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Court of First Instance of the
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Proceedings

by the Federal Republic of Germany

against the

Commission of the European Communities

on the grounds of nullity of the Commission's Decision SG-Greffe (2009)D/3985 in the state aid proceedings No. NN 8/2009 of 2 July 2009, insofar as it classifies the notified measures as state aid within the meaning of the elements of Article 87 paragraph 1 of the Treaty.

The Federal Republic of Germany requests that:

- the Commission's Decision SG-Greffe (2009)D/3985 in the state aid proceedings No. NN 8/2009 of 2 July 2009 be declared null and void, insofar as it classifies the notified measures as state aid within the meaning of the elements of Article 87 (1) of the EC Treaty, and
- the Defendant be required to bear the costs.

Contents

I. Subject of and reason for the proceedings

- 1 The proceedings are brought against the Commission's Decision SG-Greffe (2009)D/3985 in the state aid proceedings No. NN 8/2009 of 2 July 2009¹, received by the German Government on 3 July 2009, insofar as it classifies the notified measures as state aid within the meaning of the elements of Article 87 (1) of the Treaty (hereafter: Contested Decision). Verification of compatibility with the Common Market pursuant to Art. 86 (2) of the EC Treaty is not, however, the subject of the proceedings.
- 2 The reason for the proceedings is the Commission's opinion that nature conservation organisations are always "undertakings" within the meaning of Articles 81 to 89 of the Treaty if and because they (have to) seek to reduce their costs, e.g. by organising benefit events or by charging cover fees for their own brochures or postcards. In the cases in question the reduction of the costs they incur is achieved, for example, by selling timber which the relevant organisations have to fell for nature maintenance reasons or by means of guided tours run by the organisations in the nature conservation areas entrusted to their charge.
- 3 In the Member States of the European Union, the activities of such organisations depend on the honorary (voluntary) commitment of their supporters and on grants by the public sector. The Member States in their turn are dependent on the assistance and specialist competence of these organisations. The dedication of civil society is also regularly acknowledged in statements by the Commission and other EU institutions as an important support of the EU. If the aforementioned activities were sufficient to make state assistance measures qualify as "state aid" within the meaning of Art. 87 (1) of the EC Treaty, financial assistance for environmental associations and comparable organisations in Europe would be largely unlawful on the grounds of violation of the ban on implementation pursuant to Art. 88 (3), third sentence, of the EC Treaty. This is quite evidently at variance with the importance of dedication by civil society, on which not only nature conservation and environmental protection rely. Thus the significance of these proceedings – as will be demonstrated – goes far beyond the individual case.
- 4 Irrespective of this, the contested decision violates Art. 87 (1) of the EC Treaty and also the justification requirements pursuant to Art. 253 of the EC Treaty.

¹ Enclosed as Exhibit A.1.

II. The situation

1. The state aid review procedure

5 In a communication dated 7 March 2007² the German Government notified two measures in accordance with Art. 88 of the EC Treaty:

- The transfer, free of charge, of federally owned natural heritage sites (hereafter: “transfer of national natural heritage sites”)³,
- Grants to large-scale nature conservation projects (hereafter: “large-scale nature conservation projects”).⁴

6 The German Government made the notification in the interests of legal certainty. It requested the Commission to confirm that neither of these two measures constituted state aid within the meaning of Art. 87 (1) of the EC Treaty.

7 In the course of time the Commission – within which the case was first passed from DG Competition to DG Agriculture and then back to DG Competition – made various requests for information, to which the German Government gave full and prompt answers. The details of the correspondence are as follows:

- Commission question of 2 May 2007, answered by German Government on 29 May 2007;⁵
- Commission question of 2 July 2007, answered by German Government on 19 July 2007;⁶
- Commission question of 18 September 2007, answered by German Government on 21 November 2007;⁷
- Commission question of 21 December 2007, answered by German Government on 21 January 2008⁸;
- Commission question of 11 April 2008, answered by German Government on 9 May 2008⁹;
- Commission question of 24 March 2009, answered by German Government on 24 April 2009.¹⁰

² Notification communication enclosed as Exhibit A.2.

³ Notification forms enclosed as Exhibit A.3.

⁴ Notification forms enclosed as Exhibit A.4.

⁵ Enclosed as Exhibits A.5a and A.5b.

⁶ Enclosed as Exhibits A.6a and A.6b.

⁷ Enclosed as Exhibits A.7a and A.7b.

⁸ Enclosed as Exhibit A.8.

⁹ Enclosed as Exhibit A.9.

- 8 The German Government consistently adhered to its opinion that the measures do not constitute state aid within the meaning of Art. 87 (1) of the EC Treaty.
- 9 The contested decision was taken on 2 July 2009. The Commission decided that the two measures satisfied the elements of Art. 87 (1), but as services of general economic interest (hereafter: SGEI) were compatible with the Common Market in accordance with Art. 86 (2) of the EC Treaty.

2. The two measures

- 10 The Commission's description of the two measures in recitals 8 to 31 to the contested decision is on the whole not disputed. This section therefore merely recapitulates the essential outlines and clarifies a few points.

a) Transfer of national natural heritage sites

- 11 The measure "transfer of national natural heritage sites" consists in the transfer of sites, free of charge, to the Federal *Länder* and to their foundations, the German Federal Foundation for the Environment (*Deutsche Bundesstiftung Umwelt*, hereafter: DBU) or a subsidiary established specifically for this purpose (*DBU-Naturerbe GmbH*, a subsidiary of DBU), and to nature conservation organisations¹¹. Its implementation began after the contested decision by the Commission had been announced.
- 12 A rich and valuable natural heritage has been preserved and developed on many areas of the Federal Republic of Germany. These are sites that possess special importance for dynamic natural development and great biological diversity. The national natural heritage sites are selected on the basis of the following nature conservation criteria in the order stated:
- areas in national parks,

¹⁰ Enclosed as Exhibit A.10.

¹¹ To this extent the complaint has adopted the terminology in the contested decision of the Commission. In fact various types of organisations are involved, for example associations and foundations.

- areas in UNESCO biosphere reserves (Habitats Directive¹² areas and nature conservation areas under the Federal Nature Conservation Act),
 - areas within federal large-scale nature conservation projects (“Federal Programme for promoting the identification and safeguarding of natural areas in need of protection that are of representative importance for the country as a whole”),
 - former military training grounds and post-mining landscapes as large unfragmented spaces,
 - sites within NATURA 2000 areas,
 - nature conservation areas larger than 50 hectares,
 - sites in areas of importance for the biotope network and species protection,
 - the former border strip between East and West Germany (“Green Strip”), which today forms a biotope network running through the entire country.
- 13 The sites mostly fell to the Federal Republic of Germany in the course of German unification, combined with a statutory mandate to privatise them and hence put them to other uses. In the course of time, however, a determination emerged to preserve the national natural heritage sites and prevent commercial use. However, preserving these sites in accordance with nature conservation requirements gives rise to substantial running costs (e.g. nature conservation maintenance costs including personnel costs, contaminated site risks, liability risks). Consideration was therefore given to the question of how the public sector could get rid of these costs and at the same time ensure that these sites were safeguarded as natural heritage.
- 14 The Basic Law (*Grundgesetz*) of the Federal Republic of Germany lays down, with constitutional status, that the maintenance and development of nature conservation areas are tasks of the Federal *Länder*. The German Government may only take action in the context of model projects and in the development of overarching concepts. Accordingly it has created the basis¹³ for transferring up to 125,000 hectares of valuable federally owned natural land to the Federal *Länder* free of charge. In view of the cost risks already mentioned, the Federal *Länder* – especially the five New *Länder* in which the majority of these sites are to be found – did not feel they were in a position to take over all the natural heritage sites and maintain them permanently. The DBU, which has sufficient financial resources for conservation-oriented care of these sites, is therefore to take over a total of some 46,000 hectares.

¹² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora (Habitats Directive), OJ L 206, 22.7.1992, p. 7.

¹³ Item 7.4. of the Coalition Agreement for the 16th term of Parliament (2005), Budget Act 2006, Note No. 60.1. to Chapter 0807 Title 121 01, enclosed as Exhibits A.11 and A.12. The clauses in the Budget Act for 2006 are also found in the budget acts for the succeeding years.

- 15 The notified measure also serves to find a way of relieving the Federal Länder of the costs involved in the care of further sections of the remaining approx. 79,000 hectares of natural heritage sites. The task is to be transferred to technically suitable nature conservation organisations in Germany which, while discharging the objectives defined in their bylaws and using their own resources, can take on the role of bodies responsible for natural heritage sites. In view of their weak financial situation, such nature conservation organisations cannot be considered at all possible as bodies responsible for natural heritage sites unless the sites are transferred free of charge. The transfer is not intended to give the recipients any economic worth, and associated compulsory requirements will be imposed to prevent this, but it is intended to create the necessary basis for them to preserve these sites as natural heritage sites.
- 16 The potential sites for transfer with a view to long-term safeguarding of nature conservation in the national natural heritage were in each case proposed by the relevant Federal *Land*.
- 17 The transfer of the site is automatically associated with various mandatory binding obligations under nature conservation law which exclude the possibility of commercial exploitation of the site in the sense of earning net revenues. The following characteristics of transfer of ownership are crucial to the present proceedings:
- The costs of the transfer of ownership, the contaminated site risks and the ongoing maintenance costs are borne by the recipient.
 - The obligation to discontinue all uses which do not serve the interests of nature conservation applies indefinitely and is legally established by contract and by an entry in the land register. The land register is a register of land ownership. Existing rights and associated duties relating to the land are entered in it. The entry is deemed to be correct and complete (“public faith in the land register”) in relation to any person who does not have definite knowledge that the land register is incorrect.
 - Transfer of the sites to third parties is only possible with the consent of the competent authorities; this is only granted for consolidation purposes, in other words to avoid excessive fragmentation of the natural heritage sites. The proceeds of sale may only be used for the maintenance or acquisition of other natural heritage sites; if such a use is not possible in the individual case, the proceeds must be paid to the state.¹⁴ These binding obligations are also entered in the land register for an indefinite period. Apart from a sale regulated in this way, the only other possibility is onward transfer to another nature conservation organisation which assumes the same duties as the current owner. In the contested decision the Commission correctly assumes that nature conservation organisations effectively have no opportunity to obtain revenues from sale of the site.¹⁵

¹⁴ Recital 30 et seq. to the contested decision.

¹⁵ Recital 79 et seq. to the contested decision.

18 Use of the transferred sites¹⁶ by the nature conservation organisations is severely restricted by official nature conservation requirements. All uses which are not necessary for nature conservation reasons must be discontinued. However, some of the remaining activities may involve revenues on a limited scale which help the nature conservation organisations meet the costs they incur. The following activities are possible here:

- Sale of timber felled on the sites: the timber in question here is solely timber that has to be felled in any case for nature conservation reasons; thus the resulting supply is not geared to market demand, but merely represents the realisation of inevitably existing fruits of the site. Moreover, timber will only be felled on a very small portion of the natural heritage sites, especially in places where there is a need to create the basis for (possibly further) natural forest development. Thus in overall terms only a small area will be used for timber felling.
- Leasing of hunting and fishing rights: Hunting is also permitted solely from a nature conservation point of view, in other words as far as is necessary to protect the growth and stands of certain trees and shrubs from damage due to excessive browsing by game. There is no feeding of wild animals, for example. The situation regarding fishing rights is similar, i.e. fishing is only allowed in places where and to the extent that this is necessary for nature conservation reasons.
- Looking after visitors and tourists: This does not mean commercial tourism activities, but guided tours on the natural heritage sites, lectures about nature conservation and environmental protection in the individual area or similar subjects, preparation of documentary material etc., for which a contribution to costs is demanded in some cases. All this serves to familiarise the public with the ecosystem in question and thereby provide education on nature conservation and environmental protection issues.¹⁷ Thus the nature conservation organisations essentially prepare information on the individual area and its ecosystems. On the one hand this makes for social acceptance of the nature conservation measures (restrictions on use of and access to large areas), but of course it also makes the region in question more attractive to tourists, which may benefit local business such as the restaurant and hotel trade. This, however, must be clearly distinguished from visitor services provided by the nature conservation organisations.
- It is not out of the question that use of the natural heritage sites could give rise to other sources of revenue. Possible candidates here are sheep grazing to maintain a heath landscape, or taking plant waste occurring as hay during necessary maintenance of certain types of sites (open land) and using it as animal fodder or biomass for energy generation. In all cases it is true to say that no use for economic purposes takes place.

As a whole, the permissible uses of the sites merely represent exploitation of the fruits deriving from the substance of the property. Here revenues are essentially gained only from activities and goods which are in any case necessary from a technical point of view

¹⁶ In this respect the description of the situation in the contested decision is unfortunate, since the conditions for use are described only for the measure “large-scale nature conservation projects” (recitals 25 to 29 of the contested decision). However, the content of these remarks is equally applicable to the measure “natural heritage”.

¹⁷ The importance of this educational work has been stressed by the Economic and Social Committee, for example, in its statement on the contribution made by civil society to the preservation of biodiversity, OJ C 195/6, 18 August 2006, p. 96, no. 3.49.

in the interests of nature conservation, or which – like environmental education work – have direct benefits for the goal of nature conservation. Against this background the account in recital 39 to the contested decision is at the least capable of misunderstanding: the uses of the sites do not achieve the nature conservation goal “as a consequence of the environmental conditions”, as this implies that they would in themselves, i.e. without “environmental conditions”, not bear any relationship to the nature conservation goal. The situation is rather that these uses arise directly from nature conservation needs.

19 The funding of the measure from the point of view of the nature conservation organisations is as follows:

- No public funding is planned above and beyond the transfer of the sites free of charge. In particular, in the future there is to be no reimbursement of costs for the preservation of the natural heritage areas.
- The nature conservation organisations’ own costs are kept low compared with commercially organised conservation of the natural heritage sites, in that many activities are performed on an honorary basis by members or supporters of the organisation in question.
- The remaining expenditure therefore has to be met by the nature conservation organisations themselves. One method here is attracting membership subscriptions, donations and foundations, which in practice cover a significant proportion of the costs. In addition, use is also made of the revenues permissibly generated by use of the sites. Any revenues in excess of actual expenditure on the natural heritage site have to be paid to the German Government.

This provides the public sector with a means of ensuring the conservation of natural heritage sites virtually without any expenditure of budget funds thanks to the dedication of civil society. This fully satisfies the requirement of economical management of the budget.

20 Selection of the nature conservation organisations takes place in an open, non-discriminatory procedure. The umbrella association of the nature conservation organisations, the Deutscher Naturschutzring (DNR), was asked to coordinate the associations’ engagement aimed at conserving the national natural heritage. On the Deutscher Naturschutzring website, all natural heritage sites intended for transfer were listed and nature conservation organisations were invited to express their interest.¹⁸ Selection is based on the suitability of the interested organisation, which is judged by nature conservation criteria. It must be guaranteed that the organisation can carry out the ambitious task of long-term maintenance of the sites in accordance with the nature

¹⁸ The relevant page of the umbrella association’s website is <http://www.dnr.de/publikationen/news/index.php?id=99>

conservation conditions and provide the necessary financial resources of its own. Final selection of the nature conservation organisations is in the hands of the Federal Länder.

b) Assistance programme “Large-scale nature conservation projects”

- 21 The measure “large-scale nature conservation projects” is based on funding rules dating from 1993¹⁹ and was also notified in the interests of legal certainty. Unlike the measure “transfer of national natural heritage sites”, this provides nature conservation organisations with money payments, and not physical assets in the form of land.
- 22 The object of this funding is primarily the acquisition or long-term leasing of sites which as natural and cultural landscapes play a special role in providing habitat space for animal and plant species worthy of protection. These so-called “nationally representative” areas usually contain sites belonging to various owners, and the competence of the Federal Republic of Germany for funding their nature-conserving preservation is compatible with the Basic Law,. This means that initially they are not already owned by the public sector or by nature conservation organisations, at least not in a context necessary or desirable from a nature conservation point of view. Thus they first have to be purchased or leased against payment before they are available for the planned nature conservation measures at all. In addition to the cost of acquisition or leasing, funding is possible for initial investment in creating the desired long-term nature conservation status on the site in question²⁰ and – for a limited period – certain project running costs.²¹
- 23 The nature conservation organisations and other possible users of the programme (project executing agencies) have to suggest eligible projects themselves.
- 24 The duties of the project executing agencies are essentially as follows:
- The nature conservation obligations and official conditions associated with the funding are based on the provisions of the Funding Rules and are set out in the grant notice for the project in question. The notice is given more concrete shape through a “maintenance and development plan”.
 - The onward transfer of sites acquired with the aid of such funding is subject to the conditions mentioned in connection with the measure “natural heritage sites”. Here,

¹⁹ Enclosed as Exhibit A.13.

²⁰ No. 2.4.-2.5. of the 1993 funding rules. No. 2.3. relates to compensation payments to owners, not to the nature conservation organisations, as explained in the German Government’s communication to the Commission of 24.4.2009. The body responsible for the project merely passes on the payments.

²¹ No. 2.6. of the 1993 Funding Rules.

however, there is generally no provision for a sale; at most a change in the project executing agency is conceivable.

- 25 Use by the nature conservation organisations of sites acquired by purchase or long-term lease with the aid of the programme is subject to restrictions similar to those for the measure “transfer of national natural heritage sites”.²² To this extent reference can be made to the above remarks.
- 26 Regarding the financing of the measure, the situation for the individual project funded is as follows:
- Whereas the funding parameters are evident from the Funding Rules themselves, the actual amount of the grants is legally laid down in the grant notice. The funding is for a limited period.
 - Various costs incurred are excluded from any funding under the programme. In particular, all follow-on costs of the project (after the end of the funding period) are not eligible for funding.
 - Funding by the German Federal Government is limited to a maximum share of 75%. The Federal Länder may step up the funding, but a share of 10% has to be financed by the project executing agency, i.e. the nature conservation organisation itself.
 - The nature conservation organisations’ own share of the financing is largely covered by donations and other private payments to the nature conservation organisations. This income is supplemented by the limited use of the sites that is possible. The same conditions apply here as in the context of the measure “transfer of national natural heritage sites”, to which reference is made here. In particular, it is true here too that any revenues in excess of the costs actually incurred for maintenance of the site have to be paid over to the German Government.
 - The measure is based on the principle of mere – *pro rata* – reimbursement of costs, so that the nature conservation organisations are not left with any profit margin arising from execution of the project.
 - Here too the costs are kept low as a result of the non-economic character of the maintenance measures, notably by means of voluntary unpaid activities.
- 27 In this measure, the selection of nature conservation organisations which is necessary because of limited budget resources is undertaken on the basis of an evaluation of the proposed individual project, applying specialist nature conservation criteria. The procedure is open and non-discriminatory. To date no situation has arisen where different nature conservation organisations have been competing for a specific site, since the projects are typically developed and proposed by a single applicant for a specific region. However, the German Government has confirmed to the Commission that if technically comparable projects were proposed for a given area the choice would go to the project

involving the lower level of funding. This is also evident from the budgetary law provisions which apply to the measure. The general funding requirements are clearly stated in the publicly accessible Funding Rules.

3. Nature conservation organisations as beneficiaries of the two measures

- 28 For the present proceedings – apart from the transfer of “natural heritage sites” to the Federal Länder and the DBU – the two measures are only relevant to the extent that nature conservation associations, nature conservation foundations or combinations of such organisations can receive sites or money payments. There therefore follows a brief examination of the characteristic features of such organisations.
- 29 The relevant nature conservation organisations are very varied in terms of size, legal form (registered associations, foundations) and specialisation. They do however have various characteristics in common.
- They are recognised under fiscal law (Section 5 subsection (1) number 9 of the German Corporation Tax Act (*Körperschaftsteuergesetz*), Sections 51 et seq. of the Fiscal Code (*Abgabenordnung*)) as non-profit organisations, because they do not have any intention of making a profit and are, under their bylaws, dedicated to goals of the common good.²³
 - The strict orientation of the organisations to environmental protection and nature conservation is also ensured by the fact that many of these organisations have joined forces under the umbrella organisation DNR, whose member organisations have to be committed to the goals set out in its bylaws.²⁴
 - Under Community law they also enjoy a function as “nature’s advocates”, in that Directive 2003/35/EC²⁵ invests them with a right to bring class actions against environmentally relevant decisions, provided they satisfy the requirements of the Member State pursuant to the Directive. In Germany they must have undergone a

²² For the measure “large-scale nature conservation projects” the Commission has also given an appropriate description of the situation in recitals 25 to 29 to the contested decision.

²³ Excerpts from the two laws are enclosed as [Exhibit A.14](#) and [Exhibit A.15](#).

²⁴ Section 4 (2) of the DNR Bylaws reads: “Associations and societies which acknowledge the basic policy of the DNR and which engage wholly or partly in activities within the meaning of Section 2 of the Bylaws may be members of the DNR.” Section 2 (1) of the DNR Bylaws reads: “The DNR has set itself the following goals: a) to safeguard biological diversity, to protect, restore, secure, maintain and improve the natural regime and all its components, and to put a stop to the destruction and impairment of nature and the environment, b) to counteract activities by society which in any way have adverse impacts on a natural environment worth living in, c) to help establish the principle of sustainable and environmentally sound management as a basis for all private and public decisions, d) to present models, approaches and solutions for viable lifestyles and management approaches and to support their implementation, particularly in the industrialised countries.”

²⁵ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment amending, with regard to public participation and access to justice, Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.06.2003, p. 17.

corresponding recognition procedure for this purpose. The Directive serves to implement the “Aarhus Convention”²⁶ and is itself transposed into German law on this complex by means of the Environmental Appeals Act (*Umweltrechtsbehelfsgesetz*). Moreover, Section 51 of the Federal Nature Conservation Act grants environmental protection organisations with a focus on nature conservation the possibility of a class action in the field of nature conservation law.

- Art. 3 (4) of the Aarhus Convention lays down that the Parties – which also include the Community itself – shall promote nature conservation organisations; this duty is discharged by both the Community itself and the EU Member States.
- The organisations are characterised by honorary activities, i.e. by civil commitment which is entered into on a voluntary basis and for which no payment is made.
- Nature conservation and environmental organisations typically earn revenues on a small scale by means of minor activities such as the sale of environmental information brochures in return for a contribution to expenses, by organising festive events with food and drink, or by providing information, and it is these revenues that make their specialist work possible. These revenues are supplemented by public institutional or project funding. They are desired under funding law and policy, in order to minimise the need for public funding.

30 Many larger organisations have established additional companies which offer commercial activities such as organising holidays or selling specific products. Such companies are not eligible to take part in the measures under discussion here and therefore do not play any role in the assessment of the measures.

31 The motivation for nature conservation organisations to take an interest in maintaining a natural heritage site, despite the fact that this is exclusively a financial burden, lies in their altruistic goal, self-imposed under their bylaws, of dedicating themselves to nature conservation. Such a mission motivates people to display civil engagement, whether through direct participation in a specific project or through support in the form of donations.

III. The question of admissibility

32 The proceedings against the approval decision are admissible. The decision is a contestable legal action, and the German Government also has the required need for legal protection. The Federal Republic of Germany as a privileged party with capacity to sue pursuant to Art. 230 (1) and (2) of the EC Treaty does not require any further capacity

²⁶ United Nations Economic Commission for Europe – Convention of 25 June 1998 “on access to information, public participation in decision-making and access to justice in environmental matters”, *International Legal Materials* 38 [1999], p. 517.

to sue. The admissibility of proceedings by a Member State against an approval decision concerning state aid has indeed already been assumed by the Court of First Instance – under certain conditions which are also satisfied in the present case.²⁷ The essential aspects are nevertheless briefly examined here:

- The contested decision has adverse legal impacts on the Federal Republic of Germany and other parties concerned, because it finds that the elements of Art. 87 (1) of the EC Treaty are satisfied.
- The proceedings are aimed at the tenor of the contested decision.
- The tenor of the contested decision diverges unfavourably from the request made on notification of the measures, in that the Commission did not, as requested, deny the existence of state aid under Art. 87 (1) of the EC Treaty, but issued an approval pursuant to Art. 86 (2) of the EC Treaty.

1. Contestable legal act, because the contested decision has legal effects

33 According to established case law, the contestability of an act by the Community presupposes under Art. 230 (1) of the EC Treaty that the act generates binding legal effects.²⁸

34 The Commission's classification of the measures as state aid entails certain legal duties for Member States.²⁹

- If a Member State introduces a measure which it considers to be free from state aid, and if the Commission considers such measure to be state aid, then the Member State has violated the *Standstill* requirement of Art. 88 (3) of the EC Treaty, even if the Commission subsequently takes a compatibility decision pursuant to Art. 87 (2) or (3) of the EC Treaty.³⁰ There is no possibility of retroactive remedy. According to supreme-court case law in Germany, the consequence of this where state aid is granted with the aid of a civil-law contract is nullity pursuant to Article 134 of the German Civil Code (BGB). Community law at any rate requires that any advantage gained by the recipient as a result of the granting of state aid before a compatibility decision is taken by the Commission must be recovered.³¹

²⁷ Court judgement of 10 April 2008 in case T-233/04, *Netherlands/Commission*, not yet in Coll.

²⁸ See judgement of the Court of Justice as long ago as case 60/81, *IBM/Commission*, Coll. 1981, 2639, recital 9.

²⁹ Court judgement of 10 April 2008 in case T-233/04, *Netherlands/Commission*, not yet in Coll., recital 41.

³⁰ Judgements of the Court of Justice starting from the judgement of 21 November 1991 in case 354/90, *FNCE*, Coll. 1991, I-5505, recital 16; of 12 February 2008 in case C-199/06, *CELF*, Coll. 2008, I-469, recital 40.

³¹ Judgement of the Court of Justice of 12 February 2008 in case C-199/06, *CELF*, Coll. 2008, I-469, recital 55.

- The Member State must observe the substantive requirements of the legislation on state aid. These mostly arise from secondary legislation on state aid, such as guidelines and Community frameworks, in which the Commission describes the criteria according to which it exercises its discretion when examining the compatibility of state aid.
- The Member State must respect procedural requirements. In particular, it cannot introduce or modify the relevant measures without prior notification (and approval) because of the *Standstill* requirement of Article 88 (3), third sentence, of the EC Treaty. For example, in the case of limited-period approval of a Member State's scheme that is classified as state aid, any extension would have to be notified in accordance with Art. 88 (3) of the EC Treaty. And finally, Art. 21 of the *Procedural Regulation*³² imposes reporting requirements on the Member States.
- Lastly, the Member State must observe the rules on the accumulation of state aid pursuing different goals.

35 These legal consequences do not occur independently of the Commission's decision, which means that the latter is not merely of a declaratory character with regard to the affirmation of Art. 87 (1) of the EC Treaty. Especially when determining whether an advantage of relevance to state aid exists, complex economic and technical aspects have to be considered depending on the constellation in view. This becomes particularly clear when assessing the so-called "private-investor" test under the law on state aid, or in the case of compensation payments for services of general economic interest. In such determination, the Member States enjoy considerable discretionary latitude, which the Commission can only check for obvious errors. Case law, on the other hand, confines itself to examining the Commission's investigation of obvious errors in the appraisal of the elements.³³ In the field of services of general interest, the Court confined itself in a recent judgement to testing – N.B. within the test for the elements of Art. 87 (1) of the EC Treaty – whether a Commission decision was "sufficiently plausible".³⁴ To this extent the Commission has a certain authoritative latitude in assessing whether the elements of Art. 87 (1) of the EC Treaty are satisfied. For this reason alone it would be absurd to deny that its decision is of legal relevance as far as satisfaction of the elements of state aid is concerned.

36 Finally, the Commission's finding that a state measure constitutes state aid is a necessary intermediate step towards concluding that a given instance of state aid is compatible or incompatible with the Common Market. A decision which affirms that the elements of

³² 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 83, 27.3.1999, p. 1).

³³ Cf. for example the judgement of the Court of Justice in case C-56/93, *Belgium/Commission*, Coll. 1996, I 723, recital 11.

³⁴ Court judgement of 12 February 2008 in case T-289/03, *British United Provident Association Ltd. (BUPA) and others/Commission*, not yet in Coll., recital 266.

Art. 87 (1) of the EC Treaty are satisfied never stops at this finding, but – except in one of the rare cases of Art. 87 (2) of the EC Treaty – effectively paves the way for the Commission’s discretionary latitude under Art. 87 (3) or Art. 86 (2) of the EC Treaty. Thus a compatibility or incompatibility decision with all its legal consequences is inconceivable without previous affirmation of the elements of state aid. This “initialising effect” for the compatibility test has a legal relevance of its own.

2. The tenor of the decision is contested

37 According to the case law of the Court of Justice³⁵ it is a basic principle that only the tenor of a decision can produce legal effects that can be contested in proceedings for annulment. In the present case the German Government explicitly contests the tenor of the contested Commission decision which classifies the notified measures as satisfying the elements of state aid in accordance with Article 87 (1) of the EC Treaty.

38 Thus the proceedings are admissible from this point of view as well.

3. The German Government has an interest in legal protection because the contested decision diverges from the request made in the notification

39 The German Government also has an interest in legal protection in respect of the declaration of nullity sought for the contested Commission decision. The yardstick for this is whether the Commission decided as requested (proceedings for annulment not admissible) or whether its decision fell unfavourably short of the request (proceedings for nullity admissible).

40 The admissibility of proceedings against positive decisions by the Commission in legal matters concerning state aid has been denied on several occasions in the past on the grounds that in the contested decisions the Commission decided as requested.³⁶ The lack of an unfavourable legal effect on the Member State follows logically from the consideration that the subject of the procedure in the state-aid review by the Commission

³⁵ Judgement of the Court of Justice of 28 January 2004 in case C-164/02, *Netherlands/Commission*, Coll. 2004, I-1177, recital 21.

³⁶ Judgement of the Court of Justice of 18 June 2002 in case C-242/00, *Germany/Commission*, Coll. 2002, I-5636; judgement by the Court of First Instance of 30 January 2002 in case T-212/00, *Nuove Industrie Molisane/Commission*, Coll. 2002, II-349; judgement by the Court of First Instance of 17 September 1992 in case T-138/89, *Nederlandse Bankiersvereniging and Nederlandse Vereniging van Banken/Commission*, Coll. 1992, II-2181; judgement of the Court of Justice of 28 January 2004 in case C-164/02, *Netherlands/Commission*, Coll. 2004, I-1177, recital 20.

is defined by the Member State's request under Art. 88 (3) of the EC Treaty. This is because the Commission takes a decision on the state aid project notified to it pursuant to Article 88 (3) of the EC Treaty.

- 41 In the present case, however, the German Government had already, at the time of notification of the two measures, explicitly and exclusively submitted the request that the Commission find that the notified measures did not constitute state aid;³⁷ it continued to maintain this opinion throughout the notification procedure. The contested decision, by contrast, found that both measures satisfied the elements of state aid in accordance with Art. 87 (1) of the EC Treaty, but were compatible with the Common Market.
- 42 With its decision pursuant to Art. 4 (3) of the *Procedural Regulation* the Commission furthermore implicitly rejected the Federal Republic's application for a decision pursuant to Art. 4 (2) of the *Procedural Regulation*. The explicit distinction between the types of decision pursuant to Articles 4 (2) and (3) of the *Procedural Regulation* demonstrates the qualitative downgrading of an approval of state aid compared with a finding that no state aid is involved. This systematic interpretation is further evidence of the German Government's interest in legal protection.
- 43 In summary, it remains to be concluded that the proceedings are admissible.

IV. The question of justification

- 44 The proceedings are also justified. In the contested decision, the Commission applied Art. 87 (1) of the EC Treaty incorrectly in several respects and therefore violated material Community law. It also violated the justification requirements pursuant to Art. 253 of the EC Treaty.

1. The measures do not relate to undertakings

- 45 In the contested decision, the Commission – contrary to the impression created by the heading of Item 3.1.2. – regards the nature conservation organisations as undertakings only to the extent that they perform alleged economic activities (sale of timber, leasing of hunting and fishing rights, “tourism”) in the context of the two measures.

³⁷ See the two notification forms from the German Government, dated 2 March 2007.

- 46 The same applies to the classification of the DBU and the subsidiary which is to be established, which will take over several natural heritage sites, and to relevant foundations of the Federal Länder. The following remarks apply to them *mutatis mutandis* just as they do to the nature conservation organisations, since their fields of activities under the two measures are identical.
- 47 The German Government draws attention to the fact that in the decision NN 41/2005 (*Green Investment Funds – Netherlands*)³⁸ the Commission did not consider the Dutch nature conservation organisations to be undertakings, either as a whole or in connection with the notified measure. The decision does not describe their activities in the relevant project categories “A” to “D” in any detail, but they are at any rate project beneficiaries under nature conservation projects relating, for example, to the development and conservation of forest or valuable natural landscapes. This would appear *prima facie* to be a comparable activity structure.

a) No economic aim of the activities of nature conservation organisations *per se*

- 48 Whether the addressee of a specific measure is an undertaking within the meaning of Art. 87 (1) of the EC Treaty depends on whether it performs an economic activity. In recital 36 to the contested decision, the Commission rightly points to the definition by the Court of Justice, according to which “any entity engaging in economic activity” is an undertaking, “irrespective of its legal form and the nature of its financing”. Whether an activity is economic is judged largely by whether goods or services are offered in competition with other suppliers on a specific market.³⁹
- 49 At this point it is sufficient to note that in the contested decision even the Commission does not maintain that the nature conservation organisations are generally engaged in economic activities. Their activities are based, as described above, on idealistic foundations. Apart from their recognition as non-profit organisations under German law, which ensures their orientation to the common good and their lack of intention to make a profit, this is also evident from the fact that their activities are largely based on the honorary commitment of members and on the readiness of supporters to make donations.

³⁸ Commission decision of 25 August 2006, K(2006)3886; excerpt enclosed as Exhibit A.16.

³⁹ Established case law, see only the judgements of the Court of Justice of 23 March 2006 in case C-237/04, *Enirisorse*, Coll. 2006, I-2843, recital 29 with further references, and of 10 January 2006 in case C-222/04, *Cassa di Risparmio di Firenze SpA et al.*, Coll. 2006, I-289, recital 108.

In view of these characteristics, Community law, in the context of the legal acts implementing the Aarhus Convention, also assigns them functions as representatives or members of the public. Thus they do not offer goods or services on a market in which commercial entities are in competition. Their activities are therefore basically non-economic.

- 50 Moreover, the Commission does not claim that the two measures on the whole relate to economic activities of the relevant participants. In recital 39 it acknowledges that “some” of the activities under the measures “may possibly be completely non-economic in nature”. However, in its further remarks the Commission confines itself to finding that certain specific activities are indeed of an economic nature and that these therefore transport the two notified measures into the elements of Art. 87 (1) of the EC Treaty, in other words they could “infect” the measures from the point of view of the law on state aid.
- 51 The crucial issue is thus solely whether the three types of alleged economic activity mentioned by the Commission – “forestry and grazing”, “leasing of sites” and “tourism” – are themselves economic activities and whether nature conservation organisations can thus be classed as undertakings for the purpose of the notified measures.
- 52 In the opinion of the German Government this is not the case.

b) No essentially economic aim of the activities in the context of the notified measure, since any profitability is ruled out *de facto* and *de jure* and the nature conservation organisations are non-profit organisations

- 53 The activities in the context of the two notified measures which are classified by the Commission as economic do not correspond to the overall concept of economic activity that emerges from the established case law of the Court of Justice.
- 54 For example, the Court of Justice found in its judgement in the *FENIN* case that when assessing whether or not an activity is economic it is necessary to focus on the “nature” of the activity in question.⁴⁰ Established case law furthermore gives greater precision to the very broad definition of an undertaking, to the effect that the economic entity must be such that (emphasis added)

⁴⁰ Judgement of the Court of Justice of 11 July 2006 in case C-205/03, *FENIN*, Coll. 2006, I-6295, recital 26.

“an undertaking is constituted by a single organization of personal, tangible and intangible elements, pursuing a given long-term economic aim”.⁴¹

In accordance with the principle of a single definition of undertakings in the law of competition, this case law pronounced directly on the rules for undertakings under Art. 81 et seq. of the EC Treaty must also be applied to the law on state aid.

- 55 In the present case the economic aim has to be denied.
- 56 Firstly, the nature conservation organisations concerned are all non-profit within the meaning of German fiscal law, which rules out any intention of making a profit. Under the established case law of the European Court of Justice, this is of course not in itself sufficient to exempt economically active organisations from the competition rules of the EC Treaty.⁴² For example, the scope of application of competition law includes activities which are performed without any intention of making a profit, but which consist in offering goods and services on a specific market.⁴³ The non-profit character is however included in the overall picture on which an assessment of the economic character of certain activities is to be based. It is, so to speak, a feature of the “nature” of the relevant activity.
- 57 Secondly, the activities in question here differ from those that were the target of the cited case law which makes non-profit activities subject to the law of competition. This is because the nature of the three types of activity which the Commission in its contested decision regarded as economic consists in the fact that, on a minimal scale and without even the theoretical possibility of making profits, they turn to good account things which from a nature conservation point of view either exist anyway or need to be created.
- 58 In recital 39 to the contested decision the Commission acknowledges that the two notified measures as allegedly economic activities only involve activities that may be “not

⁴¹ For example the judgment of the Court of Justice as long ago as 13 July 1962 in the combined cases 17/61 and 20/61, *Klöckner and Hoesch*, Coll. 1962, 655 p. 687; also the judgements of the Court of Justice on 24 October 1996 in case C-73/95 P, *Viho Europe*, Coll. 1996, I-5457, recital 50; of the Court on 10 March 1992 in case T-11/89, *Shell/Commission*, Coll. 1992, II-757, recital 311; of the Court on 14 May 1998 in case 2/94, *Mo Och Domsjö*, Coll. 1998, II-1989; of the Court on 11 December 2003 in case T-66/99, *Minoan Lines*, Coll. 2003, II-5515, recital 122; of the Court on 12 December 2007 in case T-112/05, *Akzo Nobel*, Coll. 2007, II-5049, recital 57.

⁴² Judgement of the Court of Justice of 16 November 1995 in case C-244/94, *Fédération française des sociétés d'assurance*, Coll. 1995, I-4013, recital 21; judgement of the Court of Justice of 1 October 2006 in case C-222/04, *Ministero dell'Economia e delle Finanze*, Coll. 2006, I-289, recital 123.

⁴³ This is the definition of “economic activity”, for example in the judgement of the Court of Justice in case C-222/04, *Cassa di Risparmio die Firenze*, Coll. 2006, I-289, recital 108 with references to established case law.

particularly profitable". This view is not entirely logical in relation to the – correct – view in recital 80 to the decision, which is also referred to in recital 88: The activities are not merely "not particularly profitable"; indeed, any profitability in the sense of making profits for the benefit of the active entity is ruled out both *de facto* and *de jure* by the design of the two measures.

- On the one hand the two measures notified already preclude *de facto* the possibility of the activities in question earning more revenue than is necessary for the maintenance of the sites transferred or acquired. The Commission does not question the fact that the shares of costs to be borne by the nature conservation organisations essentially have to be covered by subscriptions and donations (see recital 25 to the contested decision);
- On the other hand, in both measures, thanks to their *de jure* design, any "surplus income" – which is only theoretically conceivable – must either be entirely reinvested in non-economic natural heritage maintenance activities or paid over to the public sector.

59 Given such a constellation, the German Government is of the opinion that none of the activities constitutes offering on a market within the meaning of the case law. If an activity, by its nature, does not permit any profitability, anyone who engages in it is not taking part in competition with others on the basis of a level playing field; the measure is, as it were, structurally non-economic. This distinguishes the present case from, for example, social or supply services or non-profit insurance products, which can at any time also be offered in commercial form. These are thus completely integrated in general economic life and are distinguished from competitors solely by the fact that they are internally earmarked for specific purposes, not by the "nature" of their activities. None of this applies to the activities of the nature conservation organisations in the present case.

c) Need to take an overall view: earning marginal revenues is the result of a completely subordinate sideline of the nature conservation organisations and does not dictate their overall character

60 The relevant individual aspects mentioned so far are ultimately incorporated in an overarching concept which has already found expression in various places: the Commission decision incorrectly focuses on a completely isolated consideration of aspects that are totally subordinate in the overall context of the two notified measures.

61 However, whether a measure relates to an economic activity and hence to an undertaking has to be judged on an overall view. Here the possibility of earning income as a result of activities that are required for nature conservation purposes proves to be an aspect which

is so subordinate that it does not justify characterising the measure as state aid for an undertaking.

- 62 The Commission itself, in other proceedings, takes the view that mere sidelines of the recipient of state funds are, on their own, “regularly” insufficient for definitive classification of a measure. For example, in the counter-rejoinder of 29 July 2009 in case T-443/08⁴⁴ (emphasis added), it states quite clearly:

“... not permissible to mix the real principal activity with sidelines of minor importance. The purpose of the museum is not the operation of a cafeteria, any more than a motorway is built to make it possible to operate additional service areas. The crucial issue for the analysis of these cases would once again be whether the actual operation of a museum or a motorway system was to be regarded as economic or not. This would depend on whether the relevant operator offered services in return for a payment that was more than symbolic. (...) When assessing the question of whether the operation of a facility is economic, it is perfectly permissible to take into account sidelines of the facility operator such as the operation of a cafeteria in a museum or of a motorway service area. However, they must not regularly be the sole deciding factor for the final classification.”

- 63 This view is correct and in line with reality. If any subordinate revenue generated as a result of certain activities were to be considered sufficient to confer the character of an undertaking, many instances of public assistance that were totally normal and provided in all Member States would suddenly be made “economic” in a way that was not in line with reality. One might think of local sports clubs which demanded a small admission fee or sold drinks when their “first team” was playing, or youth clubs, civic action groups or church communities that ran a parish fête. The list is potentially endless. All these examples underline the fact that there can be no question of considering in isolation individual activities which may generate revenues in a totally subordinate fashion and on a marginal scale. To this extent the Commission has an obligation to take a consistent position.
- 64 In the field of value-added tax law, Attorney General *Maduro* recently underlined this in proceedings relating to party-internal organisation of political advertising. Here he states:

“Political parties do not engage in publicity and advertising campaigns in order to generate income but in order to make their ideas known to the public. (...) Any financial element entailed by party publicity is subordinate to the political character of such publicity. (...) it did not act as an economic actor

⁴⁴ Recital 44; in these proceedings the Federal Republic of Germany is an intervening party on the side of the plaintiff.

guided by financial considerations but as a political organisation aiming at electoral victory”.⁴⁵

65 Even if these remarks were made in connection with the law concerning indirect taxes, the idea can be turned to good account in the present case: the environmental associations do not generate income as economic players, but as a result of an activity directly serving the purpose of the common good of conserving ecologically valuable areas. The revenues generated in the process are the result of an absolutely subordinate minor part of the overall activity; they merely contribute to pursuing the non-economic principal goal of nature conservation oriented maintenance of such areas.

66 Another area in which the character of an undertaking was denied on the basis of a comprehensive analysis of the overall activity, and which has aspects in common with the present case, is the case law on the character of the statutory health insurance funds as undertakings. On an overall view of various criteria, the Court of Justice came to the conclusion that they were not undertakings within the meaning of the law of competition:⁴⁶

- They have a purely social task to perform; indicators of this are the mere execution of statutory requirements and their lack of influence on the size of the contributions, use of funds and determination of the range of benefits;
- They function on the basis of the principle of national solidarity, which the Court of Justice sees essentially fulfilled in the equalisation of costs and risks between health funds with different insured-person structures;
- They operate without any intention to make a profit.

In recital 56 to the *AOK* judgement the Court of Justice furthermore decided that the existence of a certain latitude regarding contributions, which was specifically intended to introduce an element of competition into the system, did not in any way change the “nature of the activities” of the health insurance fund.

67 Comparable aspects are characteristic of the activities of nature conservation organisations in the context of the two measures notified:

- They perform a task oriented purely to environmental protection, which is heavily regulated by environmental requirements and gives the nature conservation organisations virtually no scope to influence their own earnings situation significantly through activities of their own, whether on the income or the expenditure side. The

⁴⁵ Final pleadings of 9 July 2009 in case C-267/08, *SPÖ Landesorganisation*, not yet in Coll., recital 17.

⁴⁶ Judgement of the Court of Justice of 16 March 2004 in the combined cases C-264/01 etc., *AOK et al.*, Coll. 2004, I-2493, recitals 47, 51, 53.

types of revenue and the prospects of revenue from what the Commission considers to be “economic activities” are predetermined by the structure of the notified measures, for example by regulation of the part of the site which must be used for hunting or timber felling. Thus the revenues cannot be influenced significantly by the nature conservation organisations’ own economically motivated efforts. Moreover, one should bear in mind here the precedent just mentioned, according to which a slight latitude in the earning of revenues is not significant for the overall view.

- Admittedly there is no solidarity element, in other words a system of equalisation between the organisations. However, such an element is structurally unnecessary in the case of the measures notified, since from the outset each nature conservation organisation applies only for the projects that it is economically able to bear. There is thus no need for a solidarity component.
- They do not have any intention to make a profit, neither do they have any opportunity to make a profit.

68 Thus if one takes the fundamental thinking of the case law on the undertaking character of statutory health insurance funds as a basis, one comes to the conclusion that even in the context of the two measures notified, the nature conservation organisations are not active as undertakings.

d) Use of revenues solely for the non-economic field or obligation to pay them over to the public sector

69 It should also be noted that the revenues earned in the course of the two measures, as already mentioned, must be invested in non-economic activities of natural heritage maintenance or paid over to the public sector.

70 In the Commission’s eyes, this earmarking of the revenues earned also plays a role in the assessment of whether an economic activity is involved.

71 In the Community framework for state aid for research, development and innovation (hereafter: RDI Framework)⁴⁷ the Commission expresses at the end of Number 3.1.1. the following opinion regarding the character of technology transfer measures by universities and research establishments as non-economic activities:

“The Commission furthermore considers that technology transfer activities (licensing, spin-off creation or other forms of management of knowledge created by the research organisation) are of non-economic character if these activities are of an internal nature [25] and all income from these activities is reinvested in the primary activities of the research organisations. [26]”

⁴⁷ Community framework for state aid for research and development and innovation, OJ C 323, 30.12.2001, p. 1.

72 Footnote 25 to the RDI Framework contains more details about the concept of “internal nature”:

By internal nature, the Commission means a situation where the management of the knowledge of the research organisation(s) is conducted either by a department or a subsidiary of the research organisation or jointly with other research organisations. Contracting the provision of specific services to third parties by way of open tenders does not jeopardise the internal nature of such activities.”

73 Footnote 26 adds that other forms of technology transfer require assessment in the individual case.

74 The German Government considers this approach to be capable of generalisation. It states that exploitation of goods which arise in any case in the course of non-economic activities does not constitute an economic activity where it is laid down that the revenues from such utilisation must be returned to the non-economic activity. This is because it is not a case of state aid within the meaning of Art. 87 (1) of the EC Treaty if non-economic activities are funded from certain resources – in this case the proceeds of such exploitation.

75 What is effectively behind this is the idea that merely enjoying the fruits of existing wealth, in other words private wealth management, is not an economic activity. This idea is taken up by the Court of Justice in the case *Cassa di Risparmio di Firenze*. Here the Court had to decide whether non-profit-making Italian banking foundations were to be regarded as undertakings within the meaning of Art. 87 (1) of the EC Treaty. Here it came to the conclusion that the mere possession and management of private equity did not constitute an economic activity (emphasis added)

“when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset.”⁴⁸

76 Thus the European Court of Justice does not regard the mere taking advantage of fruits as sufficient to assume the existence of an economic activity.

77 The same considerations apply to the present case: here too it is a matter of exploiting goods that come into being in any case (timber, grazing to safeguard certain forms of

⁴⁸ Judgement of the Court of Justice of 10 January 2006 in case C-222/04, *Cassa di Risparmio di Firenze*, Coll. 2006, I-289, recital 111.

landscape, or hunting to safeguard certain forest stands), or of levying a contribution to costs for activities which are required for public environmental protection reasons (environmental education for tourists). There is an inseparable connection between the public good created in this way and the non-economic “core” activity of maintaining areas of ecological importance. Thus if the revenues from the exploitation of the non-economic activity are returned to the non-economic activity, then the exploitation itself is to be classified as non-economic.

- 78 This also prevents the economically nonsensical consequence that it is not permissible to generate revenues which could benefit a public, non-economic aim. This would result in a greater need for public grants and would thus run contrary to the principle of economical management of the budget.

e) Taking account of Lisbon Treaty Protocol No. 26 on Services of General Interest

- 79 The Lisbon Treaty on the reform of the European Union, which is awaiting ratification, includes a Protocol No. 26 on “Services of General Interest”.⁴⁹ It makes a clear distinction between services of general “economic” interest (Art. 1) and non-economic services. Art. 2 of this protocol states that the provisions of the EC Treaty – i.e. including the ban on state aid – do not affect in any way the competence of Member States “to provide, commission and organise non-economic services of general interest”. In other words: For such services there is a sectoral exception to Community law, specifically in relation to Community law on competition.
- 80 This is of importance, not only in the present context, since it is the first time that primary law⁵⁰ has stressed that Community law does not affect the provision of non-economic services by the Member States. Previously, primary law in Art. 16 and Art. 86 (2) of the EC Treaty merely contained statements on services of general economic interest. In its communication of 20.11.2007 the Commission announced that until the entry into force of the treaty reforming the EU it would use this Protocol as “a benchmark”, “to check the consistency and proportionality of EU policies and initiatives”.⁵¹

⁴⁹ OJ C 115, 9 May 2008, p. 308.

⁵⁰ See Art. 311 of the EC Treaty, in the Lisbon Treaty Art. 51 of the Treaty on European Union.

⁵¹ Communication from the Commission to the European Parliament and the Council: “Services of general interest, including social services of general interest: a new European commitment”, COM (2007) 725 final, 20 November 2007, No. 4.

- 81 In recital 58 to the contested decision the Commission correctly acknowledges that the activities of the nature conservation organisations under the two measures are measures of general interest.
- 82 Non-economic services are services unrelated to the market. It is already clear from Art. 2 of the Protocol that the term is not confined to sovereign activities, since such activities do not have to be “commissioned”. These services can therefore be rendered outside of the public administration.
- 83 In the case of the measures in question here, the services of the nature conservation organisation have a purely nature conservation oriented character; in this context at most only the natural fruits (timber, game etc.) can be managed and used under the conditions already described. As already described, this is thus not an economic activity.
- 84 From that point of view the task of safeguarding the national natural heritage would appear to be a model example of services “of general interest”, which according to the will of the Heads of State and Government are not to be subject to supervision of competition by the Commission, but which in view of their non-economic character are to fall within the exclusive competence of the Member States. The Protocol underlines the fact that this demarcation is to be taken seriously and that it is not permissible to jump to the conclusion that every connection which is theoretically conceivable in the abstract between the market and an activity assisted by a state measure must result in the activity being classified as an economic activity.

f) Necessity to flesh out the legal system with regard to the possibilities of funding nature conservation organisations that arise from the Aarhus Convention

- 85 The German Government also draws attention to the following Community obligation under Art. 3 (4) of the Aarhus Convention (emphasis added):
- (4) Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.
- 86 The Community is a party to the Convention and is therefore bound by this provision. As a result of its ratification by the Community, the Convention is also part of Community law.
- 87 Therefore the interpretation of Art. 87 (1) of the EC Treaty must not run counter to the support for nature conservation organisations which is demanded by the Aarhus Convention. This would however be the case if such organisations fell under the ban on

state aid simply because some of their activities earned revenue to cover the costs incurred in the performance of their altruistic tasks. If this view – taken here by the Commission – were correct, any assistance for such associations, organisations or groups would have to be notified to the Commission in advance (Article 88 (3) of the EC Treaty). Political opponents of the individual organisations could invoke the lack of approval both before and during an ongoing procedure; it would be entirely in the hands of the Commission to decide the extent which organisations were allowed to be assisted by the Member States. All these legal consequences are utterly incompatible with the promotion of such associations – which is also desired by the Community.

2. The nature conservation organisations do not have any advantage as a result of the measure

- 88 In the contested decision, the Commission fails to recognise that the nature conservation organisations do not derive any advantage. The relevant recital 47, in which the Commission, without any further examination, tersely affirms the existence of an economic advantage, is in striking contrast to later remarks in recitals 79 to 82 of the contested decision, to which the Commission itself refers at this point.
- 89 The fact that a state measure results in an advantage for the undertaking in question is one of the cumulative elements to be demonstrated under Art. 87 (1) of the EC Treaty. Such an advantage presupposes that the public sector payment to the recipient is not matched by an equivalent counter-consideration.⁵² By this yardstick, the nature conservation organisations do not gain any advantage either through the transfer of a site or because they are able to use it (under a.). This is further underlined by the fact that – contrary to the contested decision – the requirements of the fourth Altmark criterion are satisfied (under b.).
- a) No advantage due to transfer of ownership of the site (possibility of resale)**
- 90 In recital 79 et seq. to the contested decision (for the measure “transfer of sites”) and recital 88 (for the measure “large-scale nature conservation projects”, by reference to recital 79 et seq.), the Commission recognises that the nature conservation organisations do not derive any economically exploitable advantage from acquiring ownership of the

⁵² See, for example, the judgement of the Court of Justice of 7 February 1985 in case 240/83, *ABDHU*, Coll. 1985, 531, recital 17 et seq.; and, on the same note, the judgement of the Court of Justice of 24 July 2003 in case C-280/00, *Altmark Trans*, Coll. 2003, I-7747, recital 87.

relevant sites. This is due to the strict and legally safeguarded ties between ownership of the site and its use in conformity with nature conservation interests, as a result of which no such site may be resold without permission. Even in the event of such permission being granted, the proceeds must be used for non-economic nature conservation measures or paid over to the state.

- 91 Accordingly, in recital 80 to the contested decision the Commission comes to the conclusion that

“the only advantage accruing to the nature conservation organisations is comprised of the revenue from engaging in economic activities on the sites”.

Thus there is no advantage deriving from ownership and the possibility of resale.

- 92 For this reason, the conflicting assessment in recital 47 of the contested decision, which in the context of the examination of the elements under Art. 87 (1) of the EC Treaty makes the totally unsubstantiated assumption of a “potential advantage” arising from the transfer of ownership, is simply invalid. There is no such advantage.

- 93 In this connection, reference should also be made to another decision in which the Commission, in a situation that was comparable to this extent, itself denied the existence of an advantage of relevance to state aid.⁵³ This was concerned with the question of whether providers of business, technology and incubator centres that provide accommodation and services for small and medium enterprises (SMEs) would derive advantages from such support. The providers of these centres included local authority associations and public or private non-profit bodies. The measures were however intended for the exclusive benefit of the small and medium enterprises that settle in these centres. The providers were supplied with financial resources in the form of grants so that they could create and equip the necessary accommodation, which they were to rent out to the SMEs at prices below the market price in line with the assistance objectives of the measure. After expiry of the special-purpose earmarking of the buildings within the 15-year period, the measure provided for complete recovery of any profit on the buildings, so that there was no advantage attached to being able to keep the buildings. For this reason the Commission acknowledged in recital 33 to this decision that there was no preferential treatment within the meaning of Art. 87 (1) of the EC Treaty.

⁵³ Decision of 3 May 2005 in State Aid Procedure No. C 3/2004 [ex N 644/g/2002]), OJ L 295, 11 November 2005, p. 44.

94 The present decision clearly conflicts with this: without even being able to show, by way of a plausibility check, why the transfer of the sites should in fact constitute an advantage for the nature conservation organisations, although a mechanism economically comparable to that in Decision C 3/2004 prevents any advantage being derived from ownership of the land, the Commission decides in this case that this criterion is satisfied. In the present case the real beneficiary of the measure is, as it were, nature itself, and not the associations. This alone demonstrates the incorrectness of the assessment pursuant to Art. 87 (1) of the EC Treaty.

b) No advantage from use of the sites

95 Much the same can be said about the opportunities afforded by the use of the sites.

96 The use of the site demonstrably brings no advantages for the nature conservation organisations either. Merely obtaining revenues from certain activities in connection with the individual measure is no such advantage where the use of such revenues is so strictly regulated as in the measures in question:

- Where they are used to meet expenses that are incurred by the nature conservation organisations themselves under the projects and have to be borne by them, the revenues are matched by expenditure that is inseparably associated with the measures. An advantage only exists if the revenues from an assisted measure are greater than the expenditure.
- If they are used to finance other nature conservation projects, they flow into a non-economic area. In the case of other nature conservation projects within the two measures notified they would constitute revenues which would have to be entered in the income-expenditure calculation for the individual project to ensure that the transfer of funds did not permit any profit generation.
- Even if such surplus revenues were left over, they would have to be returned to the body providing the state aid.

97 It is thus certain that the nature conservation organisations cannot be left with any kind of economic advantage. The Commission has not succeeded in showing such an advantage plausibly in the contested decision, neither is such an advantage evident otherwise, i.e. independently of the text of the decision.

98 Thus the two measures notified do not result in any kind of advantage for the nature conservation organisations concerned, which means there is no preferential treatment within the meaning of Art. 87 (1) of the EC Treaty.

c) Incorrect application of the fourth Altmark criterion

- 99 A further aspect demonstrates that there is no preferential treatment of the nature conservation organisations under the assisted measures.
- 100 Contrary to recital 62 et seq. of the contested decision, the fourth criterion of the *Altmark* judgement is satisfied for both measures. This case law basically applies to the determination of preferential treatment resulting from state compensation for services of general economic interest (SGEI). As already shown, however, it is not an SGEI that the present case is concerned with, but a service of general, non-economic interest. However, if the criteria of the Altmark judgement make it possible to show that such compensation does not represent any advantage in the case of SGEI, then they can certainly serve to demonstrate the lack of preferential treatment in relation to compensation for services of non-economic interest.
- 101 Thus the objection that the fourth Altmark criterion has been applied incorrectly does not cast any doubt on the fact that neither of the two measures supports business activities.
- 102 According to the fourth Altmark criterion,

“fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations,”⁵⁴

the elements of Art. 87 (1) of the EC Treaty are not satisfied for services of general – economic or non-economic – interest.

- 103 In the present case the Commission recognises in recital 65 to the contested decision that for both measures the nature conservation organisations are selected through an open and transparent public procedure. In the same recital it points out that if there were two

⁵⁴ Judgement of the Court of Justice of 24 July 2003 in case C-280/00, *Altmark Trans*, Coll. 2003, I-7747, recital 93.

competing offers for the same project, the offer that was more economically favourable would be selected.

- 104 It is nevertheless of the opinion that the fourth Altmark criterion is not satisfied, because the bidding process is not geared towards finding the lowest price for the provision of the services or the most economically favourable offer.
- 105 This view is misguided and bears witness to an excessively narrow and schematic understanding of this criterion of the ECJ's Altmark judgment. The Court has already expressly recognised that this fourth criterion must be applied in the light of the specific case. The crucial factor, it finds, is that a measure must fulfil the purpose of the criterion, namely that there be no reimbursement of costs which are due to lack of efficiency on the part of the recipient of state aid.⁵⁵
- 106 In the measure "transfer of national natural heritage sites" there are two reasons why there is no possibility of reimbursement of costs incurred to due inefficiency:
- Firstly, in this case such an efficiency criterion is from the outset a model without any value: there is no reimbursement of costs of any kind for specific services, but a transfer of sites; it is the ownership of these, combined with the inseparable nature conservation requirements, that causes the theoretically compensatable costs to arise. From a structural point of view the measure is not a compensation of costs. Consequently it is not possible to estimate any costs arising from lack of efficiency on the part of the nature conservation organisations. In other words: all costs for the nature conservation oriented care of the sites, including any which are due to lack of efficiency on the part of the nature conservation organisation concerned, have to be borne by the organisation itself, whether through donations or members' subscriptions. Thus no compensation at all takes place.
 - Secondly, the bidding process gives rise to competition on quality which results in selection of the nature conservation organisation that is in the best position to maintain the transferred land as a natural heritage site. This capability, which is the subject of comprehensive examination, reflects the nature conservation efficiency of the individual organisation, and this may be the sole deciding factor for the measure in question. The criterion of the "most economically favourable offer", as the Commission points out in footnote 21 to the contested decision, can certainly include qualitative, i.e. technical aspects. To this extent one can definitely assume that the bidding process identifies the most economically favourable offer.
- 107 In the case of funding of large-scale nature conservation projects, the Commission in recital 65 to the contested decision fails to draw the correct conclusions from its own remarks: it acknowledges that the most economically favourable offer is selected if two

⁵⁵ Judgement of the Court of Justice of 12 February 2008 in case T-289/03, *British United Provident Association Ltd. (BUPA) and others/Commission*, not yet in Coll., recitals 246, 249.

organisations submit a bid for the same project. But merely on the basis of the fact that “in practice ... this is barely likely to occur”, it concludes that the fourth Altmark criterion is not satisfied. That is legally untenable, and this is true of all activities supported under this measure:

- As far as assistance for the purchase or leasing of sites is concerned, these costs are totally independent of the organisational efficiency and workflows in the relevant nature conservation organisation; they depend more on the present owner, in dealings with whom it is necessary to ensure that the price is in line with the market. Thus the fourth Altmark criterion is *per se* not applicable to such costs⁵⁶. In the selection of the sites, the only aspect that can play a role is their significance as a nature conservation asset.
- As regards the funding of other expenditure in connection with maintenance of the sites, this is covered by the assurance already mentioned, namely that the most economically favourable offer would be accepted. To this extent the determination of efficiency in the selection of the project executing agencies is assured in relation to the same site. However, the fourth Altmark criterion does not require the selection of a project of inferior ecological quality, i.e. a project relating to a different site, merely because the nature conservation organisation proposing the other project may be more efficiently organised. This would then be a case of another project, and would thus not relate to the same placement decision. Thus a comparison of the efficiency of nature conservation organisations can be ruled out as a yardstick for project selection, even where costs other than acquisition costs are concerned. Otherwise it would be necessary, when awarding subsidies in local public transport, to leave route A unserved if a company that only submitted a bid for route B appeared to be more efficiently organised.
- Finally, the German Government draws attention to the fact that according to No. 7.4 of the Funding Rules, the nature conservation organisations are subjected to efficiency reviews, which means that there are in any case no grounds for concern that costs might be reimbursed as a result of poor efficiency.

108 For these reasons, the purpose of the fourth Altmark criterion, insofar as it is capable of meaningful application, is satisfied for both measures.

109 Thus for the purposes of the Altmark judgment it is perfectly sufficient in the present case if an open and non-discriminatory tender procedure for the measure is used to create a competition situation in which the selection criteria for placement are of a nature conservation character.

3. Alternatively: Violation of the justification requirements pursuant to Art. 253 of the EC Treaty

⁵⁶ Incidentally, in the event of multiple project applications these costs would in principle be identical, as it could be assumed that the purchase would give rise to the same costs for all nature conservation organisations.

- 110 In the event that the Court does not accept the opinion of the German Government in this matter, the German Government objects to a violation of the justification requirements pursuant to Art. 253 of the EC Treaty, namely to the extent that the Commission affirms the existence of an economic advantage within the meaning of Art. 87 (1) of the EC Treaty. As already described above, the relevant passage in recital 47 to the contested decision essentially consists in a reference to recitals 79 to 81 to the decision.
- 111 There, however, only a potential advantage is mentioned. It is subsequently recognised that the “only advantage” consists in the revenues from the performance of supposed economic activities. As regards the substance of this alleged advantage, the Commission correctly points out in recitals 81 and 82 to the contested decision that even these revenues are not at the free disposal of the nature conservation organisations, but have to be used for non-economic purposes or paid to the state, and that the organisations are not even allowed to retain a reasonable profit margin, as is permitted by the third criterion of the Altmark judgement. Thus if an advantage arising from the two measures is ruled out even here, on the basis of the correct representation in the Commission’s decision, it is not clear from the decision what the advantage for the nature conservation organisations is supposed to be.
- 112 This means it is not possible to see the grounds for the Commission’s legal assessment that a case of preferential treatment exists within the meaning of Art. 87 (1) of the EC Treaty. In view of this, the requirements of adequate justification pursuant to Art. 253 of the EC Treaty⁵⁷ are not satisfied.

V. Conclusion

- 113 In the light of the foregoing, the German Government comes to the conclusion that the contested decision violates Community law in two respects:
- It violates Art. 87 (1) of the EC Treaty and hence material Community law.
 - It violates the justification requirements pursuant to Art. 253 of the EC Treaty.
- 114 It must therefore, as requested, be declared null and void in accordance with Art.230 (1) and Art. 231 (1) of the EC Treaty, to the extent that it classifies the two notified measures as state aid within the meaning of Art. 87 (1) of the EC Treaty.

⁵⁷ Cf. the established case law in this field, e.g. the judgement of the Court of Justice of 11 June 2009 in case T-222/2004, *Italy/Commission*, not yet in Coll., recital 76.

Lumma

Klein

List of Exhibits