



EUROPEAN COMMISSION

Brussels,
C(2014)

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: State aid No SA.33045 (2013/NN) (ex 2011/CP) – Germany – Alleged unlawful aid in favour of Kristall Bäder AG

Sir,

1. PROCEDURE

- (1) By electronic letter dated 20 May 2011 (2011/052551) the Commission received a complaint about alleged unlawful State aid granted by the Free State of Bavaria and the Municipality of Kochel am See (Germany) to the undertaking "Kristall trimini Kochel am See GmbH". The complainant (hereinafter: "the complainant") requested not to reveal its identity.
- (2) By letter of 23 June 2011 (2011/066288), the Commission services sent the complaint and a request for information to the German authorities. By letters of 4 October (2011/105585) and 26 October 2011 (2011/115322), Germany submitted information to the Commission. By letter of 28 November 2011 (2011/125609), the Commission services forwarded a non-confidential version of Germany's reply to the complainant. By letter of 3 January 2012 (2012/000368), the complainant submitted its comments on Germany's submission. Germany submitted additional information and documents to the Commission by letters of 25 September 2012 (2012/101395), 22 January 2013 (2013/003052), 5 and 6

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February 2013 (2013/012308 and 2013/012509). On 29 January 2014 the complainant submitted further information and observations on the project.

2. DESCRIPTION OF THE ALLEGED STATE AID MEASURE

- (3) The complaint addresses alleged unlawful State aid granted by the Free State of Bavaria and the Municipality of Kochel am See in favour of the company "Kristall trimini Kochel am See GmbH" for an investment aiming at modernising and upgrading the local swimming pool in Kochel am See (called "Trimini") in order to create a new swimming pool, wellness and spa facilities complex (hereinafter: the "new Trimini complex").
- (4) Kristall trimini Kochel am See GmbH is a 100 % subsidiary of the Kristall Bäder AG, a group specialised in setting up and operating spas and water parks. At present Kristall Bäder AG operates, with 850 employees and an annual turnover of EUR 60 million, twelve spas and water parks in Germany¹, including the new Trimini complex in Kochel am See.

2.1. Facts provided by the German authorities

- (5) Trimini was since 1972 up to April 2011 a public swimming pool (with indoor and outdoor pools, and sauna facilities) run by the Municipality of Kochel am See (hereinafter: "the Municipality"). In 2011 Trimini had 33 employees and received some 160 000 users per year. Since the 1990ies the number of users had been constantly decreasing, causing Trimini to suffer significant operating losses, up to an average deficit of about EUR 1 million per year over the period 2000-2010.
- (6) In 2010 the Municipality considered closing Trimini. The costs to close it were estimated at EUR 6.48 million, mainly due to high dismantling and disposal expenses. The Municipality estimated in 2011 that dismantling costs alone would amount to about EUR 5 million². Moreover, in case of complete closure, the Municipality would have had to pay off the 33 employees for about EUR 541 000 (salaries of EUR [...]*) to be paid in the event of termination, plus severances amounting to EUR [...]*). Furthermore, the Municipality received for a previous modernization of Trimini³ in 1996-1997 from the Government of Upper Bavaria a grant of DEM 2 410 254 (about EUR 1.232 million), of which in the event of complete closure the Municipality would have had to pay back a total amount of EUR 941 541 (including interests).

Table 1: Costs for closing Trimini as estimated by the Municipality in 2011

Type of costs in case of closure	Amounts
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¹ Information available on the group's website <http://www.kristall-baeder-ag.com>

² As stated during the Municipal Council meeting of 27 March 2011.

* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

³ Under the old Bavarian regional funding for infrastructure measures for the Bavarian tourism promotion program ("*Bayerisches regionales Förderprogramm für Maßnahmen der Infrastruktur, Bayerisches Fremdenverkehrsförderungsprogramm*").

Dismantling / demolition costs	EUR 5 000 000
Costs for dismissing 33 employees	EUR 541 000
Reimbursement of part of funding received from the Government of Upper Bavaria in 1996-1997	EUR 941 541
Total	EUR 6 482 541

- (7) Instead of closing down Trimini, the Municipality decided to invest into a major modernisation, extension and upgrading, adding to the existing swimming pools some modern spa, fitness and wellness facilities in order to increase its attractiveness. Germany explains that the renovation (transformation and complete refurbishment of existing facilities) and the construction of the new Trimini complex almost double its dimension (**[8 000-10 000]*** m² of usable space instead of 4 754.90 m²): new spa services such as physiotherapy, various types of spas and saunas, and new pools are to be built in using the existing infrastructure as well as the new constructions.
- (8) The Municipality decided to outsource the construction and future operation of the new Trimini complex by granting a construction, building management and operating concession to the winning bidder after a European public procurement procedure⁴.
- (9) On 26 April 2011, at the end of the public procurement procedure, the Municipality signed a contract ("*Bau- und Betriebskonzessionsvertrag*") with the winning bidder, "Kristall trimini Kochel am See GmbH" (hereinafter: the "*concessionaire*").
- (10) The contractual concession period runs over 25 years. The Municipality remains the owner of the new Trimini complex whereas the *concessionaire* builds, operates and maintains the infrastructure and manages the new Trimini complex with owner-like rights and duties.
- (11) The contract stipulated between the Municipality and the *concessionaire* on 26 April 2011 sets a long list of obligations for the *concessionaire*:
- (a) To plan and build the new Trimini complex (in full respect of existing rules and of the concession contract). Whereas the contractually agreed total investment costs amount to EUR 12 154 000⁵ and have to be borne by the Municipality, cost overruns are to be covered by the *concessionaire*.

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⁴ The Municipality conducted the procurement in accordance with the applicable EU procurement rules. The tender was published as 2009/S 97-138868 in the TED-Website (OJ 2009/S 66-094745 of 04/04/2009) - <http://ted.europa.eu/udl?uri=TED:NOTICE:138868-2009:TEXT:EN:HTML&src=0>

⁵ All amounts concerning the investment and expenditure are in nominal value, unless specified otherwise.

- (b) To exploit the facilities during a 25 years exploitation period, against an up-front payment of the concession fees due for the 25 year exploitation period, for a total amount of EUR 6.154 million.
 - (c) To take up a guarantee ("*Vertragserbringungsbürgschaft*") of EUR 500 000 that can be invoked if the *concessionaire* fails to respect contractual conditions.
 - (d) To manage the infrastructure efficiently in order to maximise the accessibility for the public and to optimise its economic operation.
 - (e) To maintain and regularly modernise the new Trimini complex in order to increase its attractiveness.
 - (f) To keep entrance fees to swimming pools (but not to spa and sauna facilities) at socially acceptable prices, and offer reduced fees for certain social groups and associations, as well as free entrance for local schools and kindergartens.
 - (g) To transfer back the new Trimini complex to the Municipality in full functioning and operating conditions at the end of the concession period.
- (12) In December 2011 the Government of Upper Bavaria (Free State of Bavaria) awarded⁶ to the investor, the Municipality of Kochel am See, a direct investment grant of EUR 2.4 million. This aid was granted under a SME investment aid scheme⁷ put into effect in application of Article 15(2)(a) of Commission Regulation (EC) No 800/2008 of 6 August 2008 (hereinafter "Regulation 800/2008")⁸. Article 15 of the Regulation 800/2008 states that investment aid to small and medium enterprises shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty on the Functioning of the European Union (hereinafter "TFEU") and shall be exempt from the notification requirement of Article 108(3) TFEU if the aid intensity does not exceed 20 % of the eligible costs (for investments in tangible and intangible assets) in the case of small enterprises. Germany explains that in application of the SME definition contained in Annex I to Regulation 800/2008, the Municipality of Kochel am See qualifies as a small enterprise with respect to its economic activities, in which it had 42 employees and an annual turnover of EUR [1-2]* million in 2010⁹. Since

⁶ With granting act (*Zuwendungsbescheid*) of 23.12.2011 for an investment aid to project no. 2131059 of the Municipality of Kochel am See for the modernisation and extension of Trimini.

⁷ Under the "*Richtlinie zur Durchführung des bayerischen regionalen Förderungsprogramms für die gewerbliche Wirtschaft*" (BRF) vom 27. August 2008, Nr. III/2-3541/189/3, registered at the Commission as State aid case no. SA.26652 (X 15/2008), OJ C 249, 17.10.2009, p. 16.

⁸ Commission Regulation (EC) No 800/2008 of 6 August 2008 *declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty* (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3.

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⁹ According to Article 1 of Annex I of Regulation 800/2008 an enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. According to Article 2(2) of the same Annex I, within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. In addition, in the meaning of Article 3(2)(d) of the Annex I, the Municipality of Kochel am

the total eligible investment costs under the scheme amount to EUR 12.136 million, the aid of EUR 2.4 million, corresponds to an aid intensity of 19.78 %.

- (13) Moreover, the contract stipulates that the *cessionnaire* would receive EUR 380 000 per year during the construction phase (initially scheduled from 25 May 2011 until 31 July 2013 at latest¹⁰), as indemnity for losses on revenues during this phase with reduced operations. The contract limits sets the overall indemnity to EUR 830 795.
- (14) According to the contract, the *cessionnaire* has to set entrance fees to the swimming pools at socially acceptable prices, to offer free entrance for local schools, and to charge reduced fees for certain associations (e.g. Red Cross, rescue and first aid squads' exercises). Germany considers that these specific conditions qualify as services of general economic interest (hereinafter: "SGEI"). In order to cover the provision of these services, the *cessionnaire* receives from the Municipality a compensation of EUR 100 000 per year for a period of 23 years, as from the opening of the new Trimini complex after the construction phase until the end of the concession contract.

2.2. Complaint

- (15) The complaint addresses both the aid granted by the Free State of Bavaria to the Municipality of Kochel am See as well as the alleged unlawful aid by the Municipality to the *cessionnaire* created by the provisions of the contract.
- (16) The complainant claims that both aids distort competition and are not compatible with Article 107(3) TFEU since: (a) the standard of living in the region is neither low nor is there serious underemployment; (b) there is no serious disturbance in the economy; (c) the aid does adversely affect trading conditions with Austria to an extent contrary to the common interest; and (d) the aid does not promote culture and heritage conservation.
- (17) The complainant argues that, since the construction and operating costs of Trimini are subsidised, the *cessionnaire* has lower capital and operating costs than its competitors which operate in the same market. As a result, the *cessionnaire* can offer lower entrance prices than its competitors with a devastating impact on their competitiveness and turnover. The aid would therefore distort competition.
- (18) The complainant also claims that the public tender launched by the Municipality includes the refurbishing and modernisation of the existing Trimini infrastructure. Refurbishing and modernisation would not be covered by the provisions of

See is an autonomous local authority with an annual budget of less than EUR 10 million and less than 5 000 inhabitants: in 2011 the Municipality had a population of 4 067 inhabitants (data as from www.kochel.de), and an annual budget of EUR 8 119 077 in 2010 and of EUR 7 658 000 in 2011.

¹⁰ As a consequence of the legal uncertainty due to the preliminary investigation opened by the Commission into the measure, the construction works have been delayed. E.g. a new deadline for the investment was set at 31 December 2013, as from the *Änderungsbescheid* of the Government of Upper Bavaria of 21.9.2012, modifying certain deadlines of the granting act of 23.12.2011.

Article 15(2)(a) of Regulation 800/2008, and the corresponding national law¹¹, which excludes replacement investments.

- (19) The investment into the new Trimini complex would go far beyond what is necessary for the provision of SGEI. The existing Trimini would have been largely sufficient to offer these services to the population.
- (20) The SME aid under Article 15(2)(a) of Regulation 800/2008 that the Free State of Bavaria intends to grant to the Municipality of Kochel am See would be in contradiction to SGEI rules; a public authority could not be at the same time a market economy investor and a provider of SGEI.

2.3. Germany's comments to the complainant's allegations

- (21) Germany replied to the complainant's allegations by declaring that the Municipality of Kochel am See applied established cost-benefit criteria and acted according to MEIP standards when deciding on the three alternative options for Trimini, i.e. (a) closure, (b) continuation to operate without changes, (c) re-launch Trimini by investing in its modernisation and extension.
- (22) Germany considers that by selecting the latter option (see recitals (6), (7) and (8)) the Municipality fulfilled the MEIP criteria as: (i) it assessed on the basis of a cost-benefit analysis that closing down or keeping the old Trimini would have been more expensive than the chosen alternative to invest in the modernisation and extension of Trimini, and (ii) it applied an open, transparent and unconditional tender procedure¹² to select the *concessionaire*.
- (23) Germany explains that this *ex-ante* assessment took into account all costs that a market economy investor would face under different scenarios. Germany refers to a Commission practice recently explicitly confirmed by the General Court¹³, for which it is sufficient for MEIP purposes that an investment decision by a public authority has been successfully analysed, confirming that the selected option respected sound market criteria and corresponds to what a hypothetical private investor would have opted for. Therefore, the public authority would be under no obligation to consider options other than the chosen one.
- (24) The Municipality published a European public tender in the Official Journal of the European Union¹⁴ for the building, operating and maintaining the new Trimini complex against a concession fee. The main economic criteria in the public tender were: (i) lowest financial participation of the Municipality during the 25 years concession period, (ii) highest financial contribution of the selected undertaking

¹¹ The complaint refers to "*Richtlinie zur Durchführung der bayerischen regionalen Förderprogramme für die gewerbliche Wirtschaft*", Bekanntmachung des Bayerischen Staatsministeriums für Wirtschaft, Verkehr und Technologie vom 22.02.2002, Nr. 3540 – III/2 – 3540 - Art. 2.1.5.

¹² In compliance with Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

¹³ In its Judgment of 03.28.2012 for case T-123/09, *Ryanair v Commission*, paragraphs 119 and 121.

¹⁴ OJ 2009/S 66-094745 of 4.4.2009. See also footnote 4.

to the total initial investment costs, and (iii) lowest costs for the Municipality for the compensation of the provision of SGEI.

- (25) Of the seven parties that showed an interest, four applied (but two did not meet the required criteria). Eventually only one party (Kristall Bäder AG) submitted a comprehensive application and was selected. The successful tenderer offered to build the new Trimini complex against the payment of EUR 12 154 000 by the Municipality; to pay concession fees of EUR 6.154 million; to provide SGEI for an annual compensation of EUR 100 000.
- (26) Germany argues that the annual compensation to the *concessionaire* for the provision of SGEI would not qualify as State aid since it fulfils the so-called "Altmark" criteria¹⁵: (a) the public service obligation was clearly discharged and defined, (b) the parameters on the basis of which the compensation is calculated were established in advance in an objective and transparent manner as defined in the public tender, (c) the compensation does not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, (d) the undertaking charged with SGEI was chosen pursuant to public tender.
- (27) In addition, Germany argues that the provisions of the contract of 26 April 2011 for the compensation of SGEI meet the conditions of the Commission Decision of 28 November 2005 concerning the application of Article 106(2) of the TFEU¹⁶. The Municipality of Kochel am See is therefore exempted from the notification requirements laid down in Article 108(3) of the TFEU since (a) the revenues of Kristall Bäder AG are below EUR 100 million, (b) the effect on trade is very limited, (c) the compensation for the provision of SGEI is very low, (d) the *Altmark* criteria are fulfilled (see recital (26)). In a further submission, Germany takes the view that the concession contract meets also all the conditions of the successor decision, the Commission Decision (2012/21/EU) of 20 December 2011 *on the application of Article 106(2) of the TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI*¹⁷.
- (28) Germany concludes that the Municipality of Kochel am See acted as a market economy investor with respect to its economic activities. As the Municipality of Kochel am See qualifies as small enterprise, it was eligible to receive SME investment aid up to 20 % of the eligible investment cost under Regulation 800/2008 (see recital (12) above). With regard to the complainant's claims that private investment behaviour and provision of SGEI are in principle incompatible with each other, it fails to recognize that the provision of SGEI and other economic activities are almost always performed in parallel and that the only rule

¹⁵ As from judgment of the European Court of Justice in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747.

¹⁶ Commission Decision (2005/842/EC) of 28 November 2005 on the application of Article 86(2) of the EC Treaty 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 312, 29.11.2005, p. 67–73.

¹⁷ OJ L 7, 11.1.2012, p.3.

to be noted is that where SGEI are subsidized, their costs must not be overcompensated¹⁸.

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid

- (29) According to Article 107(1) TFEU, "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".
- (30) Therefore, for a measure to constitute State aid within the meaning of that provision, the following cumulative conditions apply: 1) the measure must be granted through State resources; 2) it has to confer an economic advantage to undertakings; 3) this advantage must be selective and distort or threaten to distort competition; and 4) the measure must affect intra-Union trade.
- (31) The criterion that the measure must be granted through State resources is fulfilled as the Municipality of Kochel am See finances the investment project, supported by an investment grant awarded by the Government of Upper Bavaria. Both the Municipality of Kochel am See and the Government of Upper Bavaria are public authorities and part of the State. Therefore the measure is imputable to the State and financed through State resources.
- (32) The public funding of the modernisation and upgrading of Trimini may constitute aid if it leads to a selective advantage for specific economic activities.
- (33) The Commission considers that both the financing of the construction and the operation of an infrastructure constitute as an economic activity in itself if that infrastructure is, or will be, used to provide goods or services on the market. The Commission in other words considers that there is a link between the managing and operating of infrastructure and its construction or development, a view that has been confirmed by the Court in the Leipzig/Halle airport judgment¹⁹. Moreover, following the Court's assessment, the economic character of the later use of the infrastructure would determine the nature of the construction. In the present case, the new Trimini complex will be used to provide services on the spa and wellness tourism market, hence for an economic activity.
- (34) The Commission reminds that the Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal

¹⁸ Germany refers here to the Judgment of the General Court of 10.7.2012 for case T-520/09, *TFI, M6 & Canal+ v Commission*, point 102, not yet published.

¹⁹ Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt and Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission* [2011] ECR II-01311, paragraph 107; Case C-288/11 *Mitteldeutsche Flughafen AG and Flughafen Leipzig- Halle GmbH v European Commission* [2012]. See also the judgement of 24 October 2002, case C-82/01P *Aéroport de Paris*, ECR 2002, I -9297.

status and the way in which they are financed. The classification of a particular entity as an undertaking therefore depends entirely on the nature of its activities. This general principle has three important consequences: (1) the status of the entity under national law is not decisive, (2) the application of the State aid rules as such does not depend on whether the entity is set up to generate profits, and (3) the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

- (35) In the present case, the existence and compatibility of aid has to be assessed insofar as the economic activity of managing and operating the infrastructure and its construction or development is concerned. In essence, the public authorities support the activity of the new Trimini complex as an undertaking, whether operated by the Municipality of Kochel am See or by the *concessionaire* "Kristall trimini Kochel am See GmbH" (whose holding company is "Kristall Bäder AG").
- (36) The Commission cannot share the position of the German authorities that the financing of the investment project by the Municipality would not qualify as State aid as the decision to invest had been taken in full respect of the MEIP (see section 2.3 of this decision). The Commission considers that:
- (a) the financing of the investment by the Municipality through public funds and the grant of the Government of Upper Bavaria to the Municipality cannot be separated as they refer to the same investment and are awarded at the same moment in time. Therefore the public financing should be considered as one single measure, and the Commission has to assess whether it represents State aid in the meaning of Article 107(1) of the TFEU;
 - (b) the public funding provided by local and regional authorities confers an economic advantage to the new Trimini complex, as the investment in the economic activity of new Trimini complex would not have been financed on market terms. Therefore, it can be assumed that the investment project would not yield an acceptable rate of return over the reference period of time of 25 years (duration of the concession).
- (37) As the expected revenues (in this case, the advanced payment of the concession fees of EUR 6.124 million paid by the *concessionaire* to the Municipality as a contribution to the initial investment) do not cover the full investment costs of the project (EUR 12.124 million), it must be concluded that a private investor would not have undertaken it. Even taking into account the fact that this project avoided the costs incurred in case of closure of the complex Trimini and the fact that the Municipality would be the owner of the complex after 25 years of concession without any obligation towards the concessionaire no private investor would have undertaken such a project. Indeed, the public authorities had three options (as detailed in the following developments, see recitals 44 to 47). No private operator would have chosen continuing the activities of Trimini (which would have entailed EUR 25 million of losses). Furthermore, the difference between the cost of the option of closing Trimini by dismantling it (EUR 5 541 000) and the one of investing into modernisation and extension (EUR 6 830 795) would amount to

EUR 1 289 795. It does not result from the information taken into account by the German authorities that the net residual value of the Trimini complex after 25 years (taking into account the dismantling/ demolition costs and the costs of dismissing 33 employees) would be higher than EUR 1 289 795. It must be concluded that in this case the public funding does not take place on terms that would have been acceptable to a private investor, and the measure therefore confers an economic advantage to the new Trimini complex.

- (38) As regards the *Altmark* criteria invoked by the German authorities (see recitals (26) and (27)), the Commission considers that they cannot apply since the third *Altmark* criterion would not be fulfilled as the compensation does not appear to be limited to what is necessary to cover the costs incurred in the discharge of public service obligations, as after the investment the infrastructure would not be exclusively used for purposes of general economic interest.
- (39) The measures confer a selective advantage to the economic activities of the new Trimini complex, which is relieved of a part of costs which it would normally have to bear for the its renovation, upgrading and operating costs.
- (40) Finally, when aid granted by a Member State strengthens the position of an undertaking compared with that of other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid²⁰. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition²¹. As regards the notified measure, the financial support granted to the economic activity of the Municipality of Kochel am See for the upgrading of Trimini could strengthen its position in relation to similar infrastructures in the Union and therefore might have potential distorting effects on competition and trade²². Furthermore, the infrastructure of Trimini is not far from the border with Austria. Hence, the aid is liable to distort competition and to affect inter-Union trade.
- (41) The Commission therefore concludes that the measure constitutes State aid within the meaning of Article 107(1) of the TFEU.

3.2. Legality of the aid measure

- (42) The German authorities have not fulfilled their obligation, in accordance with Article 108(3) TFEU, to notify the aid before putting it into effect. The Commission takes note of the fact that the part of aid granted by the Government of Upper Bavaria to the Municipality of Kochel am See will only be paid out after approval by the Commission.

²⁰ See Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para. 11; Case C-53/00 *Ferring* [2001] ECR I-9067, para. 21; and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, para. 44

²¹ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717

²² For an interesting example, see also *Altmark*.

3.3. Compatibility of the aid

- (43) The aid is a combination of the public funding by the Municipality for its investment into the modernisation and upgrading of new Trimini complex with the support in form of investment aid granted by the Government of Upper Bavaria to the Municipality for the same investment project.
- (44) On the basis of the information provided by Germany, the public authorities had three alternative options, as described in recitals (6), (7) and (21) above. The public authorities had to choose the best option to provide the local population with services and facilities (access to a municipal swimming pool) while minimising its investment and operating costs.
- (45) The public authorities decided to keep Trimini and to invest in its modernisation, extension and upgrading by entering into a contract with a *cessionnaire*, rather than closing and dismantling it at the cost of EUR 5.541 million (costs excluding funds to be reimbursed by the Municipality to the Government of Upper Bavaria, as these funds would remain in the public realm), or keeping it as it was (i.e. producing yearly losses of EUR 1 million).
- (46) The public authorities calculated that the public funding for the new Trimini complex would require an amount of EUR 12.154 million for investment costs, minus EUR 6.154 million advanced by the *cessionnaire* for concession fees, plus EUR 830 795 as a contractually agreed indemnity to the *cessionnaire* for losses during the construction phase (see recital (13)). This public funding includes EUR 2.4 million of SME investment aid awarded by the Government of Upper Bavaria to the Municipality of Kochel am See (see recital (12)). Moreover, in the long term the Municipality pays to the *cessionnaire* EUR 100 000 per year for 23 years to compensate for reduced or free access fees (see recital (14)). The present value of this compensation amounts to EUR 1 735 059²³.

Table 2: Costs of the Municipality's alternative options for Trimini

ALTERNATIVE OPTIONS	Costs
(a) Closure of Trimini by dismantling it	EUR 5 541 000 of costs
(b) Continuing activities of Trimini – losses over 25 years at EUR 1 million per year (present value)	EUR 25 million of losses
(c) Investment into modernisation and extension of Trimini with a concession, plus compensations	EUR 6 830 795 of costs, plus EUR 1 735 059 of compensation

- (47) The total of the public funding for the new investment (EUR 6 830 795), plus the compensation for reduced or free access fees (EUR 1 735 059) amounts to EUR 8 565 854, which represents the funding gap to be borne by the public

²³ The amounts have been discounted to the date of awarding the concession (26 April 2011) and taking into account the discount rate applicable at that time (base rate of 1,49 % on top of which 100 basis points need to be added, according to the Commission Communication on reference rate, OJ C 14, 19.1.2008, p.6).

authorities. In other terms, this funding gap represents the difference between the total investment cost for the new Trimini complex (EUR 12.154 million) and the Municipality's profit of the investment, given by concession fees (EUR 6.154 million), minus the indemnity for losses during the construction phase (EUR 830 795) and minus compensations for reduced or free access fees (EUR 1 735 059).

- (48) Therefore it should be determined whether the aid to cover this funding gap is compatible with the internal market within the meaning of Article 107 of the Treaty.
- (49) The General Block Exemption Regulation (hereinafter "GBER 2014")²⁴ in force since 1 July 2014 provides (Article 3 thereof) that "*aid schemes, individual aid granted under aid schemes and ad hoc aid shall be compatible with the internal market within the meaning of Article 107(2) or (3) of the Treaty (...) provided that such aid fulfils all the conditions laid down*" in the same Regulation. Section 12 of the GBER 2014 provides that investment aid for sport and multifunctional recreational infrastructures shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty if it fulfils the conditions of the same Regulation.

3.3.1. Compliance with the common provisions of the GBER 2014

- (50) In order to assess whether the investment aid for the new Trimini complex is compatible with the internal market under the GBER 2014, it is necessary to verify its compliance with the general provisions of the same Regulation. Article 3 of the GBER 2014 provides that "*... ad hoc aid shall be compatible with the internal market within the meaning of Article 107(2) or (3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty provided that such aid fulfils all the conditions laid down in Chapter I of this Regulation, as well as the specific conditions for the relevant category of aid laid down in Chapter III of this Regulation*".
- (51) Under Chapter I of the GBER 2014, Article 5 (on "*Transparency of aid*") provides that "*(t)his Regulation shall apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent of the aid ex ante without any need to undertake a risk assessment*". The public contribution to the investment in the new Trimini complex is in form of not reimbursable grant, and can therefore be considered transparent. The aid amount as from recital (47) is therefore the gross grant equivalent of the aid in the meaning of Article 7 of the GBER 2014.
- (52) Article 6 (on "*Incentive effect*") provides that "*(t)his Regulation shall apply only to aid which has an incentive effect*". More precisely, under point 2 of Article 6 it requires that "*the beneficiary has submitted a written application for the aid to the Member State concerned before work on the project or activity starts. The*

²⁴ Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187 of 26 June 2014

application for the aid shall contain at least the following information: (a) undertaking's name and size; (b) description of the project, including its start and end dates; (c) location of the project; (d) list of project costs; (e) type of aid (grant, loan, guarantee, repayable advance, equity injection or other) and amount of public funding needed for the project". Before the start of works on 25 May 2011, the Municipality of Kochel am See (both granting authority, and beneficiary of the aid for its economic activity in the new Trimini complex) decided on 27 March 2011 to modernise, extend and upgrade Trimini on the basis of the outcome of the public procurement procedure presented in recital (8). The construction, building management and operating concession contract signed on 26 April 2011 with the winning bidder defined all the details of the infrastructure project, as well as the public financial contribution to the investment (see recitals (9), (10) and (11)). The concession contract represents the granting act of the infrastructure investment aid. As a granting act is a stronger entitlement than a written application for the aid, the provision on the incentive effect of the aid can be considered to be fulfilled.

- (53) Article 8 (on "*Cumulation*") provides that "*the total amount of State aid for the aided activity or project or undertaking shall be taken into account*", by cumulating all State aid in relation to the same eligible costs, as long as "*such cumulation does not result in exceeding the highest aid intensity or aid amount applicable to this aid under this Regulation*". This provision is fulfilled as all the investment aid for the new Trimini complex from different sources has been included in this analysis (see recitals (47) and (48)).
- (54) The investment aid for the new Trimini complex falls under the scope of Article 1.1(k) of the GBER 2014: "*aid for sport and multifunctional recreational infrastructures*". The compliance with specific provisions of the GBER 2014 for aid to this type of infrastructure is assessed in the following section.

3.3.2. Compliance with the specific provisions of the GBER 2014 for sport and multifunctional recreational infrastructures

- (55) First, it has to be determined whether the new Trimini complex qualifies as a sport and multifunctional recreational infrastructure. The GBER 2014 does not provide a precise definition of this type of infrastructure, but clarifies (Article 2, point 74) that it should serve more than one purpose of recreation. The new Trimini complex serves as a swimming pool for local population and visitors, but provides the same users also other type of services (spa and wellness) with its other related facilities. Therefore, the Commission considers that it qualifies as a sport and multifunctional recreational infrastructure.
- (56) Then as for the compliance with the provisions of Article 55 of the GBER 2014:
- (a) The sport infrastructure (swimming pools) is not "*used exclusively by a single professional sport user*" (Article 55.2), as its swimming pools are not intended for professional sport purposes and open to everybody;
 - (b) The infrastructure consists of sport and recreational facilities (swimming pools, spa and wellness facilities) with multi-functional character

(education, leisure, tourism) and is neither a leisure park nor a hotel (Article 55.3);

- (c) Access to the multifunctional sport and recreational infrastructure is open to all users and is granted on a transparent and non-discriminatory basis. More precisely, access to the new Trimini complex is open to all paying users (and free for certain categories) (Article 55.4);
 - (d) As explained in recitals (8) and (22), the concession to construct, upgrade and operate the sport and multifunctional recreational infrastructure has been "*assigned on a open, transparent and non-discriminatory basis, having due regard to the applicable procurement rules*" (Article 55.6) ;
 - (e) The aid takes the form of investment aid to construct and upgrade the multifunctional sport and recreational infrastructure, for which the eligible costs are the investment costs in tangible and intangible assets, amounting to EUR 12.154 million (see recitals (11) and (46)) (Article 55.7 and Article 55.8);
 - (f) The aid amount covers the funding gap, results from one contract and does not exceed the difference between eligible costs and operating profit²⁵ of the investment (as presented in recital (47)). The operating profit was deducted from the eligible costs ex ante, as set in the concession contract (Article 55.10).
- (57) The aid (for the funding gap, amounting to EUR 8 565 854) would fall under the application of the GBER 2014 as it is below EUR 15 million and total costs (amounting to EUR 12.154 million) do not exceed EUR 50 million (as required in Article 4.1 (bb)).
- (58) Article 58 (on "*Transitional provisions*") of the GBER 2014 provides that it applies to individual aid granted before its entry into force, if the aid fulfils all the conditions laid down in this Regulation, with the exception of Article 9. As aid for the investment in the new Trimini complex fulfils all (common and specific) conditions laid down in the GBER 2014, it shall be considered compatible with the internal market within the meaning of Article 107(3) of the Treaty.

3.3.3. Further questions raised in the complaint

- (59) The complainant considers that the *concessionaire* Kristall trimini Kochel am See GmbH (and its holding Kristall Bäder AG) received an incompatible aid under the concession contract. More specifically, the complaint addresses three different sources of aid the Municipality allegedly granted to the *concessionaire*: (i) the concession fee is too low, (ii) the reimbursement for SGEI is too high (overcompensation), (iii) the indemnity for loss of revenue during the construction phase of the new Trimini complex is too high.

²⁵ As defined in Article 2.39 of the GBER 2014, "*operating profit*' means the difference between the discounted revenues and the discounted operating costs over the relevant lifetime of the investment, where this difference is positive".

3.3.3.1. *The Concession Fee*

- (60) The German authorities declare that the *cessionnaire* has been chosen on the basis of a public, open and non-conditional tender, in compliance with EU public procurement law (see recitals (8) and (22)). The Commission observes that the Municipality of Kochel am See published a European public tender in the Official Journal of the European Union for a construction, building management and operating concession of the new Trimini complex.
- (61) As a result of the public tender, the *cessionnaire* does not pay an annual concession fee, but makes an advance payment of the total concession fees over 25 years in the amount of EUR 6.154 million, amount used to finance part of the overall investment costs of EUR 12.154 million. These EUR 6.154 million correspond to an average concession fee of EUR 246 160 per year.
- (62) As far as the selection of the concessionaire is concerned, the conditions set by Article 55.6 of the GBER 2014 have been respected (see recital 56 (d) of the present decision).
- (63) More generally, the concession fee is part of a measure which is exempted according to the GBER 2014.

3.3.3.2. *Indemnity for loss of revenues during the construction phase*

- (64) As the indemnity is part of the concession contract resulting from the open tender procedure, the Commission considers that the indemnity for the loss of revenue during the construction phase is in line with the GBER 2014 conditions.

3.3.3.3. *Compensation for services of general economic interests*

- (65) As the amount of this compensation is included in the funding gap analysis (as presented in recitals (47) and (48)), and the aid is considered compatible for the amount corresponding to the funding gap, the Commission does not consider it necessary to verify whether it could be considered compatible with the rules governing the services of general economic interest (SGEI).

4. DECISION

The Commission regrets that Germany put the aid for the investment into the new Trimini complex in Kochel am See into effect before 1 July 2014, in breach of Article 108(3) of the TFEU.

However, it has decided, on the basis of the foregoing assessment, to consider the aid meets the conditions of Commission Regulation No 651/2014 and is therefore compatible with the internal market in accordance with Article 107(3) of the TFEU.

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the letter in the authentic language on the Internet site:
<http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels
Fax No: 32 2 296 12 42

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice President