



## EUROPEAN COMMISSION

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**PUBLIC VERSION**

**WORKING LANGUAGE**

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**Subject: SA.33952 (2012/NN) – Germany  
Climbing centres of Deutscher Alpenverein**

Dear Sir,

### **1. PROCEDURE**

- (1) By letter dated 24 November 2011, complainant A, a private operator of a climbing hall in Berlin, lodged a complaint with the Commission against the public support for a planned climbing complex in Berlin to be owned and operated by the local section of Deutscher Alpenverein e. V. ("DAV"), the German Alpine Association.
- (2) On 9 December 2011, the Commission sent a letter to complainant A including a preliminary assessment stating that the measure objected to *a priori* does not constitute aid under Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU").
- (3) On 9 January 2012, the complaint was joined by complainant B, a German association of operators of climbing halls in Germany, Austria and Switzerland, the scope of the complaint was broadened to subsidies of *Länder* and municipalities for the construction of climbing facilities of all relevant DAV sections and the DAV umbrella association ("the beneficiaries"), and observations were submitted in which the complainants did not agree to the preliminary assessment of the Commission, providing some new substantial information.
- (4) On 11 January 2012, the Commission sent a first request for information to the German authorities along with a copy of the complaint. On 24 January 2012, the

Seiner Exzellenz Herrn Dr. Guido WESTERWELLE  
Bundesminister des Auswärtigen  
Werderscher Markt 1  
D - 10117 Berlin

Commission informed the complainants that the request was sent to the German authorities and that they might be able to bring proceedings before their national court, which could order the suspension of aid or the recovery of unlawful aid. The German authorities replied by letter dated 21 March 2012.

- (5) On 10 April 2012, the Commission sent a letter to the complainants forwarding them a non-confidential version of the reply of the German authorities and including a preliminary assessment stating that the measure objected to *a priori* does not constitute aid under Article 107 (1) TFEU. On 10 May 2012, the complainants submitted their observations in which they did not agree to the preliminary assessment of the Commission, providing some new material elements. On 12 July 2012, the complainants submitted a letter in which they informed the Commission about their opinion regarding a recent decision taken by a national court on 5 July 2012 (see below point 39). By letter received on 30 July 2012, the German authorities referred to the same decision and submitted new information. On 4 October 2012, the Commission sent a second request for information to the German authorities which was replied to by their letter of 15 October 2012.
- (6) By e-mails of 29 February 2012, 27 March 2012, 5 April 2012, 4 May 2012 and 30 October 2012, the complainants submitted new information.

## **2. FACTS**

### **2.1. The complaint**

- (7) The complainants claim that the authorities of the *Länder* and the local authorities have supported the construction of DAV climbing facilities all around Germany in competition with their existing, viable commercial climbing halls. The complainants allege unlawful State aid to the beneficiaries in the form of contributions to the construction costs and operational costs such as non-refundable grants, interest free or advantageous loans and advantageous lease of public land for the construction of climbing facilities of the relevant sections of DAV.
- (8) The complainants allege that: the Berlin section of DAV prepares the construction of a new climbing complex in Berlin which would start its operation at the end of 2012; the *Land* Berlin let the land on which the complex would be built for a rent below market conditions; and the Berlin section of DAV benefits of a free right of pre-emption for the purchase of the land concerned. More precisely, the complainants indicated that complainant A pays EUR 17 500 as a monthly rent for the lease of its climbing hall and the land on which it is built and the *Land* has let the piece of land concerned to the Berlin section of DAV for a yearly rent of EUR 1 132.92 with no adaptation of the rent throughout the thirty years duration of the lease contract. The complainants submit that the low rent will allow the new climbing complex to offer its services for a price below market level which will attract not only the DAV members but also non-members to the planned climbing hall. According to the complainants, in view of the large capacity of the planned DAV hall, these developments would lead to jeopardy of the existence of complainant A. The complainants claim that complementary services provided in the climbing hall of complainant A such as wellness, fitness, shop and restaurant would also incur a decrease in turnover. They also state that the planned climbing centre in Berlin will be apt for the organisation of national and international sport events. Furthermore, the complainants indicate that the construction of the Berlin climbing centre is a part of a master plan of DAV by which public aid should be used for the establishment of a structure which would make the construction and operation

of commercial climbing halls uneconomical or even impossible (see for a detailed description of this document below point 24).

- (9) Allegedly, competition is distorted by the public funding for DAV climbing halls all around Germany. The complainants refer specifically to the public funding for the DAV climbing centres in Neu-Ulm, Kassel, Darmstadt, Wuerzburg, Munich, Regensburg and Frankenthal. The complainants claim that climbing in climbing centres is a type of sport with a touristic potential which goes beyond popular sport in the strict sense. They claim that this is mirrored in the size, equipment and number of visitors of newly built and planned climbing halls of DAV and its commercial competitors. The complainants assert that the users of the DAV climbing halls are predominantly not members of the local DAV sections which would only perform sport for children, youth, schools or popular sport in the strict sense. They point out that most of the climbing facilities are opened at least 360 days per year with regular opening hours of at least twelve hours a day. While referring to websites of three DAV climbing halls, the complainants also emphasize that the access of non-members to the halls is not limited in time. In addition, they classify the DAV climbing halls as special leisure parks. Furthermore, the complainants indicate that according to the DAV climbing halls handbook of August 2011 the DAV climbing facilities are open to all visitors which accept the rules of their use, i.e. not only to the DAV members.
- (10) The complainants claim a substantial fall of turnover (varying from one climbing hall to another, four concrete examples being 10%, 16%, 37% and 54%) following the opening of a new DAV climbing centre in the neighbourhood of their climbing halls.
- (11) In addition, the complainants claim that since 2004, DAV uses the internet website climbing.de as an official media partner for sport and competition climbing, and since 2011, that website is also an official media partner for Oesterreichischer Wettkletterverband (“OWK”). Allegedly, the website belongs to the 6 000 most important websites in Germany and it offers a search machine for climbing halls in Germany, Austria, Switzerland and Netherlands.
- (12) Furthermore, the complainants highlight that a first event of the German Leadcup 2012 took place in the framework of the Bodensee Trophy in St. Gallen in Switzerland on 31 March 2012 and that that competition organized by DAV, OWK and Schweizer Alpen Club in climbing halls in Germany, Austria and Switzerland targets interested persons from all these three countries.<sup>1</sup>
- (13) Moreover, the complainants submit that the operator of a climbing hall in Rosenheim in Germany operates another one in Wörgl in Austria. In addition, the company Neoliet operates three climbing halls in Germany (Bochum, Muhlheim and Essen) and three in the Netherlands (Heerlen, Tilburg and Eindhoven).<sup>2</sup>
- (14) Pursuant to the complainants, the beneficiaries of the aid are both the DAV umbrella association as well as its local sections and therefore the de minimis rules could not be applied.<sup>3</sup> The complainants indicate that DAV is structured as a concern, it has profit from the subsidized construction and operation of the climbing centres and it assumes an economic risk.

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<sup>1</sup> The complainants refer to SA.31722 *Aid to sport in Hungary*, 9 November 2011.

<sup>2</sup> See <http://neoliet.nl/index.html>.

<sup>3</sup> The complainants refer to case C-382/99 *Netherlands / Commission* of 13 June 2002.

- (15) The complainants requested the Commission to adopt a decision to initiate a formal investigation procedure under Article 4 of Regulation 659/99.

## 2.2. Subject of the case

- (16) DAV operates climbing centres all around Germany. The subject of this case is public support to the construction and operation of the climbing centres of the DAV sections which has been granted continuously in the past by the governments of the German *Länder* and municipalities.

### The complainants

- (17) Complainant A is the operator of a commercial climbing center in Berlin, located around three kilometres from the construction site of the planned DAV climbing hall. The complainant has only German shareholders.
- (18) Complainant B represents thirty six independent operators of climbing halls in Germany and two in Austria.<sup>4</sup> In addition, a partnership with IG-Kletteranlagen, a Swiss association of climbing halls, exists. One climbing hall in Germany (Rosenheim) and one in Austria (Wörgl), both members of complainant B, are owned by the same shareholders.

### The beneficiaries

- (19) DAV, with its 892 000 members the largest mountain sports organisation in the world, is a registered non-profit association founded in 1869.<sup>5</sup> Each of its sections is a separate legal entity. Under the German law on public support for sport, DAV is classified as sport organisation eligible for public support. DAV also has a 100% subsidiary, which is organized as a *GmbH* (private law commercial entity with liability limited to its share capital) and describes itself as “the leading operator of mountaineering travel in the German speaking area and the biggest climbing school in the world”.<sup>6</sup>
- (20) The national DAV association is an umbrella organization. It supports the construction of the climbing centers but it does not own or operate any climbing facilities. An investment decision is taken in principle by the respective sections of DAV. The risk associated with an investment decision thus remains with the local associations.
- (21) However, the umbrella organization has very close links with its sections. First of all, the sections constitute the general assembly of the umbrella organization and therefore exercise a joint control over the umbrella organization. Secondly, the sections are obliged to pass on a fixed part of the membership fees they collect to the umbrella organization. The sums collected in this manner are used, amongst others, to feed a fund which provides financial support to sections, which plan to carry out investments in an alpine refuge or into a climbing center. The umbrella organization also carries out a tight control over the sections: article 7 of the by-laws of the umbrella organization stipulates a list of obligations of the sections, which include the following:

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<sup>4</sup> One of the operators operates two climbing halls in two German cities. The rest of the operators operate one climbing facility.

<sup>5</sup> See <http://www.alpenverein.de/>.

<sup>6</sup> See [http://www.alpenverein.de/chameleon/outbox/public/10118/p\\_por\\_13007.pdf](http://www.alpenverein.de/chameleon/outbox/public/10118/p_por_13007.pdf).

- To execute the decisions taken by the general assembly of the umbrella organization and to put their local by-laws into conformity with the model by-laws adopted by the umbrella organization;
  - To pay a fixed contribution for each of their members to the umbrella organization;
  - To receive the agreement of the president of the umbrella organization prior to mortgaging or selling their property;
  - To receive the agreement of the president of the umbrella organization for any modification of their local by-laws.
- (22) The general assembly of the umbrella organization can exclude a section in case of violation of its obligations; in such a case, the section has to immediately pay back to the umbrella organization any aid it has received in the past from the umbrella organization.
- (23) It is possible to adhere to DAV through the web site of the umbrella organization, which describes in detailed manner the advantages of membership, insisting in particular on the fact that member may use all climbing centers of the sections free of charge or at reduced rates.
- (24) In 2010, the umbrella organisation has adopted a strategy document on the market needs for climbing centers. According to this document, there is a need for 60 new climbing centers in Germany. The document stipulates that each section that wants to invest into a climbing center needs the prior approval of the umbrella organisation. The document also explains that the approval is subject to a study on the economic viability of the climbing center. Finally, the document also points out that the construction of new climbing centers has the purpose of recruiting new members.

#### The measures

- (25) The climbing halls are financed by the own resources of the sections, sponsoring, from the fund of the umbrella organisation (see above point 21) and subsidies from municipalities or *Länder* where the halls are constructed.

#### *I. Construction of a climbing hall by the local DAV section in Berlin*

- (26) The construction permit for the new DAV climbing complex in Berlin was granted on 1 July 2011. The district of Berlin Centre and the DAV section Berlin concluded a lease contract regarding land owned by the *Land* Berlin with effect as of 1 November 2011. The construction began in the spring of 2012.
- (27) The components of the financing of the climbing gym are as follows:

Own capital of DAV Berlin	€550 000
Own work of DAV Berlin	€50 000
Loan to DAV Berlin	€595 000
Grant by the DAV umbrella association	€200 000
Loan by the DAV umbrella association	€705 000
<b>Total</b>	<b>€2 100 000</b>

- (28) According to the competent authorities of the *Land* Berlin, the requirements for a cost advantageous transfer of the piece of land at hand set by the Berlin Act on Support for Sport (*Sportförderungsgesetz Berlin*) are fulfilled. According to that Act publically owned land and buildings can be made available to sport organizations recognized as eligible for support. The administrative law may stipulate for an amount of rent which is different from the usual local rent. Sports organizations are by that Act defined as clubs whose main purpose is to conduct self-organized sports activities. They are recognized as eligible for support if they meet the following requirements stipulated for in the Act: charitable purpose followed through the promotion of sport; exemption from corporation tax; appropriate, adequate and efficient work in their area of expertise; sound management; and activities and internal structure in line with democratic principles.
- (29) The recognition of an association as eligible within the sense of the above Act is indispensable for the conclusion of a lease contract with a sport organisation. Since the DAV Berlin association disposes of a letter of the Senate for Internal Affairs and Sport of the *Land* Berlin on the recognition of eligibility, the DAV section Berlin meets the necessary conditions for the conclusion of a lease contract on the basis of the said Act.
- (30) Moreover, in these lease contracts in general and in the lease contract at stake it is stipulated that the advantageous land transfer takes place only as long as the DAV (Berlin) association is eligible for support and the climbing gym is not commercially operated within the meaning of the afore-mentioned Act. As long as the association regularly proves tax exemption, the compliance with the contractual provisions is assumed. As far as the association can no longer provide this evidence, the recognition of eligibility shall be revoked. As in such case the prerequisite for a lease based on preferential terms would not be fulfilled anymore, a right of the *Land* of Berlin for immediate termination of the lease contract and a claim of the latter against the DAV Berlin association on payment of a usual local rent would exist.
- (31) As described above, the complainants fear that the operation of the planned DAV climbing hall in Berlin will lead to a decrease in the turnover of complainant A. They also consider that the cost advantageous lease of the land is an illegal State aid in favour of the DAV Berlin association.
- (32) Apart from the above measures under the lease contract (including the free right of pre-emption for the purchase of the land concerned), no other measures for the construction and operation of a DAV climbing hall have been taken by the *Land* of Berlin.

## *II. Measures in other Länder: example of the Land Baden-Württemberg*

- (33) On the territory of Baden-Württemberg four out of all subsidized DAV climbing facilities received a total amount of more than EUR 100 000 (in 2004) or EUR 200 000 (2006 and following years) (Heidelberg, Reutlingen, Stuttgart and Karlsruhe) within three years.
- (34) The demand plan of DAV of 19 July 2010 for Baden-Württemberg includes in total 59 climbing centers, of which 31 are owned or rented by the DAV sections. In addition, there exists a large number of micro and small scale facilities (e.g. climbing wall in and around public schools, sport and association houses and public buildings), whose users are mainly sport associations,<sup>7</sup> in over 1 100 municipalities of Baden-Württemberg. A minor part of climbing walls is not run by sport associations, but by other associations and organizations such as religious organizations.<sup>8</sup>
- (35) The measures taken by the *Land* Baden-Württemberg to support sport associations at the level of the *Land* are in the form of non-repayable grants. The measures by local authorities are taken in the form of non-repayable grants, rights of construction, usufructs, leaseholds, loan guarantees or rent reductions. These measures are based on schemes open to all sports associations meeting certain minimum requirements, which are similar to the conditions described above in point 28 to 30.
- (36) The support of the *Land* for construction by sport associations (annually around EUR 12 million) is provided by the respective government council in Karlsruhe to sports federations for their independent management. These sport federations take a final decision on the specific allocation of funds on the basis of the funding guidelines and they must provide evidence on the use of the funding. Apart from support for construction, the above council grants other support, for example, for sport equipment, instructors, education and training (total volume about EUR 40 million a year).
- (37) For reasons of administrative efficiency, the Commission and Germany have limited the investigation to the concrete example of Baden-Württemberg (apart from the afore-mentioned climbing hall constructed by the local DAV section in Berlin). The system in place in other *Länder* and municipalities shares, however, the same main characteristics as those described above in point 28 to 30 and 36.

## *III. Assessment of the measures by the German authorities*

- (38) By letter dated 5 October 2010, the Finance Ministry of the *Land* of Baden-Württemberg expressed its opinion that by the use of climbing halls for a short period by persons other than members of a local DAV association, the latter association competes with commercial climbing halls and this is therefore to be treated as an economic activity subject to taxation. On 6 December 2011, the Bavarian Tax Authority issued its opinion that the use of DAV climbing facilities by non-members of DAV is an economic activity subject to taxation.
- (39) Complainant A decided to bring the matter of the planned Berlin climbing centre before the competent national court and, in view of the urgency of the situation, applied for an injunction at the Administrative Court of Berlin on 26 March 2012. Based on the possibility that State aid might be involved, on 26 April 2012, that court

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<sup>7</sup> See for example [www.klettern.tsv-schmiden.de](http://www.klettern.tsv-schmiden.de), [www.sportvg-feuerbach.de](http://www.sportvg-feuerbach.de), [www.vfl-sindelfingen.de](http://www.vfl-sindelfingen.de), [www.hans-Lorensen-sportzentrum.de](http://www.hans-Lorensen-sportzentrum.de) and [www.funssportzentrum.de](http://www.funssportzentrum.de).

<sup>8</sup> See for example [www.cityrock.de](http://www.cityrock.de).

ordered the administration of the respective Berlin district to pronounce a ban of construction and of use of the land concerned for a climbing centre. The Supreme Administrative Court of Berlin and Brandenburg did not share the opinion of the Administrative Court of Berlin and, on 5 July 2012, it dismissed the petition for interim relief. The grounds for this annulment were the classification of the activities of DAV Berlin by the above Supreme Administrative Court as non-economic and a calculation of the aid amount granted within three years made by the same Supreme Administrative Court which resulted in the amount of EUR 119 334.24, i.e. below the de minimis amount of EUR 200 000.<sup>9</sup> The main action remains pending.

### 2.3. Argumentation of Germany

(40) The German authorities do not acknowledge the presence of illegal State aid. They reject the allegations in the complaint with the following four main reasons:

1/ no undertaking and no economic activity in case of DAV sections;

2/ no (potential) distortion of competition;

3/ no effect on trade between Member States;

4/ no aid in favour of the DAV umbrella organisation.

(41) The German authorities made comments specific to the planned Berlin climbing hall. In addition, they gave explanations for Baden-Württemberg as an example of the situation in a *Land* other than Berlin; details were presented for the four largest DAV sections in Baden-Württemberg: Stuttgart, Heidelberg, Reutlingen and Karlsruhe.

(42) The most relevant statements of Germany are:

#### *I. Regarding the construction of a climbing hall by the local DAV section in Berlin*

- The DAV Berlin association is an amateur club. Amateur clubs shall regularly be not considered as undertakings, because they perform no economic activities.<sup>10</sup>
- The main aim of the Berlin climbing hall is to offer sport for members of the DAV section Berlin (such as in particular group climbing, education of children and adults on climbing walls, coming together for a common sport and achievement of a high level of safety in climbing through training and education). Exceptions are:
  - Climbing in the context of social work (children, youth, schools, disabled)
  - Organisation of competitions in which also members of other DAV sections can participate
  - Promotion of membership to non-members

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<sup>9</sup> Referring to case C-239/09 Seydaland of 16 December 2010, the complainants do not agree with this calculation made by the court because it is based on a value set by an expert committee for land in Berlin dedicated to sport in view of historical values, not on a price based on comparable prices in the current market.

<sup>10</sup> The German authorities refer to the White Paper on Sport of the Commission of 11.07.2007, p. 12.



- The fact that the hall will be used not only by members of the DAV Berlin association but also by schools and participants of competitions from other associations is not contrary to the statutory purpose and thus eligibility for support.
- A market analysis commissioned by the DAV section Berlin in 2007 foresaw a capacity of 400 visitors daily. After the funding for the realization of such a climbing center was rejected by the competent authorities of the *Land* of Berlin, the DAV Berlin section abandoned the planning of a climbing hall with a capacity exceeding the internal demand of the section and instead, it concentrated on the planning of a climbing hall covering only such demand. This resulted in the plans for a climbing gym which differs in several important respects from the facility contemplated in 2007:
  - Elimination of a public sauna, restaurant, climbing shop, fitness area, replaced by a small club bistro,
  - Reduction of capacity (maximum number of simultaneously present persons) from 400 to now 250,
  - Avoidance of labor intensive supervision of non DAV members,
  - Co-operation with public institutions of education and vocational training, public health, youth and social welfare.

Thus, the capacity of the climbing gym does not exceed the internal needs of the DAV section Berlin.

- According to the DAV Berlin association - with exceptions in favor of the school sport and the organization of competitions - the use of the climbing gym will be possible only under a membership in the DAV Berlin association. Non-members will only be allowed to climb during a period of one month to market prices conditions, not yet determined at present.
- According to a recent assessment of the DAV Berlin association, the proportion of non-members using the hall is expected to be 7.5%; it is assumed that 2.5% of the hall users will be non-members climbing for a trial and 5% non-members as part of school sport or other non-commercial special use (e.g. university sport, sport of socially disadvantaged groups including disabled persons).
- Currently, the association is prevented from a satisfactory fulfillment of one of its main tasks: training children and young people in climb and mountain sports. The existing facilities of the DAV Berlin association have reached their capacity limit years ago.
- Also the fact that the DAV Berlin association will employ a climbing hall director to manage the hall on their own and that the operation of the hall is not transmitted as part of an operating contract to a third party underlines the non-commercial nature of the project.
- The demand of the DAV climbers in Berlin could not be satisfied by the use of commercial facilities. During the winter months and especially at the usual times of use the utilization of commercial climbing halls reaches its capacity limit. The average capacity utilization during this period is between 85% and 100%.

- The climbing hall of the DAV Berlin association will be open to its members resident in Berlin and the local surroundings. The climbing center is also by no means unique in its character, so that no demand for using its service would arise in foreign countries.
- The measure is an independent project of the DAV Berlin association. The project will not be controlled and managed by the DAV umbrella association. The latter only makes a minor financial contribution and this largely in the form of a loan. An advantage of the DAV umbrella association through the promotion of sport in favor of DAV Berlin association is therefore not apparent.
- The support for the establishment of the climbing gym of the DAV Berlin association should not be considered as capital investment, linked with an expectation for a dividend.
- The climbing walls of DAV are primarily places to meet and to provide the association members a suitable room for climbing exercise as a club sport. The commercial operators direct their offer to the general public and they do not impose a commitment of an association membership. While climbing gyms of DAV have the group climbing in the foreground, commercial facilities are primarily used by individual climbers. The training and the induction of children and young people in sport climbing are in commercial facilities only a small scale operation. Finally, the climbing walls attract especially climbers from the nearby local area.

## *II. Other measures: example of the Land Baden-Württemberg*

- The activities of DAV sections are limited to at least 75% to the association members and they are structurally not economic. A possible raising of revenue by the DAV sections, especially from non-members, does not prove the nature of the measures as aid in favor of undertakings. The purpose of the operation of the climbing halls of the DAV sections is not to achieve a profit as it is the case for an economic entity.
- The sections of DAV play an important role in the promotion of sport education, integration and health.
- The small and middle sized climbing halls do not have an effect on EU trade.<sup>11</sup>
- In the case of the large climbing centers settled relatively near the border in Karlsruhe (20 kilometers from the border with France) and Heidelberg (90 kilometers from the French border) the intra-Union trade is not affected, since the climbing centers neither provide their services nor advertise abroad or in cooperation with foreign persons or facilities.
- The DAV climbing halls have no cross-border effect, because no demand for the use of their service occurs abroad. An international attraction of clients does not exist and client groups from abroad are also potentially not affected. This is because the DAV climbing centers adjust their size and their offer primarily to the association's members which, as specified by DAV Baden-Württemberg, are to at least 75% the users of the climbing centers. The DAV sections thus limit their scope of influence to the local area of their section.

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<sup>11</sup> The German authorities refer to Commission Communication Developing the European Dimension in Sport of 18 January 2011, section 3.3, second sentence.

- Multilingual websites and nationwide promotional activities are also not envisaged. The existing hypothetical possibility that in individual cases guests from the neighbouring countries visit the local facilities is negligible.
- In summary, it can be stated that the target group (only members of the section concerned and - in cooperation - students of local schools or members of local sport clubs), the language and the specific offer for local stakeholders lead to a conclusion that also potential effect on trade can be excluded.

### 3. ASSESSMENT

#### 3.1. Existence of aid within the meaning of Article 107(1) of the TFEU

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

#### 3.2. Presence of State resources

(44) The resources in question are the financial resources of the German *Länder* or municipalities and the donor is a German *Land* or municipality. The grant decision is taken by the responsible part of the administration. Therefore, the support is granted through State resources and it is imputable to the State.

#### 3.3. The notions of an undertaking and economic activity

(45) The operation of climbing centres for the general public against a fee can in principle be considered an economic activity and hence is not exempted from the State aid rules as such.

(46) In the current case there are commercial operators claiming that DAV and its sections are undertakings performing economic activities and that the public support is harming private investment. Germany claims that the DAV climbing facilities are used predominantly by the members of its operators and there is a public interest for society in maintaining the climbing halls concerned, as the latter provide physical activity for masses, schools and socially disadvantaged persons.

(47) In the present case, Germany has not provided any proof that access to climbing centers of a given DAV section is indeed strictly limited to its members or recognised candidates for membership in that section. Making the capacity of DAV climbing walls available to the general public against remuneration is comparable to commercial gyms that make fitness equipment available. The proportion of non-members differs from one DAV climbing hall to another and no reliable statistical data seem to be available.<sup>12</sup> For this reason, the Commission cannot exclude that the use of DAV climbing facilities by the general public against a fee is covered by the notion of an economic activity.

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<sup>12</sup> As an example, in case of the future indoor climbing center in Berlin, the planned number of non-members which will use the planned climbing hall has been estimated by Germany 7.5% of the hall users, by the complainant 69% of hall users whereas the Administrative Court of Berlin referred to a statement from the DAV Berlin of 10 June 2011, according to which the planned number of non-members using the center will reach 25%.

- (48) Furthermore, the Commission considers that the umbrella association and the sections of DAV have to be regarded as one single group for the purpose of State aid control. As described in detail above in points 19 to 24, the umbrella association is jointly controlled by the sections, and in turn exercises a tight control on the sections. There are close financial links, with money flowing both from the sections to the umbrella organization (in the form of a share of the membership fee) and from the umbrella organization to the sections (in the form of loans and grants for investments). Finally, there is central marketing of DAV membership through the web site, and members enjoy the same or similar user rights for installations of other sections as for installations of their own section.
- (49) DAV group is active on several markets: climbing centers; climbing and skiing courses; hotel and restaurant services in refuges; tour operation (through its subsidiary). The Commission has no information showing that there is any separation between the different activities. Therefore, the Commission concludes that the DAV group is to be considered an undertaking subject to State aid control.

### **3.4. Economic advantage and selectivity**

- (50) The measures confer to the beneficiaries an economic advantage compared with other operators of climbing halls who do not receive State assistance and have to bear similar costs by themselves without public support. The measures improve the financial situation of its beneficiaries and they do confer an advantage that the beneficiaries would not obtain in the course of their normal business.

### **3.5. Distortion of competition**

- (51) For the reasons outlined above in section 3.3, particularly above in point 47, there is a distortion of competition or at least a potential distortion of competition in so far as the publicly-funded climbing halls compete with other halls to attract customers. Moreover, it has to be noted that a complaint has been received from competing operators of climbing halls.
- (52) Fair and just competition is one of the objectives of Article 107 of the TFEU. The presence on a market of a competitor with access to public funds amounts to a subversion of such competition. It should be noted that, without access to these funds, it would be difficult for the DAV climbing halls to remain in operation or, at the very least, for them to provide services with all the features - and the corresponding expenses - of a climbing centre.

### **3.6. Effect on intra-Union trade**

- (53) In order to be considered as State aid under European Union rules and caught by the prohibition of Article 107 (1) TFEU, the use of State resources to support a climbing centre must affect trade between Member States.
- (54) The complainants claim that measures in favour of locally or regionally active undertakings can be State aid if it is able to stabilise the domestic offer or to reduce the business chances of foreign undertakings.<sup>13</sup> The complainants also allege that on the basis of its master plan DAV obtains, with the help of public financing, a significant

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<sup>13</sup> The complainants refer to cases T 55/99 CETM; C 24/01 – 28/01 Enirisorse; C 280/00 Altmark Trans.

market position which leads to a potential impairment of business chances of foreign undertakings on a domestic market.

- (55) According to settled case-law, it is not necessary to demonstrate that aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition.<sup>14</sup> It is also settled with regard to this condition that, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade, the latter must be regarded as influenced by that aid.<sup>15</sup>
- (56) On the basis of the information available, the Commission cannot fully exclude that the public financing which the sections receive for the construction of their climbing halls may have a dissuasive effect as far as potential new market entrants are concerned.
- (57) The fact that the Dutch company Neoliet operates three climbing halls in Germany<sup>16</sup> shows that a company with its seat in another Member State may invest in a climbing hall in Berlin or elsewhere in Germany. Hence, the case of Neoliet shows that foreign companies can be present on the market concerned, and the measures could impair the business chances of other foreign undertakings.
- (58) It has to be noted that the decisional practice of the Commission which the complainants refer to concerns professional sport, not amateur sport.<sup>17</sup>
- (59) More generally, the decisional practice of the Commission, as far as the qualification of State funding for sport is concerned, is nuanced.
- (60) On the one hand, it should be underlined that support for local sport facilities and for training of the non-professional youth by professional sport clubs is generally not considered as State aid by the Commission (examples include case N 258/00 *Freizeitbad Dorsten* and case N 118/00 *Subventions publiques aux clubs sportifs professionnels*, respectively). On the other hand, competition between professional sport clubs has an international dimension and public funding for such clubs might be considered as State aid (see for instance SA.31722 *Aid to sport in Hungary*).
- (61) Germany has submitted arguments on the lack of effect of the activities of the DAV climbing halls on trade (see above point 42).
- (62) However, as explained above in point 48 and 49, the Commission takes the view that the appropriate level of analysis is DAV as a group. Therefore, the case at hand is different from case N 258/00 *Freizeitbad Dorsten* and case N 118/00 *Subventions publiques aux clubs sportifs professionnels* because the beneficiary is not one local sport association or one local sport installation, but a group with branches which operate climbing centers across Germany, and it has other commercial activities as well. Moreover, DAV performs considerable activities (such as hotel and restaurant services in refuges) in other Member States, particularly in Austria and Italy. There is

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<sup>14</sup> Case C-372/97 *Italy v Commission*, paragraph 44 and case C-66/02 *Italy v Commission*, paragraph 111.

<sup>15</sup> Case C-66/02 *Italy v Commission*, paragraphs 115 and 117.

<sup>16</sup> Bochum is located around 80 kilometres from the Dutch border, Essen around 70 kilometres and Muhlheim around 50 kilometres.

<sup>17</sup> SA.31722 *Aid to sport in Hungary*, 9 November 2011.

therefore no need for the Commission to take a view whether there would be an effect on trade if the analysis was to be carried out only at the level of each climbing hall.

- (63) Therefore, the Commission concludes that the measures qualify as State aid within the meaning of Article 107 (1) TFEU, to the extent that they benefit DAV group. The Commission notes that the measures are general schemes which also benefit many other sports associations, many of which will be active only on a local level. In these cases, aid may not be present if the beneficiaries do not exercise commercial activities or there is no effect on competition or trade.

### **3.7. Compatibility of the aid**

- (64) To the extent that the schemes under assessment constitute State aid, the Commission has analysed their compatibility with the internal market.
- (65) The investigation of the Commission has, for reasons of administrative efficiency, been limited to the legal bases for the funding of DAV climbing halls in Berlin and Baden-Württemberg. However, all the aid granted to the construction of the DAV climbing halls is based on general legal bases which foresee subsidies for sport facilities operated by organizations having the status of an association serving a public interest (*gemeinnütziger Verein*). Therefore, the schemes in place in other *Länder* broadly present the same characteristics, and the Commission considers that the reasoning developed in this decision also applies to these comparable schemes.
- (66) Article 107 (3) (c) TFEU states that "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest" may be considered to be compatible with the internal market. According to the case-law, the Commission may declare State aid compatible with the internal market if the aid contributes to the attainment of an objective of common interest<sup>18</sup>, is necessary for the attainment of this objective<sup>19</sup>, and does not adversely affect trading conditions to an extent contrary to the common interest.
- (67) Accordingly, it is established Commission practice that measures may be declared compatible directly under Article 107 (3) (c) TFEU if they are necessary and proportionate and if the positive effects for the common objective outweigh the negative effects on competition and trade<sup>20</sup>. The Commission considers it appropriate here to ask the following questions:
1. Is the aid measure aimed at a well-defined objective of common interest?
  2. Is the aid well designed to deliver the objective of common interest? In particular:
    - (a) is the aid measure an appropriate and necessary instrument, or are there other, more suitable instruments?

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<sup>18</sup> Case T-162/06 *Kronoply v Commission* [2009] ECR II-1, especially paragraphs 65, 66, 74 and 75.

<sup>19</sup> Case T-187/99 *Agrana Zucker und Stärke v Commission* [2001] ECR II-1587, paragraph 74; Case T-126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraphs 41-43; Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraphs 68-69.

<sup>20</sup> Community framework for State aid for research and development and innovation, point 1.3 (OJ C 323, 30.12.2006, p. 1); Community guidelines on State aid for environmental protection, point 1.3 (OJ C 82, 1.4.2008, p. 1).

(b) is there an incentive effect, or in other words does the aid change the behaviour of undertakings?

(c) is the aid measure proportional, or in other words could the same change in behaviour be obtained with less aid?

3. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

### **3.7.1. Objective of common interest**

(68) The measures clearly aim at supporting amateur sport for masses and to improve access to it. According to Article 165 TFEU the promotion of sport is an objective of the Union which shall take account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. Indeed, the purpose of the funding is to promote climbing, related education and social life of amateurs including youth in associations based on voluntary activity of their members.

(69) The measures can therefore be considered to aim at promoting sport and physical integrity at least at a local or regional level.

### **3.7.2. Necessity of the aid**

#### **3.7.2.1. Aid measure as a necessary and appropriate instrument**

(70) Despite the commitment, both in terms of financial contributions and contributions in kind, of their members, sport associations such as DAV are normally not capable of financing the investment costs for sport infrastructure on their own. According to the Commission, the public co-financing of the construction and operation of the DAV climbing halls addresses a market failure (the projects would not be realised in the absence of public funding and investments in the climbing halls may bring about positive externalities in particular when they allow complementary activities to develop and where it would be difficult for a private owner/operator of a climbing hall to appropriate the commercial benefits of such complementary activities). Therefore, there is a long tradition of *Länder* and municipal funding of sport infrastructure. The provision of such infrastructure is regarded, in German administrative law, as a service of general economic interest (*Daseinsvorsorge*). However, Germany has not invoked Article 106 (2) TFEU in its observations.

(71) The different funding schemes have contributed to ensuring an adequate level of amateur sport infrastructure in Germany, which are often jointly used by sports associations, schools and other public institutions.

(72) The Commission therefore concludes that the aid measure is a necessary and appropriate instrument.

#### **3.7.2.2 Incentive effect**

(73) Schemes are only available for sports infrastructure which would not have been constructed absent the aid. Therefore, they ensure an incentive effect.

### **3.7.2.3. Proportionality**

- (74) Over time, the administrative authorities in charge of administering the various schemes have acquired detailed knowledge of the local funding needs and capabilities of the various sports associations.
- (75) In particular, they ensure – not least through their local knowledge and rules on eligibility in the different schemes – that aid is proportionate.
- (76) In the view of the Commission, the following elements – which are a common trait of the schemes – ensure in particular proportionality:
- (77) First of all, in order to obtain the status of association serving to a public interest, an association has to prove that it contributes to the promotion of amateur sport for masses.
- (78) In addition, various legal bases foresee supplementary conditions, namely an exclusion of commercial activities and an obligation to educate youth (see the detailed description above in points 28 to 30 and 36).
- (79) Furthermore, the DAV sections are non-profit making, permanent institutions in the service of the German society and any profit is to be reinvested in the sport and educational activities.
- (80) For these reasons, the Commission considers that the measures are proportionate.

### **3.7.3. Effect on trading conditions not contrary to the common interest**

- (81) Usually, the financing of amateur sport infrastructure owned and operated by sports associations serving to a public interest is very unlikely to adversely affect trading conditions to an extent that would be contrary to the common interest, as there is usually no competition: most sports, in particular team sports, are not offered on the market by private competitors. The negligible number of complaints on State aid to amateur sports associations also illustrates this point.
- (82) The detailed analysis of the effect on trading conditions in the present decision is therefore limited to DAV group.
- (83) The Commission considers that for the purpose of this analysis, it is appropriate to analyse first of all whether the measures are likely to affect trade in a significant manner. In the view of the Commission, where the impact of a measure on trade is limited, it is unlikely that trading conditions are adversely affected to an extent contrary to the common interest. In a second step, the Commission will analyse the concrete impact of the measures on competition, and show that also the impact on competition within Germany is limited, and therefore not contrary to the common interest.

#### **3.7.3.1. Effect on trade**

- (84) There is no DAV climbing hall outside Germany. Furthermore, the DAV climbing centers do not have power to attract clients from abroad. According to the information available to the Commission, the measures are targeted only at local or regional sport activities. The sections develop their activities in their local area or region and also their advertising activities, if any, can be considered local or regional. The operators of



commercial climbing facilities in Germany are generally smaller, local companies with limited liability. The competitors of climbing halls of the DAV sections and of the complainants are thus limited to operating sport facilities in the respective municipality and the local or regional surroundings. The DAV climbing halls provide their services or advertisements neither abroad nor in cooperation with foreign persons or entities. The website of DAV is published solely in German, with national, regional or local content. In principle, no demand arises for the services of the DAV climbing halls abroad and clients from abroad are not even potentially affected. Multilingual websites or international advertising of the DAV climbing centers are also not carried out. The fact that a DAV section wants to open a (planned) climbing centre to international competitions does not imply that that DAV section is active abroad. The Commission thus considers that the beneficiaries and the complainants are active only in the respective municipalities and its local or regional surroundings. This limits the potential of the measure to affect trade.

- (85) Indeed, the catchment area of climbing halls is limited. Therefore, the Commission fails to see how the Berlin climbing hall or the climbing halls in Neu-Ulm, Kassel, Darmstadt, Wuerzburg, Munich, Regensburg and Frankenthal could attract climbers from other Member States.<sup>21</sup> Even in border areas, the effects on trade would thus be limited.
- (86) The fact that the climbing halls belonging to complainant B include climbing halls in Germany, Austria and Switzerland, and that two members of complainant B, operating one climbing center in Germany and one in Austria, have the same owners, does not, as such, show that intra-Union trade may be affected by the measures to an extent contrary to the common interest.
- (87) Neither the capacities of the planned and existing DAV facilities and the numbers of their users, nor the existence of the website climbing.de, which is published exclusively in German, or of a master plan of the DAV change the Commission's assessment of the limited impact of the measures at hand on the EU trade. As far as the "German Leadcup 2012" is concerned, the Commission understands that although this competition is organized in three countries, the participants are non-professional individuals, but not professional individuals or teams.
- (88) It can be concluded that as regards the effect on trade, the DAV climbing centres do not compete with climbing centres in another Member State. None of the DAV climbing centres has transnational character. In any case, the sport activities as well as the advertising, if any, seem to attract mainly persons from Germany. Moreover, the amount of visitors from other Member States in the climbing halls in the border area seems to be limited.
- (89) The Commission concludes that the effect of the measures on trade is limited. Therefore, it takes the view that trading conditions are not adversely affected to an extent contrary to the common interest.

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<sup>21</sup> Berlin-centre lies around 80 kilometres from the Polish border, Neu-Ulm around 120 kilometres from the Austrian border, Kassel around 250 kilometres from the Dutch border, Darmstadt around 140 from the French border. Wuerzburg around 190 from the French border, Munich around 80 kilometres from the Austrian border, Rechenburg around 80 kilometres from the Czech border and Frankenthal around 80 kilometres from the French border.

### 3.7.3.2. Impact on competition

- (90) While defining the size of their facilities and their offer, the DAV climbing halls take account in the first place of their members. In such circumstances, the distortion of competition would be limited. All the precautions taken by the German authorities ensure proportionality of the aid at stake.
- (91) Considering the geographic areas concerned (municipalities or regions in Germany) and the fact that the public financing is only used for specific investments (construction of climbing facilities), the possible impact of the measures on competition is further reduced.
- (92) The Commission furthermore considers that the capacity of the DAV planned or existing climbing halls, even if bigger than the needs of existing members of the DAV, is not crucial. For the Commission it is evident that the majority of the activities of the non-profit DAV (activities of members, schools and disabled) has no potential to affect competition to an extent contrary to the common interest. What is more, the Commission considers that the activities performed in all DAV climbing centers is not a professional sport, but a non-profit making amateur sport for masses, schools or socially disadvantaged persons.<sup>22</sup> The distortion of competition with commercial climbing is also reduced by the fact that the DAV climbing halls are in the first place used by its members.
- (93) With regards to the listing on a website of a third party mentioned by the complainants, the Commission observes that sport and competition climbing is not considered as a profession. As far as the "Leadcup 2012" is concerned, internet searches indicate that this is an amateur sport event, which cannot be compared with competitions among professional clubs.<sup>23</sup> In the DAV competitions individual competitors participate, so that clubs do not compete against each other. The aim of such sporting events is in the Commission's view the non-commercial promotion of sport in the society.
- (94) The Commission acknowledges that the opening of a DAV climbing center may lead to a loss of revenue for an existing private operator. However, the private operator is unlikely to meet the public interest in the provision of affordable climbing facilities, and has the possibility to make its view known to the public authority in charge of administering the measure in question. As the example of the DAV climbing center in Berlin illustrates, the available remedies under national law are capable of ensuring a balance of interests, which in the case of Berlin has led to a significant reduction of the overlap between the business of the commercial climbing center and the DAV climbing center (see above point 42, fourth bullet).
- (95) For these reasons, the Commission takes the view that the impact on competition is also limited. Therefore, it takes the view that trading conditions are not adversely affected to an extent contrary to the common interest.

### 3.8. Conclusion

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<sup>22</sup> Cf. N 118/00 *Subventions publiques aux clubs sportifs professionnels*, 25 April 2001; N555/2004 *Individual measures in favour of Omniworld*, 6 April 2005; SA.31722 *Aid to sport in Hungary*, 9 November 2011.

<sup>23</sup> SA.31722 *Aid to sport in Hungary*, 9 November 2011.

(96) The Commission considers that the measures, insofar as they constitute State aid, can be declared compatible with the internal market on the basis of Article 107 (3) (c) TFEU.

#### **4. DECISION**

(97) On the basis of the foregoing assessment, the Commission has decided to consider the measures as compatible with the internal market under Article 107 (3) (c) TFEU.

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European Commission  
Directorate-General for Competition  
State Aid Greffe  
Rue Joseph II 70 / Jozef II straat 70  
1049 Brussels  
BELGIUM

Fax +32 229-61242

Yours faithfully,

For the Commission

Joaquín ALMUNIA  
Vice-president