

INFRASTRUCTURE ANALYTICAL GRID N° 6¹ – CONSTRUCTION OF SPORT AND MULTIFUNCTIONAL RECREATIONAL INFRASTRUCTURES

Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudice possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.

General principles

1. This analytical grid concerns aid for the construction and renovation of sport and multifunctional recreational infrastructures such as stadiums², multipurpose arenas³, sport and wellness facilities⁴, marinas⁵, climbing halls⁶.
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law.
3. The construction and renovation of sport and multifunctional recreational infrastructures constitutes an economic activity if the infrastructure is used to provide goods or services on a given market⁷ and thus exploited commercially. Where users, including professional⁸ and non-

¹ This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

² See Commission decision of 18 December 2013 in case SA.35501 - France - Financement de la construction et de la rénovation des stades pour l'EURO 2016, not yet published in the OJ, http://ec.europa.eu/competition/state_aid/cases/248555/248555_1532962_165_2.pdf.

³ See Commission decisions of 21 October 2008 in case C4/2008 - Netherlands - Investment of the municipality of Rotterdam in Ahoy complex, OJ L 248, 22.09.2009, p. 28, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009D0713&from=EN> of 15 May 2013 in case SA.33728 - Denmark - Financing of a new multiarena in Copenhagen, OJ L 152, 22.05.2014, p. 32, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0297&from=EN> and of 2 May 2013 in case SA.33618 - Sweden - Uppsala arena, OJ L 243, 12.09.2013, p. 19, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0452&from=EN>.

⁴ See Commission decision of 23 July 2014 in case SA.33045 - Germany - Alleged unlawful aid in favour of Kristall Bäder AG, OJ C 393, 7.11.2014, p. 2, http://ec.europa.eu/competition/state_aid/cases/247490/247490_1580456_110_2.pdf.

⁵ See Commission decision of 29 October 2003 in case C 10/2003 - Netherlands - On measures in favour of non-profit harbours for recreational crafts, OJ L 34, 6.02.2004, p. 63, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004D0114&from=EN>.

⁶ See Commission decision of 5 December 2012 in case SA.33952 - Germany - Climbing centres of Deutscher Alpenverein, OJ C 21, 24.01.2013, p. 1, http://ec.europa.eu/competition/state_aid/cases/246072/246072_1392662_211_2.pdf.

⁷ See for example Commission decision in case SA.33728 Copenhagen multiarena, see footnote 3, (recital 24).

⁸ See Commission decisions of 9 November 2011 in case SA.31722 - Hungary - Supporting the Hungarian sport sector via tax benefit scheme, OJ C 364, 14.12.2011, p. 2, http://ec.europa.eu/competition/state_aid/cases/240466/240466_1271180_52_3.pdf and in case SA.35501 - France - Stadiums EURO 2016 (see footnote 2).

professional users, have to pay a fee for the use of the infrastructure or where the infrastructure is rented out for the organisation of various events in return for remuneration, it is used on a commercial basis, i.e. for an economic activity.⁹ Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and the relevant funding may fall within the ambit of State aid rules.

Instances in which the presence of State aid is excluded

No economic activity: infrastructure for non-economic use

4. In circumstances where the aided infrastructure is used almost exclusively for non-economic activities, the principle of ancillarity may apply. That is to say, the existence of a small amount of economic activity that is directly related to and necessary for the operation of the infrastructure, or that is intrinsically linked to its main non-economic use, will not affect the overall classification of the activity as non-economic.

No potential effect on trade between Member States

5. The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis except for cases covered by the *de minimis* Regulations.
6. Support granted under the *de minimis* Regulation is not regarded as State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions of the *de minimis* Regulation are also respected¹⁰.
7. There may be no effect on competition and on trade between Member States, *inter alia*, in the following instances:
 - a. The financing of arenas or stadiums primarily used by amateur or smaller professional sport clubs and that operate locally, i.e. where the effects of the construction of the infrastructure do not extend across the border with another Member State. Such infrastructure does not appear to have an effect on trade¹¹. However, the presence of an effect on trade can be

⁹ See for example Commission decision in case SA.33045 - Germany - Kristall Bäder (see footnote 4), recitals 45-47.

¹⁰ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p.1

¹¹ Typical examples for that category could be small sport facilities, see for example Commission decisions of 9 November 2011 in case SA.31722 - Hungarian sport sector (see footnote 8) and of 25 April 2001 in case N118/2000 - France - Subventions publiques aux clubs sportifs professionnels, OJ C 333, 28.11.2001, p. 6, http://ec.europa.eu/competition/state_aid/cases/135387/135387_1153844_18_2.pdf.

Nevertheless, in other cases the measure was considered to have a potential effect on competition or trade. In its decisions of 20 March 2013 in case SA.35440 – Germany – Multifunktionsarena der Stadt Jena (OJ C 140, 18.05.2013, p. 2 and in case SA.35135 – Germany – Multifunktionsarena der Stadt Erfurt (OJ C 140, 18.05.2013, p. 1), the Commission considered that, given the distance from any border with another Member State, the effect on trade was mainly local/regional but that given the existence of an open, competitive market for non-sport event organisation across the Union an effect on trade could not be excluded. In Commission decision of 9 April 2014 in case SA.37342 (2013/NN) – UK – Regional stadia development in Northern Ireland (OJ C 418, 21.11.2014, p. 5), the "relative proximity" of the border with Ireland (which was in fact closer to the respective project than the distances between the project and the

presumed if the arenas or stadiums are used to host large international events, considering the existence of an international market for such activity¹².

- b. The funding does not involve State aid if it is granted to amenities such as swimming pools¹³ or marinas¹⁴ of small size that are mainly used by locals and will not likely attract international visitors except to a marginal extent. Such aid is unlikely to impact trade among Member States.
8. If a commercial group controls or owns a single facility that receives State support, the entire group will be presumed to benefit from the measure¹⁵. Consequently, if the group operates several similar facilities in one Member State or carries out commercial activities also in other

Czech border in both the Jena and Erfurt cases) was considered a factor giving rise to a potential effect on trade between Member States.

¹² For larger arenas, generally, there will be an effect on trade. See Order of the General Court in case T-90/09 - Mojo Concerts and Amsterdam Music Dome Exploitatie v Commission EU:T:2012:30, concerning AHOY in Rotterdam, where it considered that the market for the exploitation of arenas is not necessarily limited to the Netherlands. In its decision of 2 October 2013 in case SA.36105 – Germany – Fussballstadion Chemnitz (OJ C 50, 21.02.2014, p. 4, http://ec.europa.eu/competition/state_aid/cases/247460/247460_1472227_93_2.pdf), the Commission considered that the renovation and upgrade of a German third division football team's stadium gave rise to a mainly local/regional effect on trade for sporting and other events, though it was recognised that a wider effect on trade – for example due to the fact that there was an open, competitive market for the provision of non-sport-related commercial services across the Union – remained theoretically possible. Similarly, in Commission decision in case SA.33618 – Sweden – Uppsala arena (see footnote 3), the asset in question was primarily used by the local ice hockey and basketball teams (both comprised mainly of amateur players), but an effect on trade could not be excluded since holding mid-sized and larger events was also possible – notwithstanding the fact that it would be "unlikely that events taking place in the arena would compete with arenas in nearby countries". In Commission decision of 13 December 2013 in case SA.37373 (2013/N) – Netherlands – Thialf ice arena, Heerenveen (OJ C 50, 21.02.2014, p. 9, http://ec.europa.eu/competition/state_aid/cases/250448/250448_1502751_94_2.pdf), the renovation and improvement of an ice arena was deemed to have a predominantly local effect. Reference was made to the fact that the nearest border with another Member State (Germany) was distant and that the geographic market for recreational ice skating (the predominant use of the improved asset) is generally local, but the potential of an effect on trade between Member States was not excluded because of the possibility of holding major sporting and other events given the asset's strong technical credentials (enjoying a high official classification within its industry). In Commission decision of 20 November 2013 in case SA.37109 (2013/N) – Belgium – Football stadiums in Flanders (OJ C 69, 7.03.2014, p. 13, http://ec.europa.eu/competition/state_aid/cases/249493/249493_1510284_167_2.pdf), which concerned the construction/improvement of stadiums for use by professional football teams playing in the Belgian first and second division, it was generally observed that competition between professional football clubs clearly has an international dimension - with reference to the existence of supranational industry standards to which stadium construction must conform.

¹³ In its decision of 12 January 2001 in case N 258/2000 - Germany - Leisure Pool Dorsten (OJ C 172, 16.06.2001, p. 16, http://ec.europa.eu/competition/state_aid/cases/137009/137009_1153410_12_2.pdf) the Commission held that the aid in favour of facilities aimed at attracting international visitors is likely to affect trade between Member States. However, considering that the swimming pool would be mainly used by the local population and does not have any special characteristics to attract customers from abroad, the Commission came to the conclusion that there was no effect on trade.

¹⁴ In its decision in case C 10/2003 – Netherlands - Harbours for recreational crafts(see footnote 5) the Commission decided that the aid provided to two marinas which were not aimed at attracting international visitors and were used on average in a range of 0.25% and 14% by foreign users did not affect trade between Member States.

¹⁵ See Commission decision of 5 December 2012 in case SA.33952 - *Climbing centres*, OJ C 21, 24.01.2013, p. 1, http://ec.europa.eu/competition/state_aid/cases/246072/246072_1392662_211_2.pdf, recitals 62-63.

Member States, the measure is liable to affect trade between Member States and to constitute State aid¹⁶.

No economic advantage: Investments in compliance with the Market Economy Operator Principle

9. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest in line with the Altmark criteria

10. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of services that can be considered a genuine service of general economic interest (SGEI)¹⁷ for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require¹⁸.

SGEI de minimis Regulation¹⁹

11. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

¹⁶ For example, in its decision in case SA.33952 - *Climbing centres* (see footnote 16), the Commission considered that aid granted to a single climbing centre of a local character but that was controlled by a group with branches that operate several climbing facilities across Germany and provide hotel and restaurant services in Austria and Italy was liable to affect trade between Member States.

¹⁷ This could for instance be the case where a municipality decides to build a sports stadium for its local population and schools, provided the infrastructure is open to everybody.

¹⁸ See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4 .

¹⁹ Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

Instances in which there is no need to notify for State aid clearance, but other requirements could apply

12. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following two instances:

General Block Exemption Regulation (GBER)²⁰

13. The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. In particular, **Article 55 of the GBER** allowing aid for sport and multifunctional recreational infrastructures up to EUR 15 million or the total costs over EUR 50 million per project, can apply. Under Article 55 of the GBER, it is important to note that the supported sport infrastructures must not be used exclusively by professional sports users. Note that all the conditions set by Article 55 of the GBER and the general provisions of Chapter 1 of the GBER must be complied with.
14. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area, that the aid intensities established in the regional aid map are not exceeded, and that all the conditions of Article 14 of the GBER are complied with. Note that all the conditions set by Article 14 of the GBER and the general provisions of Chapter 1 of the GBER must be complied with.

Services of General Economic interest: SGEI Decision²¹

15. If the sport and multifunctional recreational infrastructure is constructed or renovated to facilitate the provision of an SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such an SGEI up to EUR 15 million per year (on average over the whole duration of the entrustment²²) may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

Instances in which notifying for State aid clearance is necessary

16. If the measure appears to constitute State aid and does not meet the conditions allowing an exemption from notification, a notification to the Commission for State aid clearance is required.

²⁰ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

²¹ See Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

²² Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

State aid for sport and multifunctional recreational infrastructure under Article 107(3)(c) TFEU

17. In such a case, the assessment of the aid to sport and multifunctional recreational infrastructures is normally conducted under Article 107(3)(c) TFEU²³.

Service of General Economic interest: SGEI Framework²⁴

18. The compatibility of State aid for sport and multifunctional recreational infrastructure which is necessary for the provision of a genuine SGEI and that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework.

References:

- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106\(2\) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest](#), OJ L 7, 11.01.2012, p. 3.

²³ See for instance Commission decision of 2 October 2013 in case SA.36105 - Germany - Fussballstadion Chemnitz, OJ C 50, 21.2.2014, p. 4.

²⁴ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.