

INFRASTRUCTURE ANALYTICAL GRID FOR SPORT AND MULTIFUNCTIONAL RECREATIONAL INFRASTRUCTURES

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I. PRINCIPLES FOR SPORT AND MULTIFUNCTIONAL RECREATIONAL INFRASTRUCTURES

- (1) This analytical grid concerns the financing of the construction, renovation and operation of sport and multifunctional recreational infrastructures such as stadiums¹, multipurpose arenas², sport and wellness facilities³, marinas⁴, and climbing halls⁵, which for ease of reference, will be qualified throughout the text as "sport infrastructure".
- (2) The construction, renovation and operation of sport and multifunctional recreational infrastructures which is commercially exploited⁶, constitute an economic activity. Where users, including professional⁷ and non-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.⁸ Therefore public funding of such infrastructure is in principle subject to State aid rules.

II. INSTANCES IN WHICH THE EXISTENCE OF STATE AID IS EXCLUDED

- (3) Please note that the following sections present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be excluded. These instances may apply to the owner/developer, operator/concessionaire or user levels, but also to these levels combined (e.g. integrated developer and operator).

¹ 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*.

² 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, of 15 May 2013 in case SA.33728 - Denmark - *Financing of a new multiarena in Copenhagen*, OJ L 152, 22.05.2014, p. 32, and of 2 May 2013 in case SA.33618 - Sweden - *Uppsala arena*, OJ L 243, 12.09.2013, p. 19.

³ 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.

⁴ 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.

⁵ 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.

⁶ See for example Commission decision in case SA.33728 *Copenhagen multiarena*, (see footnote 2).

⁷ 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, and in case SA.35501 - France - *Stadiums EURO 2016* (see footnote 1).

⁸ See for example Commission decision in case SA.33045 - Germany - *Kristall Bäder* (see footnote 3).

1. No economic activity: infrastructure not meant to be commercially exploited

- (4) The funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of State aid rules. Public funding of sport infrastructure that is accessible to the general public free of charge fulfils a general purpose which is non-economic in nature.
- (5) If sport infrastructure is used for both **economic and non-economic activities**, public funding thereof will fall under the State aid rules only insofar as it covers the costs linked to the economic activities in question. In such cases, Member States have to ensure that the public funding provided for the non-economic activities cannot be used to cross-subsidize the entity's economic activities. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a **clear separation of accounts**.
- (6) In cases of mixed use, the funding of sport infrastructure that is used almost exclusively for a non-economic activity, may fall outside the State aid rules in its entirety, provided the economic use remains **purely ancillary**, that is to say an activity which is directly related to and necessary for the operation of the sport infrastructure, or intrinsically linked to its main non-economic use. This should be considered to be the case when the economic activities consume the same inputs as the primary non-economic activities, for example material, equipment, labour or fixed capital.
- (7) Ancillary economic activities must remain limited in scope, as regards the capacity of the infrastructure. In this respect, the economic use of the infrastructure may be considered ancillary when the capacity allocated each year to such activity does not exceed 20% of the infrastructure's overall capacity.

2. No potential effect on trade between Member States: purely local impact

- (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 except for cases covered by the *de minimis* Regulations.
- (9) 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 respected⁹.
- (10) There may be cases of support measures which have a **purely local impact** and consequently have no effect on trade between Member States. This is the case if the beneficiary supplies services to a limited area within a Member State, is unlikely to attract customers from other Member States, and it cannot be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment. For example:
 - the public funding of sports and leisure facilities serving predominantly a local audience and unlikely to attract customers or investment from other Member States¹⁰,

⁹ 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.

- the financing of certain cable ways (and in particular ski lifts) in areas with few facilities and limited tourism capability¹¹,
- or a conference centre, where its location and the potential effect of the aid on prices is genuinely unlikely to divert users from other centres in other Member States¹²,

are unlikely to affect trade¹³. The absence of effect on trade can be assessed on the basis of data showing that there is only limited use of the sport infrastructure from outside the Member State and that the impact on cross-border investments of the measure under consideration is no more than marginal.

- (11) Public financing provided to **customary amenities** (such as restaurants, cafes, shops, paid cloakrooms or paid parking) of sport infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between Member States since those customary amenities are unlikely to attract customers from other Member States and their financing is unlikely to have a more than marginal effect on cross-border investment or establishment.
- (12) If a commercial group controls or owns a single facility that receives State support, the entire group will be presumed to benefit from the measure. Consequently, if the group operates several similar facilities in one Member State or carries out commercial activities also in other Member States, the measure may be liable to affect trade between Member States and to constitute State aid¹⁴.

3. No economic advantage at the level of the owner/developer of the infrastructure

- (13) If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of sport infrastructure, 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 (and therefore with the same level of risks and rewards) as the public authorities

¹⁰ See, for instance, Commission Decisions in cases N 258/2000 – Germany - *Leisure Pool Dorsten* (OJ C 172, 16.6.2001, p. 16); C 10/2003 – Netherlands – *Non-profit harbours for recreational crafts* (OJ L 34, 6.2.2004, p. 63); SA.37963 – United Kingdom – *Alleged State aid to Glenmore Lodge* (OJ C 277, 21.8.2015, p. 3); SA.38208 – United Kingdom – *Alleged State aid to UK member-owned golf clubs* (OJ C 277, 21.8.2015, p. 4).

¹¹ In its decision in case N 376/01 – Italy – *Aid scheme for cableways*, OJ C 172, 18.7.2002, p. 2, the Commission has clarified that the following factors are typically taken into account to draw a distinction between installations supporting an activity capable of attracting non-local users, which are generally considered to have an effect on trade, and sport-related installations in areas with few facilities and limited tourism capability, where public support may not have an effect on trade between Member States: a) the location of the installation (for example within cities or linking villages); b) operating time; c) predominantly local users (proportion of daily as opposed to weekly passes); d) the total number and capacity of installations relative to the number of resident users; e) other tourism-related facilities in the area. Similar factors could, with the necessary adjustments, also be relevant for other types of facilities.

¹² See, for instance, the Commission Decision in State aid case N 486/2002 Sweden – *Congress hall in Visby* (OJ C 75, 27.3.2003, p. 2)

¹³ See paragraph 197 of the Commission Notice on the Notion of State aid, as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ("NoA"), OJ C 262, 19.7.2016, p. 1, points a), e) and h).

¹⁴ See, for example, Commission decision in case SA.33952 - *Climbing centres* (see footnote 5).

who are in a comparable situation¹⁵; and/or (ii) a *ex ante* sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investor(s), in line with the normal market return that would be reasonably expected by operators on similar projects taking into account the level of risk and future expectations¹⁶. 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 investor¹⁷.

4. No economic advantage at the level of the operator/*cessionnaire*

4.1. Selection of operator/*cessionnaire* through a tender or fees that are otherwise in compliance with the Market Economy Operator Principle

- (14) Operators who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions.
- (15) If the operation of a sport infrastructure is assigned for a positive price to an operator/*cessionnaire* on the basis of a competitive, transparent, non-discriminatory and unconditional tender in line with the principles of the TFEU on public procurement¹⁸, an advantage can be excluded at the level of the operator, as it can be presumed that the fee it pays for the right to exploit the sport infrastructure is in line with market conditions.
- (16) If the operator/*cessionnaire* has not been selected through a tender in line with the above conditions, it may also be possible to establish that the fees paid by the operator/*cessionnaire* are in line with normal market conditions through (i) benchmarking with comparable situations¹⁹, or (ii) on the basis of a generally-accepted standard assessment methodology²⁰.

4.2. The operation of the infrastructure entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria

- (17) The existence of an economic advantage at the level of the operator (*cessionnaire*) may be excluded, if: (i) the infrastructure project is necessary for the provision of services that can be considered as genuine services 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

¹⁵ For more details, see paragraphs 86 to 88 of the NoA.

¹⁶ For more information see in this respect chapter 4.2 and in particular paragraphs 101 to 105 of the NoA.

¹⁷ See paragraph 81 of the NoA.

¹⁸ As described in paragraphs 89-96 of the NoA.

¹⁹ See paragraphs 97 to 100 of the NoA.

²⁰ See paragraphs 101 to 105 of the NoA.

provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require²¹.

4.3. SGEI de minimis Regulation²²

- (18) 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.

5. No economic advantage at the level of the user

- (19) In case the user(s) are undertakings, and the operator of sport infrastructure received State aid or its resources constitute State resources, a selective advantage at the level of the user(s) can be excluded if: (i) the sport infrastructure is not dedicated to a specific user, (ii) all users enjoy equal and non-discriminatory access to the infrastructure and (iii) the infrastructure is made available to the users on market terms.

III. INSTANCES IN WHICH THERE IS NO NEED TO NOTIFY FOR STATE AID CLEARANCE, BUT OTHER REQUIREMENTS COULD APPLY

- (20) State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

1. General Block Exemption Regulation (GBER)²³

- (21) The measure is 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 30 million or the total costs up to EUR 100 million per project, or operating aid of up to EUR 2 million per infrastructure per year, can apply.
- (22) **Article 14 of the GBER** can also apply, allowing regional investment aid up to the maximum aid intensities established in the regional aid map.
- (23) The provisions of Chapter 1 of the GBER in addition to the specific provisions in Article 55 or 14 of the GBER must be complied with.

²¹ 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.

²² Commission Regulation on 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.

²³ 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, as amended by Regulation (EU) No 2017/1084 Amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards calculation of eligible costs, OJ L 156, 20.6.2017, p. 1–18.

2. Services of General Economic interest: SGEI Decision²⁴

- (24) If the sport 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 entrustment²⁵) 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.

IV. INSTANCES IN WHICH NOTIFYING FOR STATE AID CLEARANCE IS NECESSARY

- (25) If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification, State aid clearance following a notification to the Commission is required.

1. State aid for sport infrastructure under Article 107(3)(c) TFEU

- (26) The compatibility of aid to sport infrastructure is normally assessed on the basis of Article 107(3)(c) TFEU. That provision constitutes the basis for declaring aid to facilitate the development of certain economic activities or of certain economic areas compatible with the internal market. In accordance with the Commission's practice, a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality and incentive effect of the aid; (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest; and (iv) compliance with the transparency principle.
- (27) Article 165 TFEU establishes that the Union shall contribute to the promotion of European sport, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function.

2. Service of General Economic interest: SGEI Framework²⁶

- (28) The compatibility of State aid for sport 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. Under the SGEI Framework, which is based on Article 106(2) TFEU, an aid measure should comply with the following main conditions: (i) entrustment of a clearly defined and genuine SGEI, (ii) compliance with Directive 2006/111/EC²⁷, (iii) compliance with

²⁴ 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.

²⁵ 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.

²⁶ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

EU public procurement rules, (iv) absence of discrimination, (v) a mechanism to avoid any overcompensation and (vi) transparency.

References:

- [Commission Notice on the notion of State aid as referred to in Article 107\(1\) of the Treaty on the Functioning of the European Union](#), OJ C 262, 19.7.2016, p. 1.
- [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 Regulation \(EU\) 2017/1084](#) of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs, OJ L 156, 20.6.2017.
- [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.
- [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.

Indicative list of Commission decisions taken under State aid rules concerning sport infrastructure:

Instances in which the existence of State aid is excluded:

- N 258/2000 – Germany – Leisure Pool Dorsten:
http://ec.europa.eu/competition/state_aid/cases/137009/137009_1153410_12_2.pdf
- C 10/2003 — Netherlands — Non-profit harbours for recreational crafts:
http://ec.europa.eu/competition/eojade/isef/case_details.cfm?proc_code=3_C10_2003
- SA.37963 (2014/NN) (ex 2013/CP) — United Kingdom — Alleged State aid to Glenmore Lodge:
http://ec.europa.eu/competition/state_aid/cases/256221/256221_1657697_67_2.pdf
- SA.38208 (2014/NN) (ex 2014/CP)— United Kingdom — Alleged State aid to UK member-owned golf clubs:
http://ec.europa.eu/competition/state_aid/cases/256220/256220_1657664_57_2.pdf

Instances in which the measure constitutes compatible State aid under Article 107(3)(c) TFEU:

- SA.33045 (2013/NN) (ex 2011/CP) – Germany – Alleged unlawful aid in favour of Kristall Bäder AG:
http://ec.europa.eu/competition/state_aid/cases/247490/247490_1580456_110_2.pdf
- SA.33618 (2012/C) – Sweden – Uppsala arena:
http://ec.europa.eu/competition/state_aid/cases/244148/244148_1453714_110_2.pdf
- SA.35135 (2012/N) – Germany – Multifunktionsarena der Stadt Erfurt:
http://ec.europa.eu/competition/state_aid/cases/245994/245994_1426005_90_2.pdf
- SA.35440 (2012/N) – Germany – Multifunktionsarena der Stadt Jena:
http://ec.europa.eu/competition/state_aid/cases/245993/245993_1426021_127_2.pdf
- SA 35501 (2013/N) – France – Financement de la construction et de la rénovation des stades pour l'EURO 2016:
http://ec.europa.eu/competition/state_aid/cases/248555/248555_1532962_165_2.pdf (*in French*)
- SA. 36105 (2013/N) – Germany – Fußballstadion Chemnitz:
http://ec.europa.eu/competition/state_aid/cases/247460/247460_1682818_210_2.pdf
- SA. 37342 (2013/NN) – United Kingdom – Regional Stadia in Northern Ireland:
http://ec.europa.eu/competition/state_aid/cases/252038/252038_1585421_47_2.pdf
- SA.37373 (2013/N) – The Netherlands – Contribution to the renovation of ice arena Thialf in Heerenveen:
http://ec.europa.eu/competition/state_aid/cases/250448/250448_1502751_94_2.pdf
- SA.43575 (2015/N) – Latvia – Aid for the construction of cultural and sport center "Daugavas stadions":
http://ec.europa.eu/competition/state_aid/cases/261289/261289_1780081_122_2.pdf
- SA.44439 (2016/N) – Ireland – Sporting Arena Cork:
http://ec.europa.eu/competition/state_aid/cases/262741/262741_1832940_137_2.pdf
- SA.46530 (2016/N) – Slovakia – National Football Stadium:
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_46530