STATE AID & SPORTS

– HOW TO PLAY IT BY THE RULES?

Antitrust Alliance

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STATE AID & SPORTS: WHY IS IT A TOPIC?

FROM SOFT LAW TO HARD LAW

Even though EU hard law covered state aid in relation to the commercial activities of professional sports ever since the Walrave judgement, the Commission relied on a soft law approach for a long time. To a certain extent the Commission seemed reluctant to apply the state aid rules in the sports sector.

In recent years, the Commission has launched more investigations in the sector. In 2013, the Commission initiated proceedings against six Dutch football clubs [case SA.33584]. For the clubs the outcome eventually was favourable. At the end of the same year four Spanish football clubs came under investigation [case SA.29769]. This case ended however with negative decisions ordering recovery of illegal state aid. Later annulled by the General Court [case T-791/16]. Furthermore, state aid to construction, operation and use of sports infrastructure has been pursued by the Commission and the national authorities as a consequence of the Leipzig/Halle judgement.

FOCUS ON ECONOMIC CONSEQUENCES

We generally see an increased focus on state aid within sports, where the cases often revolve around aid in the form of loans, sponsoring or renting below market value, as well as public funding for construction of stadiums. The increased focus may also find it's reason in the fact that illegal aid can be met with a requirement to recover the aid plus interest, which can ruin the economic basis for the recipient.

TODAY'S STATE AID & SPORTS

In 2014 the new General block exception Regulation (GBER) introduced compatibility conditions under which aid for sports and multifunctional recreational infrastructures is considered admissible.

STATE AID: THE BASIC RULES

THE STATE AID TEST

In order for a measure to constitute state aid, it has to:

- grant a selective economic advantage;
- to one or more undertakings;
- paid for by the State or through State resources;
- distort or threaten to distort competition; **and**
- affect trade between Member States.

DE MINIMIS

Insignificant measures which meet the De minimis conditions are considered not to affect trade between Members States. Consequently, these measures do not constitute state aid.

ADMISSIBILITY

Measures that qualify as state aid can nevertheless be admissible:

- ### THE GBER

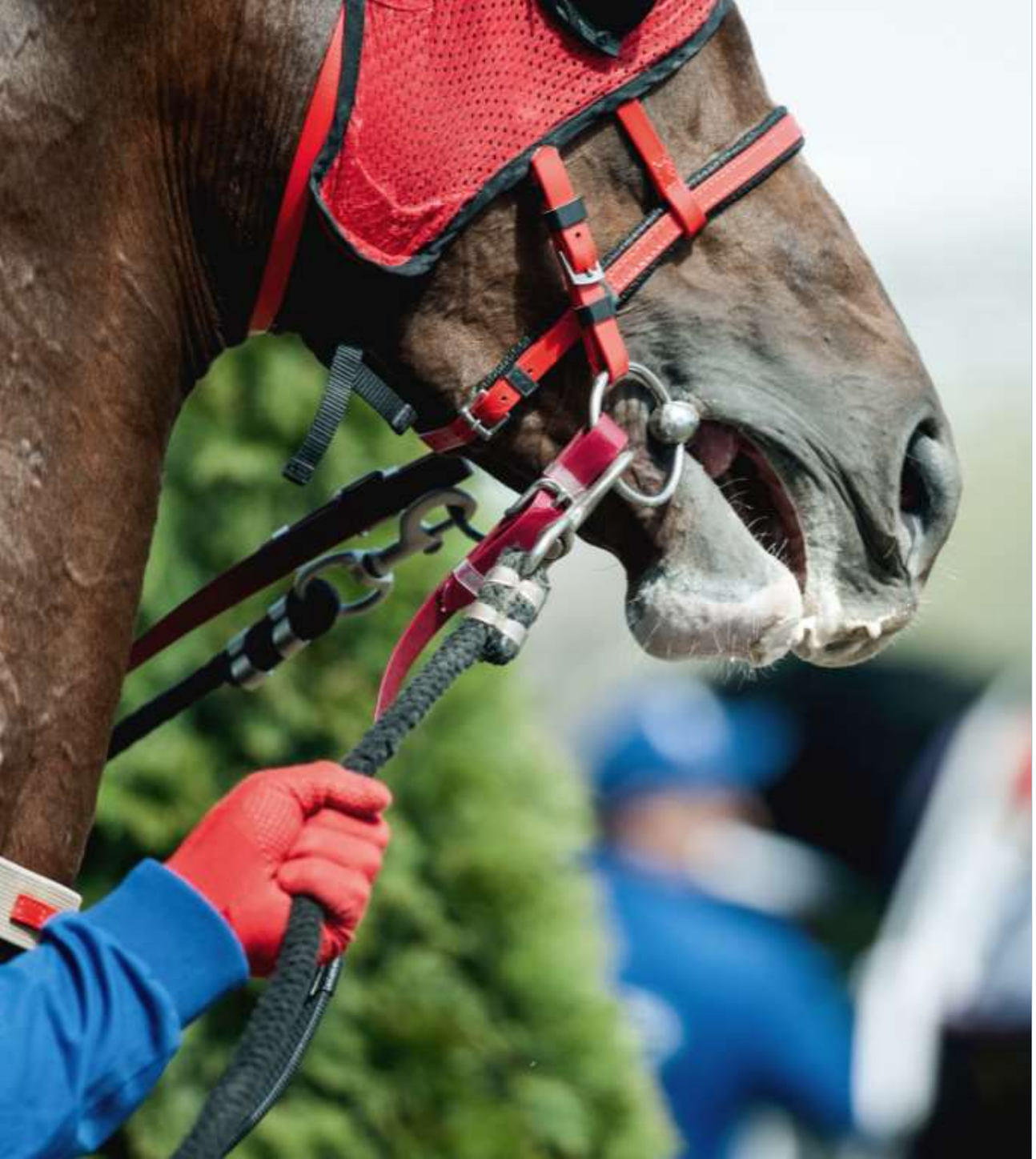
  Aid for sports and multifunctional recreational infrastructures can be block exempted provided the GBER conditions are fulfilled.

- ### INDIVIDUAL APPRAISAL

  Aid not block exempted can be declared compatible with the internal market, but only by the Commission after individual case-by-case assessment of the measure.

STAND STILL

State aid measures that have to be notified to the Commission cannot be executed before the Commission has issued a positive decision.



UNDERTAKING IN THE SPORTS SECTOR

UNDERTAKING

An undertaking is any entity which engages in economic activities, regardless of the way in which it is financed. The legal status under national law is irrelevant. Sport federations, sport clubs, teams or even individual athletes are therefore considered undertakings provided that they engage in economic activities – e.g. by transferring players and athletes, selling tickets to sport events, selling broadcasting rights, concluding sponsoring or advertising agreements.

NON-PROFESSIONAL AS UNDERTAKINGS

The Commission has stated that non-professional users do not qualify as undertakings within the meaning of Article 107 TFEU [case SA.37109]. Moreover, the Commission has stated that: "*Sport clubs are only considered as undertakings to the extent that they carry out an economic activity. In that regard, the exercise of amateur sport in a non-for-profit association is not an economic activity.*" [case SA.43983].

This does not alter the fact that a non-professional sports club can still be an undertaking. After all, the club can carry out economic activities (e.g. operating a canteen or renting out facilities). However, it is likely that aid to these clubs does not qualify as State aid as trade between Member States is not affected [case SA.38208].

THE STATE AS UNDERTAKING

When (local) governments or government agencies engage into an economic activity, it can be an undertaking for the application of the state aid rules. This can for instance be the case when the government constructs and or runs the sports infrastructure. An example is the multifunctional arena in the German city of Jena [case SA.35440].

SPORTS AND THE EFFECT ON TRADE

EFFECT ON TRADE

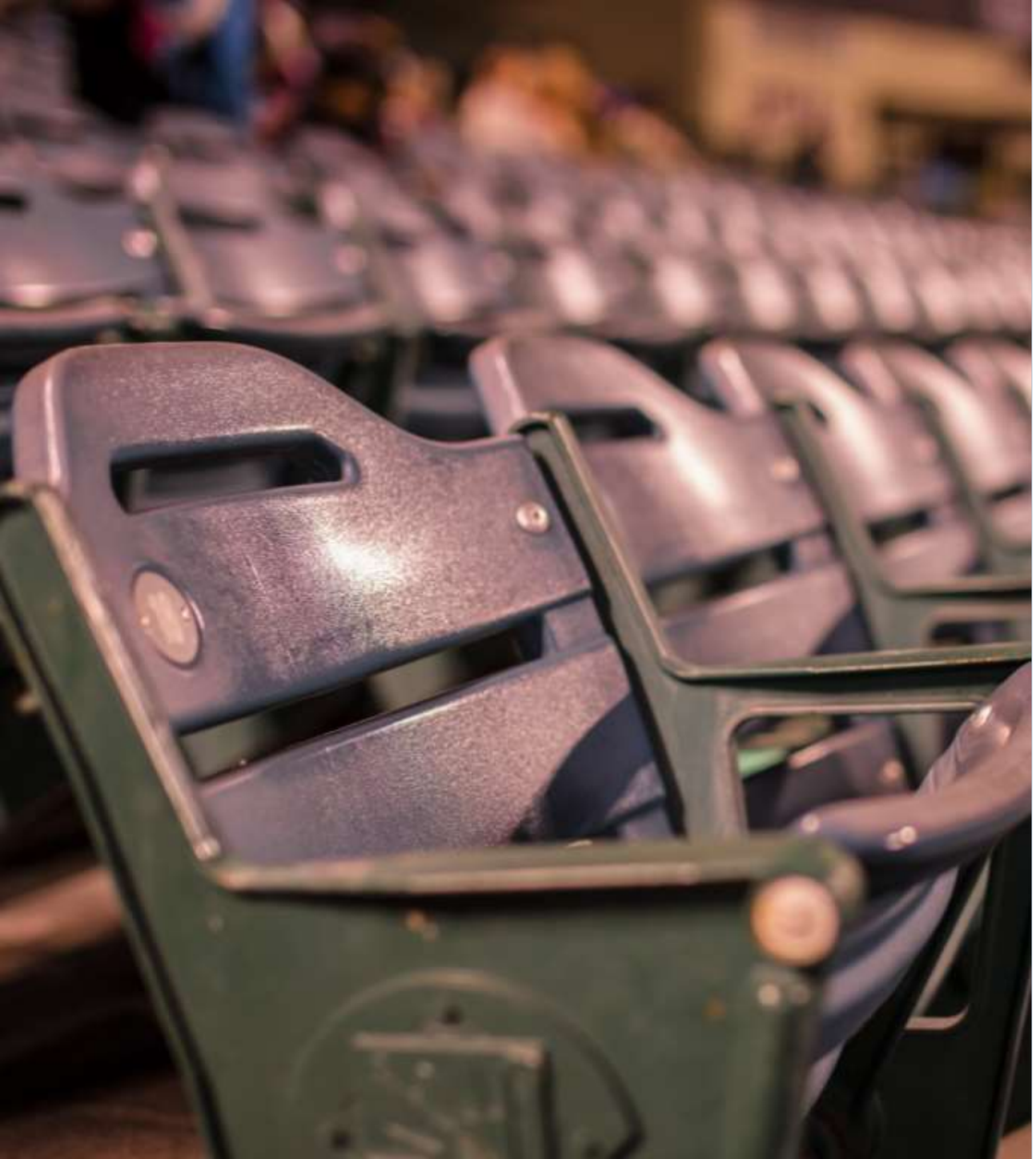
Aid to sport clubs or sports infrastructure is only covered by the state aid rules if the aid affect trade between two or more Member States.

PROFESSIONAL SPORTS

If State resources are used to provide a selective advantage to a professional team, such aid will quickly have the potential to distort competition and affect trade between Member States. Aid given to the Dutch football club MVV affected trade between Member States, because MVV employed several Belgian players [case SA.41612]. With regard to the renovation and considerable upgrading of a swimming pool in the German town of Kochel am See, the Commission found that the public funding affected trade, as the renovated and upgraded pool would be able to attract visitors from neighbouring Austria [case SA.33045]. The rescuing aid for Slovenian ski maker Elan d.o.o. affected the trade between Member States as skiing equipment is traded within the EU [case SA. 26379].

LOCAL SPORTS AND THE EFFECT ON TRADE

Measures with a local scope might not affect trade between member states. The most famous case concerned a leisure pool in the German town of Dorsten. The funding did not affect trade between member states, because the facility was unlikely to attract visitors from other member states [case N258/2000]. The same reasoning was applied to funding of a sport camp in the German state of Bavaria [case SA.43983], a tax advantage granted to UK Golf Clubs [case SA.38208], the upgrading of ski lifts in the Greek Sterea Ellada region [case SA.32737] and aid to Danish local fitness centres [case SA. 37900].



FOCUS: SPORTS INFRASTRUCTURE

SPORTS INFRASTRUCTURE & STATE AID

According to the Leipzig/Halle judgement in infrastructure cases, aid may be granted at several levels: construction, operation and the use of the infrastructure. Consequently, at each level the funding must be state aid proof. The test is not always easy, because account should be taken of cross-subsidisation.

EXAMPLES

The funding of the National Football Stadium in the Slovenian capital Bratislava constituted state aid. After notification it was declared compatible with the internal market [case SA. 46530]. A comparable decision was taken with regard to Thialf ice skating stadium in the Dutch city of Heerenveen [case SA.37373] and the support for Flemish football stadiums [case SA.37109]. On the other hand, with regard to the Nurburgring racing track in Germany, the Commission ordered recovery of the public support [case SA.31550]. Upheld by the General Court [case T-373/15]

GBER

Investment and operating aid for sport and multifunctional recreational infrastructures can be compatible, provided the GBER conditions are met. Especially for local governments this provision has proved to be a very popular tool to make their measures state aid proof. A relevant impetus is the Commission decision in the German Kristalbäder case [case SA.33045]. By way of example, reference can be made to the Danish communication of the funding of a new Stadium in Helsingør [case SA.51414].

FOCUS: SPORT CLUBS

SPORT CLUBS & STATE AID

Not every professional sport club has a rich owner. For many sport clubs it is hard to make ends meet. Consequently, they often look to the State or local government for support.

EXAMPLES

A rather ingenious way of supporting a sport club was applied by the Spanish capital Madrid. It changed the classification of a sporting complex owned by the football club Real Madrid from "*private sporting use*" into "*all-purpose use*". It was clear this favoured Real Madrid enormously. However, as no state resources were transferred, the measure did not constitute state aid [case P-2491/02].

In 2010 the Dutch municipality of Nijmegen "*compensated*" the professional football club NEC for not respecting a disputed right to buy back a sports facility. The Commission found that the "*compensation*" was unlawful aid. However, the Commission stated that the aid was compatible with the internal market as restructuring aid within the meaning of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (case SA.41617).

FINANCIAL FAIR-PLAY RULES

In order to create a more equal playing field, UEFA introduced Financial Fair-Play rules in professional football. After examination, the Commission confirmed that these rules in are in line with EU state aid policy [IP/12/264].

The need for the mentioned Financial Fair-Play rules is shown by the creative way by which (local) governments supported professional football clubs in Spain and the Netherlands. It varied from bank loans, debt waivers, the transfer and sale of land and property, state guarantees, and tax privileges [case SA.33584 and case SA.29769]. The Real Madrid case has been annulled by the General Court[T-791/16].

FOCUS: MATCHES & TOURNAMENTS

SPORT MATCHES & TOURNAMENTS

Matches and tournaments are regard to be economic activities par excellence. After all, in general the public must pay for access. Sometimes, big money is involved. The Olympics, Wimbledon and Roland Garos quickly come to mind. However, it is without prejudice that local matches and tournaments can also attract international attention. And what about the television rights?

EXAMPLES

The Commission asked France in a reasoned opinion to levy taxes on tickets for admission to matches and other sporting events which are not subject to entertainment tax. Following this intervention France introduced a reduced VAT rate of 5% [memo/14/470]. With regard to French public support for the construction and renovation of nine stadiums in order to host the UEFA EURO Championship in 2016, the Commission was milder. The measure was considered to be compatible with the internal market [case SA.35501] [IP/13/1288]. More or less the same reasoning was applied after Finland notified the intended public funding of the construction of Tampere Arena [case SA.47683].

The Danes came up with a rather ingenious measure to finance the horse-racing sector. Undertakings in this sector would be granted a percentage of the state controlled horse betting proceeds. It met the approval of the Commission [case SA. 48604].

FOCUS: GRASS ROOTS SPORTS

GRASS ROOTS SPORTS

In its 2007 White Paper on Sports, the Commission underlined the importance of grass roots sports. The Commission clearly understands the importance of public support for grass roots sports, and is in favour of such support, provided it is granted in accordance with among others the state aid rules.

EXAMPLES

A landmark case is the French public subsidy scheme for professional sports clubs. As it was designed to assist education and initial training, it did not constitute state aid [case N 118/00] [IP/01/599]. More or less the same reasoning was applied with regard to the Danish support to local sports associations [case SA. 37900]. Constituting state aid, but declared compatible with the internal market, was the Hungarian sport support scheme [case SA.31722] [IP/11/1322].

That affordable grass roots sports is of public interest and even can be considered part of services of general economic interest, is demonstrated by the Czech support to non-profit sport facilities [case SA. 33575] upheld by the General Court [T- 693/14] and the German funding of climbing centres [case SA. 33952] also upheld by the General Court [T-162/13]. Both cases furthermore show that article 165 TFEU, stating that the EU shall "*contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*", is not a mere promise.

WHAT ATA CAN DO FOR YOU?

ATA

The Antitrust Alliance is an EU-wide network of law firms. The alliance brings together the knowledge and resources of independent specialised antitrust teams across the Member States of the European Union, to provide clients with a complete state aid law counselling.

For more information please check our website.

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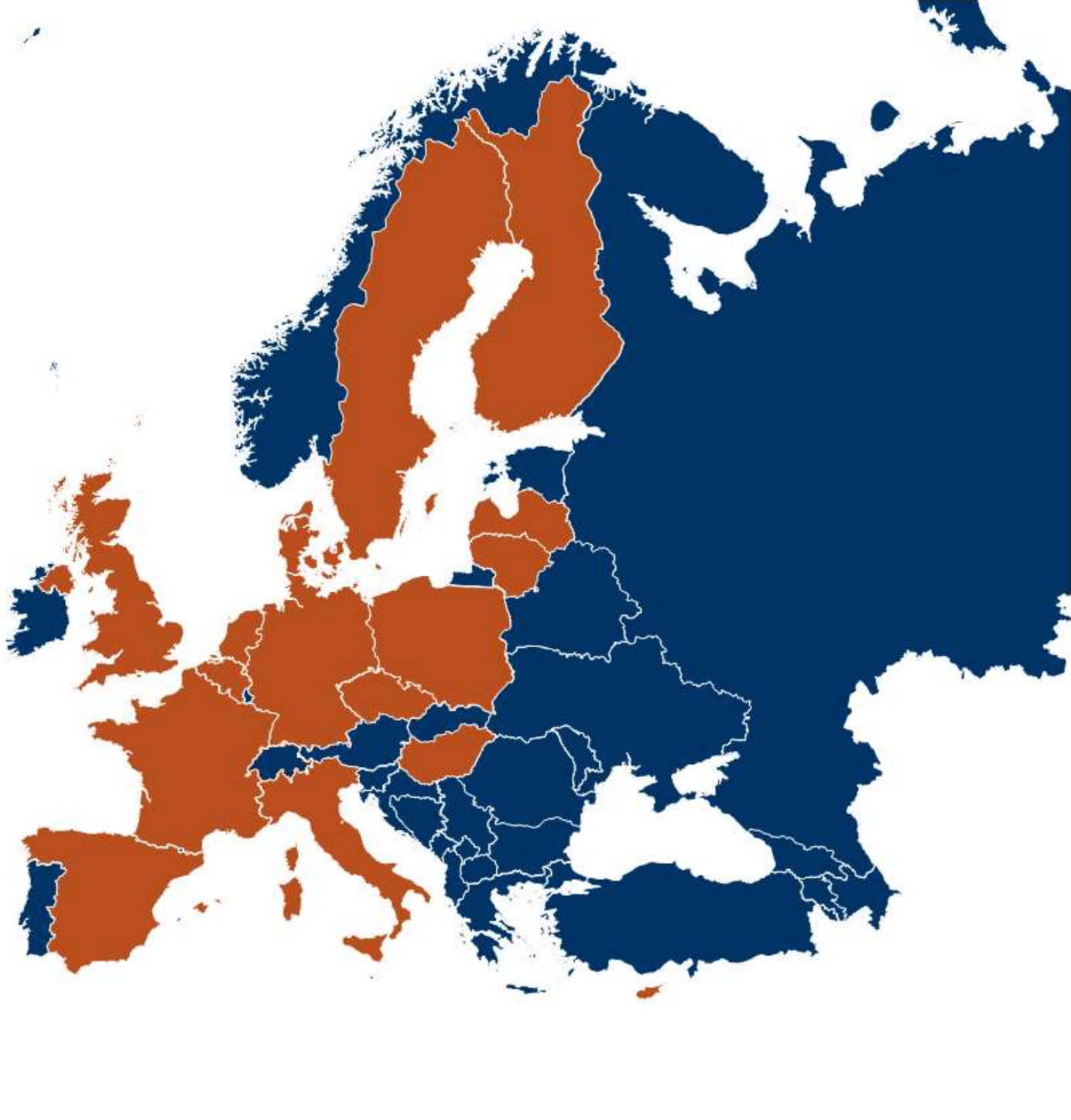

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BELGIUM
State aid and football stadiums: A Belgian case

CYPRUS
CYPRUS – €30 mln aid for the construction of a new football stadium in Limassol for the benefit of the three local teams playing in the main football league

DENMARK
Public funds to local fitness centres are not state aid

FRANCE
Public support for the construction and renovation of nine stadiums in order to host the UEFA EURO Championship in 2016

GERMANY
Kristall Bäder AG – Investment aid to upgrade a local swimming pool

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State Aid and Sports – The tax benefit scheme in the Hungarian sport sector

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State aid and the state as private creditor: The Vitesse case

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State aid and the construction of a congress and sports centre: the Katowice International Congress Centre case

SPAIN
Real Madrid and other Spanish clubs: State aid

SWEDEN
Uppsala Arena project

UK
Alleged State aid to Glenmore Lodge