INFRASTRUCTURE ANALYTICAL GRID FOR CULTURE, HERITAGE and NATURE CONSERVATION

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I. PRINCIPLES FOR CULTURE, HERITAGE AND NATURE CONSERVATION INFRASTRUCTURE

(1) This analytical grid covers the financing of the construction, maintenance and operation of infrastructure and sites used for activities related to culture, heritage and nature conservation. For ease of reference only, infrastructures and sites used for these activities will be qualified throughout this text as "cultural infrastructure".[1]

(2) The area of culture, heritage and nature conservation covers a vast array of purposes and activities, *inter alia* museums, archives, libraries, artistic and cultural centres or spaces, theatres, opera houses, concert halls, archaeological sites, monuments, historical sites and buildings, traditional customs and crafts, festivals and exhibitions, as well as cultural and artistic education activities. It covers also natural heritage, including conservation of biodiversity, habitats and species.[2]

(3) The public funding of cultural infrastructure is in principle not subject to State aid rules. Given their particular nature, cultural activities for which the infrastructure is used are normally organised in a non-commercial way or are objectively non substitutable, thus excluding the existence of a genuine market; therefore they are not economic in nature[3] and thus the funding of such infrastructure will not be considered as State aid.

(4) Even if the activities for which the infrastructure is used can be qualified as economic in nature, public support measures for cultural infrastructures frequently have no effect on trade between Member States (see below Part II.3).

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

(5) 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 or user levels, as referred to in the "introduction to the analytical grids", but also to these levels combined (e.g. integrated developer and operator).

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1 This definition typically excludes multifunctional infrastructure such as congress centres.

2 See paragraph 33 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.

3 See paragraphs 34 and 36 of the NoA.

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

(6) The funding of cultural infrastructure not meant to be commercially exploited is in principle excluded from the application of State aid rules. Public funding of cultural infrastructure that is accessible to the general public free of charge fulfils a purely social and cultural purpose[4] which is non-economic in nature[5]. Public financing for the preservation or restoration of tangible cultural heritage that can be visited free of charge without any limitation, and that is not used for any commercial activity, does not benefit any undertaking within the meaning of EU competition law[6].

(7) In the same vein, the fact that visitors of cultural infrastructures open to the general public are required to pay a monetary contribution only covering a fraction of the true costs does not alter the non-economic nature of the culture activity conducted in the infrastructure, as it cannot be considered as genuine remuneration for the service provided.[7]

(8) In contrast, cultural activities predominantly financed by visitor or user fees or by other commercial means (for example, commercial exhibitions, cinemas, commercial music performances and festivals and arts schools predominantly financed from tuition fees) should be qualified as economic in nature. Similarly, heritage conservation or cultural activities benefitting exclusively certain undertakings rather than the general public (for example, the restoration of a historical building used by a private company) should normally be qualified as economic in nature. Accordingly, the public financing of infrastructure used for such economic activities may constitute State aid.

(9) Finally, many cultural activities are objectively non substitutable (for example, keeping public archives holding unique documents) and thus exclude the existence of a genuine market and the economic nature of the activity. Consequently the public funding of infrastructure used for such activities falls outside the scope of State aid rules.

2. Cultural infrastructure used for both economic and non-economic activities

(10) If cultural infrastructure is used for both economic and non-economic activities (for example, the organisation of conferences and commercial events in museums or culture centres), public funding thereof will fall under 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

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4 For instance, see Commission decision of 16 April 2013 in case SA.35529 (2012/N) - Czech Republic - *Digitization of books in public libraries,* OJ C 134, 14.5.2013, p. 3.

5 Similarly, nature protection and conservation activities that have an exclusively social character and are based on the principle of solidarity may also be considered as non-economic. Please note that these activities would not include sale of wood and meat, hunting and fishing leases, or tourism activities.

6 See for instance Commission decision of 20 November 2012 in case SA.34891 (2012/N) - Poland - *State support to Związek Gmin Fortecznych Twierdzy Przemyśl,* OJ C 293, 9.10.2013, p. 1.

7 See paragraph 35 of the NoA.

net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a **clear separation of accounts.**

(11) In cases of mixed use, the funding of cultural 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 cultural 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.

(12) 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.

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

(13) 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.

(14) 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 respected[8].

(15) Even if the activities for which cultural infrastructure is used can be qualified as economic in nature, public support measures in the field of culture frequently have no effect on trade between Member States. Similarly, public financing provided to **customary amenities** (such as restaurants, cafes, shops, paid cloakrooms or paid parkings) of cultural 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. In principle, only funding granted in a Member State to large and renowned cultural institutions (and events) widely promoted outside their home region have the potential to affect trade between Member States.[9]

(16) For film studios, the high mobility of film and television productions implies that an effect on competition and trade between Member States is present[10].

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[8] 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.

[9] However, some of these cultural or heritage conservation activities are objectively unique and non-substitutable and thus exclude the existence of a genuine market, as explained above in point 9.

[10] See for instance Commission decision of 8 May 2012 in case SA.22668 - Spain - *Ciudad de la Luz SA,* OJ L 85, 23.3.2013, p. 1.

4. No economic advantage at the level of the owner/developer

(17) 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 cultural infrastructure, then State aid is not involved. This can be assessed on the basis of: (i) significant *pari passu* investments of private operators, i.e. on the same terms and conditions (and therefore with the same level of risks and rewards) as the public authorities who are in a comparable situation[11]; and/or (ii) a (ex ante) sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate return for the investor(s), in line with the normal market return that would be reasonably expected by commercial operators on similar projects taking into account the level of risk and future expectations[12]**.** Note, however, that the existence of consecutive State interventions concerning the same cultural infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor. [13]

5. No economic advantage at the level of the operator:

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

(18) 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.

(19) If the operation of cultural infrastructure is assigned for a positive price to a third party operator on the basis of a competitive, transparent, non-discriminatory and unconditional tender in line with the principles of the TFEU in public procurement[14], an advantage can be excluded at this level, as it can be presumed that the fee they pay for the right to exploit the infrastructure is in line with market conditions.

(20) If the operator has not been selected through a tender in line with the above conditions, it may also possible to establish that the fees paid by the operator in line with normal market conditions through (i) benchmarking with comparable situations[15], or (ii) on the basis of a generally-accepted standard assessment methodology[16].

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

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

13 See in this respect also paragraph 81 of the NoA.

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

15 See paragraphs 97 to 100 of the NoA.

16 See paragraphs 101 to 105 of the NoA.

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

(21) The existence of an economic advantage at the level of the operator 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 provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require[17].

5.3. SGEI de minimis Regulation[18]

(22) 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.

6. No economic advantage at the level of the user

(23) In case the user(s) are undertakings, and the operator of cultural 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 cultural 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

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

1. General Block Exemption Regulation (GBER)[19]

(25) The measure may be exempted from notification if it is granted in compliance with the conditions of the GBER. In particular, **Article 53 of the GBER** can apply, allowing investment

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17 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.

18 Commission Regulation No 360/2012 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.

19 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, 20.06.2017, p.1.

aid for culture and heritage conservation[20] up to EUR 150 million per project, as well as operating aid up to EUR 75 million per undertaking per year. **Article 14 of the GBER** can also apply, allowing regional investment aid up to the maximum aid intensities established in the regional aid map. The provisions of Chapter 1 of the GBER in addition to the specific provisions in Article 53 or 14 of the GBER must be complied with.

2. Service of General Economic Interest: SGEI Decision[21]

(26) 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 EUR 15 million per year (average over the whole duration of the entrustment[22]), is exempted from notification on the basis of the SGEI Decision, provided that the criteria of that Decision are met, in particular: 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.

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

(27) 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.

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

(28) 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.

2. Service of General Economic interest: SGEI Framework[23]

(29) 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. 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/EC[24], (iii) compliance with

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20 Including natural heritage conservation.

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 the investments) as SGEI compensation.

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

24 Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

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

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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 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.
- 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.
- 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.

Indicative list of Commission decisions taken under State aid rules concerning culture infrastructures (these decisions were adopted before the entry in force of NoA and of the GBER).

Decisions in which the existence of State aid is excluded:

- N 630/2003 – Italy – Musei di interesse locale in Sardegna: http://ec.europa.eu/competition/state_aid/cases/136585/136585_490232_15_2.pdf
- N 377/2007 – The Netherlands – Support to Bataviawerf – Reconstruction of a vessel from the 17th century: http://ec.europa.eu/competition/state_aid/cases/220891/220891_771915_6_1.pdf
- SA. 34466 (2012/N) – Cyprus – State support to the Centre for Visual Arts and Research:

http://ec.europa.eu/competition/state_aid/cases/244012/244012_1383483_121_2.pdf

- SA. 34891 (2012/N) – Poland – State support to Związek Gmin Fortecznych Twierdzy Przemyśll:
  http://ec.europa.eu/competition/state_aid/cases/244866/244866_1398073_222_3.pdf
- SA. 35529 (2012/N) – Czech Republic – Digitization of books in public libraries:
  http://ec.europa.eu/competition/state_aid/cases/246172/246172_1421787_126_2.pdf
- SA. 35909 (2012/N) – Czech Republic – Infrastructure for tourism (NUTS II region Southeast):
  http://ec.europa.eu/competition/state_aid/cases/247108/247108_1471756_131_2.pdf
- SA. 36581 (2013/NN) – Greece – Construction of archaeological museum Messara Crete:
  http://ec.europa.eu/competition/state_aid/cases/250254/250254_1484489_76_2.pdf

Decisions in which the measure partly constitutes State aid:

- N 39/2010 – Hungary – Cultural Heritage Scheme to Promote Tourism:
  http://ec.europa.eu/competition/state_aid/cases/234944/234944_1108316_24_1.pdf
- SA. 34462 (2012/NN) – Latvia Programme "Culture":
  http://ec.europa.eu/competition/state_aid/cases/246755/246755_1428594_85_2.pdf
- SA. 34770 (2012/N-2) – Hungary – Prolongation of State aid Scheme N 357/2007 - Appropriations of the Ministry of Education and Culture and the National Cultural Fund:
  http://ec.europa.eu/competition/state_aid/cases/245312/245312_1352885_136_2.pdf
- SA. 36873 (2013/N) – Hungary – Aid measures with a cultural objective under the Regional Development Operational Programmes:
  http://ec.europa.eu/competition/state_aid/cases/249063/249063_1467351_124_2.pdf
- SA. 37043 (2013/N) – Hungary – Aid for multifunctional community cultural centres, museums, public Libraries:
  http://ec.europa.eu/competition/state_aid/cases/249355/249355_1477921_119_2.pdf

Decisions in which the aid was considered compatible:

- NN 55/2005 – Poland – Heritage conservation:
  http://ec.europa.eu/competition/state_aid/cases/199545/199545_516648_24_2.pdf
- N 393/2007 – The Netherlands - Subsidy to NV Bergkwartier:
  http://ec.europa.eu/competition/state_aid/cases/220943/220943_783368_7_1.pdf
- N 220/2008 – Latvia - EEA/Norwegian Financial Mechanism priority "Conservation of European cultural heritage" – SIA BC GROUP individual project "Second Life: Restoration of Wooden Cultural Heritage at Kalnciema/Melnsila quarter in Riga":
  http://ec.europa.eu/competition/state_aid/cases/225521/225521_872277_30_1.pdf
- N 470/2008 – Poland – Aid for revitalisation of degraded areas in Poland:
  http://ec.europa.eu/competition/state_aid/cases/227534/227534_1082164_86_1.pdf
- NN 8/2009 – Germany – Nature conservation areas:
  http://ec.europa.eu/competition/state_aid/cases/229660/229660_973605_24_1.pdf

- N 378/2009 – The Netherlands – Extension of Monument Scheme in North Brabant:
  http://ec.europa.eu/competition/state_aid/cases/232058/232058_1095586_28_1.pdf
- N 564/2009 – Latvia – Support for private owners of cultural monuments in the restoration and preservation of cultural heritage:
  http://ec.europa.eu/competition/state_aid/cases/233487/233487_1108426_33_1.pdf
- N 568/2009 – Poland – Aid measures with a cultural objective under the Regional Development Operational Programme "Innovative Economy":
  http://ec.europa.eu/competition/state_aid/cases/233500/233500_1122536_37_1.pdf
- N 606/2009 – The Netherlands – National framework for conservation and restoration of protected historical Monuments:
  http://ec.europa.eu/competition/state_aid/cases/233714/233714_1287926_14_2.pdf
- N 318/2010 – Latvia – Support for private owners of cultural monuments in the restoration and preservation of cultural heritage:
  http://ec.europa.eu/competition/state_aid/cases/237019/237019_1152605_25_1.pdf
- SA.27301 (2015/NN) - Netherlands – Alleged illegal State aid in connection with the subsidized acquisition or free granting of nature land
  http://ec.europa.eu/competition/state_aid/cases/259133/259133_1708634_151_4.pdf
- SA. 33106 – Latvia – Amendments to State aid scheme N 564/2009 - Support for private owners of cultural monuments in the restoration and preservation of cultural heritage:
  http://ec.europa.eu/competition/state_aid/cases/240851/240851_1232175_30_2.pdf
- SA. 33470 (2011/N) – Hungary – Hungarian cultural heritage:
  http://ec.europa.eu/competition/state_aid/cases/242571/242571_1289683_65_2.pdf