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<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 WORKING LANGUAGE</p> <p>This document is made available for information purposes only.</p>
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Subject: State aid SA.33728 – Denmark
Financing of a new multiarena in Copenhagen

Sir,

The Commission wishes to inform Denmark that, after having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. PROCEDURE

- (1) On 7 December 2012, the Danish authorities notified the European Commission a measure for the financing of a new multiarena in Copenhagen following a pre-notification phase. The Commission has received two complaints concerning the proposed measure and on 21 December 2012, the Commission asked the Danish authorities, in the form of a request for information, to clarify the issues brought forward in the complaints. The Danish authorities submitted their reply on 6 February 2012.

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2. DESCRIPTION OF THE MEASURE

- (2) The City of Copenhagen plans to build a "multiarena" of international standard which can provide facilities for music, culture and sport of a high, international level. The multiarena will have a maximum capacity of 15,000 seats.
- (3) There are other existing arenas in Copenhagen, primarily intended for football, but the Danish authorities argue that these are not sufficiently flexible and scalable to attract international sports, music and entertainment events to Copenhagen. In particular "Parken" should be mentioned, an arena in the centre of Copenhagen (home ground of FC Copenhagen and also used for large shows/concerts with up to 45,000 spectators). There are also other arenas nearby, e.g. in Malmö, Sweden.
- (4) The main parties (hereafter "the parties") involved in the multiarena project are the City of Copenhagen and Realdania (a private foundation)¹. Another actor, By & Havn (owned by the City of Copenhagen (55%) and the Danish State (45%)) shall provide for free the right to use land on which the multiarena is to be built.
- (5) According to the City of Copenhagen and Realdania, following previous failed attempts, no multiarena will be built in Copenhagen unless the project receives public co-financing.

2.1. Construction and Ownership:

- (6) The parties will set up a jointly owned "Arena Company", the purpose of which will be to construct and own the multiarena and to manage the operator agreement, whereas the operation of the multiarena shall be handled by a separate operator.
- (7) It is currently estimated that the total costs involved in the planning and construction of the multiarena will be approximately DKK 1,100 million (EUR 148 million)². The multiarena project will be financed by equity from the parties combined with external financing. Each of the parties will contribute DKK 325 million (EUR 43.7 million) to the capital of the Arena Company (total of DKK 650 million). The ownership will be proportionate to the contributions made, i.e. 50% to each of the parties. The external financing of DKK 345 million (EUR 46.4 million) will be covered by loans on market terms with a repayment period of 30 years. Elitefacilitetsudvalget³ will also pay a sum of DKK 15 million (EUR 2 million) for the financing of the construction of the multiarena.

¹ Although it seeks to ensure a return on its operations, Realdania is not a profit-maximizing business but a philanthropic foundation which describes its mission thus "to improve quality of life for the common good through the built environment, see www.realdania.dk.

² The total costs of DKK 1,100 million includes interest on loans and indexation of prices and wages foreseen until 2015.

³ A committee with the purpose of upgrading sports facilities to an international standard with the aim of hosting sports events at an international level. It is partly financed by the Danish State.

- (8) By & Havn shall provide the right to use land on which the multiarena is to be built free of charge for the first 40 years. After 40 years the Arena Company shall pay market rent.
- (9) The actual construction work will be awarded through an open tender.

2.2. Operation and Use:

- (10) The operation of the multiarena shall be handled by the operator. Based on a call for tender, the Arena Company shall enter into an agreement with a private party (the operator) on the lease of the multiarena.⁴ The operator which has been selected in an open and transparent tender procedure⁵ will be obliged to ensure that access to the multiarena is open to all users on non discriminatory conditions at market rent. Specifically, the operator will be obliged to rent the multiarena to a variety of user groups and for a variety of activities and not to give unduly preferential treatment to any certain type of activities to ensure the multifunctional use of the arena.
- (11) The Arena Company shall receive current income through the lease agreement with the operator which, in line with the current expectations, will be approximately [...] annually for the first 10 years. In addition, the Arena Company will have revenues from a car parking. It is envisaged that there will be such a connection between the external financing and the rent paid by the operator that the income received can pay the external financing.
- (12) For the first 10 years of operation, DIF⁶ will also provide an operational grant of DKK 5 million (EUR 672 000) each year (totally DKK 50 million). In return DIF will have the right to book the multiarena with an agreed notice to use it for international sports championships and other sport events. According to the Danish authorities, DIF shall pay market rent to the operator for the use.
- (13) Moreover, the Capital Region of Denmark will make available 5 annual grants of DKK 10 million (EUR 1.4 million) to be provided as financial support for such major international events which would not have been possible to carry through on general commercial terms. Anyone, including the operator of the multiarena, will be able to apply for these grants for such events in the multiarena.

⁴ The contract with the selected operator is expected to have duration of 25 years. The Commission was informed in February 2012 that the tender process for the operation of the arena has been concluded and thus that the operator has been selected. Denmark is to confirm that no aid has been paid with regards to this project as such, including the selected operator, and that the standstill obligation is respected, see paragraph (43) of the Decision.

⁵ The Danish authorities confirmed that the tender procedure regarding the operator agreement is based on transparent, objective and non-discriminatory conditions and requirements with the relative weight of each of the sub-criteria established in advance, and that price is an important criterion in the overall assessment.

⁶ DIF is an umbrella organization for 61 sports federations with totally more than 1.6 million members in approximately 10,700 sports associations. Besides being responsible for both the elite sports and the popular sports DIF constitutes the Danish National Olympic Committee and is thereby responsible for the Danish participation at the Olympic Games.

3. THE VIEWS OF THE DANISH AUTHORITIES

- (14) The Danish authorities argue that the proposed measure does not involve state aid referring to previous Commission practice where, under certain conditions, support for infrastructure might not constitute state aid under article 107(1) TFEU.
- (15) The Danish authorities focus their arguments on, in their view, the lack of economic advantage and they claim that none of the parties involved in the project gain a financial advantage, be it directly or indirectly, as a consequence of the public co-financing. In short, the Danish authorities state the following:
- The owners of the Arena Company (the City of Copenhagen and Realdania), obtain ownership right proportionate to the injected capital and the external financing is on market terms. Realdania's participation in the project cannot be seen as an investment that would have been made by an ordinary market economic investor and the provision of the land merely lowers the special non-market based risk that Realdania assumes by the investment. The same would apply to the grant from Elitefacilitetsudvalget which merely contributes to ensuring the viability of the project. Regarding the grant from DIF, it is argued that these payments are not State resources and that in any case these are payments for a right to reserve the multiarena.
 - The Arena Company will not gain a financial advantage since the multiarena is multifunctional and open to different users and activities and both the construction and operation will be tendered out in a transparent, objective and non-discriminatory way and the selection criteria and the relative weight of each of them have been established in advance (with emphasize on price).
 - The operator is, as mentioned above, selected in an open tender based on transparent, objective and non-discriminatory conditions and requirements and the rent paid to the Arena Company will not be less than market rent. Also the possible grants by the Capital Region of Denmark are made in an open and transparent process.
- (16) If the multiarena project was found to involve state aid, the Danish authorities argue that it should be considered compatible with the internal market under article 107(3)(c) TFEU. They argue that in particular the following should be taken into consideration:
- There is a market failure (the project would not be realised in the absence of public co-funding);
 - The public co-funding is limited to the strictly necessary in order to realise the project;

- The funding is used exclusively for the establishment (construction) of the facility as the subsequent operation will take place on market terms;
- The construction of such venues constitutes the embodiment of a typical State responsibility towards the general public; and
- The multiarena will only to a very limited extent compete for events that would presumably otherwise be held in other venues in Copenhagen because the multiarena will provide different facilities.

4. THE VIEW OF THIRD PARTIES

- (17) As mentioned, the Commission has received two complaints concerning the proposed measure, which both claim that the multiarena project will distort or threaten to distort competition within the event industry, in particular in the market for the hosting of commercial mid-sized and large live entertainment events, and affect trade between Member States as the operator will be competing with arena operators in other Member States.
- (18) One of the complaints goes further into the assessment of the project by stating that it would constitute state aid incompatible with the internal market due to its distortive effect on competition between venues for hosting of commercial mid-sized and large live entertainment events, which would be aggravated by a vertical foreclosure threat [...].
- (19) The complaint in particular states that the multiarena will confer an advantage on the operator as other arenas or venues in Copenhagen which can host commercial mid-size and large live events either had to finance the acquisition of land and the entire building themselves or obtained external financing that is repaid with the proceeds from operating the venue in question. According to the complainant, the mere organisation of a tender process does not ensure that the compensation paid by the operator to the arena's owner will cover the financing costs of the arena. Moreover, the tendering process itself does not remedy the fact that the compensation to be paid by the private operator will be artificially low compared to the return on investment that the competing operators of private venues have to realize.
- (20) Consequently, through its artificially low cost base, the operator of the multiarena could attract all or nearly all paid-for mid-sized and large live entertainment events away from the other venues which will lose their main source of income with the result that the measure will not only distort competition but can even threaten the survival of other venues. As the operator will be competing with arena operators in other Member States (in particular Sweden and possibly also parts of Germany), the measure would have an effect on trade between Member States.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of aid within the meaning of Article 107(1) of the TFEU⁷

- (21) 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"*.
- (22) In order to be classified as a state aid, the notified project must thus fulfil the following cumulative conditions: 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-Community trade.
- (23) With regards to the requirement that the measure must be granted through State resources and attributable to the State, this criterion is clearly fulfilled in this case as the financing is partly made by the City of Copenhagen and the granting of land from By & Havn (owned by the City of Copenhagen and the Danish State). The City of Copenhagen and the Danish State clearly constitute public authorities using resources belonging and/or controlled by the State. Also the grants from Elitefacilitetsudvalget, which is at least partly financed by the Danish State, and the Capital Region of Denmark (an administrative region of Denmark consisting of the municipalities of Copenhagen, Frederiksberg, and the regional municipality of Bornholm) should in principle also constitute State resources. Municipalities are public authorities and part of the State and their resources thereby deemed attributable to the State. Elitefacilitetsudvalget is admittedly, at least partly, financed by the Danish State and thus with regard to such financing it receives State resources which in turn it would use/grant in fulfilment of its tasks. With regard to the grants from DIF, the Danish authorities argue that these payments are not State resources. However, since DIF, amongst other, constitutes the Danish National Olympic Committee and is thereby responsible for the Danish participation at the Olympic Games and its funding is not clear, it cannot at this stage be excluded that DIF receives State resources for at least this task which DIF in turn would use/grant in its fulfilment thereof.
- (24) The Commission is of the opinion that both the construction and operation of an infrastructure constitute an economic activity in itself (and are thus subject to state aid rules) if that infrastructure is, or will be used, to provide goods or services on the market. In this case, the arena is intended for e.g. music, culture and sport events on a commercial basis, i.e. for the provision of services on the market. This view has been confirmed by the General

⁷ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

Court in Leipzig/Halle.⁸ Consequently in infrastructure cases, aid may be granted at several levels: construction, operation and use of the arena.

- (25) Regarding the construction, state aid can only be excluded if it is in conformity with the market economy investor principle ("MEIP"), however, in this case the Danish authorities acknowledge that the multiarena project would not be carried out by way of market forces alone and that the public funding is necessary for it to be realized. Consequently, the Danish authorities do not claim that the project is in line with the MEIP.
- (26) According to the Commission, at least at this stage, the public co-financing of the construction of the multiarena would constitute an advantage and thus aid, since it is admittedly not in accordance with MEIP and addresses a market failure (the project would not be realised in the absence of public funding). The Commission therefore cannot exclude at this stage that there is economic advantage at the operator and user levels.
- (27) Regarding the operation, the precise conditions of the selection of the operator and the agreement between the operator and the Arena Company would need to be investigated further.
- (28) Regarding aid at the user level, it needs to be further verified whether use of the arena will be ensured on a non-discriminatory basis without favouring any specific undertaking(s) and on market terms. This is necessary in particular since it has been indicated that incentives to or benefits for any party that is a frequent or repeated user or hirer of the arena or for any party that is a sponsor or commercial partner of the arena may be offered.
- (29) In fact, the potential beneficiaries of the measure could be all undertakings, which can own, use or manage part of the facilities benefiting from the aid, unless these undertakings would pay comparable prices for comparable facilities on the same relevant market.
- (30) Consequently, at this stage, the Commission cannot exclude that the proposed measure would include state aid at the operator and user levels as well. In particular the operator selection and agreement must be further examined to verify if it can be considered to be on market terms bearing in mind also the views expressed so far by third parties mentioned above. With regards to the user level, the openness to all potential users on equal and non-discriminatory conditions must be verified.
- (31) Thus, the preliminary assessment of the Commission shows that a selective economic advantage cannot be excluded at any level (construction, operation and use) and consequently the project would involve state aid. In addition, the public co-financing of the multiarena, which without the public financing would not be constructed, would most likely thereby distort, or at least, threaten to distort competition. As the market for organising international events is open to competition between venue providers and event organisers, which generally engage in activities which are subject to

⁸ Joint cases T-455/08 and T-443/08.

trade between Member States, the effect on trade can be assumed. In this case, the effect on trade between certain neighbouring Member States is even more likely due to the location of the planned multiarena. Moreover, the General Court has recently, in its Order concerning the Ahoy complex in the Netherlands, held that there was no reason to limit the market to the territory of that Member State.⁹

- (32) Therefore, at this stage and based on its preliminary assessment, the Commission cannot exclude that the notified measure includes elements of state aid within the meaning of Article 107(1) TFEU. Under the conditions referred to above, it is thus necessary to consider whether the measure can be found to be compatible with the internal market.

5.2. Compatibility assessment

- (33) The Danish authorities argued that if the measure was found to constitute state aid, this should be declared compatible under article 107(3)(c) TFEU. In order for a proposed measure to be found compatible with the internal market under this derogation, the Commission examines whether it pursues a policy objective of common interest, as well as whether it is necessary and proportional and does not cause undue distortion of competition.
- (34) With regards to the achievement of a policy objective of common interest, it is noted that the construction of venues for sport and other public events and supporting different types of activities which benefit the general public can be considered as a State responsibility, particularly in light of the Amsterdam Declaration on Sport and article 165 TFEU. In addition, the construction of arenas implies a large and risky investment which the market may not be able to carry out entirely on its own.
- (35) Concerning necessity and proportionality of the proposed measure, the Commission notes the alleged need of additional arena capacity as there is a lack of capacity in existing arenas and/or existing arenas would be inappropriate for certain types of events etc (according to the Danish authorities other arenas in Copenhagen do not have the capacity and flexibility to attract major international sports events and shows). In this respect it should also be noted that the multiarena would to some extent result in duplication of infrastructures (other arenas exist both directly in the areas and in nearby cities/countries) and at this stage it has not yet been sufficiently justified why the need of the arena's additional capacity cannot be met by private actors or by use of the existing arenas in Denmark. The argument of the Danish authorities that the multiarena would make it possible to stage a range of events which allegedly currently cannot take place in Copenhagen, thus increase the number of events, and only to a limited extent compete for events that would presumably otherwise be held in Copenhagen, has to be further examined in particular in light of the

⁹ Case T-90/09, *Mojo Concerts BV and Amsterdam Music Dome Exploitatie BV v. the European Commission*, Order of the General Court of 26/01/2012, paragraph 45.

complaints received. It would also need to be further assessed whether the public financing is indeed limited to the strictly necessary and whether it is proportionate in order to achieve its objective. Furthermore, in case state aid would also be found at the level of operation and use of the arena, it would need to be further examined (e.g. the precise conditions of the selection of the operator and the agreement between the operator and the Arena Company) whether the necessity and proportionality requirements are fulfilled.

- (36) Consequently, following its preliminary assessment, the Commission has doubts whether the proposed project could be deemed compatible under Article 107(3)(c) TFEU, at this stage at all three levels of possible aid (construction, operation and use) in accordance with the above.
- (37) At this stage, the Commission has not carried out an assessment with respect to other possible derogations, under which the measure could be found compatible with the internal market. In this respect, the Danish authorities did not bring forward any further specific arguments.

6. CONCLUSION

- (38) Based on the information submitted by the Danish authorities and third parties, the Commission, after carrying out the preliminary assessment, is of the opinion that the financing of a new multiarena in Copenhagen - within the context of the project as outlined above – might constitute state aid within the meaning of Article 107(1) TFEU. As outlined above, the Commission has doubts as regards the compatibility of the potential state aid with the internal market.
- (39) Given these doubts and the impact of potential state aid on the investments of private operators it appears necessary that the Commission opens the formal investigation procedure.
- (40) Finally, the opening of the procedure will enable interested third parties to comment on the questions raised by this project.
- (41) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Denmark to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.
- (42) The Commission wishes to remind Denmark that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient. In this respect, Denmark is to confirm that no aid has been paid with regards to this project and that the standstill obligation, i.e. that the aid can only be granted after the Commission has approved the aid, will be

respected and thus the proposed measure will not be put into effect before it has been authorised by the Commission.¹⁰ If not, the measure is considered as unlawful (non-notified) aid.

- (43) The Commission warns Denmark that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.
- (44) It should also be noted that this decision in no way prejudices any possible further analysis by the Commission as far as compliance with EU public procurement rules is concerned.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

Joaquín Almunia
Vice-president

¹⁰ See Article 3 of Regulation 659/1999, Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty. Official Journal L 83/1, 27.03.1999, p. 1-9.