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German Federal Administrative Court (Bundesverwaltungsgericht – BVerwG)
Judgment of 26 October 2016, file number: 10 C 3/15
– Magic Mountain Kletterhallen (Magic Mountain climbing gyms) –

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Procedural History:

Preceding judgment *Oberverwaltungsgericht Berlin-Brandenburg, 18 February 2015, file number: 6 B 24.14*
Preceding judgment *Verwaltungsgericht Berlin, 19 March 2013, file number: 26 K 6.13*

Headnotes:

a) In applying the standstill obligation according to Article 108 (3), third sentence of the TFEU, the national courts are to review the existence of notifiable State aid independently and comprehensively (see mn. 28, 31).
b) The scope of the review is not reduced by the European Commission having expressed its views as to whether the criteria for State aid exist in a decision not to raise objections (Article 4 (3) of the Procedural Regulation).

Holding:

In this administrative lawsuit, the 10th Senate of the Federal Administrative Court has come to the following decisions after the oral proceedings held by the president of the Court, Prof. Dr. Dr. h.c. Rennert and the court's judges Dr. Häußler, Hoock, Dr. Rublack and Dr. Seegmüller:

The judgment of the Higher Administrative Court of 18 February 2015 is reversed.

The case will be referred back to the higher administrative court for further hearing.

The decision on procedural costs is reserved for the final decision.

Rationale:

I

1 The parties are disputing the lawfulness of a measure promoting sports for the time period prior to a favourable State aid decision law by the European Commission.

2 The claimant has been operating a climbing gym for commercial purposes for a substantial period of time. Approximately three kilometres away, the joined (*beigeladene*) party, an association belonging to the German Alpine Association (*Deutscher Alpenverein, DAV*), planned to open a climbing gym for amateur sporting activities. In a lease agreement dated 26 October 2011, the respondent federal state allotted the association, within the scope of its promotion of sports, a parcel of land for the construction of the climbing gym for a term of 30 years for a rental charge of 1,132.92 Euros for the first year, a figure significantly lower than the usual market rent. The construction permit was issued to the joined party on 1 July 2011. The gym was constructed in the summer of 2012 und thereupon put into operation.

3 The claimant alleges that the reduction of the rental charges constitutes competition-distorting State aid that is impermissible under European law. For this reason she first filed suit in December 2010 seeking to enjoin the intended transfer of property; at the end of 2011 the suit was amended and sought that the lease agreement be declared invalid.

4 At the same time, she also filed a complaint at the European Commission. The Commission (Directorate-General for Competition) wrote to the claimant on 9 December 2011 and again on 10 April 2012 after she had lodged an objection to the first letter and expanded her complaint to cover all sections of the German Alpine Association as well as the umbrella organisation. In these letters the Commission suggested to the claimant that she withdraw her complaint as a preliminary assessment indicated that the measures could not - a priori – be seen as State aid. After the claimant renewed her objection, the Commission – in its order of 5 December 2012 – declared all support measures of the federal states and the municipalities benefitting the climbing facilities of the German Alpine Association and its sections as compatible with the internal market. The claimant's action for annulment of the decision of the Commission was rejected by the European Court of Justice in its judgment of 9 June 2016 (see T-162/13 [ECLI:EU:T:2016:341]). The ruling is final.

5 In this present litigation, the Administrative Court partially granted the claim. The lease agreement between the joined party and the respondent was found unlawful up to the Commission's decision of 5 December 2012, and invalid in terms of the reduction of the rental charges. The court reasoned that European law prohibited putting this support measure into effect before the favourable decision of the Commission. For the time afterwards, the claim was disallowed. In this respect, the claimant was not allowed to assert a continuing unlawfulness of the lease agreement.

6 The Higher Administrative Court substantially shared this legal view and therefore rejected the appeal of the joined party. The court concluded that the grant of financial support was initially in violation of the European treaties' prohibition against putting non-notified State aid into effect; the declaration of

compatibility later issued by the Commission did not retroactively cure the violation of the law. Regarding the actual presence of State aid in this case, the court of appeal concluded that it was bound to follow the order of the European Commission of 5 December 2012. The court held that this obligation resulted from the principle providing that legislative acts by Community institutions are presumed to be lawful and from the necessity to preserve the practical effects of the standstill obligation under Union law; it exists regardless of whether the decision of the Commission is legally valid or not. Doubts concerning the accuracy of this decision and the State aid nature of the rental scheme, which would have made it necessary to refer the case to the European Court of Justice, were not seen as existing at the time. Accordingly, the appeal court held it inappropriate to conclude that the State aid had been lawful from the start. The court found in particular that this was not a case of permissible State aid under the *de minimis* Regulation. The German Alpine Association and their regional sections were, in the court's view, to be seen as a cohesive group in the context of State aid control. The appellate court therefore found that the granted State aid should be aggregated, which led to its exceeding the limit for lesser amounts of State aid deemed too small to distort competition.

7 With this appeal the joined party argues that the claim for declaratory relief was inadmissible and in any case unsubstantiated. It is alleged that the higher administrative court misunderstood the content of the Commission's decision and wrongly assumed that the legal understanding of the Commission had a continuing binding effect on the national courts. The joined party asserts that the sports funding granted to it is conceptually not State aid. In particular, it purportedly lacks the required relevance for the internal market. Furthermore, the joined party argues that measure was not notifiable as resulting from, among other things, the *de minimis* Regulation.

8 The joined party requests

> to amend the judgments of the Administrative Court of Berlin of 13 March 2013 and of the Higher Administrative Court of Berlin-Brandenburg of 18 February 2015 and to dismiss the case completely.

9 The claimant requests

> denial of the appeal.

10 The claimant defends the judgment on appeal and asserts that both the European Commission and the European Court of Justice were correct in their assumption that this is a case of notifiable State aid with relevance for the internal market. It is contended that the aid was granted in violation of the Union law standstill obligation before the Commission's decision. Therefore, the claimant argues that it has to be declared void for this time span and rescinded.

11 The respondent has not submitted a claim. It supports the appeal of the joined party and additionally states that the General Block Exemption Regulation (GBER) enacted by the European Union on 17 June 2014 retroactively allows the sports-funding measures from the beginning.

II

12 The appeal is meritorious and requires referral of the case back to the lower courts. The higher administrative court proceeded – in violation of Article 108 (3), third sentence of the TFEU – on the assumption that the national courts are bound by the European Commission's assessment of the state-aid nature of the measure when reviewing the standstill obligation and are therefore only obliged to engage in a limited factual and legal examination. Because it limited itself to a discretionary standard

of review and it cannot be said with certainty that the necessary extensive examination would not have led to a different conclusion, this case is to be referred back to the higher administrative court for a new hearing and judgment.

13 1. The Higher Administrative Court had, however, rightly concluded the declaratory action as permissible, concluding that the lease agreement of 26 October 2011 between the joined party and the respondent prior to the decision of the Commission of 5 December 2012 was in violation of the ban on State aid and therefore to be declared void. It is not necessary for the claimant to be a party to the lease agreement herself for the existence of determinable legal relationship according to Section 43 of the VwGO (*Verwaltungsgerichtsordnung* – Rules of the Administrative Courts) (see BVerwG, judgment of 31 August 2011, file number: 3 C 44.09, BVerwGE 140, 267, mn. 14 with further references). It is furthermore not of significance that the contested time period is in the past as long as there is still an interest in declaring the unlawfulness of the act in question (see BVerwG, judgment of 11 March 1993, file number: 3 C 90.90 – BVerwGE 92, 172). The continuing declaratory interest and the necessary right to bring proceedings in the present case can be concluded from the facts that (i) the claimant as a commercial operator of a climbing gym in close proximity to the gym of the joined party is in a service competition with him and (ii) Article 108 (3), third sentence of the TFEU grants potential competitors in cases of State aid a personal right to have the national courts address the necessary consequences for a violation of the standstill obligation (see BVerwG, judgment of 16 December 2010, file number: 3 C 44.09, BVerwGE 138, 322, mn. 13; also BGH, judgment of 5 December 2012, file number: I ZR 92/11, BGHZ 196, 254, mn. 14 with further references).

14 The priority of the action for annulment of the construction permit does not stand in the way of the admissibility of the declaratory action, contrary to the opinion of the joined party. The issuing of the construction permit and the granting of a subsidy in the form of a price reduction in the lease agreement are two separate objects of dispute. As has been decided by lower instance courts in binding interpretation of non-reviewable federal state law, European State aid law is not to be considered in the building construction authorisation process. Since it does not grant protection under State aid law, the subsidiarity principle of section 43 (2) of the VwGO cannot demand the primary filing of an action for annulment. Consequently, the objection of the joined party in relation to the circumstances connected to the construction permit for the climbing gym cannot be successful.

15 The claimant was lastly not obliged according to Article 43 (2) of the VwGO to file first a suit for performance in order to get the rental charges adapted to the customary charges for this area. In accord with the purpose of this provision, an exclusion of the declaratory action is not called for, if – as is the case here – there is no imminent threat that the rules on deadlines and preliminary proceedings in annulment and performance actions are being bypassed. Nor does Art. 43 (2) of the VwGO stand in the way of a declaratory action in cases where it provides effective legal protection (see BVerwG, judgment of 29 April 1997, file number: 1 C 2.95, Buchenholz 310, Section 43 of the VwGO, mn. 127). Because of this, it is also prohibited to refer the claimant to an action for performance under which the legal relationship – on which she has a legitimate interest in an independent determination – would be only a preliminary question and in which all the other elements of the claim are of only minor interest to her (see BVerwG, judgment of 29 April 1997, file number: 1 C 2.95, Buchenholz 310 Section 43 of the VwGO, mn. 127).

16 2. Contrary to the appeal of the claimant, the higher administrative court did not misconstrue the content of the Commission's decision. It correctly stated that the Commission perceived State aid in the rental charge reduction granted by the sued federal state. This is a consequence of the legal

evaluation in the Commission's decision of 5 December 2012 (file number: C (2012) 8761, mn. 43-63). It initially explains that the German Alpine Association's sections and the governing body are to be seen as a single entity for the sake of State aid control (mn. 48) and accordingly took into account the sports promotion measures of all federal states and municipalities in which they saw a State aid arrangement. The Commission concluded that the measures qualify as State aid within the meaning of Article 107 (1) of the TFEU to the extent that they benefit the entity of the German Alpine Association (mn. 63, "*zu dem Schluss, dass die Maßnahme als staatliche Beihilfe im Sinne des Artikels 107 Absatz 1 AEUV zu betrachten sind, insofern die der DAV-Gruppe zugutekommen*"). The caveat in the concluding statement that the measures have been declared as compatible with the internal market insofar as they constitute a State aid (Commission's Decision of 5 December 2012, mn. 69) is clearly referring to the fact that the reviewed measure for the promotion of sports can be utilised by other sports associations. In these cases there can be no State aid (mn. 63).

17 The objections of the joined party do not apply here. The contrary assessments, which were only stated by the Commission in its description of the facts (mn. 16-42), do not change the legal analysis in any way. The Commission's having estimated the consequences of a declaration of compatibility on domestic trade and European competition as only minor (mn. 84-95) cannot be seen as an argument for their assuming no effect at all for the internal market or for competition. Rather, the Commission sets out in detail the effects on competition and the internal market that are necessary for a State aid determination (mn. 51-63). The Commission's statement that Germany did not offer sufficient evidence of entrance being restricted to the members of the German Alpine Association (mn. 47) also does not refute the fact that the Commission assumed State aid did exist in this case.

18 3. The higher administrative court, however, did not meet its obligation to review the issue and gave the Commission's Decision of 5 December 2012 an extensive binding effect and therefore did not sufficiently review the existence of notifiable aid.

19 a) Article 108 (3) of the TFEU demands a preliminary examination of any planned grant of new aid. Article 108 (3), third sentence of the TFEU sets out that a Member State wanting to grant State aid is not allowed to put its proposed measures into effect until the review has been completed (the standstill obligation). This rule was introduced in order to ensure that only State aid compatible with the internal market is put into effect (see ECJ, Judgment of 12 February 2008, C-199/06 – CELF I, mn. 35 et seqq., mn. 48).

20 The handling of this control system resides on the one hand with the Commission and on the other hand with the national courts, whereby their functions are complementary but nonetheless different. Whilst the Commission is responsible solely for deciding on the compatibility of the State aid measure with the internal market, the national courts protect the rights of individuals from a possible Member State violation of the standstill obligation until a final decision is issued by the Commission (see ECJ, Judgment of 12 February 2008, C-199/06 [ECLI:EU:C:2008:79] – CELF I, mn. 38; Judgment of 5 October 2006, C-368/04 [ELCI:EU:C:2006:644] – Transalpine Pipeline, mn. 36 et seqq.; Judgment of 21 November 2013, C-284/12 [ELCI:EU:C:2013:755] – German Lufthansa, mn. 27 et seqq.). Specifically, in response to a competitor's request for protection they are obligated to order a measure suitable to eliminate the violation of the standstill obligation. The reason for having this function fulfilled by the national courts relates to the direct effect attributed to the standstill obligation.

21 In order to determine if a state measure constitutes State aid put into effect in violation of Article 108 (3), third sentence of the TFEU, the national court has to interpret and apply the concept of aid under Article 107 (1) of the TFEU (see ECJ, Judgment of 5 October 2006, C-368/04 – Transalpine Pipeline,

mn. 39). This obligation is neither eliminated nor reduced by the Commission's decision of 5 December 2012.

22 aa) This determination is not a "positive decision" by the Commission – under Article 7, Article 13 (1), second sentence of Council Regulation (EC), No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC treaty (OJ L 38, page 1) in the here relevant version of Council Regulation (EC) No 1791/2006 of 20 November 2006, OJ L 363, page 1 – hereinafter referred to as the "Procedural Regulation" – with which the formal investigation would be completed. This follows from the decision resulting not from a formal investigation procedure but solely a preliminary examination. It is thus not a decision on the conclusion of a formal investigation procedure under Article 7 of the Procedural Regulation, but a decision based on a preliminary examination pursuant to Article 13 (1), first sentence, Article 4 of the Procedural Regulation, namely a decision not to raise any objections under Article 4 (3) of the Procedural Regulation.

23 bb) Such a decision by the Commission does not free the national court from its obligation to examine for itself whether the measure referred to is indeed State aid or not. This applies without further ado if – as allowed in Article 4 of the Procedural Regulation – the Commission leaves open the question as to the conceptual existence of aid and restricts itself to deciding that the measure is in any event compatible with the common market. This applies also – as here – when the Commission confirms the state-aid-character of the measure but, nevertheless, decides not to raise objections without initiating the formal investigation procedure.

24 This follows from the fact that, in accordance with Article 4 of the Procedural Regulation, the Commission's decision is based merely on a preliminary examination, whereas the national court, on an action brought before it, has to base its judgment in the principal proceedings on a concluded examination. The national court is indeed allowed to proceed from the result of the preliminary examination by the Commission; but it is not allowed to stop at this point as it has to exhaust all the evidence available to it during the lawsuit. At most, a different approach can be assumed during proceedings for interim protection as the urgency of these matters does not allow a thorough examination (see Bartosch, *EU-Beihilfenrecht*, 2nd ed. 2016, Article 108 AEUV, mn. 27; Traupel/Jennert, EWS 2014, 1, 4).

25 Moreover, the decision by the Commission made pursuant to Article 4 of the Procedural Regulation is made without the participation of the grantee. In this present case as well, the Commission did not hear the joined party. In the preliminary examination, apart from other complainants only the claimant and the Federal Republic of Germany, representing the sued federal state, participated – but not the joined party.

26 Ultimately, the joined party did not have any chance to have the Commission's decision judicially reviewed. The Commission informed it in its writing of 18 December 2013, that it had no right to object to the Commission's decision (see p. 949, 952 of the file, referring to the judgment of the Court of First Instance of 30 January 2002, T-212/00 – Molisane Srl, mn. 35 et seqq.). But then, according to the case law of the European Court of Justice on preventing gaps in legal protection, there has to at least be the possibility to have the Community measure judicially reviewed by the national courts and a chance to obtain a preliminary decision (see ECJ, Judgment of 27 September 1983, C-216/82 – University of Hamburg; and Judgment of 9 March 1994, C-188/92). A restriction of the scope of inquiry in this situation would – as the joined party correctly asserted – contradict the principle of effective judicial protection under national constitutional law. Pursuant to Article 19 (4) of the Basic Law (*Grundgesetz* – GG) every individual has a right to a complete review of administrative decisions both

legally and factually (see BVerfG, Judgment of 22 October 1986, file number: 2 BvR 197/83, BVerfGE 73, 339, 373).

27 The evaluation of the Commission in their decision of 5 December 2012, stating this was conceptually State aid, was not made more binding as a consequence of the Court of First Instance of the European Communities, in a judgment of 9 June 2016, having rejected the appeal of this decision as brought by the claimant and other commercial climbing gyms (see case T-162/13). While true that the joined party participated as an intervening party on behalf the Commission, the court did not consider the question of whether State aid even existed in this case. This point was, rather, undisputed by the lawsuit's main parties (the claimant and the Commission). Due to this, the court limited its review to the assessment of compatibility according to Article 107 (2), lit. c, of the TFEU, which it clearly noted (see Court of First Instance, Judgment of 9 June 2016, T-162/13, mn. 151).

28 Contrary to the opinion of the higher administrative court, the national court is not bound to the Commission's decision as a result of general principles of European Union law.

29 The generally accepted principle in Union law presuming the legality of Community acts does not lead to this conclusion. Although it does follow from this principle that measures of Community institutions are presumed to be lawful until they are either withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (see ECJ, Judgment of 5 October 2004, C-475/01, [ELCI:EU:C:2004:585] – Commission/Greece, mn. 18; and Judgment of 12 February 2008, C-199/06 – CELF I, mn. 60), this applies only to the legal validity of these measures. The principle is the basis for giving legal effect also to incorrect Community acts – similar to Section 43 (1), Section 44 (1) of the Administrative Procedure Act (*Verwaltungsverfahrungsgesetz* – VwVfG) in national law.

30 The scope of review of the competent Courts is not restricted by this principle. Courts responsible for judicial control are not bound by the legal assessments of the Community institutions they are to control. The same applies to the European courts that can annul Community measures, as well as to national courts, who pursuant to Article 267 of the TFEU have to obtain a preliminary ruling from the Court of Justice of the European Union if they have doubts concerning the validity or interpretation of a Community measure (see ECJ, Judgment of 22 October 1987, C-314/85 [ECLI:EU:C:1987:452] – Foto-Frost, mn. 14-19). In both contexts the courts have to independently examine the objections of the parties challenging the legality of the Community measures to the extent provided by law before making their final decision or requesting a preliminary ruling. This obligation is not changed by the principle of presuming the lawfulness of Community measures. A different conclusion would not comply with the principle of separation of power, which is not only a part of the primary Union law but also an element of many Member States' Constitutions.

31 A restriction of the scope of judicial examination and control also does not follow from the duty of loyalty as enshrined in the primary law of the European Union (see Article 4 (3) of the TEU).

32 In the context of State aid law and the division of labour between the national courts and the European institutions as arising from Article 108 of the TFEU (see above 3.a), the Court of Justice of the European Union has prescribed a duty of loyal cooperation; this applies in those cases where the European Commission has decided to open a formal investigation procedure due to the suspicion of unannounced State aid and the national courts are to decide on the granting or provisional reversal of the measure. In these cases the national courts must refrain from making a decision which conflicts with the decision of the Commission. They must suspend the benefits in question, order recovery of

payments already made or order necessary safeguard measures (see ECJ, Judgment of 21 November 2013, C-284/12 – German Lufthansa, mn. 41-43; Order of 4 April 2014, C-27/13 [ECLI:EU:C:2014:240] – Air Berlin, mn. 24-26).

33 It is debatable whether the case law on the duty of loyalty as regards State aid law aims to establish that national courts are legally bound to the State aid evaluation by the Commission in a decision under Article 4 of the Procedural Regulation (critical opinion: Berrisch, EuZW 2014, 253, 256; von Bonin/Wittenberg, EuZW 2014, 1, 2 et seqq.). Furthermore, it is debatable whether the binding effect is restricted to proceedings for interim relief, as suggested by safeguard measures identified by the Court of Justice (see Bartosch, EU-Beihilfenrecht, 2nd ed. 2016, Article 108 AEUV, mn. 27; Traupel/Jennert, EWS 2014, 1, 4) or whether it can be extended to main proceedings, although Union law, with provisions on legal effects and duties of referral, contains decision-making rules especially for principal proceedings – rules that do not seem to require further clarification. In any event the extension of this case law to principal proceedings does not restrict the judicial review obligations as the Court of Justice of the European Union has stated that national courts should seek clarification from the Commission or make a reference to the European Court of Justice for a preliminary ruling if they have doubts as to whether a measure constitutes State aid (see ECJ, Judgment of 21 November 2013, C-284/12 – German Lufthansa, mn. 44). It follows that the obligation of the national courts to independently and thoroughly examine whether the eligibility criteria for State aid are given is not challenged by the duty of loyal cooperation in State aid cases.

34 The appellate court did not conduct the necessary examination into whether the criteria for the standstill obligation under Article 108 (3), third sentence, of the TFEU were fulfilled. The court based its rejection of the appeal on the binding nature of the Commission's decision and, subsidiary to this, only asked whether there were obvious doubts as to the correctness of the Commission's decision and the State aid character of the rental charge arrangement. It thus reduced its review to a kind of plausibility check. The appealed ruling rests upon this flaw. It cannot be ruled out that a judgment in favour of the joined party would have been reached through a more detailed review of the substantive and legal questions. Because of this, this dispute will be referred back for further proceedings and judgment (see Section 144 (3), no. 2, of the Rules of the Administrative Courts). In this regard, the Senate gives the following instructions:

35 a) Even though the Commission's decision of 5 December 2012 cannot legally bind the national courts, the decision is still important in two ways:

36 On the one hand the decision is based on an interpretation of the European Union concept of State aid, incorporating the existing case law of the Court of Justice of the European Union. The national courts have to consider this when they themselves interpret the concept State aid. If the appeal court finds that the concept of State aid should be interpreted in a manner varying from the Commission's view, it will have to seek clarification from the Court of Justice of the European Union by means of a preliminary ruling (see ECJ, Judgment of 21 November 2013, C-284/12 – German Lufthansa, mn. 44).

37 On the other hand the Commission applied Article 107 (1) of the TFEU to the submitted facts, though only in a preliminary examination. The national courts have to consider this as well, having regard, of course, for their obligation to conduct a comprehensive review. If this examination does not reveal any additional aspects to questions already addressed by the Commission, it stands to reason that the national Court will follow the assessment of the Commission. Otherwise, they should request that the

Commission comment on a divergent assessment. If the national Court still does not wish to follow the Commission's view, they should, here again, seek clarification from the Court of Justice of the European Union (see ECJ, Judgment of 21 November 2013, C-284/12 – German Lufthansa). If the comprehensive review reveals additional facts which the Commission did not know about, then the horizon of the Commission's decision has been exceeded. Even then, however, a request to the Commission for a supplementary and, if appropriate, more detailed explanation of its decision is not precluded; the general rules for obtaining a preliminary ruling by the Court of Justice of the European Union will apply.

38 b) On examining whether State aid exists or not, the legal standards employed by the Commission and the appeal court are viable.

39 aa) Pursuant to Article 107 (1) of the TFEU, save as otherwise provided in the Treaties, 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 is, in so far as it affects trade between Member States, incompatible with the internal market. The rental charge reduction in this case is without any doubt a benefit granted by the sued federal state, which is in its character and effects identical to a subsidy (see ECJ, Judgment of 19 March 2015, C-672/13 [ECLI:EU:C:2015:185] – OTP Bank Nyrt, mn. 40).

40 bb) It is more difficult to say whether the promotion of the joined sporting association is under Union law to be seen as a favouring a commercial enterprise. The term "undertaking" as appearing in Article 107 (1) of the TFEU has to be interpreted broadly. Every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed is included in the term "undertaking" (see ECJ, Judgment of 23 April 1991, C-41/90 [ECLI:EU:C:1991:3161] – Höffner and Elser, mn. 21; and Judgment of 24 October 2002, C-82/01 [ELCI:EU:C:2002:617] – Aeroports de Paris, mn. 75). The case law of the European Court of Justice has consistently recognised an action as commercial when goods or services are offered on a certain market (see ECJ, Judgment of 18 June 1998, C-35/96 [ECLI:EU:C:1998:303] – Commission/Italy, mn. 36; and Judgment of 24 October 2002, C-82/01 – Aeroports de Paris, mn. 79).

41 Consequently, the objection of the joined party that it cannot, as a charitable amateur sporting association, be seen as an undertaking is not convincing. From the standpoint of Union law, it is irrelevant whether an entity has the legal structure of an association or is recognised in Germany as acting in the common public interest. Further, there is no Union law stating that sport associations cannot be seen as an undertaking in terms of State aid or competition law. Rather, the European Court of Justice has repeatedly ruled that the exercise of sport falls with the scope of Community law in so far as it relates to economic activity in the sense of Article 2 of the TEC (now Article 3 of the TFEU) (see ECJ, Judgment of 15 December 1995, C-415/93 [ECLI:EU:C:1995:463] – Bosman, mn. 73; and Judgment of 13 April 2000, C-176/96, [ECLI:EU:C:2000:201] – Lehtonen, mn. 32). Therefore sports associations can also be undertakings according to Article 107 (1) of the TFEU, if and to the extent they engage in economic activities.

42 However, most of the time the promotion of local sport facilities by amateur sporting associations lacks the required connection to the internal market and to competition (see Recital 74 of the Preamble of the General Block Exemption Regulation). Nevertheless, it is the extent of the economic activity of the amateur sports association which is crucial. Similarly, it cannot be inferred from Article 165 of the TFEU that amateur sport associations cannot, in principle, be regarded as undertakings. According to Article 165 (1) of the TFEU, the European Union is to contribute to the promotion of European sporting

issues, while taking account of the specific nature of sport, its structures based on volunteer activity and its social and educational function. Although establishing competence in the European Union to promote sports and also giving interpretative guidance for other Union laws, this provision does not justify a general exclusion of the commercial activities of amateur sport associations from general European competition law (see Persch, NJW 2010, 1917). If amateur sport associations, like undertakings, offer goods or services on the market in a manner that affects the internal market, then their special features – the volunteer engagement and their social and educational functions – assume a lower priority. Accordingly, an across-the-board competition law exception is not justified.

43 Ultimately, the Commission's overall view considering the joined association, the other sections of the German Alpine Association and the governing body as comprising a single corporate group corresponds to the Court of Justice of the European Union's case law on competition law. The Court views as an economic entity actors who – like a parent company and its subsidiaries – are connected (see ECJ, Judgment of 24 October 1996, C-73/95 P [ECLI:EU:C1996:405] – Viho, mn. 15-17; Khan, in: Geiger/Kahn/Kotzur, AEUV, 5th ed. 2010, Article 101, mn. 10). The joined party has not contested the economic link between the sections and the governing body of the German Alpine Association, nor has it disputed that the construction of the climbing gym is part of the German Alpine Associations programme to construct climbing gyms all over Germany. For these reasons, it makes sense to see the governing body of the German Alpine Association and its sections as a cohesive entity. The benefits granted to the German Alpine Association group by different federal states and municipalities, especially regarding the operation of climbing gyms, fulfil the element of selectivity (see ECJ, Judgment of 19 March 2015, C-672/16 – OTP Bank Nyrt, mn. 44 et seqq.). At issue is a benefit granted not to all operators of climbing gyms, but only to "certain" operators organised as sporting associations.

44 The factually disputed question of whether the granted benefits enable the German Alpine Association and their sections to act as an enterprise on the market requires a more comprehensive inquiry. The European Commission rightly assumes that there is no provision of services on the free market if the climbing gyms are exclusively used as sports facilities for club members and aspiring members, as well as for the purpose of school sports and public programmes benefitting socially disadvantaged individuals. If the climbing walls are at least partially made accessible to the public by charging an admission fee, then this is to be considered a commercial activity (see Commission, Decision of 5 December 2012, mn. 46 et seqq.). The reason for this is that the German Alpine Association is then behaving like a commercial operator of climbing gyms and acts as a service provider on the leisure market.

45 As the climbing gym of the joined section was, during the disputed time period, still in the planning phase or under construction, the Commission had only various prognoses concerning the future use of this gym by club members and non-club members (see Commission, Decision of 5 December 2012, mn. 47 fn. 12). The Commission's determination that commercial activity was also being promoted was in particular based on the fact, that the Federal Republic of Germany did not present any evidence establishing a correspondingly restricted usage (see Commission, Decision of 5 December 2012, mn. 47 fn. 12). As the Commission later stated to the European court in its writing of 11 September 2015 (GA Bl. 1201), whether the measure qualified as State aid decisively hinged, in the view of the Commission, on whether it was generally possible under the terms of funding that the climbing gym be used by people who were not club members. The Commission observed that this was not contested (see mn. 15). In the opinion of the Commission it had not been necessary for them to express a final opinion on this matter. Even if it was indeed a commercial activity, the Commission concluded, the aid would still be compatible with internal market (see mn. 16). As the Commission did not in the course

of its preliminary examination pursuant to Article 4 (3), 13 (1) of the Procedural Regulation determine whether the elements establishing the promotion of a commercial activity are given, a closer judicial examination is required.

46 c) Lastly, further examination is potentially also required regarding the respondent's contention that a possible violation of the standstill obligation in this case has been retroactively remedied by adoption of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, page 1) – in the following regard: General Block Exemption Regulation (GBER). The application of this later-adopted Regulation to the period under dispute cannot be excluded given that Article 58, no. 1, of the GBER also applies to individual grants of aid done before the Regulation's entry into force. Regardless of whether State aid already declared as compatible by the Commission under earlier legislation falls under this Regulation, Article 58, no. 1, of the GBER mandates a retroactive application only for existing aid that meets all the requirements of this Regulation, with the exception of the publication duty contained in Article 9 of the GBER. Article 55 of the GBER contains a number of strict restrictions for State aid benefitting sports infrastructure institutions, such as a climbing gyms. As stated in Article 55 no. 4, first sentence, of the GBER, the sport infrastructure institution must in particular be available to a number of people under transparent and non-discriminatory terms. Enterprises, such as that of the joined party, which have contributed at least 30% of the costs themselves, can be granted preferential access according to Article 55 no. 4, second sentence, of the GBER. In this respect it may be necessary to clarify whether and under what conditions the focus should be on end users (see Recital 74 of the preamble to the GBER). Also as regards operating cost aid – such as a rent discounts – there are under Article 55 no. 7, lit. b, no. 9 and no. 11 additional requirements whose applicability and observance may have to be examined.

Decision

The value of the subject matter is set at 72,406.29 € for the appeal proceedings.