

INFRASTRUCTURE ANALYTICAL GRID N° 5¹ – CONSTRUCTION OF CULTURE INFRASTRUCTURES

Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge 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 of culture infrastructures such as museums, theatres and cinemas², as well as for the renovation of historical monuments.
2. In the culture and heritage conservation sector, a number of measures taken by Member States may not constitute State aid because they do not fulfil all the criteria of Article 107(1) TFEU, for example because the activity is not economic or because trade between Member States is not affected.
3. According to the established jurisprudence of the Union Courts any activity consisting in offering goods and services on a market constitutes an economic activity. Thus the construction of infrastructures for cultural purposes constitutes an economic activity if those infrastructures are exploited commercially. However, cultural institutions and projects do not typically give rise to significant distortion of competition, and the Commission's decisional practice shows that often such aid has limited effects on trade.

Instances in which the existence of State aid is excluded

No economic activity: construction or renovation of culture infrastructure and renovation of historical monuments for non-economic use

4. If the culture infrastructure or historic monuments are not used to carry out an economic activity, State aid is not involved. Activities through which the State fulfils a genuine public task and responsibility (in the educational, cultural and social areas) are not of an economic nature and in general fall outside the scope of State aid rules.
5. The Commission has, for instance, considered that public libraries can be vehicles for the State authorities to fulfil a genuine public task and responsibility (in the educational, cultural and social areas), in which case there is no economic activity³. Moreover, nature protection and

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 26 November 2008 in case NN 70/2006 - Finland - *Finnish film support scheme*, OJ C 268, 10.11.2009, p. 17, http://ec.europa.eu/competition/state_aid/cases/246172/246172_1421787_126_2.pdf.

³ See decision of 16 April 2013 in case SA.35529 (2012/N) - Czech Republic - *Digitization of books in public libraries*, OJ C 134, 14.05.2013, p. 3, http://ec.europa.eu/competition/state_aid/cases/246172/246172_1421787_126_2.pdf.

conservation activities⁴ that have an exclusively social character and are based on the principle of solidarity may also be considered as non-economic⁵.

6. In a case where a renovation financed by public money improved the accessibility of an infrastructure that can be visited free of charge without any limitation and that is not used for any commercial activity, the Commission considered that the public funding did not support the conduct of any economic activity and therefore did not benefit any undertaking within the meaning of EU competition law⁶.
7. 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 minor 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

8. The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
9. The Commission has generally held that the restoration of cultural and historical landmarks does not, in most cases, affect intra-Union trade⁷.
10. For museums and historic monuments that cater for a local demand and do not attract international visitors, the effect on trade may be minimal and therefore State aid rules would not apply⁸.
11. The limited size of museum-related projects may also preclude any effect on trade between Member States, as people from other Member States are less likely to cross borders for the primary purpose of visiting those museums⁹. Equally, for cinemas in rural areas or cinemas with specialised ("art house") programming in urban areas, there may be no effect on trade or distortion of competition.

⁴ Such activities would not include sale of wood and meat, hunting and fishing leases, or tourism activities.

⁵ See Case T-347/09 Germany v Commission EU:T:2013:418.

⁶ See Commission decision of 20 November 2012 in case SA.34891 (2012/N) - Poland - *State support to Związek Gmin Fortecznych Twierdzy Przemysł*, OJ C 293, 9.10.2013, p. 1, http://ec.europa.eu/competition/state_aid/cases/244866/244866_1398073_222_3.pdf.

⁷ See Commission decisions of 9 April 2002 in case N560/2001 - UK - *National heritage fund for Brighton West Pier Trust*, OJ C 239, 4.10.2002, p. 3 and of 20 July 2005 in case NN 55/2005 - PL - *Heritage conservation*, OJ C 295, 26.11.2005, p. 10, http://ec.europa.eu/competition/state_aid/cases/199545/199545_516648_24_2.pdf.

⁸ See Commission decisions of 28 November 2007 in case N 377/2007 - Netherlands - *Support to Bataviawerf - Reconstruction of a vessel from the 17th century*, OJ C 35, 8.02.2008, p. 3, http://ec.europa.eu/competition/state_aid/cases/220891/220891_771915_6_1.pdf and of 2 July 2013 in case SA.35909 (2012/N) – Czech Republic - *Infrastructure for tourism (NUTS II region Southeast)*, OJ C 306, 22.10.2013, p. 4.

⁹ See Commission decision of 18 February 2004 in case N 630/2003 - Italy - *Musei di interesse locale – Sardegna*, OJ C 275, 8.11.2005, p. 3, http://ec.europa.eu/competition/state_aid/cases/136585/136585_490232_15_2.pdf and Commission decision of 20 November 2012 in case SA.34891 (2012/N) - Poland - *State support to Związek Gmin Fortecznych Twierdzy Przemysł*, (see footnote 6).

12. In some cases, the geographical position (i.e. where the aided project is situated in a remote location, far from borders with other Member States, etc.) can help establish that there would be no effect on trade¹⁰.
13. For larger museums and historic monuments which enjoy an international reputation, however, it may not be possible to exclude an effect on competition and trade between Member States. The assessment depends on the actual/potential capacity to attract foreign visitors¹¹.
14. For film studios, the high mobility of film and television productions implies that an effect on competition and trade between Member States normally is assumed.
15. 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 laid down in the *de minimis* Regulation are also respected¹².

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

16. 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 (SGEI) in line with the Altmark criteria

17. The existence of an economic advantage may be excluded if: (i) the infrastructure project is necessary for the provision of cultural and heritage conservation¹³ services that can be

¹⁰ See decisions of 7 November 2012 in case SA.34466 (2012/N) - Cyprus - *State aid to the Centre for Visual Arts and Research*, OJ C 1, 4.01.2013, p. 10, http://ec.europa.eu/competition/state_aid/cases/244012/244012_1383483_121_2.pdf and of 6 November 2013 in case SA.36581 (2013/NN) - Greece - *Construction of archeological museum Messara Crete*, OJ C 353, 3.12.2013, p. 4, http://ec.europa.eu/competition/state_aid/cases/250254/250254_1484489_76_2.pdf.

¹¹ In its decision in case SA.35909 (2012/N) – Czech Republic - *Infrastructure for tourism (NUTS II region Southeast)*(see footnote 8), the Commission took into account that the tourist overnight flows from neighbouring countries to the region receiving the aid are very limited.

¹² 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

¹³ Nature conservation heritage included; in this respect see Commission decision of 2 July 2009 in case NN 8/2009 – Germany - *Nature conservation areas*, OJ C 230, 24.09.2009, p. 2, http://ec.europa.eu/competition/state_aid/cases/229660/229660_973605_24_1.pdf.

considered as a genuine service of general economic interest (SGEI) 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 require¹⁴.

SGEI de minimis Regulation¹⁵

18. Public funding granted for the provision of an 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.

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

19. 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)¹⁶

20. The measure may be exempted from notification if it is granted in compliance with conditions the GBER. In particular, **Article 53 of the GBER** allowing investment aid for culture and heritage conservation¹⁷ up to EUR 100 million per project, can apply. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area, that aid intensities established in the regional aid map are not exceeded, and that all the conditions set by Article 14 are complied with. Note that in both cases the provisions of Chapter 1 of the GBER must also be complied with.

Service of General Economic Interest: SGEI Decision¹⁸

21. If the infrastructure is necessary for the provision of cultural services entrusted as an SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such an SGEI up to

¹⁴ 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 .

¹⁵ 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.

¹⁶ 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.

¹⁷ Including natural heritage conservation.

¹⁸ 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.

EUR 15 million per year (average over the whole duration of the entrustment¹⁹), 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 an 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

22. If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification under the GBER or the SGEI Decision, State aid clearance after a notification to the Commission is required.

State aid for cultural infrastructure assessed directly under Article 107(3)(d) TFEU

23. The compatibility of aid for cultural infrastructure is normally assessed directly under the TFEU on the basis of **Article 107(3)(d) TFEU, as aid to promote culture and heritage conservation**. In such cases the Commission assesses whether the aid is intended for a genuine cultural objective and if the conditions of necessity and proportionality are met.

Service of General Economic interest: SGEI Framework²⁰

24. The compatibility of State aid for culture 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.
- [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 interest](#), OJ C 8, 11.1.2012, p. 4.

¹⁹ 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 the investments) as SGEI compensation.

²⁰ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

- [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.