[DE] VG Berlin Rules on "Structural Improvement" in the Sense of Film Support Act

IRIS 2010-7:1/16

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On 27 April 2010, the *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG) ruled on the decisive criteria for defining "structural improvement" in the sense of Art. 56 para. 1 no. 1 of the *Filmförderungsgesetz 2004* (2004 Film Support Act - FFG 2004) and the date on which such criteria should be applied.

In the underlying case, the plaintiffs had applied to the *Filmförderungsanstalt* (Film Support Office - FFA) in 2006 for financial assistance with the construction of a multiplex cinema with 10 screens and 1,200 seats. The FFA refused the application, most recently in a decision taken on 29 November 2007, against which the appeal was lodged. The plaintiffs opened the multiplex cinema in December 2007.

The VG agreed with the FFA and rejected the appeal. It ruled that the basis for a claim in this case was provided by Art. 56 para. 1 no. 1 and para. 3 of the 2004 version of the FFG, in accordance with which the application was submitted. Under this provision, the FFA could provide financial assistance for the modernisation, improvement and construction of cinemas, as long as the project would produce a structural improvement.

The plaintiffs had argued that the new multiplex building had been constructed by a party that was not involved in the proceedings and that they themselves were only tenants or leaseholders, so the funding would not support the construction of a new cinema but the furnishing of it, which meant that a structural improvement was completely irrelevant. The VG rejected this argument and held that this case did concern a new construction in the sense of the Act, since "a new cinema was opened"; its ownership structure was irrelevant.

In this case, the new construction did not produce a structural improvement. In view of the case-law of the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG; see IRIS 2010-1: 1/14), such an improvement was only produced if, at the location concerned, "there is a shortage of cinemas for the local population, or at the very least, if the anticipated increase in ticket sales is so great that the average seat occupancy level (including new seats) will not be significantly lower than the average found in similar locations." An examination of the 19 similar cities used for such a comparison had shown that, before the

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multiplex had opened, the number of cinema screens and seats in the location concerned had been average and seat occupancy levels "(below) average". There had been no shortage of cinemas for the local population.

As regards the significant increase in ticket sales, the BVerwG required that this "is able to offset the increase in capacity linked to the new construction [...] and that existing providers will not be disadvantaged, or proof that the newly-built cinema will appeal to specific groups who are not adequately served by existing local cinemas."

The VG also thought that these criteria were not met in this case. According to the regular statistical surveys referred to by the FFG, the anticipated increase in ticket sales in the location concerned in 2007 had been no more than 16.7%, whereas the new multiplex had increased the number of seats by 140%. It had therefore been unlikely that the capacity increase would be offset. However, it had been foreseeable that fierce competition would result, which would be detrimental to the existing providers, since the plaintiffs, with the multiplex, owned 57% of the seats and 71% of the screens in the area. This threat to existing providers had been realised with the closure of both existing cinemas in 2009 and 2010.

The plaintiffs' claim that their cinema would appeal to specific groups by screening particularly highbrow films in its "*Kino für Kenner*" programme as well as Turkish-language films had remained unsubstantiated. In any case, the plaintiffs had failed to mention this to the FFA in their application, which was why it had not been taken into account.

This ruling cannot be appealed.

Urteil des VG Berlin vom 27. April 2010 (Az: 21 K 4.10)

http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/y1o/bs/10/page/sammlung.psml?doc.hl=1&doc.id=JURE100062156%3Ajuris-r01&documentnumber=27&numberofresults=537&showdoccase=1&doc.part=L&paramfromHL=true#focuspo

Ruling of the VG Berlin of 27 April 2010 (case no. 21 K 4.10)

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