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Subject: **State aid SA.35440 (2012/N) – Germany**
Multifunktionsarena der Stadt Jena

Sir,

1. Procedure

- (1) On 20 September 2012, Germany notified the plan of the City of Jena, situated in the Land of Thüringen, to renovate and reconstruct its sport stadium into a multifunctional arena. Upon request, Germany submitted further information on 19 November and 17 December 2012. On 15 January 2013 the Commission asked Germany, in accordance with Article 4(5) of Regulation 659/1999, to agree to an extension of the period of two months within which the Commission is required to adopt a decision until the end of February 2013. This request was accepted by Germany on 16 January 2013.

2. Description of the measure

- (2) The City of Jena, a university and industry town with around 105 000 inhabitants, plans to renovate and improve with public funds its existing sport stadium. It plans to transform its stadium of 1924, which is in urgent need of a thorough renovation, from a mere sports stadium into a multifunctional arena which will be used primarily for football, athletics, popular sport, or other events like concerts, but in addition should now also offer the possibility to host company events or congresses for business and other users in the Region. Events may use the entire arena, planned for 16 000 persons, or single tribunes and internal facilities for up to 2000 persons. International events are only envisaged for non-professional athletics competitions.

Seiner Exzellenz Herrn Dr Guido WESTERWELLE
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

- (3) Jena plans to extend the possible scope of uses of the arena because the town lacks appropriate facilities for such events. A market analysis had demonstrated that there is a need for congress and event facilities for more than 2000 participants or visitors. In the region there are no other publicly or privately owned sport arenas of significant size. In Jena and surroundings there are also no other event facilities capable of hosting more than 400 people.
- (4) The city owns the stadium, will organise and finance (together with the Land Thüringen) the restructuring, and will operate the stadium by its own means and administration. The estimated costs are €34,450,000. €26,450,000 will be financed through the Land Thüringen which it intends to finance from the fund "Gemeinschaftsaufgabe zur Verbesserung der regionalen Wirtschaftsstruktur" (Improvement of the Regional Economic Structure - GRW), the remainder by the City of Jena.
- (5) Jena will rent the stadium to two local non-professional football clubs and to other non-commercial users for school sport, non-professional athletic competitions, cultural or societal events. The fees will be set at a level which respects the financial ability of the users to pay.
- (6) The city will furthermore engage a management company (chosen following an EU-wide tender) which will be entrusted - in exchange for a management fee which is subject of the tender - to market the stadium for professional use (company events and congresses) and to assist in the organisation of these events. The rents collected for this professional use remain due to the city of Jena. The management company will not be an operator which exploits the infrastructure independently and on its own account. It will just provide a limited set of services to the City of Jena. The duration of this contract is three years. The contract will provide for a mechanism by which the management fee will be increased moderately in case of a higher than expected turnover. This mechanism is introduced to ensure that prices charged to professional users will be market oriented.

2.1. Assessment

2.1.1. Existence of aid

- (7) The question arises whether the planned measure could constitute State aid within the meaning of Article 107 (1) TFEU, by supporting through State resources an economic activity which derives therefrom an advantage which could affect competition and trade between Member States.
- (8) The stadium renovation is fully financed by public funds. Also a possible financing through the ERDF programme is attributable to the State as the allocation of the fund is administered under the responsibility of the German authorities. The funding of the arena may constitute aid if it leads to a selective advantage for specific economic activities. In this context, the funding of the necessary infrastructure, which will be used for commercial activities, could constitute aid, according to the Leipzig/Halle airport judgment of the Court of Justice¹. Following the Court's assessment, the economic character of the later use of the infrastructure would determine the nature of

¹ Judgment of 19 December 2012 in Case C-288/11, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*.

the construction. Accordingly, the economic activity of operating the infrastructure would benefit from aid.

- (9) The City of Jena as the owner of the stadium will run and rent it to non-professional users and for professional activities. The offering of a venue against remuneration for holding events organised either by professional users or by non-professional ones constitutes an economic activity.
- (10) In the present case the investment costs necessary for carrying out this economic activity are not covered with revenues of the said activity but with State resources. Therefore, the economic activity benefits of an advantage it would not have received in a normal market situation².
- (11) Regarding a possible effect on trade and competition in the internal market, the envisaged commercial exploitation concerns local and regional firms and not international events. The next border, with the Czech Republic, is around 100 km away. It is therefore unlikely that the operation of the Jena stadium will have a strong cross border effect like e.g. arenas which are planned for commercial events (in particular music and sport) of international level. The market for organising sport and other types of public events is open to competition between venue providers and event organisers, some of which operate in several Member States or belong to international groups. Therefore, the measure at issue has at least a potential an effect on trade and competition in the internal market.
- (12) The renting of the stadium infrastructure may furthermore constitute aid for the users, if the users can be considered undertakings and if the rent they pay is below market levels. Non-professional users do not qualify as undertakings within the meaning of Article 107. Offering them the arena for a low rent does therefore not constitute aid. In Jena, there is also no professional football club. The professional users have to pay a market oriented fee which is negotiated by the management company. The contract of Jena with this company will provide for a mechanism by which the management fee will be increased in case of a higher than expected turnover. Thereby it has an incentive not to undercut prices for the final users when it markets the arena. The German authorities committed furthermore to apply a market oriented fee. However, and in the absence of any clarification on how that fee will be calculated the Commission cannot exclude that part of the economic advantage benefitting the operation will indeed be transferred to the final users through prices which are indeed below those for the use of comparable infrastructure under normal market conditions.
- (13) The management company, which the City of Jena will contract to market the stadium for professional users and to assist in the organisation of their events, enters into a commercial service contract with the municipality. The contract will be concluded following a tender procedure which also includes the requested management fee and will include incentives for this company to maximise income for the City of Jena. There is nothing which suggests that the management company will benefit from an exceedingly high management fee which would not any more reflect market terms. It is thus not benefiting from aid.

² Ref to point 107 Leipzig halle GC.

2.1.2. *Compatibility*

- (14) The public financing of the reconstruction of the stadium with the aim to offer it, in part, for commercial use may be compatible with the internal market pursuant to Article 107(3) c TFEU if it pursues a policy objective of common interest, is necessary and proportionate and does not cause undue distortion of competition.
- (15) With regard to the achievement of a policy objective of common interest, the construction of venues for sport and other public events and supporting different types of activities which benefit the general public can be considered a State responsibility towards the general public³. The Amsterdam Declaration on Sport and Article 165 TFEU both acknowledge the social significance of sport: "The Union shall contribute to the promotion of European sporting issues...". The arena will also be used for cultural events (concerts, shows), as well as providing a meeting place (conferences, fairs, church meetings) and as such contribute to the promotion of cultural diversity, according to Article 167(4) TFEU also a Union policy objective.
- (16) The arenas will thereby ensure the general public's access to sport and culture, which is a typical task of municipalities. There is a lack of capacity and/or adequate and up-to-date facilities for sports and cultural events. For the local football clubs and other sport organisations there are no alternative arenas available; existing privately owned facilities for congress or seminar type of events can only cater to much smaller types of events. Thus, the Jena stadium is the only large arena in a mid-size town with the purpose to serve for events of principally local or regional character. The objective is not to attract international commercial events but to cater to the local or regional needs for a place to organise major events. The realisation of the arenas must therefore be regarded as satisfying policy objectives of common interest.
- (17) The aid is well-targeted as it addresses the specific problem of under-investment in sports infrastructure. The public financing of the arena is necessary because the existing facilities have become outdated and do not anymore meet the requirements of the public. In addition, according to the German authorities, there is no private investor willing to finance a medium sized regional multipurpose stadium which is a facility implying a large and risky investment.
- (18) The financing is also justified by the fact that such an infrastructure otherwise would be absent in the region concerned. There is no duplication with existing commercial event facilities of comparable size in the region. The largest existing conference and event facility has a capacity of 400 places. Jena's size and structure justifies the size of the arena. Apart from sport, the local population and institutions require own event facilities on the ground.
- (19) Although both towns are within a distance of 50 km, their size and structure justify an arena for each. For the local sport they need it anyway; and the local population and institutions require own event facilities on the ground. Jena is a University town and has traditional and important industry. Erfurt is the Capital of the Land Thüringen and sees the need to offer central meeting facilities for the Land in order to better fulfil this function. It is furthermore a University town.

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Cf. point 67 in decision on case C4/2008, Netherlands, Investment in Ahoy sports palace by Rotterdam.

- (20) The upgrade of the arena to further possible uses is also inspired by a wish to make better use of public funds and to obtain some return on it. Jena wants to seize the opportunity of the necessary renovation to upgrade the stadium in a way that it may also host, in addition, other events of different sizes other than sport, for which it identified a need among the local community.
- (21) Furthermore, the subsidised infrastructures will be open to the general public, without jeopardising the primary sport objective. This will ensure that several different types of users and sectors will be able to benefit from the subsidized facility. In addition, the professional activities which are to be carried out in the arena are of local character; therefore the aid will not affect trading conditions to an extent contrary to the common interest.
- (22) By the same token, in the light of the commitment of the German authorities to apply market prices, the possible advantage given to professional users does not appear to be disproportionate either to the objectives of common interest pursued by the building and operation of the arena and therefore it can be considered compatible for the same reasons that justify the aid for its building and operation.
- (23) The public financing of the reconstruction and operation of the multifunctional arena of the City of Jena is therefore pursuing acknowledged public policy objectives, is necessary and does not affect trade and competition between Member States to an extent contrary to the common interest, according to Article 107(3) c TFEU.

3. Conclusion

- (24) The Commission has accordingly decided to consider the aid for the construction and operation of the multifunctional arena of the City of Jena to be compatible with the internal market pursuant to Article 107(3)c of the Treaty on the Functioning of the European Union.

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European Commission
Directorate-General for Competition
State Aid Greffe
1049 Brussels
Belgium
Fax No: +32 2 29 61242

Yours faithfully,

For the Commission

Joaquin ALMUNIA
Vice-President