Reference No.
U 1274/09. Kart
12 HK O 57/09 Kart
Regional Court Mainz

Pronounced:
on 17.12.2009

COPY

Wetzlar, Clerk of the Higher
Regional Court

HIGHER REGIONAL COURT

OF KOBLENZ

IN THE NAME OF THE PEOPLE

JUDGEMENT

In the proceedings for the issue for an interim injunction of

1. Airparks Hahn, represented by Jörg Jlies, Michael-Felke-Strasse, 55487 Sohren

2. ABC Holiday Plus GmbH, represented by the managing director Martin Pundt, Aldenbackstrasse 52, 81879 Munich

Plaintiffs, appellants under 1) and 2) and
Cross-appeal defendants under 1) and 2),

Legal representative: Thümmel und Partner, lawyers, Urbanstrasse 7, 70182 Stuttgart

versus

Flughafen Frankfurt-Hahn GmbH, represented by the managing director, Jörg Schumacher, Gebäude 667, 55483 Hahn-Flughafen,

Defendant, appellee and cross-appeal plaintiff

Legal representative: Dr. Müller-Heidelberg und Partner GbR, lawyers, Veronastrasse 10, 55411 Bingen –

the 6th Civil Division of the Higher Regional Court of Koblenz, through the vice-president of the Higher Regional Court, Sartor, the judge at the Higher Regional Court, Ritter and the judge at the District Court, Steinhausen

ruled as follows regarding the hearing of 03.12.2009:

Following the appeal of the plaintiff under 1) and the cross-appeal of the defendant, the judgement of the 12th Chamber for Commercial Matters of the Mainz Regional Court, pronounced on 02.10.2009, is partially amended and is reworded overall as follows:

> The defendant is ordered to grant the plaintiff under 1) against payment of a consideration of 250.00 EUR per month plus turnover tax, payable in each case on the first working day of each month, unrestricted access to the shuttle bus bay at terminal 2 at Frankfurt-Hahn airport, 55483 Hahn-Flughafen, for the purpose of providing shuttle services, i.e. picking up and setting down passengers.
>
> The pleas of the plaintiff are otherwise rejected.

The appeal of the plaintiff under 1) and the cross-appeal of the defendant are otherwise rejected. The appeal of the plaintiff under 2) is rejected.

The costs of the legal dispute as a whole are allocated as follows: Of the court costs, the plaintiff under 1) will pay 1/6th, the plaintiff under 2), 1/2 and the defendant 1/3. Of the out-of-court costs of the defendant, the plaintiff under 1) will pay 1/6th and the plaintiff under 2) 1/2. The defendant will pay 2/3rds of the out-of-court costs of the plaintiff under 1). Otherwise, each party will pay its own out-of-court costs.

Grounds

The plaintiff under 1) maintains a parking place with shuttle service close to Frankfurt-Hahn airport. The parking space is operated by the defendant, which is also the owner of the airport grounds. The plaintiff under 2) markets the commercial services of the plaintiff under 1) for a percentage share in its turnover. The plaintiffs demand from the defendant that it allow them access to the roadway immediately in front of the terminal of Frankfurt-Hahn airport.

After the plaintiff under 1) had had unimpeded access with its shuttle service to the roadway, which passes in front of the airport terminal (so-called terminal ring road) for a considerable time, the defendant in a letter dated 14.07.2009, requested that the plaintiff and other shuttle services companies which come to the airport, in future only drive as far as the bus station, which is approximately 250 metres from the terminal. In a letter of 30.07.2009 the defendant forbade the plaintiff under 1), under threat of legal proceedings, to drive the shuttle vehicle into the area directly in front of the terminal.

The plaintiffs submitted that the defendant, which undisputedly operates its own parking spaces at or near the airport, including a parking space with shuttle service, was acting improperly in that it was forcing the plaintiffs out of the market.

The plaintiffs have petitioned that:

1. the opponent , under penalty of a fine of up to 25,000 EURO for every case of contravention, alternatively coercive detention of up to 6 months or imprisonment up to 6 months, be ordered to permit the claimants, on payment of a reasonable remuneration as judged by the court, unlimited access to the terminal ring road on the grounds of Frankfurt-Hahn airport, 55483 Hahn-Flughafen, for the purpose of providing shuttle services, i.e. for picking up and setting down passengers;

alternatively,

2. The opponent, under penalty of a fine of up to 25,000 EURO for every case of contravention, alternatively coercive detention of up to 6 months or imprisonment up to 6 months, be ordered to permit the claimants, on payment of a reasonable remuneration as judged by the court, unlimited access to the taxi rank in front of terminal 1 on the grounds of Frankfurt-Hahn airport, 55483 Hahn-Flughafen, for the purpose of providing shuttle services, i.e. for picking up and setting down passengers;

Alternatively,

3. The opponent, under penalty of a fine of up to 25,000 EURO for every case of contravention, alternatively coercive detention of up to 6 months or imprisonment up to 6 months, be

ordered to permit the claimants, on payment of a reasonable remuneration as judged by the court, unlimited access to the shuttle bus bay at terminal 2 on the grounds of Frankfurt-Hahn airport, 55483 Hahn-Flughafen, for the purpose of providing shuttle services, i.e. for picking up and setting down passengers;

Alternatively,

4. The opponent, under penalty of a fine of up to 25,000 EURO for every case of contravention, alternatively coercive detention of up to 6 months or imprisonment up to 6 months, be ordered to permit the claimants, on payment of a reasonable remuneration as judged by the court, unlimited access to the parking area P0 on the grounds of Frankfurt-Hahn airport, 55483 Hahn-Flughafen, for the purpose of providing shuttle services, i.e. for picking up and setting down passengers;

Alternatively,

5. The opponent, under penalty of a fine of up to 25,000 EURO for every case of contravention, alternatively coercive detention of up to 6 months or imprisonment up to 6 months, be ordered to re-establish the existing shuttle bus bay in the cargo area of Terminal 2, 55483 Hahn-Flughafen, and to allow the claimants on payment of a reasonable remuneration as judged by the court, unlimited access to the terminal ring road on the grounds of Frankfurt-Hahn air, for the purpose of providing shuttle services, i.e. for picking up and setting down passengers;

Alternatively,

6. The opponent, under penalty of a fine of up to 25,000 EURO for every case of contravention, alternatively coercive detention of up to 6 months or imprisonment up to 6 months, be ordered to provide shuttle services, i.e. for picking up and setting down passengers, using its own shuttle buses, and likewise to use only the bus stop allocated to the claimants at the bus station at Frankfurt-Hahn airport, 55483 Hahn Flughafen.

The defendant requested rejection of the application for the issue for an interim injunction and pleaded that there was no improper behaviour towards the plaintiffs. The prohibition of access was based on the fact that visitors to the airport are put at risk by traffic, including shuttle vehicles, directly in front of the terminal. It was reasonable for the plaintiffs and their customers to use the bus station.

The Regional Court ordered the defendant by an interim injunction, to allow the plaintiffs access to the shuttle bus bay at terminal 2 on the grounds of the Frankfurt-Hahn airport against payment of 2.50 Euro per arrival and departure at the terminal for the purpose of providing shuttle services and to reject the plea of the threat of coercive payment or coercive detention. Reference is made to the actual findings in the contested decision.

As grounds for their appeal, the plaintiffs submit that the remuneration fixed by the Regional Court is unreasonably high; the plaintiff under 1) could no longer operate at a profit at this rate.

The plaintiffs request

That the contested decision be amended and the defendant be ordered to grant the plaintiffs, against payment of a reasonable remuneration as judged by the court, amounting to a maximum of 300.00 EUR per year plus VAT, unlimited access to the shuttle bus bay at Terminal 2 on the grounds of Frankfurt-Hahn airport, 55483 Hahn-Flughafen for the purpose of providing shuttle services, i.e. for picking up and setting down passengers.

The defendant requests

that the appeal be rejected,

and by way of the cross-appeal

the contested judgement be amended and the application for issue of an interim injunction be rejected.

It submits that the plaintiffs are not aggrieved by the contested judgement because, in the first instance, they had not put a figure on the remuneration, which they were prepared to pay. The interim injunction had been unjustly issued. The plaintiffs had no claim to use the terminal ring road, particularly since the bus station is available as a stopping place. In addition, there was no reason for the order, because the terminal ring road would continued to be used unhindered by the shuttle service of the plaintiff under 1).

The plaintiffs request that

the cross-appeal be rejected.

Regarding all the further details of the submissions of the parties, reference is made to the written pleadings and documents (up to p. 274 Court file) submitted up to the end of the hearing and to the minutes of the hearing of 03.12.2009 (p. 276 ff Court file). After the end of the hearing, the defendant filed a written pleading of 07.12.2009 (p. 283 ff. Court file) and the plaintiff filed a written pleading of 11.12.2009 (p. 289 ff. Court file).

II.

A. Appeal and cross-appeal are admissible.

In so far as they attack the contested judgement, the plaintiffs are aggrieved by this.

The admissibility of a remedy submitted by the plaintiff depends on whether there is a so-called formal grievance: the plaintiff is aggrieved by a court decision if it deviates from the application submitted to the lower court to his disadvantage, and in other words, his request has not been fully met (Federal Supreme Court [BGH] NJW 1999, 1339). To the extent that the plaintiffs in the present case are not aggrieved by the fact that the Regional Court did not grant its applications under 1) and 2) (main application and first plea in the alternative), they did not, of course, dispute the judgement. However, there is a grievance in the fact that the Regional Court granted the injunction application under 3) (second plea in the alternative) on condition that a remuneration of 2.50 EUR per arrival and departure be paid to the defendant. This is not jeopardised by the fact that the plaintiffs neither put a figure on the amount of the remuneration payable in their applications nor did they indicate a maximum amount in their submission. Therefore, the following applies: each of the requests mirrors an unspecified payment request and is therefore – as far as the grievance is concerned – to be treated in the same way. The principles, which the Federal Supreme Court follows in its jurisdiction for unspecified payment claims, shall therefore be applied correspondingly here. If the plaintiff, in submitting an unspecified request for payment, keeps open a possibility of a remedy, then he must name the amount that he would like awarded and where this amount is not met, he regards himself as not receiving satisfaction (Federal Supreme court, NJW 1999, 1339, 1340). With reference to the present proceedings, this means: the claimants should in principal, have indicated an amount, which the remuneration fixed by the court, should not fall short of. But even then, if the plaintiff – as in this instance – has asked the court to adjudicate on the level of the amount payable, without indicating numbers, then as an exception, a grievance is to be assumed, if the amount fixed by the court clearly does not correspond to the perceptions of the plaintiff, as can be gathered from the petition submitted, for example, if compensation for pain and suffering is awarded, which, considering the physical injury pleaded, is clearly far too low (Federal Supreme court, NJW 1966, 780; Zöller / Gummer / Heßler, Code of Civil Procedure, 28th edition, before § 511 marginal No. 17a). This is a corresponding case.

The remuneration of 2.50 EURO per arrival and departure payable according to the judgement of the Regional Court exceeds many times the amount which, according to the statement of facts of the plaintiffs, can just about be considered reasonable. The fixed remuneration corresponds to an annual remuneration of more than 31,000.00 EUR based on the daily frequency submitted by the plaintiffs of roughly 30 to 40 shuttle trips by the plaintiff under 1). If we assume, as submitted by the plaintiffs, that in all a total of roughly 1000 vehicles access the area directly in front of the terminal building every day, then given the same volume of use by all these customers, this would result in a total annual remuneration of more than 900,000 EUR. If we take into account a maximum annual linear depreciation of the "terminal ring road" of 1/15th and after deduction of the share of annual operating costs attributable to the terminal ring road and taxes amounting to less than 100,000.00 EUR, this amount would correspond to 6% net worth return on a capital invested of far more than 6 million EUR. However, this is not in a reasonable relationship with the actual value of the roadway, to which the defendant is to grant access, because the defendant has clearly only spent a fraction of this on building the terminal ring road. The remuneration fixed by the regional court is therefore quite clearly excessive and does not correspond to the perceptions of reasonable remuneration, which the plaintiff sensibly had according to the facts they submitted. The plaintiffs are therefore aggrieved by the contested decision.

B. In this case, the remedy of the plaintiff under 1) is partially successful, whilst the remedy of the plaintiff under 2) is not. The cross appeal of the defendant is only partially successful.

1. The Regional Court rightly issued the interim injunction in favour of the plaintiff under 1) (§§ 935, 940 Code of Civil Procedure), but set the remuneration payable too high. The plaintiff under 1) has a claim under §§ 33, 19, para. 1, para. 4, No. 1, 20 para. 1 GWB [Anti-competition law] that the defendant allows it to use the road directly in front of the terminal building of the Frankfurt-Hahn airport.

a) Anyone who contravenes a regulation of the Cartel Law (GWB) is obliged to the party concerned to remedy this and, if there is a risk of recurrence, to desist (§ 33 para. 1, sentence 1 GWB). The defendant breaches § 19 para. 1, para. 4, No. 1 GWB. It abuses its dominant market position, in that it refuses the plaintiff under 1) partial access to the Frankfurt-Hahn airport installations and thereby impairs the competitive potential of this company in a way that is relevant to competition in the market, without objective and justified reason. In so doing, it simultaneously constitutes the facts - to this extent coincident with § 19, para. 1 GWB (see Immenga / Markert, GWB, 4th edition, § 20

marginal No. 239) – of § 20, para. 1 GWB, i.e. it prevents the plaintiff under 1), in an unfair way, from carrying on its business, which is normally accessible to companies of a similar kind.

aa). The plaintiff under 1) and the defendant are competitors in the market for parking spaces with shuttle services to and from Frankfurt-Hahn airport. A market of this kind is factually and spatially definable. According to invariable practice of the Federal Supreme Court, the decisive factor is the so-called demand market concept by which all products or services, which in the view of the demanders are exchangeable according to property, purpose and pricing to cover a particular need, can be assigned to a specific, relevant market (Federal Supreme Court, GRUR* 1996, 808, 810). In this case we have to proceed on the basis of the demand for parking spaces of the flight passengers, who arrive at Frankfurt-Hahn airport in a private car, which will enable them to reach the airport site without spending a great deal of time. Not included in the relevant market are those flight passengers, who wish to use parking spaces directly at the airport terminal. Because of the quite considerable difference of the prices between these parking spaces (currently at least 7.00 EUR per day / 40.00 EUR per week) and those which are further away from the airport (e.g. in the case of the plaintiff: 3.00 EUR per day / 27.00 EUR per week), there is no interchange ability in this respect. What is relevant therefore, is only the market for parking spaces, for which there is a shuttle service – provided either by the car park operator or a third party company. In spatial terms, the market is defined by the fact that it is important for the demanders to get precisely to Frankfurt-Hahn airport and not any other airport. In other words, the market is limited to the users who wish to avail themselves of flights from and to this airport. Active in this market are both the plaintiff under 1), which operates a car park with shuttle vehicle approximately 5 km away from the airport and the defendant. The latter maintains the car parks designated "P7" and "P8", which are situated roughly 0.8 to 1.5 km from the terminal building and for which the defendant provides a shuttle bus.

bb) The defendant dominates the market for car parks with shuttle service to and from its airport.

A company dominates the market, amongst other things, if, as a supplier or demander of a particular type of goods or commercial services, it has a predominant market position in relation to its competitors in the factually and spatially relevant market (§ 19, para. 2, No. 2 GWB). This is assumed acc. to § 19 para. 3, sentence 1 GWB, if the company has a market share of at least one third. This is the case here. The car park P7 maintained by the defendant has 3,500 parking spaces and car park P8 has 400 spaces. The car parks of the other companies that operate shuttle services to and from Frankfurt-Hahn airport make up a total of only roughly 1000 parking spaces. If we ignore car park P8, which according to the defendant is only used exceptionally, then the defendant has a market share of roughly 75%.

The dominant market position of the defendant is further reinforced by the fact that it alone has direct access to the airport terminal. The roadway, by which the terminal building is directly reached, is owned by the defendant so that without the latter's permission, shuttle vehicles may not set down or pick up passengers in front of the terminal entrance, but must do so at a distance of roughly 250 metres away. Here lies a legal and factual barrier in terms of market access by other companies (§ 19, para. 2 No. 1, half p. 2, 5 Alt.GWB). However, it remains to be seen whether, as a result, activity in the relevant market is only impeded or whether the shuttle services, which carry their passengers immediately up to the front of the terminal building, serve a part of the market that can be differentiated from the other car park and shuttle service market, in which, it is absolutely impossible for these companies to operate without using the terminal access road (§ 19, para. 4 No. 4 GWB). In any case, the distance between the shuttle service stop and the terminal represents, for the demander, a significant component of the service offered. The decision by an interested party in favour of one or other car park with shuttle service is decisively influenced by whether the customer is set down or picked up by the shuttle vehicle directly in front of the terminal entrance or at a not inconsiderable distance from it – in this case 250 metres. Therefore, if the price and quality are the same, the customer will decide in favour of the provider, whose shuttle service takes him close to the front of the terminal building.

cc) The fact that the defendant refuses the plaintiff under 1) access to the terminal ring road, represents a considerable impairment of competition in the relevant market (§ 19, para. 4 No. 1 GWB) and the plaintiff under 1) is thereby prevented from carrying on a business, which is usually accessible to the same type of companies (§ 20, para. 1 GWB).

Obstruction of another company according to § 20, para. 1 GWB means, in a purely objective sense, any impairment of its potential to operate in competition, irrespective of whether anti-competitive or otherwise controversial means are employed (see § 26 para. 2 GWB old version: Federal Supreme Court NJW 1982, 46, 47). This is such a case. Because the plaintiff under 1) is prevented from transporting its customers directly in front of the defendant's terminal and to pick them up from there again, it suffers a severe competitive disadvantage. The only decisive way of answering the question of whether there is obstruction within the meaning of § 20, para. 1 GWB or impairment within the meaning of § 19 para. 4 No. 1 GWB, is the behaviour of the demanding consumers. When a potential customer decides which of the services offered in the car park with shuttle service market he will choose, the degree of convenience offered plays a decisive role in addition to the price and therefore, according to the belief of the senate, so too does the question of whether the customer – with luggage as appropriate – can get from the shuttle vehicle to the aircraft or from the aircraft to the shuttle vehicle in the shortest time and with as little effort as possible. At a competitive disadvantage therefore, are those providers whose shuttle vehicles do not stop directly in front of the terminal but set down or pick up their passengers at the point provided by the defendant, approx. 250 metres away, the more so since the footpath to the terminal building is not under cover and is uneven in parts. Completely irrelevant in this connection is whether the effort associated in covering this distance on foot is reasonable for the customers, as the defendant believes. For the demander, who has to decide between two providers, who offer a different level of convenience at the same price, this is unimportant.

dd) The defendant obstructs the plaintiff under 1) "in business dealings that are usually accessible to companies of the same kind" (§ 20, para. 1 GWB). What is important here is not the business practice of that company, which is subject to obstruction. Rather, the argument should be based on the practice that grows out of natural commercial development and the understanding of the business groups in question (Federal Supreme Court, NJW 1972, 483, 484), i.e. in the present case the normal practice at airports. This includes being allowed to drive shuttle services up to the front of the terminals. According to the undisputed submission of the plaintiffs, this is the practice in, at least, fourteen German airports. Even at the airport of the defendant, it was usual, up until 2009 for shuttle services to be allowed to use the road directly in front of the terminal. Business practice relating to car parks with shuttle services, which transport their customers directly up to the front of the airport terminals, is normally accessible to companies like the plaintiff under 1). The ban now imposed by the defendant on all shuttle services alters nothing.

ee) The obstacle put in front of the plaintiff under 1) by the defendant is unfair (§ 20, para. 1 GWB). It is done without any justified reason (§ 19, para. 4, No. 1 GWB).

The feature of unfairness within the meaning of § 20, para. 1 GWB shall be reinforced by virtue of an overall evaluation and assessment of the interests of the parties involved, taking into account objectives of the law aimed at freedom of competition (Federal Supreme Court, NJW 1982, 46, 48). The same applies to the lack of any objectively justified reason under § 19, para. 4, No. 1 GWB (Federal Supreme Court, NJW 1969, 1716, 1717; Immenga / Markert § 19 marginal no. 115). Speaking for the obstructed norm-addressees, all interests can, in principle, be considered when weighing up the interests, provided they are not directed towards illegal purposes or breach prohibitions and legal appraisals of the GWB, in particular § 19, para. 1 GWB or of other legal provisions. The limit on acknowledging these interests under § 20, para. 1 GWB only becomes apparent from consideration of the individual interests of other parties involved and the standard assessment of interests (Immenga / Markert § 20 marginal No. 131). Speaking for the obstructed company, its interest has to be considered so that its ability to operate competitively is not jeopardised by power-related behaviour of norm-addressees of § 20, para. 1 GWB. This includes in the first place, interest in freedom of market access and interest not to be disadvantaged by the impairment of equality of opportunity in operating competitively in the market compared with other companies, where there is open market access (see for example, Federal Supreme Court, NJW 1969, 1716, 1718; Immenga / Markert § 20, marginal No. 132).

In the present case we have, on the one hand, the interest of the plaintiff under 1) in operating its car park with shuttle service profitably and for this purpose in free access to the terminal ring road. Against this, is the interest of the defendant to have free disposal over the airport site in its possession, to maintain smooth operation of the airport, in particular to protect users of the airport against damage and interference and to operate its own car parks as profitably as possible. Any overriding interest of the defendant is denied in this case.

aaa) The interest of the plaintiff under 1) in being able to set down or pick up passengers with its shuttle service directly in front of the terminal building, arises from the fact that, as already stated, there is otherwise a considerable competitive disadvantage for it compared with those companies, for which this is possible, i.e. compared with the defendant. The plaintiff under 1) could only compete with this disadvantage by offering its services at a lower price than the defendant. However, the plaintiff under 1) would run the risk of no longer being able to operate profitably.

The owner of the plaintiff under 1) has given credible assurance that its company achieved sales of approx. 120,000.00 EUR in the last year – after deduction of the amounts paid over to the plaintiff under 2) - but could only expect much reduced sales, once the defendant reduced the prices for its car park P 7 and in consequence of which a severe decline in sales was already experienced by the plaintiff under 1). Whilst the latter has, up to now, offered its services at a price of 3.00 EUR per parking space and day or 27.00 EUR per week, the defendant charges 2.50 EUR per day or 17.50 EUR per week. Whether the plaintiff under 1) can continue to operate profitably after dropping its prices below this level is at least questionable.

bbb) According to its own submission, the defendant sees detriment to its interests solely in the fact that traffic in the vicinity of the terminal from approx. 20 shuttle services, which serve the airport, will increase so much, that the safety of passengers and visitors to the airport would no longer be guaranteed. In this connection, the defendant submitted the affidavit of its employee, Heidi Porteset, of 27.11.2009, according to which the shuttle vehicles frequenting the airport were waiting, at least when picking up passengers, "longer" and indeed, in some cases more than 15 minutes in front of the terminal building and in some cases were double parked. Against this, the proprietor of the plaintiff under 1), at its hearing before the senate, stated that its shuttle vehicle only ever stopped for a few minutes in front of the terminal building. This applied not only to setting down but also to picking up passengers; because the shuttle service is only notified by telephone once the passengers arriving by aircraft have already collected their luggage at the baggage reclaim. There is no material contradiction between this description and the above-mentioned affidavit, because in the affidavit it remains unclear how many minutes are meant by "longer". The affidavit does not state that the vehicles of all shuttle services stopped for longer than 15 minutes in front of the terminal and it also did not indicate which vehicles of which shuttle service were concerned. The senate therefore regards it as credible that the only shuttle vehicle of the plaintiff under 1) is directly in front of the terminal building for a short time. It should also be considered that the vehicle in

question is a saloon car, i.e. a Fiat Doblo type, in other words, a vehicle of only small dimensions, which in any case is no larger than the vehicles of private travellers, who use the terminal ring road.

It can also not be assumed that there was a noticeable increase in traffic on the terminal ring road before the ban was announced by the defendant. According to the undisputed submission of the defendant, the proportion of flight passengers arriving at the Frankfurt-Hahn airport in their own car, has steadily declined since 2005 and in 2008 was roughly 15% less than in 2005. Against any deterioration in the traffic conditions is also the fact that on the official website of Frankfurt-Hahn airport, those flight passengers arriving by car are expressly requested first of all to drive up to the terminal and allow their passengers and luggage to disembark there, and to then take their vehicle to a car park. It can therefore be assumed that a not inconsiderable number of private cars use the terminal ring road because of this request, thereby contributing to an increase in traffic. It can be concluded from the fact that the defendant considers it justifiable that, in its own estimation, there is no unreasonable traffic situation at the front of the terminal. Therefore, there is no necessity to exclude the plaintiff under 1) from using the terminal ring road on account of the volume of traffic.

ccc) When assessing the interests of the parties, the quite considerable interest of the plaintiff under 1) in continuing with the profitable operation of its business should be given priority over the interests of the defendant.

In this case it must be considered that any unfairness of the obstruction can only be denied if the restriction of competition is a reasonable and justifiable means of preserving the interests of the obstructing party. In particular it must go no further than is necessary objectively and in terms of time, so that the company that dominates the market can pursue its interests, which are acknowledged as legitimate if considered objectively (Gloy / Karl / Reichelt, Manual of competition law, 3rd edition, § 39 marginal No. 42). The ban imposed on the plaintiff under 1) goes beyond this. It cannot be assumed that as a result of the roughly 35 daily journeys of the relatively small vehicle of the plaintiff under 1), traffic in front of the terminal would be made noticeably worse and the safety of visitors put at risk.

Even if the volume of traffic on the terminal ring road was said to have increased unreasonably by the roughly 20 shuttle services operating there, this would not make it necessary to forbid access to all shuttle vehicles with the exception of the shuttle bus of the defendant. Rather, it can be assumed with certainty that at least allowing some of the shuttle services to use the terminal ring road would not cause the traffic situation to deteriorate unreasonably. However, if it were necessary – and the senate is not assuming this on the basis of the facts submitted – to refuse access to some of the shuttle services in order to reduce the traffic volume, then there would have to be an objectively justified reason for this, according to the principles of § 20, para. 1 GWB vis-à-vis each of the excluded companies, to put them at a disadvantage. The defendant cannot get round this requirement by extending this ban to all its competitors. Certainly this does not constitute different treatment compared with companies of the same kind under § 20, para. 1 GWB, because in our opinion, giving preference to a company that is one of the norm-addressees compared with all the competitors, shall not be regarded as different treatment within the meaning of this provision. However, giving preference to one's own company, when examining the case, should be taken into account when considering whether there is a case of unfair obstruction (Immenga/ Markert § 20 , marginal No. 126). Therefore, an objectively justified reason must be demanded for excluding precisely the plaintiff under 1) from using the terminal ring road. However, no such reason can be found. Whether the plaintiff or – as in the case of discrimination acc. to § 20, para. 1 GWB – the defendants are obliged to present the case and provide evidence (see Immenga / Markert § 20, marginal No. 236), therefore, remains to be seen.

The defendant wrongfully invokes the judgement of the European Court of Justice of 26.11.1998 – ref. C-7/97 – and attempts to deduce from this that there is no case of abuse against the plaintiff under 1) within the meaning of § 19, para. 1 GWB, because the latter's shuttle service was able to call at the bus station, which is 250 metres away from the terminal. The decision of the European Court of Justice is already not relevant, because it only examines the applicability of Art. 86 EC Treaty, old version. Furthermore, the facts being judged by the European Court of Justice differ significantly from the case being decided here. In that case, abusive conduct of a potential market dominating newspaper publisher , who refused the use of the only national newspaper delivery system to a competitor, was denied amongst other things, because it was not demonstrated that the competitor was not in a position, perhaps together with other competitors, to set up an equivalent delivery system. However, in the present case it is beyond dispute that it is completely impossible for the plaintiff under 1), without access to the airport premises owned by the defendant, to operate a shuttle service, which sets down its passengers directly in front of the terminal.

ddd) In so far as the norm-addressee – as in this case – is a market dominating company, an unfair obstacle within the meaning of § 20, para. 1 GWB, as a rule also constitutes the definition of an offence of § 19, para. 1 GWB (Immenga / Markert § 20 marginal No. 239), as also in the present case. The obstruction of the plaintiff under 1) by the defendant is at the same time a considerable detriment to competition for the reasons highlighted in connection with unfairness, without objectively justified reason (§ 19, para. 4, No. 1 GWB). It remains to be seen whether in the present case the offence of § 19, para. 4 No. 4 GWB is fulfilled or whether there is lack of a definable market, in which it can be made completely impossible for the plaintiff under 1) to operate without using the infrastructure maintained by the defendant.

b) The claim of the plaintiff under 1) according to § 22, para. 1 GWB is only directed towards removing or desisting from obstructing competition. However, in the present case rectifying the breach of competition law requires action on the part of the defendant, namely either the signing of a contract with the plaintiff concerning the use of the airport grounds or at least a legally-binding statement, that such use will be allowed. Any obligation by the competitor to this end, which is shown to be as an obligation to contract or at least comes close to being such, has been regularly dealt with in the adjudication of the Federal Supreme Court as a duty to pay compensation, directed towards restitution, be it in accordance with § 33 para. 3 GWB or § 35, para. 1 GWB old version, or according to § 823, para. 2 BGB (see for example, Federal Supreme Court NJW-RR 1999, 189, 190). Any such obligation on the part of a market dominating company, which in business dealings that are usually accessible to companies of the same kind, unfairly refuses business relations to a weaker company, will however, correctly have to be understood as a direct product of the obligation to desist under § 33, para. 1 GWB, which exists independently of any fault (as well as Federal Supreme Court NJW 1999, 825, 826 to § 35 GWB old version; see Immenga / Markert § 33 marginal No. 231). The defendant is therefore obliged under § 33, para. 1 GWB to act positively and to allow the terminal ring road to be used by the plaintiff under 1).

c) The consideration fixed by the Regional Court, which the plaintiff under 1) is to pay for using the terminal ring road, is unreasonably high. The senate considers a payment of 3,000.00 EUR per year to be reasonable.

Irrespective of whether the claim of the plaintiff under 1) is based on §§ 19, para. 4, No. 1, 20 para. 1 or on § 19, para. 4, No. 4 GWB, access to the grounds of the defendant shall in any case only be granted against a reasonable payment. It remains to be seen whether this can be derived from the legal concept of § 19 para. 4 No. 4 GWB when applying §§ 19, para. 4 No. 1, 20, para. 1 GWB or whether the plaintiff under 1) has a claim to signature of a contract, by which it is allowed access for a consideration to be determined in accordance with §§ 315, 316 Civil Code [BGB]. Even then, the consideration must be reasonable.

Under the interim injunction the appropriate consideration can only be fixed temporarily on the basis of a rough estimate. Any final and exact determination of the amount is reserved for the main proceedings, which are still to be conducted.

The parking fee of 2.50 Euro, which the defendant demands from those who stop in their vehicle on the terminal ring road for longer than 15 minutes or on car park P0, is not suitable as the yardstick for a reasonable consideration, because this fee clearly has the primary purpose of exercising pressure in order to shorten the stay of vehicles in this area and therefore exceeds any mere counter consideration for use of the terminal ring road.

To determine the reasonable consideration within the meaning of § 19, para. 4 no. 4 GWB, and based on the legal concept of § 19, para. 4 No. 2 GWB, the overwhelming view is that the access fee should, as far as possible, reflect the costs, which would ensue if there were effective competition (Immenga / Mestmäcker, GWB, 4th edition, § 19 Marginal No. 205; Gloy / Karl / Reichelt § 38 marginal no. 21). Reference literature recommends as a rough guideline, apart from the additional costs brought about by the use [of the ring road], the payment of a share of the fixed costs – which are admittedly difficult to determine in practical terms - and a reasonable return on the capital invested (Immenga / Mestmäcker loc. cit.; Wiedemann GWB § 19 marginal No. 65), as is even laid down by positive law for special industrial sectors, e.g. for passing through gas or electricity networks (GasNEV, StromNEV). These principles can also be applied to the present case.

In the present case, no special costs are apparent, which would be caused by allowing the plaintiff under 1) to access the terminal ring road. The appropriate consideration shall therefore be calculated as the total of the operating costs, applicable to the terminal ring road (individual costs applicable to the property and the share of overheads; see, for example, the appropriate remuneration for the joint use of gas line networks: § 4 GasNEV), the total of a reasonable interest

on equity capital (see § 7 GasNEV) and of an imputed amount for depreciation. The senate estimates the annual costs, including a share of the overheads and a share of taxes at 50,000.00 EUR. According to current practice, the interest on equity capital is calculated at a rate of 6% p.a. The capital represented by the structure of the road is taken to be approx. 350,000.00 EUR and the senate takes as the basis for the assessment a road of approx. 500 m in length and 10 m wide (excluding the car park P0) at a cost of no more than 70.00 EUR per m^2. With regard to linear depreciation, a service life of 25 years is assumed and hence an annual depreciation rate of $1/25^{th}$. This results in an amount of approx. 85,000.00 EUR per annum for total use of the terminal ring road. Of this, 3.5% (35 out of approx. 1000 journeys per day), i.e. approx. 3000.00 EUR are allocated to the plaintiff under 1). An annual consideration of this level, i.e.250.00 EUR monthly, is therefore reasonable.

d) There are grounds for an injunction under §§ 935, 940 Code of Civil Procedure. The issue of an interim injunction is imperative because there are concerns that, as a result of the access ban, the realisation of the right of the plaintiff under 1) to enjoy unimpeded practice of its business, will be frustrated or made significantly more difficult (§ 935, Code of Civil Procedure).

What cannot be accepted is the view of the defendant that there is no reason to issue an interim injunction because the plaintiff under 1) can continue to approach the area directly in front of the terminal. Once the defendant forbade the plaintiff under 1) to access the terminal ring road in a letter dated 30.07.2009 and threatened legal enforcement of a claim against the plaintiff under 1) to desist, the plaintiff under 1) is in breach irrespective of whether the behaviour of the defendant is anti-competitive and contrary to objective law, when it drives its shuttle vehicle directly in front of the terminal. The defendant is undisputedly the sole proprietor of the land in question and therefore has sole householder's right under § 903, Civil Code. Against this, the plaintiff under 1) has no material right to drive on the third party land, but the defendant is merely obliged to lift the ban. Just as the plaintiff under 1) could not assert this claim against actual measures taken by the defendant by taking the law into its own hands, so it cannot be expected to breach the third party right of ownership until further notice and to wait until the defendant brings the dispute before the court.

The plaintiff under 1) has to fear that it will not be able to continue its business if the ban imposed by the defendant continues. It is at least threatened with large financial disadvantages from being prevented from carrying on its business. These disadvantages cannot simply be cushioned by proper

assertion of its claims in the main proceedings, because, for one thing, any claim for compensation is dependent upon evidence of fault on the part of the defendant (§ 33, para. 3 GWB) and for another, there is a permanent threat to the business of the plaintiff if the shuttle service is partially suspended. This is sufficient to affirm reason for an injunction (see, for example. Karlsruhe Higher Regional Court, GRUR 1980, 811, 812).

The danger of losses that cannot be made good again, exists for the plaintiff under 1) even after the issue, by the regional court, of the interim injunction, which is contested here. On account of the burden resulting from the consideration fixed by the interim injunction, it is no longer possible for the plaintiff under 1), as its proprietor, Jörg Jlies substantiated at the hearing, to operate a profitable business. The latter substantiated the fact that the sales of his company declined sharply after the defendant reduced the prices for its P7 car park and therefore, significantly lower sales are expected in future than in previous years. The plaintiff under 1) up to now offers a price of 3.00 EUR per parking space per day or 27.00 EUR per week, but has to react to the fact that the defendant only charges 2.50 EUR per day or 17.50 EUR per week. If the plaintiff under 1) were also to incur additional costs amounting to more than 30,000 EUR per year, then its business would at the very least, be severely put at risk. Temporarily financing these costs by taking out a loan is unreasonable for the plaintiff with respect to the considerable risk that is associated with conducting main proceedings.

2. The cross-appeal of the defendant will have no success as long as it is directed against the interim injunction issued in favour of the plaintiff under 1). Regarding the reasons, reference is made to the preceding submissions concerning the appeal of the plaintiff under 1).

However, the cross-appeal of the defendant had to be partially granted in relation to the plaintiff under 2). The contested interim injunction had to be amended in so far as the defendant has been ordered also to grant the plaintiff under 2) access to the terminal ring road of Frankfurt-Hahn airport. The plaintiffs do not have any claim to this nor is there any reason for an injunction in this respect.

Under § 33, para. 1 GWB there is no claim to grant shuttle vehicles of the plaintiff under 2) access to the terminal ring road. The plaintiff under 2) does not operate a shuttle vehicle nor does it intend to become active in this market itself. The access ban imposed by the defendant is therefore directed

not against use of the airport grounds by the defendant under 2) so that to this extent, there is no improper exploitation of the dominant market position of the defendant.

3. The appeal of the plaintiff under 2) is not successful.

To the extent that the defendant, at the request of the plaintiff under 2), has been ordered to grant the plaintiff under 1) access to the terminal ring road, there is no reason for an injunction (§§ 935, 940 Code of Civil Procedure) with respect to the plaintiff under 2).

As a result of the interim injunction of 02.10.2009, the plaintiff under 1) has only been granted access to the terminal ring road on payment of a consideration to the defendant, the level of which the plaintiff under 2) is contesting. However, because the latter is active at a large number of domestic and foreign airports, there is no threat to its existence from the financial disadvantages, which it will incur from paying the consideration. This was confirmed by the representative of the claimant under 2) when questioned at the hearing. Therefore, there is no need for an interim ruling to uphold the rights of the plaintiff under 2). It therefore remains to be seen whether the plaintiff under 2) has any claim to access by the plaintiff under 1).

To the extent that access to the terminal ring road has been granted to the plaintiff under 2), there is no right to an injunction. In this respect, reference is made to the submissions relating to the cross-appeal.

C. The appeal of the plaintiff under 1) and the cross-appeal of the defendant were, after all, partially granted, as is apparent from the operative part of the judgement. Otherwise, the appeals and the cross-appeal were rejected.

The secondary decisions are based on §§ 91, para. 1, 92 para. 1, 97 para 1, 100 Code of Civil Procedure.

The value in dispute is fixed for the appeal proceedings at 50,000.00 EUR.

Sartor Ritter Steinhausen

Reference No.
12 HK O 25/10 Kart

Pronounced:
on 7.1.2011
Wirbelauer, Chief court assistant, as clerk of the Office of the Regional Court

REGIONAL COURT

OF MAINZ

ORDER FOR EVIDENCE

In the legal matter of

AIRPARKS HAHN Thümmel pp. Lawyers	VERSUS	FLUGHAFEN FRANKFURT-HAHN GmbH Dr. Müller-Heidelberg pp lawyer

I.

Evidence is to be provided concerning the following allegations by the defendant (sheet 48, 49, 50 GA).

1.
The total investment costs for the terminal ring road at Hahn airport (see Attachment B 6 / sketch) amount to 497,394.02 €. These total investments are calculated as follows:

[next page is the sketch] – Attachment B6

Autovermietung Hertz = Hertz car hire
Busbahnhof = bus station
Parkdeck = parking level

The terminal ring road comprises an area of 3,814 m^2 with building costs of 108.21 € per m^2 and hence building costs for the total area of 412,699.37 €,

by examination of the witness named by the defendant, Theodor Braun, Technical Department of the Defendant, to be summoned through the defendant.

2.
Added to this are 84,694.54 € for the necessary technical equipment for the terminal ring road, such as barrier system and electrical supply

by examination of the witness named by the defendant, Heidi Porteset, Parking Manager of the defendant, to be summoned through the defendant.

3.
The total investment of 497,394.02 € is to be depreciated over 10 years, producing an annual rate of depreciation of 49,739.40 €. Added to this is 6.5% interest on the capital employed so that the annual interest paid is calculated at 32,330.61 €,

By examination of the witnesses named by the defendant

a. Heidi Porteset,
b. Bernd Müller, the defendant's commercial manager, to be summoned through the defendant.

4.
The annual maintenance costs of the terminal ring road amount to 4.8% of the building cost, therefore to 23,874.91 €

by examination of the witness, Theodor Brau, named by the defendant, Technical Department of the Defendant, to be summoned through the defendant.

5.
Summer cleaning costs and winter service costs amount annually to 11,216.59 €.

by examination of the witness named by the defendant, Siegfried Gauer, to be summoned through the defendant.

6.
Servicing and maintenance of the technical equipment of the terminal ring road account for an annual cost of 35,092.47 €, so that the total annual costs for the terminal ring road work out at 152,253.93 €,

by examination of the witness named by the defendant, Thomas Boemer, Technical Department of the Defendant, to be summoned through the defendant.

II

The plaintiff is requested to pay an advance on disbursements of 150.00 € for each named witness or to submit witness fee waivers.

Period allowed for this: 3 weeks .

III

In the present main proceedings, the court also proceeds on the basic justification for a right of access under cartel law so that consequently it becomes necessary to take evidence regarding the level of reasonable consideration.

With regard to these circumstances, the court also considers the conclusion of a comprehensive settlement in the present stage of the proceedings as proper and appropriate to the interests involved.

The court proposes the conclusion of the following settlement to the parties, in accordance with § 278, para. 6 Code of Civil Procedure:

1) The defendant is ordered to allow the plaintiff, on payment of a consideration of 400.00 € per month (gross), payable in each case on the first working day of each month, unrestricted access to the shuttle bus bay at terminal 2 of the Frankfurt-Hahn airport, 55483 Hahn-Flughafen, for the purpose of providing shuttle services, i.e. for picking up and setting down passengers.
2) With the legally binding conclusion of this settlement, the present main proceedings 12 HK O 25/10 Kart, Mainz Regional Court, as well as the proceedings for the interim injunction 12 HK O 57/09 Kart, Mainz Regional Court (U 1274/09 Kart Koblenz Higher Regional Court) are finally settled.
3) Arrangements as to costs: The costs of the present action 12 HK O 25/10 Kart Mainz Regional Court cancel each other out.

Both parties are ordered to notify the court within three weeks of delivery of this order, as to whether the settlement proposed by the court is accepted or if a settlement is to be concluded on some other basis. If the settlement proposed by the court is accepted, then it is planned to proceed in accordance with § 278 para. 6 Code of Civil Procedure.

IV

The new date for the hearing and, if necessary, the taking of evidence will be officially decided.

Mainz, 7.1.2011

Regional Court
- 12th Civil Chamber -
- 2nd Chamber for Commercial Matters –

Endell
Presiding judge
at the Regional Court

Schreiber
Commercial judge

Schmitz
Commercial judge

Done:

Wirbelauer, Chief Court Assistant
as clerk of the court's office

Stamp: Mainz regional court