the third party intervening may take actions in the proceedings so long as no will on the part of the primary party can be identified precluding such. In case of doubt, the action of the third party intervening remains effective (RGZ 147, 125, 127; BGH, judgment of 28 March 1985- VII ZR317/84, NJW 1985, 2480). If the primary party provides the information that it has been sentenced to give, this does not as a rule constitute a contradiction to the filing of an appeal on the part of the Intervener.

21 Following its complete privatization, it must furthermore be noted in the case of a dispute that the Defendant is no longer a shareholder of Lübeck Airport. Any reduction in the Defendant's interest in the outcome of the legal dispute that may result therefrom, so that the fact of rendering it more likely to provide the information cannot lead to a conclusion of disapproval of the filing of an appeal on points of law only on the part of the Intervener.

22 II. The appeal on points of law only rightly complains that the Regional Court passed a partial verdict in violation of Section 301 of the Code of Civil Procedure. The court of appeal on points of fact and law should either have also ruled on the part of the legal dispute that is still pending at first instance, or should have remitted the matter back to the Regional Court (see BGH, judgment of 13 April 2000 - I ZR 220/97, GRUR 2001, 54, 55 = WRP 2000, 1296 – SUBWAY/Subwear).

23 1. According to the established case-law of the Federal Court of Justice, a part judgment may only be passed if there is no risk of rulings that contradict one another; the possibility of a derogating ruling being handed down by an appellate court must be taken into consideration as well. A part judgment is therefore impermissible if it serves to rule on a matter that arises once more in the further proceedings regarding the other claims (BGH, GRUR 2001, 54, 55 – SUBWAY/Subwear; BGH, judgment of 21 August 2014 - VII ZR 24/12, NJW-RR 2014, 1298, mn. 9; judgment of 23 September 2015 - I ZR 78/14, GRUR 2015, 1201, mn. 26 = WRP 2015, 1487 – Sparkassen-Rot/Santander-Rot; judgment of 12 April 2016 - XI ZR 205/14, NJW 2016, 2662, mn. 26 and 28 et seq.).

24 2. This is the case here.

25 a) In accordance with Section 254 of the Code of Civil Procedure, a hierarchical relationship exists between the information request that was granted to the Plaintiff in the previous instances and the entitlement to reclaim aid after the information has been provided, so that a ruling could be handed down on the information request in this regard by means of a partial judgment, and the ruling on the payment entitlement could be reserved for the final judgment. No such hierarchical structure however exists between the right to information and the Plaintiff's motions for injunctive relief that are still pending before the Regional Court (motions 5 and 6). A preliminary granting of information is irrelevant to any right to injunctive relief. Unlike motion 4, which is directed at a reclaim, motions for injunctive relief 5 and 6 accordingly also do not refer to the information previously granted.

26 b) It cannot be ruled out that the right to information, which was ruled on by a partial judgment, and the rights to injunctive relief still pending before the court of first instance, depend on common preliminary questions. The right to information as well as the motions for injunctive relief are only well founded if aid in accordance with Article 107 of the TFEU was granted to the Intervener, or if following the Commission's opening decision of 10 July 2007, the court must consider it to constitute aid. The Regional Court's partial judgment, ruling on the right to information alone, without at the same time ruling on the right to injunctive relief, was therefore impermissible (BGH, GRUR 2001, 54, 55– SUBWAY/Subwear).

27 3. The permissibility of the partial judgment does not result from the fact that the injunctive relief claims still pending at first instance are said to have now become manifestly ill-founded due to the cessation of the risk of an infringement. The court of appeal on points of fact and law did consider that a risk of repetition might no longer exist because the former Defendant, Flughafen Lübeck GmbH, ceased operating Lübeck Airport on 1 January 2013, and it has not been found that the (new) Defendant paid aid to the Intervener. However, conclusive findings about the presence of a risk of infringement have not been made by the previous instances. It cannot therefore be ruled out that, when ruling on the motions for injunctive relief, questions under state aid law might be decisive that are vital to a ruling on the request for information.

28 4. Considering the partial judgment handed down by the Regional Court to be impermissible does not run counter to the first appeal on points of law only judgment handed down by the Senate. The court of appeal on points of fact and law ruled on the claim as a whole in its first judgment and dismissed it completely. The question of the permissibility of the Regional Court's partial judgment does not therefore arise in the proceedings on the first appeal on points of law only.

29 5. The impermissibility of the partial judgment at first instance had to be taken into consideration by the court of appeal on points of fact and law ex officio. It should therefore have rescinded the first instance judgment in accordance with Section 538 (2) no. 7 of the Code of Civil Procedure, or also ruled at first instance on the part that was still pending. Delivering an impermissible part judgment constitutes a substantial procedural error which must be taken into consideration ex officio on appeal on points of fact only (BGH, judgment of 11 May 2011 - VIII ZR 42/10, BGHZ 189, 356, mn. 19, 27; judgment of 13 July 2011 - VIII ZR 342/09, NJW 2011, 2800, mn. 31).

30 6. The judgment on the appeal on points of fact and law must therefore be rescinded. If the court of appeal on points of fact and law omitted to remit the case back to the first instance even if this was due, then this ruling – even without a corresponding motion – must as a matter of principle be handed down in the court of appeal on points of law only (BGH, GRUR 2001, 54, 55 – SUBWAY/Subwear). No reasons of procedural efficiency are manifest in this dispute suggesting that the legal dispute is to be remitted back to the court of appeal on points of fact and law, and that, by way of exception, the latter will seek to gain jurisdiction over the part that is still pending at first instance. The facts have not been clarified. Furthermore, no agreement has been reached between the parties for the court of appeal on points of fact and law to rule on the entire subject-matter of the dispute (BGH, GRUR 2001, 54, 55 – SUBWAY/Subwear).

31 C. Immediately prior to the delivery of this judgment, the Senate became aware of a press release stating that the Commission had decided on 7 February 2017 that the agreement on airport fees and marketing that had been concluded in 2000 between the Defendant's legal successor and its Intervener did not contain state aid. This decision has not yet been published and can no longer be taken into account in the instant proceedings on appeal on points of law only. In particular, it is unclear whether it covers all the pending claims of the adversary proceedings. Moreover, the parties must be given a legal hearing regarding the Commission's decision and its impact on the legal dispute. Should it emerge, according to the Commission's decision, that none of the measures contested by the Plaintiff constitutes state aid, then a breach of the notification obligation could not be considered. Granting the contractually-agreed payments to the Defendant's Intervener would then have been in compliance with the Union's formal and substantive law on state aid from the outset.

32 D. Since no final assessment of the content and scope of the Commission's decision can be made in the proceedings as they stand, the Senate would like to point to the following:

33 I. The starting point of any assessment of whether the measures contested by the Plaintiff in the instant proceedings constitute aid, which is material to the well-foundedness of the motions contained in the action, is constituted by the decisions of the European Court of Justice delivered after the first judgment on the appeal on points of law only. Accordingly, the assessments in the Commission's opening decision are preliminary. This does not however mean that this decision has no legal effect (ECJ, judgment of 21 November 2013 - C-284/12, NJW 2013, 3771, mn. 37 – Deutsche Lufthansa; decision of 4 April 2014 - C-27/13, mn. 20 – Flughafen Lübeck/Air Berlin, juris). In order to guarantee the practical effectiveness of the state aid control system in accordance with Article 108 (3) of the TFEU, the national courts are obligated to suspend the performance of a measure until the Commission has decided on its compliance with the Single Market if, on the grounds of a preliminary assessment made in the decision on the opening of a formal investigation, the Commission assumed that this measure demonstrated characteristics of aid (ECJ, NJW 2013, 3771, mn. 38-40 – Deutsche Lufthansa; ECJ, decision of 4 April 2014 – C-27/13, mn. 22 et seq. – Flughafen Lübeck/Air Berlin, juris). Under their obligation to loyal cooperation with the Commission and the Courts of the European Union (Article 4 (3) of the TEU), in accordance with the case-law of the European Court of Justice, in order to meet their obligations under European Law, the national courts must take all appropriate measures, whether general or particular, and refrain from all actions that might endanger the realization of the objectives of the Treaty. In particular, the national courts must refrain from handing down rulings that are contrary to a decision by the Commission, even if they are of a preliminary nature (ECJ, NJW 2013, 3771, mn. 41 – Deutsche Lufthansa; decision of 4 April 2014 - C-27/13, mn. 24 – Flughafen Lübeck/Air Berlin, juris).

34 Beyond that, if the Commission has opened the formal investigation regarding a measure in progress, then according to the case-law of the European Court of Justice, the national courts are obligated to take all necessary measures to draw the conclusions of a potential violation of the obligation to suspend the performance of such measure. To this end, they may suspend the performance of the measure in question and order the reclaim of the amounts that have already been paid. They may also take interim measures, firstly, to guarantee the interests of the parties involved and, secondly, the practical effectiveness of the Commission's decision to open formal investigation proceedings (ECJ, NJW 2013, 3771, mn. 42 et seq. – Deutsche Lufthansa; decision of 4 April 2014 - C-27/13 mn. 25 et seq. – Flughafen Lübeck/Air Berlin, juris).

35 II. The Senate's statement in the first judgment on appeal on points of fact only that, on examining a violation of the ban on implementation, the national courts were obligated to interpret the term "state aid" so long as the Commission had not handed down a ruling completing the proceedings in accordance with Article 108 (2) of the TFEU (BGH, judgment of 10 February 2011 - I ZR 213/08, mn. 31, juris), was in concurrence with the earlier case-law of the European Court of Justice (see ECJ, judgment of 21 November 1991 - C-354/90, [1991], I-5505 = NJW 1993, 49, mn. 10 – FNCE). Regarding the case-law (mn. 33) that was handed down after the Senate's first judgment on appeal on points of fact only, it can only be concurred with until an opening decision is taken by the Commission. After the opening decision has been handed down, the national courts – with the restrictions outlined at D.IV. – may not deviate from the preliminary assessment of the aid character by the Commission.

36 III. Contrary to the opinion of the court of appeal on points of law only, the scope of the answers and specific details of the wording in the decision of the European Court of Justice following the submission by the court of appeal on points of fact and law do not result in a narrower understanding of the effect of the Commission's opening decision.

37 1. According to the court of appeal on points of fact and law's wording in the order for reference, Questions 3 and 4 needed to be answered only if the European Court of Justice answered Questions 1 or 2 in the negative, which means that the national court does not have to already consider the measure to constitute aid due to the preliminary assessment made by the Commission in the opening decision. Regardless of the wording used by court of appeal on points of fact and law, the European Court of Justice however considered it appropriate to answer Questions 3 and 4 as well. This circumstance does not result in a restriction of the statements made in the answers to the first two questions. Furthermore, there is no indication that the answers to Questions 1 and 2 should be qualified merely because the European Court of Justice answered Questions 3 and 4 as well.

38 2. The appeal on points of law only objected, albeit unsuccessfully, that, according to the wording chosen by the European Court of Justice, the national courts were allegedly obligated to draw the conclusion of a "potential" and not of a "presumed" violation of the ban of implementation in accordance with Article 108 (3), sentence 3, of the TFEU (see ECJ, NJW 2013, 3771, mn. 42 – Deutsche Lufthansa; ECJ, decision of 4 April 2014 - C-27/13, mn. 25 – Flughafen Lübeck/Air Berlin, juris). By selecting this wording, the European Court of Justice merely emphasizes the preliminary nature of the Commission's assessment under the law on state aid in the opening decision. This does not place any question marks over the legal effect attributed to the decision.

39 IV. Contrary to the opinion of the court of appeal on points of fact and law, the European Court of Justice did not however prohibit the national courts from holding the view that a measure with aid characteristics on the grounds of which the European Commission initiated formal investigation proceedings nonetheless does not constitute aid. The case-law of the European Court of Justice does not imply that national courts are bound by the preliminary view of an administrative authority – even if established on the Union level – which would be hardly compatible with their independence (BVerwG, judgment of 26 October 2016 - 10 C 3/15, mn. 18 et seqq., juris; critical of such a binding effect for example Rennert, DVBl 2014, 669, 674; Engel, EnWZ 2014, 22, 23; Giesberts/Kleve, NVwZ 2014, 643, 645; Traupel/Jennert, EWS 2014, 1, 3; Sonder, ZEuS 2014, 361, 371).

40 1. However, the European Court of Justice elaborated correspondingly that the national courts may not hold the view that a measure does not constitute state aid in accordance with Article 107 (1) of the TFEU if, due to a preliminary assessment, the Commission found in its decision on the initiation of formal investigation proceedings that the measure shows elements of aid (see ECJ, NJW 2013, 3771, mn. 38 et seq. – Deutsche Lufthansa; decision of 4 April 2014 - C 27/13, mn. 21 et seq. – Flughafen Lübeck/Air Berlin, juris). The European Court of Justice clarified, however, that national courts may, firstly, ask the Commission for clarifications in the case of doubt regarding the aid character of a measure or the validity or interpretation of the decision on the initiation of the formal investigation proceedings, and secondly, in accordance with Article 267 (2) and (3) of the TFEU, they may, or indeed must, turn to the European Court of Justice in the preliminary ruling procedure (ECJ, NJW 2013, 3771, mn. 44 – Deutsche Lufthansa).

41 Accordingly, there is no absolute or unconditional obligation incumbent on the national court to directly follow the Commission's preliminary assessment (EGC, decision of 3 March 2015 - T-251/13, EuZW 2015, 524, mn. 46 – Gemeente Nijmegen). Competence to place in question the preliminary assessment carried out by the Commission under the law on state aid results directly from the function of the national courts whose obligation to ensure the sovereign application of law and jurisdiction cannot be limited with binding effect by preliminary assessments carried out by the Commission acting as an administrative authority (see BVerwG, judgment of 26 October 2016 - 10 C 3/15, mn. 30, juris). The court of appeal on points of fact and law has already requested the

Commission's opinion and asked the European Court of Justice for preliminary rulings in accordance with Article 267 of the TFEU. However, this does not rule out further questions being posed to the Commission (see Article 29 (1) of Regulation [EU] 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ 2015, L 248/9 – hereinafter Regulation 2015/1589), or to the European Court of Justice.

42 2. Beyond that, following an opening decision by the Commission, the parties may also present their arguments regarding the aid nature of the measures in question to the national court to the extent that is permissible in accordance with its procedural law. Should circumstances result from such pleadings that place a question mark on the Commission's preliminary assessment that aid has been granted and which the Commission did not consider in the opening decision, the court is not obligated to directly consider the measures to constitute aid on the basis of the Commission's preliminary assessment. There are, rather, grounds for requesting the Commission's opinion as to whether these circumstances allow for a differing assessment under the law on state aid that derogates from the opening decision (see BVerwG, judgment of 26 October 2016 - 10 C 3/15, mn. 37, juris; Kamann, ZWeR 2014, 60, 78).

43 a) With regard to the right to effective legal protection that is guaranteed under Article 19 (4) of the Basic Law (*Grundgesetz* – GG) and Article 47 of the CFR, the bodies granting the aid, and the beneficiaries, must also be enabled to argue on the aid character of a measure before the national court, following the Commission's opening decision.

44 aa) This is supported by the fact that the bodies granting the aid and the beneficiaries do not have any procedurally-secured participation rights before the opening decision in the Commission's state aid investigation proceedings (ECJ, judgment of 19 May 1993 - C-198/91,1993, I-2522, mn. 22 – Cook/Commission; judgment of 9 July 2009 - C-319/07 P, 2009, I-5963, mn. 30 – 3F/Commission). Even though the case-law of the European Court of Justice attributes an extensive legal effect to the Commission's opening decision, it is doubtful whether the unforeseen participation of aid grantors and beneficiary companies in the preliminary proceedings which precede the opening decision is in accordance with the right to be heard under Article 41 (2) of the CFR before issuing an adverse administrative decision (Soltész, NJW 2013, 3771, 3774; Kamann, ZWeR 2014, 60, 74 et seq.; Rennert, DVBl 2014, 669, 672). In this regard, it is probably insufficient if the Member States include aid grantors and beneficiaries, in purely factual terms and without any participation rights secured under European Law, to a greater or lesser degree before the opening decision (differing opinion Martin-Ehlers, EuZW 2014, 247, 251; on the lack of participation in the preliminary investigation proceedings see BVerfG [Chamber], Order of 23 November 2001 - 1 BvR 2682/11, juris).

45 bb) The commercial enterprises concerned do not receive sufficient legal protection by way of the option to contest the Commission's opening decision with an action for annulment before the General Court of the European Union (see General Court, judgment of 25 March 2009 - T-332/06, mn. 35-43 – Alcoa Trasformazioni). This does not include an extensive examination of the assessment under state aid law in the opening decision. Firstly, the opening decision is already lawful so long as there is only doubt about the state aid character of the Member State's respective measure. Thus, it does not depend on whether aid has actually been given. Secondly, the subsequent examination by the Union's Courts is limited to the question of whether the Commission made manifest errors of assessment (ECJ, judgment of 21 July 2011 - 5-134/09 P, 2011, I-6344, mn. 61 – Alcoa Trasformazioni; see Rennert, DVBl 2014, 669, 672).

46 b) If, correspondingly, there are no sufficiently secured rights to be heard in the preliminary examination proceedings for the companies benefitting from potential aid, with regard to Article 19 (4) of the Basic Law and Article 47 of the CFR, they cannot be prevented from casting doubt before the national courts on the Commission's preliminary assessment under state aid law, which constitutes a burden on them, at least so long as the Commission has not yet come to a final, uncontestable decision. If the parties' arguments, which were not recognizably taken under consideration by the Commission in the opening decision, convince the court that there are cogent reasons in favor of an assessment which differs from the Commission's preliminary view, it may not concur with the Commission's preliminary assessment when reaching its decision. Referring to its reservations, it rather has to request a statement on the part of the Commission. If the Commission maintains its opinion, but the grounds put forward therefore do not seem to the court to be convincing, the court must ask the European Court of Justice for a preliminary decision in accordance with Article 267 of the TFEU (see BVerwG, judgment of 26 October 2016 - 10 C 3/15, mn. 26, juris; Kamann, ZWeR 2014, 60, 78 et seq.).

47 c) This procedure is suitable to guarantee the concerned parties' rights and the independence of the courts while adhering to the duty of loyal cooperation between the national courts, on the one hand, and the Commission and the European Courts, on the other hand (Article 4 (3) of the TEU).

48 V. Contrary to the view held by the Regional Court in the judgment of 28 July 2006, it is of importance for the aid character in the case at dispute to determine whether Flughafen Lübeck GmbH was acting as a private investor operating in a market economy sense when it entered into the agreement with the Intervener on 29 May 2000 ("private investor test"; see opening decision, mn. 121). The fact that only the Intervener benefitted from these special conditions (selectivity of the measure) does not in itself preclude such a market economy-based act. It is furthermore also important to determine whether it constitutes a measure that was inadequately transparent vis-à-vis competitors.

49 VI. If, taking these principles into account, the court should have to consider, as a preliminary step, that the contested measures constitute aid until such time as the Commission hands down its final ruling, this alone does not lead to the right to information and repayment being well founded.

50 1. If the case refers to non-unauthorized aid, the national courts may order that the amounts paid be reclaimed, or may decide to take provisional measures to guarantee both the concerned parties' interests, as well as the practical effectiveness of the opening decision (ECJ, NJW 2013, 3771, mn. 43 – Deutsche Lufthansa; judgment of 4 April 2014 - C-27/13, mn. 26 – Flughafen Lübeck/Air Berlin, juris). The case at dispute does not refer to any provisional measures such as the suspension of the aid measure, but only to a claim for repayment and the claim for information in preparation thereof. At least in the case of completed actions, the national courts are not obligated to consider these claims to be justified on the basis of the Commission's opening decision alone (see General Court, judgment of 16 October 2014 - T-517/12, mn. 40, juris; judgment of 16 October 2014 - T-129/13, EuZW 2015, 150, mn. 40 – Alpiq). The Court rather has to decide on their well-foundedness, taking into account the obligation to assist in lending practical effect to the Commission's opening decision, as well as to make a decision that protects the concerned parties' interests, and where appropriate considers the exceptional circumstances of the individual case. The order to effect a reclaim prior to a final decision being taken by the Commission must be in accordance especially with the principle of proportionality under European Law (Article 5 of the TEU; on the principle of proportionality in the Commission's state aid investigation proceedings see General Court, judgment of 9 June 2016 - T-162/13, SpuRt 2016, 202, mn. 148).

51 2. Even if it has been granted in violation of the ban on implementation contained in Article 108 (3), sentence 3, of the TFEU, it must be taken into consideration that, prior to taking a decision on its compliance with the Single Market, the Commission may only provisionally reclaim unlawful aid if there are no doubts, under current practice, as to whether the measure in question constitutes aid, there is an urgent need to take action, and there are serious grounds to expect a competitor to incur substantial, irreversible damage (Article 13 (2) of Regulation 2015/1589; same wording Article 11 (2) of the Regulation (EC) No. 659/1999, which was in effect until 13 October 2015, subsequently Regulation 659/1999). In connection with Article 108 (3) of the TFEU, the European Court of Justice similarly held that an obligation to adopt protective measures, such as the order to repay the aid, only exists if the qualification as aid was not in doubt, if the implementation of the aid was imminent, or if the aid had been implemented and no exceptional circumstances had been determined which showed the reclaim to appear to be inappropriate (ECJ, judgment of 11 March 2010 - C-1/09, 2010, I-2099 = EuZW 2010, 587, mn. 36 – CELF II).

52 3. Insofar as the European Court of Justice assumes that the reclaiming of state aid that was granted wrongly cannot be disproportionate as a matter of principle (see for instance ECJ, judgment of 17 June 1999 - C-75/97, 1999, I-3571 = EuZW 1999, 534, mn. 68 – Belgium/Commission), this case-law relates solely to the case of an obligation to reclaim that is incumbent on the Member State which is included in a final decision handed down by the Commission by virtue of which aid has been declared incompatible with the Single Market. The obligation to reclaim may not be imposed in order to restore the status quo ante. The situation pertaining after the opening decision, but prior to the Commission's final decision, is not comparable with this. The preceding preliminary examination proceedings in accordance with Article 108 (3) of the TFEU only serve to provide the Commission with adequate time to reflect and examine in order to enable it to form a preliminary opinion with regard to whether aid has been constituted and to whether a measure taken by the State, or financed with state funds, conforms with the Treaty (see General Court, judgment of 9 June 2016 - T-162/13, mn. 135).

53 4. That having been said, on the basis of an only preliminary classification as aid by the Commission, the reclaiming of aid may prove to be disproportionate for the national court for various reasons. This is the case for example if it is an aid which, under the Commission's practice in accordance with Article 107 (2) or (3) of the TFEU and the implementing provisions that have been handed down in its regard, are highly likely to be declared compliant with the Single Market, and whose reclaiming seriously threatens the economic survival of the company concerned. In the case at dispute, no decision needs to be made as to whether and under what circumstances one could presume reclaiming to be disproportionate, given that, generally speaking, there should be no faits accomplis in the shape of the insolvency of the company receiving the aid by way of a preliminary measure before the Commission's final decision – this also being the case in the interest of the employees concerned.

54 When it comes to the question of whether information and reclaiming are (still) necessary, and hence proportionate in order to lend practical effect to the implementation ban contained in Article 108 (3), sentence 3, of the TFEU, it must also be considered that, following a final decision by the Commission affirming the existence of aid that is incompatible with the Single Market, reclaiming plus appropriate interest for the duration of the unlawful utilization can and must be effected in order to withdraw the benefit of the aid in full, including for the past (see Kamann, ZWeR 2014, 61, 76). As a matter of principle, this could be taken into consideration as a less incisive means the suitability of

which, in comparison with immediate reclaiming, however, depends on the circumstances, and particularly on the remaining distortive effects continuing to be exerted by the specific aid.

55 5. The Member States' courts that are seized of the request for reclaim are responsible for examining the proportionality of such reclaim in individual cases. Considering the abovementioned principles, and given the specific circumstances set out below in the case at dispute, it might not appear to be unlikely that a preliminary reclaim must be assumed to be disproportionate solely because of the opening decision:

56 The Commission initiated the main investigation proceedings on 10 July 2007, but had not completed them by the date of the oral hearing on the appeal on points of law only. Moreover, it did not see itself fit to give information in response to a corresponding question by the court of appeal on point of fact and law in March 2012 as to the anticipated further duration of the main investigation proceedings. The Defendant no longer operates an airport, and the Intervener no longer flies to Lübeck Airport. It therefore appears to be questionable whether there is any competition-distorting effect at this time ensuing from the aid that was paid to the Intervener for flight connections to Airport Lübeck in the years 2000 through 2004 (see Kamann, ZWeR 2014, 60, 81).

57 6. It seems hardly consistent with the duty of loyal cooperation between the Commission and the national courts that, for an indefinite period of time, the Commission does not come to a decision in state aid main investigation proceedings, whilst, contrary to the distribution of responsibilities as provided in the Treaties, it is not the Commission but, de facto, the national courts that must hand down a final regulation by ordering a reclaim that is based on the violation of the implementation ban (see Article 108 (3), sentence 3, of the TFEU). By postponing the decision, the Commission was thus only able to subject measures that are preliminarily classified as aid to a principle of repayment which must be enforced by the national courts, without being bound by the requirements of a reclaim that apply to the Commission itself in accordance with Article 13 of Regulation 2015/1589. In the implementation of state aid law, such a shift of function from the Commission to the national courts through the combination of failing to apply Article 13 of Regulation 2015/1589 with the Commission's very long investigation proceedings does not comply with the cooperation model under European law (see Giesberts/Kleve, NVwZ 2014, 643, 646; von Bonin/Wittenberg, EuZW 2014, 65, 69).

58 The duty of loyal cooperation is also binding on the institutions of the Union (Article 4 (3), first half-clause, of the TEU; ECJ, judgment of 26 November 2002 . C-275/00, 2002, I-10943 = EuZW 2003, 54, mn. 49 – First und Franex; judgment of 16 October 2003 - C-339/00,2003, I-11757, mn. 71 – Ireland/Commission; von Bogdandy/Schill in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, version of September 2013, Art. 4 EUV mn. 111; Rennert, DVBl 2014, 669, 674). Accordingly, the Commission is obligated to terminate administrative proceedings within a reasonable time, whereby not any period of time that the Commission actually takes up can of necessity be considered reasonable. The standard investigation period of 18 months after the initiation of the investigation proceedings is only applicable for the Commission if aid is registered (see Article 9 (6) and Article 15 (2) of Regulation 2015/1589 and same wording in Article 7 (6) and Article 13 (2) of Regulation 659/1999). An extension of the investigation period by an arbitrary multiple of such period can nonetheless hardly appear reasonable.