State aid in the water sector: second circuit water — Belgium

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On 2 June 2004, the Commission decided that public support to water companies to create new infrastructure for the distribution of so-called grey water does constitute State aid within the meaning of Article 87(1) of the EC Treaty. The Commission rejected the arguments presented by the Belgian authorities that the criteria of the Altmark-ruling would apply. The aid measure was authorised directly under Article 87(1) of the EC Treaty, as the Community guidelines on State aid for environmental protection did not apply.

Description of the measure

In September 2003, the Belgian authorities notified an aid measure for Flemish water suppliers for the construction of second circuit water distribution networks and treatment facilities. The objective of the measure is to protect the groundwater reserves in Belgium. The Belgian authorities plan to replace the industrial use of groundwater by the use of alternative water sources, i.e. second circuit water or also called grey water.

The distribution of ‘grey water’ (e.g. purified waste water, rain water or surface water) can become necessary because of insufficient availability of groundwater at several locations in Belgium. The notified scheme should contribute to a good qualitative and quantitative status of the groundwater in accordance with Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (1). The cost for the supply of grey water varies considerably, depending on e.g. the desired quality of the delivered grey water, the actual water source, the scale of the initiative and the distance to the grey water source. In any case prices of grey water supply are substantially higher than the current groundwater cost.

So far, there is no infrastructure for the distribution of grey water in Flanders. The Belgian authorities would like to grant investment aid to stimulate the construction of the alternative water supply. With the aid, the final price for the industrial users will be lower. At the same time, the Belgian authorities will increase the groundwater prices, by means of an increase in groundwater charges. Herewith, the costs of groundwater will get equal to the costs of grey water.

The Belgian authorities plan to grant aid to existing Flemish drinking water suppliers, which are all public entities. The envisaged budget for 2004 amounts to 3 million EUR. As the Belgian authorities intend to wait for the results of the pilot project (minimum duration 2 years) before developing other projects, a total budget of 60 million EUR within the period of 10 years is expected to be the absolute maximum.

According to the Belgian authorities the construction of grey water circuits is a public service obligation. The drinking water companies, which will receive the support to construct grey water circuits, will not receive an advantage, because the granted compensation forms a reward to implement an obligation of public utility, more specifically the distribution — at an acceptable price — of alternative water distribution.

In their notification, the Belgian authorities explained that the notified scheme does not constitute State aid within the meaning of Article 87(1) of the EC Treaty. According to recent case law of the Court of Justice (2), public service compensation does not constitute state aid within the meaning of Article 87(1) of the EC Treaty if it meets four conditions:

1. The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined.
2. The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner.
3. The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

(2) Judgment of 24 July 2003 in Case C-280/00 Altmark Trans and judgment of 27 November 2003 in Joined Cases C-34/01 to C-38/01 Eniririsorse SpA.
4. Where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

State aid or no State aid within the meaning of Article 87(1)?

The Commission has noted that the notified scheme is not imposing any obligation upon public water companies to invest in grey water circuits. The aid scheme merely provides for financial support in the event a public water company takes the initiative to invest in a grey water circuit and files a request for financial support with the competent public authorities. Secondly, the notified scheme is aimed at water companies that will provide grey water to a small amount of industrial undertakings in a certain area. The measure is not aimed at a large amount of companies or citizens. Therefore, the Commission does not consider the construction of a grey water network as a public service obligation.

Even if the measure could be considered as a public service obligation, the Commission has noted that seems too difficult to compare the costs of the envisaged projects with those of another similar company. Therefore, the level of compensation for the envisaged projects will not be determined on the basis of an analysis of the costs which a typical well run undertaking would have incurred. Herewith, the fourth criterion of the Altmark ruling is not met.

The advantage and selectivity criteria of State aid assessment are clearly met in this case. As regards the effect on competition and trade criterion the Commission noted that water supply is identified as task of municipal importance under Belgian law. All Flemish water companies are public entities, supervised by the Flemish minister of Internal Affairs, who is allowed to annul decisions if they are not in accordance with Belgian legislation or with the general interest. On the basis of the existing legislation it is not possible for private persons to participate in these bodies or to start water distribution business (1). Although at present the activities of the Flemish public water distributors are almost entirely concentrated on the home market, the decree on inter-municipal co-operation provides that municipalities and its formed co-operations can — in conformity with the conventions and international agreements that are in force — participate in corporate persons of public law that operate across the border. Furthermore, corporate persons, subject to a foreign legislation, can participate in co-operations in conformity with the Flemish decree, if they are entitled to do so by their own legislation. Therefore, the effect on competition and trade criterion of the definition of State aid within the meaning of Article 87(1) of the EC Treaty applies.

The Commission is therefore of the opinion that the notified scheme constitutes State aid measure within the meaning of Article 87(1) of the EC Treaty.

Compliance with the Treaty

Since the aid measure is not characterised as a public service obligation, the Commission did not assess the notified scheme under Article 86(2) of the EC Treaty (i.e. service of general economic interest).

The objective of the aid scheme is to protect the Flemish groundwater reserves, i.e. environmental protection. The scheme is aimed at investment aid. According to point 29 of the Community guidelines on State aid for environmental protection (2), hereinafter the environmental guidelines, investment aid may be granted to enable firms to improve on Community standards applicable, or when the firms undertake investment in the absence of Community standards applicable. The first possibility expressed in point 29 of the environmental guidelines, which allows aid to be granted in order to enable firms to improve on Community standards applicable, or when the firms undertake investment in the absence of Community standards applicable. The first possibility expressed in point 29 of the environmental aid guidelines, which allows aid to be granted in order to enable firms to improve on Community standards applicable, does not apply in this case. The aid is granted in order to improve the Flemish environment in general, and to help Belgium to achieve its obligations under the aforementioned Directive 2000/60/EC on Community action in the field of water policy (3). The aid is not granted to enable the water companies to improve on the standards applicable to them directly.

(1) Flemish communes could concede water distribution to private entities (EU rules on concessions would be applicable) but can also operate them themselves. Until now they have chosen the second option which prevents any competition on the Flemish market.

(2) OJ C 37, 3.2.2001, p. 3.

Furthermore, in the light of point 18 (b) of the environmental aid guidelines, which states that ‘aid may act as an incentive to firms to improve on standards or to undertake further investment designed to reduce pollution from their plants’, the Commission considers that point 29 of the environmental aid guidelines concerns cases of investment aid where an undertaking invests to improve its own environmental record. This is not the case under the present scheme. The aid scheme is related to environmental protection at the regional level (i.e. Flemish ground water reserves) and not at the individual level of the beneficiary (1).

Therefore, the environmental aid guidelines are not applicable to the notified second circuit water scheme. Therefore the Commission had to consider whether this type of aid fulfils the criteria to be directly compatible with Article 87(3)(c) of the Treaty. Article 87(3)(c) of the Treaty states that ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’ may be considered to be compatible with the common market.

The Commission noted that the Belgian authorities are in control of the price-fixing of the grey water on the basis of public and transparent parameters. The objective is to offer grey water at a reasonable price. The parameters of compensation are calculated and assessed in detail before the start of the projects. The aid intensity is limited to 67% of the eligible investment costs. Point 37 of the environmental aid guidelines states that ‘eligible costs must be confined strictly to the extra investments costs necessary to meet the environmental objectives’, which is normally done by deducting, from the eligible investment costs, ‘the cost of a technically comparable investment that does not provide the same degree of environmental protection’. In the notified scheme, the Belgian authorities have not deducted the cost of any such comparable investment from the eligible investment costs. This approach appears to be justifiable given the specificity of the measure. The environmental aid guidelines are applicable to aid measures intended to make a certain production process more environmentally friendly, by reducing its polluting emissions. This is why point 37 recommends the deduction from the eligible investment costs of a comparable, less environmentally friendly investment. In the notified scheme, however, the situation is different. It is the whole economic activity of the aid beneficiary (supply of second circuit water) that is environmentally friendly. It is therefore appropriate to consider that the whole cost of investment is eligible.

The aid intensity of the notified scheme is relatively high (67%) in comparison with the regular aid intensities under the environmental aid guidelines (30% to 50%). Nevertheless, at present there is no commercial interest to develop second circuit water distribution networks, since the cost of grey water supply by water companies would turn out substantially higher than the present costs of using groundwater for industrial undertakings. Moreover, the supply of water is exclusively entrusted to public water companies. The envisaged distribution of grey water is defined by act, including responsibility, sanctions and duration. The conditions and criteria to grant aid to the public water companies are clearly set out in the notified measure. The aid will be granted for investment projects in the form of one-off grants. The recipient water companies will engage in investments that are directly related to environmental protection at the regional level (Flemish ground water reserves) and not at the individual level of the beneficiary. Therefore, the Commission is of the opinion that the aid intensity of 67% of the eligible costs is acceptable.

The effect on competition and trade by this aid measure is expected to be very low. The Belgian authorities provided sufficient evidence that there is an environmental need for a switch in the use of groundwater by industrial companies to the use of grey water. Given the very low distortion of competition and the clear environmental public interest of the measure, the Commission authorised the notified scheme on the basis of Article 87(3)(c) of the EC Treaty.