

INFRASTRUCTURE ANALYTICAL GRID FOR ENERGY INFRASTRUCTURE

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I. PRINCIPLES FOR ENERGY INFRASTRUCTURE

- (1) This analytical grid covers the financing of the construction, replacement or upgrade, as well as the operation and use of energy infrastructure.
- (2) For the purpose of the present document, the definition of energy infrastructure means any physical equipment or facility located within the Union or linking the Union to one or more third countries and falling under the categories defined in the Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG)¹. Energy infrastructure includes, in particular, transmission, distribution and storage infrastructure for electricity, gas and oil (e.g. electricity smart grids, gas transmission and distribution pipelines; underground storage facilities of gas; regasification or decompression facilities for liquefied natural gas; oil pipelines and pumping stations; CO₂ networks of pipelines). For more details see the definition in recital 19 (31) of the EEAG.
- (3) For the purpose of the present document, the definition of energy infrastructure does not cover aid for energy production units or aid for the construction or operation of district heating and cooling².
- (4) Energy infrastructure is used for the provision of energy services against payment, which amounts to an economic activity³. Against this background, the following paragraphs seek to clarify the exact scope of the State aid rules as regards different types of infrastructure investments in particular in the areas of electricity, gas and oil.

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

- (5) Please note that the following sections under Part II present a comprehensive, but not exhaustive, number of separate instances in which the existence of State aid may be

¹ Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1.

² Such projects may be supported in accordance with the specific provisions of the 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 ("GBER") or under the EEAG. For instance, among other indications, the EEAG refer at footnote 6 to the European Council Conclusions from 23 May 2013 which *confirmed the need to phase out environmentally or economically harmful subsidies, including for fossil fuels, to facilitate investments in new and intelligent energy infrastructure.*

³ See paragraph 217 of the 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 ("NoA"), OJ C 262, 19.7.2016, p. 1.

excluded. These instances may apply to the owner/developer, operator or user levels, but also to these levels combined (e.g. integrated developer and operator).

1. No potential distortion of competition for the construction and/or management and operation of energy infrastructure: legal monopoly

- (6) Since energy markets are liberalised⁴, public financing for infrastructure projects in the energy sector can in principle affect competition. However, paragraph 188 of the NoA clarifies that infrastructure investments which are made within the framework of a legal monopoly are not subject to State aid rules, provided a number of requirements are met.
- (7) In the energy sector, this is particularly relevant for Member States where the construction and operation of certain infrastructures in the fields of electricity and gas is legally exclusively reserved for the Transmission System Operator (TSO) or the Distribution System Operators (DSO). In order to exclude a distortion of competition in such a situation, the following cumulative conditions have to be met:
- a. the construction and operation of the infrastructure is subject to a legal monopoly⁵ (established in compliance with EU law, and in particular with the Treaty rules on competition⁶). This is the case where the TSO/DSO is legally the only entity entitled to make a certain type of investment and no other entity can operate an alternative network;
 - 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 infrastructure in question;
 - c. the service is not in competition with other services⁷; and
 - d. if the operator of the energy 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. In this case, the 2009 Electricity and Gas

⁴ There are few exceptions, like those foreseen in Article 44 of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC ("Third package electricity Directive"), e.g. for small and micro isolated systems, Malta, etc.

⁵ 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.

⁶ Chapter 1 of Title VII of the Treaty.

⁷ In case of not substitutable energy networks, the infrastructure operation service is not in competition with other infrastructure services.

Directives⁸ require keeping for vertically integrated entities separate accounts for each of their activities⁹.

2. No potential effect on trade or distortion of competition for the construction of energy infrastructure: natural monopoly

- (8) In Member States where the TSO/DSO does not enjoy a legal monopoly, for comprehensive network infrastructures in the area of electricity or gas for which a replication by market players would be uneconomical, an effect on trade between Member States or a distortion of competition may be excluded as regards the construction, upgrading or maintenance of the electricity and gas networks by the TSO/DSO in cases where at the same time¹⁰:
- (i) an infrastructure typically faces no direct competition, which would be the case where the TSO's/DSO's network cannot be replicated for economic reasons and hence where no operators other than the TSO/DSO are involved;
 - (ii) alternative financing in the network infrastructure, in addition to the TSO/DSO 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 large, which is normally the case for the TSO/DSO networks, as the access and use of this infrastructure is subject to third party access requirements under the EU energy market Legislation("Third Package")¹¹.
- (9) In order for the entire public funding of a given electricity and gas infrastructure project to fall outside State aid rules, Member States have to ensure that the funding provided for the construction of the electricity and gas network infrastructure cannot be used to cross-subsidise or indirectly subsidise other economic activities, including the operation of the infrastructure¹². As already explained in point (7)(d), the 2009 Electricity and Gas Directives require the TSO/DSO to keep separate accounts for each activity.

⁸ Directive 2009/72/EC 13 July 2009 concerning common rules for the internal market in electricity (OJ L 211, 14.8.2009, p. 55); Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (OJ L 211, 14.8.2009, p. 94)

⁹ See Article 31 of both Directives.

¹⁰ See paragraph 211 of the NoA.

¹¹ Internal market legislation in the field of energy in particular includes Directive 2009/72/EC 13 July 2009 concerning common rules for the internal market in electricity (OJ L 211, 14.8.2009, p. 55); Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (OJ L 211, 14.8.2009, p. 94); Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity (OJ L 211, 14.8.2009, p. 15); and Regulation (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks (OJ L 211, 14.8.2009, p. 36).

¹² See paragraph 212 of the NoA.

3. Types of energy infrastructure for which potential effect on trade or distortion of competition cannot be excluded

- (10) Certain energy infrastructure categories are to a large extent built by market actors, which is evidence of significant market financing¹³. Hence, these infrastructure categories are typically not covered by a legal monopoly or do not constitute a natural monopoly. In the areas of electricity, gas and oil, this is in particular the case for the following infrastructure categories:

3.1. Electricity

- (11) Certain electricity infrastructures, and in particular electricity interconnectors and storage facilities, do not fall under legal or natural monopoly and are typically financed by market actors. As acknowledged in previous decisions, interconnectors are revenue-generating installations, which do not as such exhibit the characteristics of natural monopolies, and for which the construction and operation is in principle an activity open to competition¹⁴. Similarly, investments in storage facilities by market actors are rather common.

3.2. Gas

- (12) Certain gas infrastructures, such as gas storage and LNG terminals, import pipelines and interconnectors, normally do not fall under legal or natural monopoly, as they are typically financed by market actors and the relevant markets are open to competition¹⁵. Only in specific situations, subject to compliance with the requirements of the 2009 Gas Directive and Regulation, the creation and operation of gas storage can be part of a legal monopoly attributed to the TSO/DSO¹⁶.

3.3. Oil

- (13) Investments in oil infrastructures are generally carried out by private operators in competition with each other. Therefore, any public financing for this category of infrastructure in principle distorts competition and affects trade between Member States.

4. No economic advantage at the level of the owner/developer of the infrastructure

- (14) 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 energy 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

¹³ See paragraph 217 of the NoA

¹⁴ See Commission decision of 17.10.2010 in case N 629/2009 – Romania - *Grants for investment in electricity and natural gas transmission networks*, OJ C 37, 5.2.2011, p. 1

¹⁵ See Commission decision of 17.10.2010 in case SA.36740 (2013/NN) - Lithuania- *Aid to Klaipėdos Nafta-LNG Terminal*, OJ C 161, 4.5.2016, p. 2

¹⁶ See Articles 12 (on Designation of gas storage and/or LNG system operators) and, in particular, 33 (on Access to gas storage) of the 2009 Gas Directive.

a comparable situation¹⁷; 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 operators on similar projects taking into account the level of risk and future expectations¹⁸. Note, however, that the existence of consecutive State interventions concerning the same energy infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.¹⁹

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

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

- (15) 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.
- (16) If the operation of energy infrastructure is assigned for a positive price to an operator/concessionaire on the basis of a competitive, transparent, non-discriminatory and unconditional tender²⁰ in line with the principles of the TFEU on public procurement²¹, an advantage can be excluded at the level of the operator, as it can be presumed that the fee it pays for the right to exploit the energy infrastructure is in line with market conditions.
- (17) 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 conditions through (i) benchmarking with comparable situations²², or (ii) on the basis of a generally-accepted standard assessment methodology²³.

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

- (18) In very exceptional circumstances where the market cannot deliver the service in a satisfactory manner and under conditions (such as price, objective quality characteristics, continuity and access to the service) that are consistent with the public interest, the Member States may decide to compensate the service provider within the framework of a clearly defined and entrusted, genuine service of general economic interest. This could, for instance,

¹⁷ For more details, see paragraphs 86 to 88 of the NoA.

¹⁸ For more information see in this respect chapter 4.2 and in particular paragraphs 101 to 105 of the NoA.

¹⁹ See in this respect also paragraph 81 of the NoA.

²⁰ As described in paragraphs 89-94 of the NoA.

²¹ Provided that the appropriate selection criteria as set out in paragraphs 95 and 96 of the NoA have been used.

²² See paragraphs 97 to 100 of the NoA.

²³ See paragraphs 101 to 105 of the NoA.

be particularly relevant in situations where there is difficulty in providing access to energy infrastructure against affordable prices for end-users.

- (19) Thus, in such cases, 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 require²⁴.

6. No economic advantage at the level of the user

- (20) If the operator of an energy infrastructure has received State aid or if its resources constitute State resources, it is in a position to grant an economic advantage to the user(s) of the infrastructure, if they are undertakings.

6.1. Fees set through a tender

- (21) Where the fees for the use/access of energy infrastructure have been set through a competitive, transparent, non-discriminatory and unconditional tender²⁵ in line with the principles of the TFEU in public procurement²⁶, an advantage can be excluded at the level of the user, as it can be presumed that they are in line with market conditions. In the energy sector, this case is particularly relevant when capacities are traded through auction mechanisms²⁷.

6.2. User tariffs set in line with EU legislation

- (22) Where the use of energy infrastructure (e.g. energy and gas transmission networks) is open to all potential users in a fair and non-discriminatory manner, and access to that infrastructure is charged for at a regulated tariff in accordance with EU energy market legislation, the Commission normally considers that public financing of the infrastructure does not constitute State aid to users.

²⁴ See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and the 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.

²⁵ As described in paragraphs 91-94 of the NoA.

²⁶ Provided that the appropriate selection criteria set out in paragraphs 95 and 96 of the NoA have been used.

²⁷ See Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management and Commission Regulation (EU) No 984/2013 of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council

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

(23) 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)²⁸

(24) The measure is exempted from notification if it is granted in conformity with the GBER. In particular, Article 48 GBER allowing investment aid for energy infrastructure²⁹ up to EUR 50 million (per undertaking, per investment project) can apply. The provisions of Chapter 1 of the GBER in addition to the specific provisions in Article 48 GBER must be complied with.

2. Service of general economic interest: SGEI Decision³⁰

(25) To the extent the construction of energy infrastructure accompanies a clearly defined and entrusted genuine SGEI, State aid for the compensation of such an SGEI up to EUR 15 million per year (average over the whole duration of the entrustment³¹), may be exempted from notification on the basis of **SGEI Decision**, provided that the criteria of that decision are met: definition and entrustment of SGEI, parameters of compensation³² established ex ante, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

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

1. Energy and Environmental Guidelines (EEAG)

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

²⁸ 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,), as amended by Regulation (EU) No 2017/1084 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards calculation of eligible costs, OJ L 156, 20.06.2017, p.1..

²⁹ Except for electricity and gas storage projects and oil infrastructure.

³⁰ 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.

³¹ 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 (this infrastructure may be depreciated for more than 10 years).

³² Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

- (27) The compatibility of State aid to energy infrastructure is normally assessed on the basis of the Energy and Environmental Guidelines (EEAG), provided that the conditions detailed in section 3.8 of the EEAG are met.
- (28) Energy infrastructure is excluded from the scope of application of the Regional Aid Guidelines³³.

2. Service of General Economic Interest: SGEI Framework³⁴

- (29) The compatibility of State aid for energy infrastructure which is necessary for the provision of a clearly defined and entrusted genuine SGEI, and that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework. Under the SGEI Framework, which is based on Article 106(2) TFEU, 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/EC³⁵, (iii) compliance with EU public procurement rules, (iv) absence of discrimination, (v) a mechanism to avoid any overcompensation and (vi) transparency.

References:

- [Guidelines on State aid for environmental protection and energy 2014-2020](#) (2014/C 200/01) OJ C 200, 28.6.2014, p. 1.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, 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 Regulation \(EU\) 2017/1084](#) of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs, OJ L 156, 20.6.2017.
- [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 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.
- EU Third Energy Package:

³³ Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1. For the exclusion of energy infrastructure, see point 11.

³⁴ European Union Framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

³⁵ 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.

- [Directive 2009/72/EC](#) concerning common rules for the internal market in electricity, OJ L 211, 14.8.2009, p. 55
- [Directive 2009/73/EC](#) concerning common rules for the internal market in natural gas, J L 211, 14.8.2009, p. 94
- [Regulation \(EC\) No 713/2009](#) of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.8.2009, p. 1
- [Regulation \(EC\) No 714/2009](#) of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, OJ L 211, 14.8.2009, p. 15
- [Regulation \(EC\) No 715/2009](#) of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, OJ L 211, 14.8.2009, p. 36

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

- SA N629/2009 - Romania - Grants for investment in electricity and natural gas transmission networks.
http://ec.europa.eu/competition/state_aid/cases/233848/233848_1177808_84_2.pdf
- SA.34359 - Poland - Aid for the construction of the oil pipeline Brody-Adamowo
http://ec.europa.eu/competition/state_aid/cases/245930/245930_1430503_212_2.pdf
- SA.39515 - Finland - Individual aid to LNG infrastructure (Pori)
http://ec.europa.eu/competition/state_aid/cases/259680/259680_1708691_97_2.pdf
- SA 36740 (2013/NN) – Lithuania - Aid to Klapeidos Nafta-LNG Terminal
http://ec.europa.eu/competition/state_aid/cases/250416/250416_1542635_190_2.pdf