

INFRASTRUCTURE ANALYTICAL GRID FOR WASTE MANAGEMENT INFRASTRUCTURE

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I. PRINCIPLES FOR WASTE MANAGEMENT INFRASTRUCTURE

- (1) This analytical grid covers the financing of the construction, upgrade, extension, as well as the operation and use of infrastructure related to the provision of waste management services, excluding waste water infrastructure¹, which for ease of reference will be qualified throughout the text as "waste management infrastructure".
- (2) The construction, upgrade or extension of waste management infrastructure which is commercially exploited constitutes an economic activity. Therefore, public funding of such infrastructure is in principle subject to State aid rules.
- (3) The generally economic nature of waste management services is apparent from the fact that lucrative, established markets for the provision of that kind of services exist in the European Economic Area (EEA)². Prospective aid beneficiaries in that sector often operate under concession contracts and may be deemed to be providing a service of general economic interest (SGEI). As a consequence, there may be a heightened **risk of cross-subsidisation** of other economic activities of the aid beneficiaries. The award of concessions should therefore in principle take place via a competitive, transparent, non-discriminatory and unconditional tender procedure. Moreover, in case of concessions Member States should avoid any overcompensation, e.g. by **scrutinising the concession arrangements on a continuing basis**.
- (4) Waste management can relate to direct service provision to households and undertakings that is typically narrow in scope, particularly as regards its geographic extent (often reflecting district or municipal boundaries). However, multinational enterprises (global players) are sometimes engaged in such direct service provision when competition is opened for the market.
- (5) The waste management sector is highly regulated, at national level as well as at Union level. In that context, the **waste hierarchy principle**³, which prioritises the ways in which waste

¹ Waste water infrastructure is covered by the specific Analytical Grid for water supply and waste water infrastructure.

² See Commission Staff Working Paper "The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation" Brussels, 23.03.2011 SEC(2011) 397 final, point 3.3.1.

³ The waste hierarchy consists of (a) prevention, (b) preparing for re-use, (c) recycling, (d) other recovery, for instance energy recovery, and (e) disposal. See Article 4(1) of Directive 2008/98/EC of the European Parliament and of the Council 19 November 2008 on waste and repealing certain Directives (Waste Framework Directive) (OJ L 312, 22.11.2008, p. 3).

should be treated, and the **polluter pays principle**⁴, according to which undertakings generating waste should be held liable for the cost of its treatment, are core principles of Union legislation.

- (6) Certain publicly funded waste management projects (e.g. projects involving waste incineration infrastructure) may lead to energy production. This grid does not apply to those projects, which may be supported in accordance with the specific provisions of the General Block Exemption Regulation (GBER)⁵ and/or the Guidelines on State aid for environmental protection and energy (EEAG)⁶.

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

- (7) 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/concessionnaire 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. No potential distortion of competition for the construction and/or management and operation of waste management infrastructure: legal monopoly

- (8) Whenever a market is open to competition, public financing can affect competition and therefore State aid rules are likely to apply.
- (9) In certain Member States the responsibility to develop, operate and manage waste management infrastructure 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 monopoly. As the management and operation of waste management infrastructure in these 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.
- (10) However, the fact that public authorities assign the construction, management and operation of the waste management service and its infrastructure 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:

⁴ As from the definitions in the Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1 (EEAG), it means that the costs of measures to deal with pollution should be borne by the polluter who causes the pollution.

⁵ 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 .

⁶ See sections 3.3, 3.4 and 3.5 of the Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1.

- a. the construction, management and operation of the infrastructure is subject to a **legal monopoly**⁷ (established in compliance with EU law, and in particular with the Treaty rules on competition⁸);
- 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 waste management infrastructure in question⁹;
- c. the service is not in competition with other services; and
- d. if the operator of the waste management 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.

2. No economic activity: waste management infrastructure not meant to be commercially exploited

- (11) The funding of waste management infrastructure not meant to be commercially exploited is in principle excluded from the application of State aid rules. This concerns for instance waste management infrastructure that is used for activities that the State normally performs in the exercise of its **public powers** (e.g. for safety or security) 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.

3. Waste management infrastructure used for both economic and non-economic activities

- (12) If the waste management 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**.

⁷ 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.

⁸ Chapter 1 of Title VII of the Treaty

⁹ 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. No potential effect on trade between Member States: purely local impact

- (13) 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.
- (14) 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 respected¹⁰.
- (15) 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 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.

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

- (16) 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 waste management 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 situation¹¹; 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 expectations¹². Note, however, that the existence of consecutive State interventions concerning the same waste management infrastructure project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.¹³

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

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

- (17) 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.

¹⁰ 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

¹¹ For more details, see paragraphs 86 to 88 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.

¹² For more information see in this respect chapter 4.2, and in particular paragraphs 101 to 105, of the NoA.

¹³ See in this respect also paragraph 81 of the NoA.

- (18) If the operation of a waste management 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 procurement¹⁴, 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.
- (19) 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 situations¹⁵, or (ii) on the basis of a generally-accepted standard assessment methodology¹⁶.

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

- (20) The provision of "universal" waste management services for households and businesses alike¹⁷ may be entrusted as an SGEI¹⁸. 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 require¹⁹.

6.3. SGEI de minimis Regulation²⁰

- (21) 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.

¹⁴ As described in paragraphs 89-96 of the NoA.

¹⁵ See paragraphs 97 to 100 of the NoA.

¹⁶ See paragraphs 101 to 105 of the NoA.

¹⁷ See by contrast Judgment of the Court of 20 November 2003 in Case C-126/01 - *Ministère de l'Economie, des Finances et de l'Industrie v GEMO*, EU:C:2003:622, and Commission decision of 25 April 2012 in case SA.25051 – Germany – Association for disposal of dead animal bodies, OJ L 236, 1.9.2012, p. 1, http://ec.europa.eu/competition/state_aid/cases/237074/237074_1323831_302_2.pdf, where the SGEI character of the service provided was not accepted

¹⁸ Mainly waste collection and possibly waste treatment in duly justified cases.

¹⁹ 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.

²⁰ 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.

7. No economic advantage at the level of the user

- (22) In case the user(s) are undertakings, and the operator of waste management 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 waste management 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 pricing policy for users is established on market terms.

III. INSTANCES 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)²¹

- (24) The measure is exempted from notification if it is granted in conformity with the conditions of the GBER. A number of GBER provisions may be applicable.
- (25) **Article 14 of the GBER** can apply, allowing regional investment aid up to the maximum aid intensities established in the regional aid map²².
- (26) **Article 36 of the GBER** allowing investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards up to EUR 15 million, can also apply.
- (27) **Article 47 of the GBER** allowing investment aid for waste recycling and re-utilisation up to EUR 15 million (per undertaking per investment project) can also apply.
- (28) **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 also apply²³. This Article shall not apply to aid for infrastructures that is covered by Articles 36 or 47 of the GBER.
- (29) The provisions of Chapter 1 of the GBER in addition to the specific provisions in Article 14 or 36 or 47 or 56 of the GBER must be complied with.

²¹ 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.

²² Please note that waste management infrastructure that leads to energy production falls outside Article 14 GBER.

²³ 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 Decision²⁴

- (30) If the infrastructure is necessary for the provision of "universal" waste management services for households and businesses alike that are entrusted as an SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such an SGEI up to EUR 15 million per year (on average over the whole duration of the entrustment²⁵), is exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are also met: in particular definition and entrustment of the SGEI, parameters of compensation²⁶ established ex ante in a transparent manner, 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

- (31) 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. Energy and Environmental Guidelines (EEAG)²⁷

- (32) In case the measure falls under the EEAG the compatibility of State aid for waste management infrastructure is normally assessed on the basis of section 3.5 of the EEAG.
- (33) Public support for waste management infrastructure may also be assessed as aid for going beyond Union standards or increasing the level of environmental protection in the absence of Union standards, or aid for early adaptation to future Union standards²⁸, provided that the conditions detailed in section 3.2 of the EEAG are met.

2. Regional Aid Guidelines (RAG)

- (34) Waste management infrastructure projects may also be supported in assisted areas on the basis of the Regional Aid Guidelines (RAG), if not falling under the specific provisions for regional aid under the GBER. In that case, aid to waste management infrastructure may qualify as aid for an initial investment within the meaning of the RAG and it will be assessed on the basis of the compatibility conditions set out in the RAG.

²⁴ 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.

²⁵ 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 a longer amortisation of investments.

²⁶ 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 the investments) as SGEI compensation.

²⁷ Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1 (EEAG).

²⁸ This type of aid is intended for the management of the beneficiary's own waste.

3. Service of General Economic interest: SGEI Framework²⁹

- (35) The compatibility of State aid for waste management infrastructure which is necessary for the provision of a genuine SGEI may be assessed on the basis of the SGEI Framework. 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/EC³⁰, (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.
- [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 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.
- [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, 11.1.2012, p. 4.
- [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.
- [Commission Regulation \(EU\) No 360/2012](#) of 25 April 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.

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

³⁰ 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 waste management infrastructure.

Instances in which the existence of State aid is excluded:

- 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

Instances in which the measure constitutes compatible State aid under RAG:

- State aid N 350/2002 – Ireland – Waste management infrastructure
http://ec.europa.eu/competition/state_aid/cases/137136/137136_452586_16_2.pdf
- State aid N 495/2009 – Latvia – Electric and electronic waste sorting and recycling facility in Tume
http://ec.europa.eu/competition/state_aid/cases/232806/232806_1080784_34_1.pdf
- State aid n. N 390/2009 – Latvia – Development of separate waste collection systems
http://ec.europa.eu/competition/state_aid/cases/232158/232158_1033920_33_1.pdf
- SA.35190 – Latvia – Amendment of the scheme "Development of separate waste collection systems"
http://ec.europa.eu/competition/state_aid/cases/245496/245496_1405009_118_2.pdf
- SA.35615 – Latvia – Second amendment of the scheme "Development of separate waste collection systems" (N 390/2009)
http://ec.europa.eu/competition/state_aid/cases/246394/246394_1402005_106_2.pdf
- SA.38431 – Latvia – Prolongation of the approved State aid scheme N 390/2009 (Development of separate waste collection systems) until and including 30 June 2014
http://ec.europa.eu/competition/state_aid/cases/252012/252012_1553726_48_2.pdf
- SA.46228 – Latvia – Development of separate waste collection systems (to be published)

Instances in which the measure constitutes compatible State aid under EEAG Section 3.5:

- SA.37380 – Denmark – Aid to Waste Management – Shredder Scheme
http://ec.europa.eu/competition/state_aid/cases/249982/249982_1562944_119_2.pdf