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Analytical Grids on the application of State aid rules to the financing of infrastructure projects

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This series of staff working documents contains the "Analytical grids" on the application of State aid rules to the public financing of infrastructure projects.

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Please see the Annex for the documents.

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INTRODUCTION TO THE ANALYTICAL GRIDS ¹

Disclaimer:

The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case the services of the Directorate-General for Competition (DG COMP) are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure. ²

Background to the analytical grids

1. In 2012, in the wake of the Leipzig-Halle judgment³, DG COMP provided guidance by way of so-called "analytical grids" on the application of State aid rules to the public financing of infrastructure projects. The content of the grids reflected the rules and decisional practice at that point in time. Since then, the State aid regulatory framework has undergone modifications in the context of the State aid modernisation exercise, resulting in a need to update those grids. More specifically, the new grids integrate new State aid rules (the new General Block Exemption Regulation⁴, the new *de minimis* Regulation⁵, the new Aviation Guidelines⁶, etc.)⁷.

State aid rules and projects funded by the European Fund for Strategic Investments (EFSI)

2. EFSI financing is not State aid within the meaning of the EU Treaties, and EFSI financing will not have to be approved by the European Commission under EU State aid rules⁸. Projects supported by EFSI may however also benefit from financial support (co-financing) by Member States (ESI Funds and national co-financing). Such co-financing is, unless granted on market terms, State aid which must be approved by the Commission.

¹ This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

² Commission Notice on *Best Practices Code on the conduct of State aid control proceedings*, OJ C 136, 16.6.2009, p. 13.

³ Joined Cases T-443/08 and T-455/08 Flughafen Freistaat Sachsen and others v Commission, EU:T:2011:117.

⁴ 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.

⁵ Commission Regulation (EC) 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.

⁶ Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, p. 3.

⁷ State aid rules in force are available on: http://ec.europa.eu/competition/state_aid/legislation/legislation.html.

⁸ See the Communication from the Commission to the European Parliament and the Council "*Working together for jobs and growth: The role of National Promotional Banks (NPBs) in supporting the Investment Plan for Europe*", [COM/2015/0361 final](#), and the Commission's Factsheet on "*The Investment Plan for Europe: Questions and Answers*", [press release of 20 July 2015](#).

3. The Commission will assess EFSI projects with Member State co-funding on the basis of its modernised State aid framework. To support EFSI, it will assess Member State co-financing as a matter of priority, and give it fast-track treatment, aiming to complete its assessment within six weeks of receiving the required information from the Member State.

Structure of the analytical grids

4. The analytical grids follow a uniform structure, providing sector-specific guidance as to when:
 - i. aid is not involved, and therefore a notification is not necessary (due for example to the use of the infrastructure not involving an economic activity, the lack of potential for any effect on completion and trade, or the absence of economic advantage);
 - ii. aid is involved but no notification is necessary, and specific rules may apply (in case of aid exempted from notification obligations); and
 - iii. aid is involved and a notification is necessary, with reference to the main applicable State aid rules.

Access to State aid decisions on DG Competition's website

5. Decisions and other published State aid case documentation may be accessed by using the search function in the following link: <http://ec.europa.eu/competition/elojade/isef/index.cfm>

List of sector-specific grids:

- 1) Broadband infrastructures
- 2) Airports
- 3) Ports
- 4) RDI infrastructures
- 5) Culture infrastructures
- 6) Sport and multifunctional recreational infrastructures
- 7) Energy
- 8) Waste management infrastructures
- 9) Rail, metro and local transport infrastructures

INFRASTRUCTURE ANALYTICAL GRID N° 1¹ – BROADBAND NETWORK INFRASTRUCTURES

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General principles

1. This analytical grid covers the construction of broadband infrastructures. Public funding can be granted to the complete infrastructure roll-out or to part of the infrastructure only (for instance for constructing backhaul networks or basic physical infrastructure elements, such as ducts).
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.

Instances in which the presence of State aid is excluded

No economic activity: construction of a broadband network for non-economic use

3. If a broadband network is rolled out exclusively for non-commercial purposes not favouring any undertaking (e.g. a network to provide connectivity services to public bodies not engaged in economic activity²), then the funding for such a project does not involve State aid. However, if such a network (for instance its extra capacity) is made available for use by commercial broadband investors or other operators, State aid is likely to be involved. Similarly, if the network is made available later for commercial use, any further construction/upgrade may involve State aid.

No potential effect on trade between Member States: de minimis

4. Support granted under the *de minimis* Regulation is not regarded as 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 are also respected³.

¹ This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

² See for instance Commission decision of 30 May 2007 in case N 46/2007 – UK - Welsh Public Sector Network Scheme, OJ C 157, 10.07.2007, p. 2, http://ec.europa.eu/competition/state_aid/cases/218491/218491_683319_19_2.pdf.

³ 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.

No economic advantage: Investments in compliance with the Market Economy Operator Principle

5. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (*ex ante*) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account all the relevant circumstances. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria

6. The deployment and the operation of a broadband infrastructure can qualify as a SGEI. Broadband deployment as a SGEI should normally be based on the provision of a passive⁴, technologically neutral⁵ and open⁶ infrastructure that provides universal service coverage for the given area. Any compensation should be limited to the related wholesale access services, and should not include retail communication services⁷. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of broadband services that can be considered as genuine 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 require⁸.

SGEI de minimis Regulation⁹

7. 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.

⁴ The passive infrastructure is basically the physical infrastructure of the networks: such as ducts, dark fibre, cabinets.

⁵ A network should be technologically neutral and thus enable access seekers to use any of the available technologies to provide services to end users.

⁶ Open, non-discriminatory wholesale access shall be granted to third party operators.

⁷ See Communication from the Commission EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (“Broadband Guidelines”), OJ C 25, 26.1.2013, p. 1, paragraph 2.

⁸ 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.

⁹ Commission Regulation on 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.

Instances in which there is no need to notify for State aid clearance, but other requirements could apply

8. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

General block exemption regulation (GBER)¹⁰

9. The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. In particular, Article 52 GBER allowing investment aid for broadband infrastructure up to EUR 70 million total costs per project can apply. Article 14 GBER allowing regional aid for broadband network development can also apply, provided that the investment 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 all the provisions of Chapter 1 of the GBER must also be complied with.

Service of General Economic interest: SGEI Decision¹¹

10. If the deployment and the operation of a broadband infrastructure is necessary for the provision of a SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such a SGEI up to 15 million per year (average over the whole duration of the entrustment¹²), may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation 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 overcompensation¹³.

If aid can be granted under an existing State aid scheme

11. If the Commission has approved a scheme allowing aid for broadband infrastructure, Member States may grant aid in conformity with the conditions established in the relevant Commission decision. The list of all Commission decisions taken under the State aid rules concerning broadband is available at the following website: http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf.

¹⁰ 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.

¹¹ 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.

¹² 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 (those infrastructures may be depreciated for more than 10 years).

¹³ See Section 2.3 of the Broadband Guidelines on "State aid for broadband deployment as a SGEI".

Instances in which notifying for State aid clearance is necessary

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

Broadband Guidelines¹⁴

13. The compatibility of State aid for broadband infrastructure is normally assessed on the basis of the Broadband Guidelines. In general, the Broadband Guidelines distinguish target areas according to current level of coverage with broadband infrastructure. If no comparable broadband infrastructure is available ("white areas"), State aid is allowed if the relevant compatibility conditions are met. In areas where several broadband infrastructures are already deployed or planned to be deployed by commercial operators in the next three years ("black areas"), the Commission views aid measures negatively. The most common compatibility conditions are detailed in paragraph 78 of the Broadband Guidelines. One of the guiding principles set out in the Broadband Guidelines is that, whenever the granting authorities select a third-party operator to deploy and operate the subsidised infrastructure, the selection process shall be conducted in line with spirit and the principles of the EU Public Procurement Directives¹⁵.

Regional Aid Guidelines (RAG)¹⁶

14. Broadband 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 broadband 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 RAG¹⁷.

Service of General Economic Interest: SGEI Framework¹⁸

15. The compatibility of State aid for broadband infrastructure which is necessary for the provision of an SGEI and that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework. The considerations set out in point 6 on the quality of the definition of the public service obligation for broadband deployment regarding passive, open and technologically neutral infrastructures providing universal coverage will apply. In addition, the SGEI Framework includes a number of further compatibility conditions that must be complied with.

Projects that in principle should not be supported

16. Projects that involve State aid but do not comply with the relevant State aid rules (GBER, Broadband Guidelines, RAG, or SGEI) should not be supported. In those cases, serious distortions

¹⁴ See footnote 8.

¹⁵ See paragraph 78(c) of the Broadband Guidelines. See also the clarifications provided in footnote 96 for situations where a public authority decides to deploy and manage the network directly.

¹⁶ Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1.

¹⁷ Note that RAG contains specific requirements for broadband infrastructure.

¹⁸ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

of competition cannot be excluded. In particular, and in broad terms, projects should not be supported that do not comply with the generally required conditions, which include amongst others:

- Award made on the basis of a transparent, open and non-discriminatory competitive selection process;
- The project must conform with the principle of technological neutrality, both at the level of project selection and at the level of commercialisation (wholesale), allowing for different technologies to compete;
- The project must offer the widest open and non-discriminatory access to the publicly-funded infrastructure;
- The project takes place in areas where there is no infrastructure of the same category (either basic broadband or next generation access (NGA) network) and where no such infrastructure is likely to be developed on commercial terms in the near future.

References:

- [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.
- [European Union framework for State aid in the form of public service compensation](#), OJ C 8, 11.1.2012, p. 15.
- [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.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, p. 1.
- [EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks](#), OJ C 25, 26.01.2013, p. 1.

A comprehensive list of Commission decisions taken under State aid rules concerning broadband:

- http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf

INFRASTRUCTURE ANALYTICAL GRID N° 2¹ – CONSTRUCTION OF AIRPORT INFRASTRUCTURES

Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudice possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.

General principles

1. This analytical grid covers the application of State aid rules to airport infrastructure. The Commission distinguishes three types of public support:
 - Support for the construction of airport infrastructure (investment aid);
 - Support for the operation of airport infrastructure (operating aid); and
 - Support for the airlines using the infrastructure.
2. According to established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of airport infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.

Instances in which the existence of State aid is excluded

No economic activity: activities within the public policy remit

3. The distinction between public policy remit and economic activities has to be assessed on a case-by-case basis.
4. Activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general fall outside the scope of the State aid rules. Certain investments in airport infrastructure, which are exclusively reserved for functions within such a "public policy remit", may concern such non-economic activities². This can be the case in particular for air traffic control-related infrastructure, customs and police related infrastructure (e.g. premises allocated to customs / police within a terminal), aircraft rescue and firefighting (ARFF) infrastructure and infrastructure necessary to counteract public threats or terrorist attacks (such as equipment to screen luggage or passengers, CCTV and

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² See paragraph 98 of Joined Cases T-443/08 and T-455/08 Flughafen Freistaat Sachsen and others v Commission EU:T:2011:117. Note that "activity within the public remit" is not a static notion, meaning that an activity can become economic, for instance, when it is privatised.

fences preventing access to the airport's reserved area³). Public funding granted for the construction, extension or modernisation of infrastructure exclusively used for such activities does not constitute State aid provided that it is limited to compensating the costs to which they give rise and does not lead to undue discrimination between airports⁴.

5. While the exact extent of the services provided by airports varies across the Union, the provision of airport services to airlines in exchange for airport charges constitutes an economic activity in all Member States⁵.

No economic advantage: Investments in compliance with the Market Economy Operator Principle

6. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.
7. The financing of infrastructure often requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore not be undertaken on the basis of purely economic considerations. In such cases, Member States would thus have to provide a convincing explanation why the criteria for the application of the MEOP are nevertheless complied with⁶.

No economic advantage at the level of the user of the infrastructure

8. Where an airport has public resources at its disposal, aid to an airline using that airport can, in principle, be excluded if: (a) the price charged for the airport services corresponds to the market price, as estimated on the basis of prices charged by comparable airports ("benchmarking approach" or (b) it can be demonstrated through an ex ante analysis that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport. However, the

³ See Commission decisions of 23 July 2014 in case SA.22614 – France – Airport Pau Pyrénées, OJ 201, 30.7.2015, p. 109, http://ec.europa.eu/competition/state_aid/cases/223036/223036_1614098_1194_2.pdf and in case SA.33961 – France – Aéroport de Nîmes, not yet published.

⁴ When it is normal under a given legal order that civil airports have to bear certain costs inherent to their operation, whereas other civil airports do not, the latter might be recipients of State aid, regardless of whether or not those costs relate to an activity which in general is considered to be of a non-economic nature (see paragraph 37 of Guidelines on State aid to airports and airlines ("Aviation Guidelines"), OJ C 99, 4.4.2014, p. 3).

⁵ See paragraphs 31-33 of the Aviation Guidelines (footnote 4).

⁶ See for example Commission decision of 13 July 2014 in case SA.32576 Flughafen Niederrhein GmbH, OJ C 279, 14.09.2012, p. 1, http://ec.europa.eu/competition/state_aid/cases/243457/243457_1359832_419_2.pdf; Commission decision of 3 October 2012 in the case SA.23600 Financing arrangements concerning Munich Airport Terminal 2, OJ L 319, 29.11.2013, p. 8, http://ec.europa.eu/competition/state_aid/cases/226773/226773_1399901_101_2.pdf.

INFRASTRUCTURE ANALYTICAL GRID N° 8 ¹ – INFRASTRUCTURES FOR WASTE MANAGEMENT SERVICES

Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.

General principles

Introduction to the waste management services market

1. This analytical grid concerns aid for the construction of infrastructure relative to the provision of waste management services, excluding waste water infrastructure.
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of waste management infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.
3. The generally economic nature of waste management services is apparent from the fact that lucrative, established markets for service provision of that kind exist in the European Economic Area (EEA)². Prospective aid beneficiaries in that sector often operate as concessionaires and may be deemed to be providing an SGEI. In consequence, there may be a heightened risk of cross-subsidisation of other economic activities of such beneficiaries. Concession awards should therefore always take place via an open and transparent tender process. Moreover, when notifying aid measures in which the beneficiaries are concessionaires, Member States may wish to commit to scrutinise concession arrangements on a continuing basis.
4. Waste management can relate to direct service provision to households and businesses that is typically narrow in scope, particularly as regards its geographic extent (which usually reflects municipal boundaries). However, multinational enterprises sometimes are engaged in such direct service provision.
5. The waste management sector is highly regulated, at national level as well as at Union level. In that context, the waste hierarchy principle which prioritises the ways in which waste should be

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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.

treated and the polluter pays principle according to which undertakings generating waste should be held liable for the cost of its treatment, are core principles of Union legislation. As described more fully below, the most relevant Union State aid instruments include: (i) the General Block Exemption Regulation (GBER)³ (ii) the Guidelines on State aid for environmental protection and energy (EEAG)⁴; (iii) the Regional Aid Guidelines (RAG)⁵; (iv) the SGEI Decision⁶; and (v) the SGEI Framework⁷.

6. Certain State-aided waste management projects (for example projects involving waste incineration infrastructure) may lead to energy production. Such projects may be supported in accordance with the specific provisions of the GBER and/or the EEAG and this grid does not apply to those projects⁸.

Instances in which the existence of State aid is excluded

No potential effect on competition and trade: the market is closed to competition (e.g. exclusive rights) and the beneficiary is precluded from being active on other geographic or service/product markets.

7. Whenever a market is open to competition, public financing can affect competition and therefore State aid rules are likely to apply.
8. If markets are closed to competition State aid is not present. No potential effect on competition and trade may occur if the beneficiary holds an exclusive right in the waste management services market and is not and cannot be active on other markets (e.g. energy generation) or geographic areas open to competition. The assessment depends on national/regional/local rules in the Member State concerned. If the recipient is active on other markets, the financing of infrastructure that falls within the reserved area may constitute State aid. Keeping separate accounts⁹ for operations in different markets allows the identification of possible cross-subsidisation between/among markets.

³ 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.

⁴ Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1.

⁵ Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1. See also, for example, Commission decision of 24 February 2010 in case N 495/2009 - Latvia – *Electric and electronic waste sorting and recycling facility in Tume*, OJ C 94, 14.4.2010, p. 9, http://ec.europa.eu/competition/state_aid/cases/232806/232806_1080784_34_1.pdf. Despite "positive spill-over effects" on other undertakings and "efficiency improvement in the regional waste collection system", the measure was notified primarily under RAG principles on the basis that it would contribute to regional development in Latvia.

⁶ 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.

⁷ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

⁸ See sections 3.3, 3.4 and 3.5 of the EEAG.

⁹ According to the principles set out in Commission Directive 2006/111/EC of 16 November 2006 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.

No potential effect on trade between Member States: *de minimis*

9. Support granted under the *de minimis* Regulation is not regarded as 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 are also respected¹⁰.

No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria

10. The provision of "universal" waste management services for households and businesses alike¹¹ may be entrusted as an SGEI¹². In such a case, the existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of waste management service that can be considered as a genuine service 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 the 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 require¹³.

SGEI *de minimis* Regulation¹⁴

11. 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.

No economic advantage: Investments in compliance with the Market Economy Operator Principle

12. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market

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 See by contrast 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 and Case C-126/01 Ministère de l'Economie, des Finances et de l'Industrie v GEMO, EU:C:2003:622.

¹² Mainly waste collection and possibly waste treatment in duly justified cases.

¹³ 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 interest, OJ C 8, 11.1.2012, p. 8.

¹⁴ Commission Regulation 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.

rate of return that would be expected by commercial operators on comparable projects, taking into account all the relevant circumstances. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

Instances in which there is no need to notify for State aid clearance, but other requirements could apply

13. Possible State aid may be considered compatible with the internal market and may be granted without notification in the following two instances:

General Block Exemption Regulation (GBER)¹⁵

14. The measure may be exempted from notification if it is granted in compliance with the conditions of the GBER. A number of GBER provisions may be applicable.

15. **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 apply, subject to compliance with certain conditions reflecting core Union environmental rules¹⁶ – namely that: (i) the aid is granted for the recycling and re-utilisation of waste generated by other undertakings; (ii) without the aid, the recycled or re-used materials treated would be disposed of, or be treated in a less environmentally friendly manner; (iii) the aid is not granted to waste recovery operations other than recycling; (iv) the aid does not indirectly relieve the polluters from a burden that should be borne by them under Union law, or from a burden that should be considered a normal company cost; (v) the investment does not merely increase demand for the materials to be recycled without increasing collection of those materials; and (vi) the investment goes beyond the state of the art.

16. **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. Only the part of the investment which is linked to the achievement of a higher level of environmental protection going beyond the Union standards can be covered by Article 36 of the GBER. Subject to certain exceptions, aid may not be granted under this provision for projects simply involving early implementation of Union standards that have already been adopted but are yet to enter into force.

17. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area and that aid intensities established in the regional aid map are not exceeded and that all the conditions of Article 14 are complied with¹⁷.

18. **Article 56 of the GBER** allowing investment aid for local infrastructures up to EUR 10 million of aid or up to EUR 20 million of total costs. It covers only investment aid granted for the

¹⁵ See footnote 3.

¹⁶ See EEAG, in particular section 3.5.

¹⁷ Please note that waste incineration infrastructure that leads to energy production, falls outside Article 14 GBER.

construction or upgrade of infrastructure contributing towards the improvement of the local business and consumer environment. Operating aid is not exempted. Aid for dedicated infrastructure is not permissible under Article 56 of the GBER¹⁸. It is important to note that Article 56 GBER will only apply where other GBER provisions (e.g. Article 47 – see point 15) are not applicable.

19. Note that in all cases the provisions of Chapter 1 of the GBER must also be complied with.

Service of General Economic interest: SGEI Decision¹⁹

20. 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 entrustment²⁰) may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of an SGEI, parameters of compensation 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.

Instances in which notifying for State aid clearance is necessary

21. 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.

22. Under the **Energy and Environmental Guidelines (EEAG)**²¹ the compatibility of State aid for waste management infrastructure is normally assessed on the basis of section 3.5 of the EEAG.

23. 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 standards²², provided that the conditions detailed in section 3.2 of the EEAG are met.

Service of General Economic Interest: SGEI Framework²³

¹⁸ Investment aid for the construction or upgrade of dedicated infrastructure is not exempted under Article 56 GBER as per Article 56(7) GBER. In case SA.36147 – Germany – Infrastructure aid implemented by Germany in favour of Propapier (Commission decision of 1 October 2014), OJ L 89, 1.4.2015, p. 72, the Commission decided 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.

¹⁹ See footnote 6.

²⁰ 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.

²¹ See footnote 4.

²² This type of aid is intended for the management of the beneficiary's own waste.

²³ See footnote 12.

24. To the extent that the construction of waste management infrastructure is necessary for the provision of a clearly defined and entrusted genuine SGEI, the compatibility of such aid that exceeds EUR 15 million per year may be assessed on the basis of the SGEI Framework.

Regional Aid Guidelines (RAG)²⁴

25. 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.

References:

- [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 Directive 2006/111/EC](#) of 16 November 2006 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.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, p. 1.
- [Guidelines on State aid for environmental protection and energy 2014-2020](#) OJ C 200, 28.6.2014, p. 1.

²⁴ See footnote 10.

INFRASTRUCTURE ANALYTICAL GRID N° 9¹ – RAIL, METRO, LOCAL TRANSPORT INFRASTRUCTURE

Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.

General principles

1. This analytical grid covers the financing of the construction, maintenance and management of railway, local transport (including metro) infrastructure, as well as the purchase of rolling stock for metro and local public transport.
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules. Investment into a project with a view to its future economic exploitation, to which it is intrinsically linked, will constitute an economic activity. The investment may be exploited by a local authority's in-house transport operator or a third party transport provider.

Instances in which the existence of State aid is excluded

No effect on competition and on trade between Member States: Investment into the construction, maintenance and management of general railway infrastructure

3. The responsibility to operate and manage the main national railway networks is the responsibility of the State, either through an administrative body or by a public undertaking, in many cases under a statutory monopoly². As the management and operation of the main rail infrastructure networks within the EU are generally carried out in national, geographically closed and separated markets that are not subject to competition, public financial support made available to infrastructure managers is generally not liable to affect intra-Union trade.
4. Therefore, if the railway infrastructure is part of the general rail infrastructure managed by the railway infrastructure manager, the Commission considers that State aid is not involved in the project when the following conditions are satisfied:

¹ This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

² See for instance Commission decision of 2 May 2013 in case SA.35948 - Czech Republic - Prolongation of the interoperability scheme in railway transport, OJ C 306, 22.10.2013, p. 7, http://ec.europa.eu/competition/state_aid/cases/247158/247158_1468536_73_2.pdf.

- i. there is no competition by virtue of the fact that the infrastructure manager has a legal monopoly to manage the main national rail infrastructure³; in that context the investment must concern a part of that general rail infrastructure which is not otherwise provided on the market; and
- ii. the financing must not benefit any commercial activities of the infrastructure manager, which has to keep the accounts for its infrastructure-related tasks separate from its other activities⁴.

No potential effect on trade between Member States: Local infrastructure

5. 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.
6. Where the financed infrastructure is of a purely local nature, such as small railways of local importance, with an insignificant number of users from other Member States and not likely to attract foreign investment, the support may not constitute State aid due to the absence of effect on trade.⁵

No potential effect on trade: de minimis

7. Support granted under the *de minimis* Regulation⁶ is not regarded as 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 are also respected.

No economic advantage: Investments in compliance with the Market Economy Operator Principle

8. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (*ex ante*) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on similar projects, taking into account all the relevant circumstances. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor

³ See Commission decision of 17 July 2002 in case N 356/2002 - UK - Railtrack plc/Network Rail, OJ C 232, 28.09.2002, p. 2, http://ec.europa.eu/competition/state_aid/cases/137131/137131_453400_5_2.pdf.

⁴ See Commission decision of 7 June 2006 in case N 478/2004 - Ireland – State guarantee for capital borrowings by Coras Iompair Eirann for infrastructure investments, http://ec.europa.eu/competition/state_aid/cases/180019/180019_577971_10_2.pdf.

⁵ See for instance Commission decision of 7 May 2014 in case SA.38441- UK - Isles of Sicily, OJ C 5, 9.1.2005, p. 4, http://ec.europa.eu/competition/state_aid/cases/252032/252032_1545484_83_5.pdf.

⁶ 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.

9. The financing of infrastructure often requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore in such circumstances not be undertaken on the basis of purely economic considerations. Thus in such cases, Member States would have to successfully argue that the criteria for the application of the MEOP are complied with⁷.

No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria

10. The maintenance and construction of the infrastructure as well as the purchase and maintenance of the rolling stock necessary for the provision of those services may be necessary for the provision of public transport services. In such a case, the existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of a service that can be considered as a **genuine service 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 the 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 require⁸.

Instances in which there is no need to notify for State aid clearance, but other requirements could apply

11. State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

Public service obligation (PSO): Regulation 1370/2007

12. The maintenance and construction of the infrastructure as well as the purchase and maintenance of the rolling stock necessary for the provision of those services may be part of public transport obligations. In that case Regulation 1370/2007⁹ will be applied to the costs related to those investments.
13. In general, public service contracts must be awarded on the basis of an open, transparent and non-discriminatory procurement procedure. A local authority can, however, award such a contract directly to its in-house provider, provided that it has complete control of the provider

⁷ See e.g. Commission decision of 13 July 2014 in case SA.32576 – Germany - Flughafen Niederrhein GmbH, OJ C 279, 14.09.2012, p. 1, http://ec.europa.eu/competition/state_aid/cases/243457/243457_1359832_419_2.pdf; and Commission decision of 3 October 2012 in the case SA.23600 – Germany - Financing arrangements concerning Munich Airport Terminal 2, OJ L 319, 29.11.2013, p. 8, http://ec.europa.eu/competition/state_aid/cases/226773/226773_1399901_101_2.pdf.

⁸ 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 interest, OJ C 8, 11.1.2012, p. 8.

⁹ Regulation(EC) of the European Parliament and the Council No 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.

and the provider does not operate outside of the territory for which the local authority is responsible. Moreover, public service contracts concerning railway transport (excluding metro) can be awarded directly for up to 10 years with a possibility of prolongation by 5 years.

14. The main conditions of Regulation 1370/2007 are a clear definition of the public service obligation, clear rules setting out the compensations for the service and the prevention of overcompensation. The latter condition means that the entity providing the transport can only be paid the difference between its costs and revenues from the PSO, plus a reasonable profit.
15. When those conditions are fulfilled, the financing of the PSO is deemed compatible with the internal market and may be implemented without being notified to the Commission.

General Block Exemption Regulation (GBER)¹⁰

16. The measure may be 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 or total costs exceeding EUR 20 million, can apply. In particular, the infrastructure must be available to interested users at market price and on an open, transparent and non-discriminatory basis. In practice those requirements mean that: (i) the price charged for the use or the sale of the infrastructure must correspond to the market price; and (ii) any concession to operate the infrastructure must be assigned through an open, transparent and non-discriminatory procurement procedure. Note that the provisions of Chapter 1 of the GBER must also be complied with.

Instances in which notifying for State aid clearance is necessary

17. 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. The Commission would then assess the compatibility of such aid individually on its merits under Article 93 or Article 107(3)(c) TFEU.
18. The compatibility of aid to infrastructure which meets the needs of coordination of transport, such as intermodal platforms, is assessed on the basis of Article 93 TFEU¹¹. Under that legal basis a measure should, in particular, 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) open access to all users on a non-discriminatory basis; and (iv) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest.

¹⁰ 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.

¹¹ See for instance Commission decision of 19 September 2012 in case SA.34985 - Austria – Programme for supporting the development of connecting railways and transfer terminals 2013 – 2017, OJ C 43, 15.2.2013, p.19, http://ec.europa.eu/competition/state_aid/cases/245111/245111_1398705_116_2.pdf and Commission decision of 1 August 2014 in case SA.38714 (2014/N) – France - Aides à l'investissement au projet d'autoroute ferroviaire atlantique, OJ C 369, 17.10.2014, p. 1, http://ec.europa.eu/competition/state_aid/cases/252684/252684_1583429_106_2.pdf.

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- [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.
- [Regulation\(EC\) of the European Parliament and the Council No 1370/2007](#) of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1.
- Communication of the Commission (2008/C 184/07) "[Community guidelines on State aid for railway undertakings](#)", OJ C 184, 22.7.2008, p. 13.