

INFRASTRUCTURE ANALYTICAL GRID FOR WATER INFRASTRUCTURES

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I. PRINCIPLES FOR WATER AND WASTE WATER INFRASTRUCTURE

- (1) This analytical grid covers the financing of the construction, maintenance and operation of comprehensive water supply and waste water networks¹. All those types of infrastructure will be qualified throughout this text as "water infrastructure".
- (2) Comprehensive water supply and waste water networks are typically a natural monopoly (see Part II.1 below). To the extent that they are used to provide services to end-users on equal and non-discriminatory terms and that private financing for their construction is insignificant, the public financing for their construction would typically not affect trade between Member States or distort competition.
- (3) Conversely, the operation of water infrastructure, for example by a local authority's in-house operator or a third party provider, constitutes in many instances an economic activity to which the State aid rules may apply. For instance, the provision of water services (e.g. for drinking/waste water) against payment of a price is typically an economic activity.
- (4) In practice, the **construction and the operation of water infrastructure may be bundled**². The financing of such bundled operations does not constitute State aid if for instance the construction relates to water infrastructure which is a natural monopoly (see Part II.1 below) and either (i) the bundled construction and operation of the water infrastructure is tendered out together (see Part II, Point 7.1 below), or (ii) the operation of that infrastructure is subject to a legal monopoly (see Part II.2 below).

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

- (5) Please note that the following sections present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be excluded. These instances may apply to the owner/developer, operator/*concessionaire* or user levels, as referred to in the "introduction to the analytical grids", but also to these levels combined (e.g. integrated developer and operator).

¹ Such as the infrastructure for the distribution of water and the transportation of waste water, and the respective pipes.

² Bundling means that the same entity is in charge of the construction, maintenance and operation of the infrastructure.

1. No potential effect on trade or distortion of competition for the construction of water infrastructure: natural monopoly and insignificant private financing

- (6) Water networks typically constitute **natural monopolies** which are not in competition with other infrastructures of the same nature, as their duplication would be uneconomical and private financing for the construction of such infrastructure is normally insignificant. An effect on trade between Member States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time:
- (i) an infrastructure typically faces no direct competition,
 - (ii) private financing is insignificant in the sector and Member State concerned and
 - (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large³.
- (7) The construction of a comprehensive water supply and waste water network as such typically fulfils the conditions set out above and its financing therefore typically does not distort competition or affect trade between Member States. The condition relevant to insignificant private financing of water infrastructures has to be assessed at the level of the Member State concerned rather than at regional or local level.
- (8) In order for the entire public funding of a given water infrastructure project to fall outside State aid rules, Member States have to ensure that the funding provided for the construction of the water infrastructure in the situation mentioned above cannot be used to cross-subsidize or indirectly subsidize other economic activities, including the operation of the water infrastructure. Cross-subsidization can be excluded by ensuring that the infrastructure owner/developer does not engage in any other economic activity or – if the infrastructure owner/developer is engaged in any other economic activity – by keeping separate accounts, allocating costs and revenues in an appropriate way and ensuring that any public funding does not benefit other activities⁴.

2. No potential distortion of competition for the operation of an infrastructure: legal monopoly

- (9) In many Member States in the water sector the responsibility to operate and manage water infrastructures is the responsibility of the State (i.e. of local or regional authorities), either through an administrative body or a public undertaking, often realised under a legal monopoly⁵. As the management and operation of water infrastructures in many Member States are carried out in local, geographically closed and separate markets that are not subject to competition, public financial support made available to public infrastructure managers/operators in such cases is not liable to affect trade between Member States.

³ See paragraph 211 of the Notice on the Notion of aid ("NoA").

⁴ See paragraph 212 of the NoA.

⁵ In its decision of 4 April 2007 in case N 588/2006 – The Netherlands – *Subsidy measure vital Gelderland*, OJ C 107, p. 1, the Commission held that subsidy measures benefitting only drinking water companies (owned by local authorities) in the Dutch market, which is not open to competition, did not have the potential to affect competition and trade between Member States. However, measures open to other beneficiaries or concerning industrial water – which was a market open to competition – were found to have such potential.

- (10) However, the fact that public authorities assign the management and operation of a water network to an **in-house provider** does not as such exclude a possible distortion of competition. In order to exclude a distortion of competition in such a situation the following cumulative conditions have to be met:
- a. the management and operation of the infrastructure is subject to a **legal monopoly**⁶ (established in compliance with EU law, and in particular with the Treaty rules on competition⁷);
 - b. the legal monopoly not only excludes competition *on* the market, but also *for* the market, in that it excludes any possible competition to become the exclusive operator of the water infrastructure in question⁸;
 - c. the service is not in competition with other services; and
 - d. if the operator of the water infrastructure is active in another (geographical or product) market that is open to competition, **cross-subsidization has to be excluded**. This requires that **separate accounts** are used, costs and revenues are allocated in an appropriate way and public funding provided for the service subject to the legal monopoly cannot benefit other activities.

3. No economic activity: water infrastructure not meant to be commercially exploited

- (11) The funding of water infrastructure not meant to be commercially exploited is in principle excluded from the application of State aid rules. This concerns for instance water infrastructure that is used for activities that the State normally performs in the exercise of its **public powers** or that is not used for offering goods or services on a market. Such activities are not of an economic nature and consequently fall outside the scope of State aid rules, as does, accordingly, the public funding of the related infrastructure.
- (12) This may concern infrastructure which is distant from the market on which water services are provided, involving hydrological basins serving different local areas. Current experience shows that such infrastructures, as part of the public tasks of the State (e.g. desalination plants, hydrological basins for flood risk prevention) are normally general infrastructure of a non-economic nature. Financing of such infrastructure typically does not fall under State aid rules, as the entities running the infrastructure do not qualify as undertakings and the operation of the infrastructure would not be an economic activity.

⁶ A legal monopoly exists where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly.

⁷ Chapter 1 of Title VII of the Treaty.

⁸ Judgment of the General Court of 16 July 2014, *Germany v Commission*, T-295/12, ECLI:EU:T:2014:675, paragraph 158. For example, if a concession is awarded through a competitive procedure there is competition for the market.

4. Water infrastructure used for both economic and non-economic activities

- (13) If water infrastructure is used for both economic and non-economic activities, public funding for its construction will fall under the State aid rules only insofar as it covers the costs linked to the economic activities in question. In such cases, Member States have to ensure that the public funding provided for the non-economic activities cannot be used to cross-subsidize the entity's economic activities. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a **clear separation of accounts**.

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

- (14) The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis apart from cases covered by the *de minimis* Regulations.
- (15) Support granted under the *de minimis* Regulation is deemed not to constitute State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions laid down in the *de minimis* Regulation are also respected⁹.
- (16) There may be cases of support measures which have a **purely local impact** and consequently have no effect on trade between Member States. This is the case if the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States, and if it cannot be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment.

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

- (17) If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of water infrastructure, then State aid is not involved. This can be assessed on the basis of: (i) significant *pari passu* investments of private operators, i.e. on the same terms and conditions (and therefore with the same level of risks and rewards) as the public authorities who are in a comparable situation¹⁰; and/or (ii) a (ex ante) sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate return for the investor(s), in line with the normal market return that would be reasonably expected by commercial operators on similar projects taking into account the level of risk and future expectations¹¹. Note, however, that the existence of consecutive State interventions concerning the same water infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.¹²

⁹ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1

¹⁰ For more details, see paragraphs 86 to 88 of the NoA.

¹¹ For more information see in this respect chapter 4.2, and in particular paragraphs 101 to 105, of the NoA.

¹² See in this respect also paragraph 81 of the NoA.

7. No economic advantage at the level of the operator/concessionaire

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

- (18) Operators who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions.
- (19) If the operation of a water infrastructure is assigned for a positive price to an operator/*concessionaire* on the basis of a competitive, transparent, non-discriminatory and unconditional tender in line with the principles of the TFEU on public procurement¹³, an advantage can be excluded at this level, as it can be presumed that the agreement on the right to exploit the infrastructure is in line with market conditions.
- (20) If the operator/*concessionaire* has not been selected through a tender in line with the above conditions, it may also be possible to establish that the fees paid by the operator/*concessionaire* are in line with normal market conditions¹⁴ through (i) benchmarking with comparable situations¹⁵, or (ii) on the basis of a generally-accepted standard assessment methodology¹⁶.

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

- (21) The existence of an economic advantage at the level of the operator (*concessionaire*) may be excluded, if: (i) the infrastructure project is necessary for the provision of services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require¹⁷.

¹³ As described in paragraphs 91-96 of the NoA.

¹⁴ See Commission decision of 15 June 2011 in case SA.31296 (N 322/2010) – Germany – *Individual Aid to Water Supply Company*, OJ C 1, 4.1.2013, p. 2.

¹⁵ See paragraphs 97 to 100 of the NoA.

¹⁶ See paragraphs 101 to 105 of the NoA.

¹⁷ See case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

7.3. SGEI de minimis Regulation¹⁸

- (22) Public funding granted for the provision of a SGEI not exceeding EUR 500.000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

8. No economic advantage at the level of the user

- (23) In case the user(s) are undertakings, and the operator of water infrastructure has received State aid or its resources constitute State resources, an economic advantage at the level of the user(s) can be excluded (i) if the water infrastructure is not dedicated for the use by a specific user, (ii) all users enjoy equal and non-discriminatory access to the infrastructure and (iii) the infrastructure is made available to the users on market terms¹⁹.

III. INSTANCES IN WHICH THERE IS NO NEED TO NOTIFY FOR STATE AID CLEARANCE, BUT OTHER REQUIREMENTS COULD APPLY

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

1. General Block Exemption Regulation (GBER)²⁰

- (25) The measure is exempted from notification if it is granted in conformity with the conditions of the GBER. **Article 56 of the GBER** allowing investment aid for local infrastructures up to EUR 10 million of aid and total costs not exceeding EUR 20 million, can apply²¹. In particular, (i) the infrastructure must be available to interested users at market price and on an open, transparent and non-discriminatory basis, (ii) any concession to operate the infrastructure must be assigned through an open, transparent and non-discriminatory procedure, and (iii) at the level of the owner, only the difference between the eligible costs and the operating profit of the investment can be financed. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that it refers to an investment which takes place in an assisted area, that aid intensities established in the regional aid map are not exceeded, and that all the conditions set by Article 14 are complied with. Note that in both cases the provisions of Chapter 1 of the GBER must also be complied with.

¹⁸ Commission Regulation No 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

¹⁹ See Commission decisions in cases SA.37757 (2013/N) – Italy – *Framework Law concerning the Bonification Consortia (Consorti di Bonifica)* and SA.35661 (2012/N) – Italy – *Contributions pour les travaux d'irrigation des Consortiums de bonification des Marches*; and of 1 October 2014 in case SA.36147 – Germany – *Infrastructure aid implemented by Germany in favour of Propapier*, OJ L 89, 1.4.2015, p. 72.

²⁰ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

²¹ Investment aid for the construction or upgrade of dedicated infrastructure is not exempted under Article 56 GBER as per Article 56(7) of the GBER. In its decision of 1 October 2014 in case SA.36147 – Germany – *Infrastructure aid implemented by Germany in favour of Propapier*, OJ L 89, 1.4.2015, p. 72, the Commission held that a wastewater plant that was used by several investors and open to all users on a non-discriminatory basis did not constitute a dedicated infrastructure although it was built in an industrial park that mainly served the needs of one company.

2. Service of General Economic Interest: SGEI Decision²²

- (26) The provision of "universal" water services for households and businesses alike may be entrusted as an SGEI. If the compensation per service of general economic interest is below EUR 15 million per year (on average over the whole duration of the entrustment²³) it will be covered by **SGEI Decision 2012/21/EU²⁴**, provided that the other requirements of that Decision are also met.

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

- (27) If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification, a notification to the Commission for State aid clearance is required.

1. State aid for water infrastructure under Article 107(3)(c) TFEU

- (28) The compatibility of aid to water and waste water infrastructure is normally assessed on the basis of Article 107(3)(c) TFEU²⁵. That provision constitutes the legal basis for declaring aid to facilitate the development of certain economic activities or of certain economic areas compatible with the internal market. In accordance with the Commission's practice, a measure should comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality and incentive effect of the aid; (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest; and (iv) compliance with the transparency principles
- (29) Regarding the possible advantage for end-users in case of waste water infrastructure, the **polluter pays principle²⁶** should be taken into account when determining user fees (if users are undertakings)²⁷.
- (30) More specifically, State aid for the financing of a water infrastructure may be compatible with the internal market, for example if it contributes to achieve a higher level of

²² See Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

²³ Initial support for investment on necessary infrastructure may be averaged as (annual) compensation for the duration of the entrustment as SGEI compensation: normally 10 years, unless justified by the amortisation of investments (water infrastructure may be depreciated for more than 10 years).

²⁴ See Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L7, 11.01.2012, p. 3.

²⁵ See Commission decisions of 2 June 2004 in case N 443/2003 – Belgium – *Eaux de deuxième circuit*, OJ C 21, 28.1.2006, p. 4; of 5 June 2008 in case N 670/2007– Czech Republic – *Investment aid for the reduction of industrial emissions into water*, OJ C 184, 22.7.2008, p. 3; and of 11 December 2008 in case N 445/2008 – Austria – *Boxmark Leather – Grant for waste water filtering unit*, OJ C 46, 25.2.2009, p. 1.

²⁶ As defined in paragraph 19(28) of the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01) as the costs of measures to deal with pollution should be borne by the polluter who causes the pollution.

²⁷ Concerning the determination of user fees, for the public funding of open infrastructures not dedicated to any specific user(s) the Commission considers that the applicable conditions are satisfied where their users incrementally contribute, from an ex ante point of view, to the profitability of the project/operator.

environmental protection (for going beyond Union standards), in compliance with the provisions of the Guidelines on State aid for environmental protection and energy²⁸.

2. Service of General Economic interest: SGEI Framework²⁹

- (31) The compatibility of State aid for water infrastructure which is necessary for the provision of a genuine SGEI may be assessed on the basis of the SGEI Framework³⁰. Under the SGEI Framework, which is based on article 106(2) of the Treaty, an aid measure should comply with the following main conditions: (i) entrustment of a clearly defined and genuine SGEI, (ii) compliance with Directive 2006/111/EC³¹, (iii) compliance with EU public procurement rules, (iv) absence of discrimination, (v) a mechanism to avoid any overcompensation and (vi) transparency.

References:

- [Commission Notice on the notion of State aid as referred to in Article 107\(1\) of the Treaty on the Functioning of the European Union](#), OJ C 262, 19.7.2016, p. 1.
- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision of 20 December on the application of Article 106\(2\) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest](#), OJ L7, 11.01.2012, p.3.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8 of 11.1.2012, p.4.
- [Commission Guidelines on State aid for environmental protection and energy 2014-2020](#) (2014/C 200/01)
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.

²⁸ See paragraph 18 of the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01)

²⁹ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15

³⁰ Communication from the Commission - European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

³¹ Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

Indicative list of Commission decisions taken under State aid rules concerning construction of water infrastructure:

Instances in which the existence of State aid is excluded:

- C 15/2005 (ex NN 34/2005) – The Netherlands – Aid toward VAOP Oud Papier:
http://ec.europa.eu/competition/state_aid/cases/199244/199244_580074_56_1.pdf
- N 559/2008 – Italy – Framework Law concerning the Bonification Consortia (*Consorti di Bonifica*):
http://ec.europa.eu/competition/state_aid/cases/228289/228289_1006841_20_1.pdf
- SA.31296 (N 322/2010) – Germany – Individual Aid to Water Supply Company (DE):
http://ec.europa.eu/competition/state_aid/cases/237041/237041_1243261_83_3.pdf
- SA.35665 – Italy – Contributions pour les travaux d'irrigation des Consortiums de bonification des Marches:
http://ec.europa.eu/competition/state_aid/cases/246689/246689_1403398_64_2.pdf
- SA.36147 – Germany – Alleged infrastructure aid for Propapier PM2:
http://ec.europa.eu/competition/state_aid/cases/238104/238104_1170011_46_2.pdf
http://ec.europa.eu/competition/state_aid/cases/238104/238104_1604031_278_4.pdf
- SA.37757 (2013/N) – Italy – Framework Law concerning the Bonification Consortia (*Consorti di Bonifica*):
http://ec.europa.eu/competition/state_aid/cases/250754/250754_1554917_76_2.pdf

Instances in which the measure constitutes compatible State aid:

- N 548/99 – Austria – Aid to wastewater treatment measure:
http://ec.europa.eu/competition/state_aid/cases/137995/137995_1153590_1_2.pdf
- C 24/2000 – Austria – A-VOEST Alpine Stahl Linz GmbH - Investment aid for water purification facilities:
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001D0669&from=EN>
- N 443/2003 – Belgique – Eaux de deuxième circuit:
http://ec.europa.eu/competition/state_aid/cases/137495/137495_483065_34_2.pdf
- N 588/2006 – The Netherlands – Subsidy measure vital Gelderland:
http://ec.europa.eu/competition/state_aid/cases/216718/216718_674315_9_1.pdf
- N 812/2006 – Germany – Investment programme "Wastewater NRW":
http://ec.europa.eu/competition/state_aid/cases/217797/217797_678700_7_1.pdf
- N 670/2007 – Czech Republic – Investment aid for the reduction of industrial emissions into water:
http://ec.europa.eu/competition/state_aid/cases/222898/222898_827818_22_1.pdf
- N 445/2008 – Austria – Boxmark Leather – Grant for waste water filtering unit:
http://ec.europa.eu/competition/state_aid/cases/227331/227331_920262_30_1.pdf