



EUROPEAN COMMISSION

Brussels, 01.10.2014

C(2014) 6847 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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COMMISSION DECISION

of 01.10.2014

on the alleged infrastructure aid implemented by Germany

in favour of Propapier PM2 GmbH

STATE AID

SA.36147 (C 30/2010) (ex NN 45/2010; ex CP 327/2008)

(Only the German version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the Treaty¹,

Having called on interested parties to submit their comments pursuant to the provisions cited above² and having regard to their comments,

Whereas:

1. Procedure

- (1) By letter of 29 October 2008 the Commission received a complaint from the Smurfit Kappa Group (hereinafter: 'Smurfit Kappa', or 'the complainant'), alleging that infrastructure aid had been granted to the benefit of Propapier PM2 GmbH. The complaint was registered under the reference CP 327/2008 and transferred to the register for unlawful aid (with reference NN 45/2010).
- (2) By letter dated 27 October 2010, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the alleged aid.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*³. The Commission invited interested parties to submit their comments on the alleged aid.
- (4) Germany submitted comments by letter dated 28 January 2011 (non-confidential version received on 31 January 2011). The Commission also received comments from the following interested parties: a joint comment from the German municipal associations Deutscher Städtetag, Deutscher Landkreistag, and Deutscher Städte- und Gemeindebund, as well as the association of municipal undertakings Verband kommunaler Unternehmen (VKU) on 11 February 2011, and from the complainant on 14 February 2011 (non-confidential version received on 1 March 2011). It forwarded them to Germany, which was given the opportunity to react; Germany's comments were received on 13 April 2011 (non-confidential version received on 26 April 2011).
- (5) On 17 January 2013 a meeting took place between the Commission services and the German authorities. By letter of 25 February 2013 the German authorities provided further information. The Commission services requested additional information by letter dated 26 April 2013, which Germany provided by letter dated 14 May 2013.

¹ OJ L 83, 27.3.1999, p. 1.

² OJ C 7, 12.1.2011, p. 10.

³ Cf. footnote 2.

- (6) By email dated 23 May 2013 the Commission requested further information, which was provided by Germany by emails dated 24 May 2013, 27 May 2013 and 28 May 2013.
- (7) After a meeting on 6 June 2013 between the Commission services, the German authorities, technical experts, and representatives of the beneficiary company, Germany announced potential further comments. Following a further information request dated 15 October 2013, Germany provided extensive additional comments by emails dated 4 November 2013, 13 December 2013, 18 December 2013, 6 January 2014 and 24 April 2014.

2. Description of the measures

- (8) Propapier PM2 GmbH (hereinafter: 'Propapier') belongs to Progroup AG (hereinafter: 'Progroup'). Progroup produces and sells corrugated case material (CCM) and corrugated board through its subsidiaries. The complainant, Smurfit Kappa, is one of the largest paper producers in the Union.
- (9) On 2 April 2008, the Commission approved⁴ regional aid for the construction of a paper mill aimed at producing CCM and of a related power plant by Propapier in a newly opened extension of the existing industrial park 'Industriegebiet am Oder-Spree-Kanal' in Eisenhüttenstadt/Brandenburg, an area which at the time was eligible for regional aid pursuant to Article 107(3)(a) TFEU.
- (10) The complainant alleged that certain infrastructure projects financed by State resources in the newly extended industrial park where the new Propapier plant is situated are exclusively dedicated to the paper mill and therefore should qualify as dedicated infrastructure and State aid to the benefit of Propapier.
- (11) The complainant specified the following infrastructure projects (see section 2.1 below): the construction of a waste water treatment plant, the construction of a parking lot, a new road and the widening and deepening of the Oder-Spree-Kanal.
- (12) Furthermore, the complainant argued that the tariffs charged for the use of the waste water treatment plant are advantageous to the benefit of Propapier (see section 2.2 below).

⁴ Commission decision on State aid case N 582/2007 (OJ C 131, 29.5.2008). After a challenge by competitor Smurfit Kappa, the General Court annulled the Commission decision by Judgment of 10 July 2012 (Case T-304/08 Smurfit Kappa Group plc/Commission). On 15 May 2013 the Commission opened the formal investigation against the notified regional aid granted to Propapier (State aid case SA.23827(2013/C), OJ C 230, 8.8.2013, p. 39). The opening decision SA.23827 (2013/C) stated that if, 'after a formal investigation on State aid case SA.36147 (C 30/2010), the Commission would conclude that other aided investments constitute a single investment project with the Propapier paper plant investment, or that additional aid was granted to Propapier in the form of infrastructure measures, the compliance with point 67 of the RAG will have to be assessed taking account of the combined aid package'.

2.1. Aid for the construction of the waste water treatment plant and other infrastructure

- (13) In July 2008 the Land Brandenburg awarded a direct grant in the amount of EUR 33 808 200⁵ from resources of the Joint Federal/Länder programme 'Improvement of Regional Economic Structures' (in German: 'Ausbau der kommunalen wirtschaftsnahen Infrastruktur im Rahmen der Gemeinschaftsausgabe (GA)') (hereinafter: 'Gemeinschaftsausgabe scheme'⁶) for the construction of a new waste water treatment plant in an extension of the industrial area at the Oder-Spree-Kanal, in Eisenhüttenstadt. It should be noted in this context that the Gemeinschaftsaufgabe scheme for the financing of the construction or extension of waste water treatment plants was the subject matter of State aid case N 644e/2002⁷ in which the Commission in 2003 had established for the programming period 2004 to 2006 that public support from it does not constitute State aid in the meaning of Article 107(1) TFEU in favour of the owner and operator of the waste water treatment plant.
- (14) In this 2003 decision, the Commission considered the grants from the version of the scheme applicable from 2004 to 2006 to be an internal transfer of state resources and not State aid to owners and operators primarily because the recipients were not viewed as economic operators and the service was as a typical public service to be provided by the municipalities. Under the scheme's conditions, the recipient had to be either a local authority (Gebietskörperschaft) or a municipal association under public law for a special purpose ('Zweckverband') which was subject to oversight by the municipality. For eligibility, no legal, personal or business relationship could exist between a beneficiary of the measure, i.e. waste water treatment plant, and the user of the plant.
- (15) The grant covered 80% of the total eligible costs of EUR 42 260 340. The beneficiary of the grant is the 'Trinkwasser- und Abwasserzweckverband Oderaue Eisenhüttenstadt' (hereinafter: 'TAZV'), an inter-municipal association in charge of the supply of drinking water and the treatment of wastewater governed by public law which is the owner and operator of the waste water treatment plant and bore the remaining 20% of the total public financing of the investment.
- (16) The granting was subject to the condition that by 15 August 2008 the legal and financial requirements for the settlement of a main investor (*in casu* Propapier) were proven. Construction of the plant began in October 2008 and its entry into service took place in March 2010.
- (17) The complainant claims that the TAZV plant constitutes dedicated infrastructure, as Propapier will use practically all of its wastewater treatment capacity. According to the complainant, the plant has originally been designed

⁵ Germany informed in its submission dd. 15.5.2013 that an amount of EUR 30 849 271 had been paid out for eligible costs amounting to EUR 38 561 588.

⁶ Ausbau der kommunalen wirtschaftsnahen Infrastruktur im Rahmen der Gemeinschaftsausgabe (GA) "Verbesserung der regionalen Wirtschaftsstruktur" nach Teil II Punkt 7 des Rahmenplanes e) Errichtung oder Ausbau von Anlagen für die Beseitigung bzw. Reinigung von Abwasser und Abfall.

⁷ State aid case N 644e/2002, Commission decision C(2003)1999 of 9 July 2003 (OJ C 197, 21.8.2003, p. 12).

for Propapier as a wastewater treatment plant and is a *conditio sine qua non* for the establishment of a paper mill in the region (paper production being very water-intensive).

- (18) As regards the other infrastructure projects, the complainant argued that the creation of a parking lot adjacent to Propapier's site, the construction of a new road connecting the industrial area with the motorway B-112, and the widening/deepening of the Oder-Spree-Kanal are infrastructure measures dedicated to Propapier. In the opening decision, the Commission preliminarily concluded that these do not provide a selective advantage to Propapier and hence do not constitute dedicated infrastructure, but it nevertheless invited third parties to comment on these measure as well.

2.2. Reduced fees for the use of the waste water treatment plant

- (19) A further element of the complaint concerning the waste water treatment plant was that the tariff of EUR 0.95 per cubic metre to be charged from Propapier for the use of the plant is lower than what a private investor would charge for such services.
- (20) The calculation of the user fees is regulated by the applicable act of the Brandenburg law ('Kommunalabgabengesetz für das Land Brandenburg'⁸, the Brandenburg Municipal Charges Act, hereinafter: 'KAG Brandenburg'). Paragraph 6 of the KAG Brandenburg determines that the calculation of the charges for the use of the plant has to cover, but must not exceed, all reasonable costs of the relevant waste water treatment plant (construction costs, maintenance and repair costs, operating costs, in particular personnel and administration of the fees), imputed interest and imputed depreciation. However, subsidies which the municipality received from other public sources (in this case the grant of EUR 33.8 million from the Gemeinschaftsaufgabe scheme) must not⁹ be taken into account for calculating the imputed interest on capital invested. The complainant takes the view that the subsidy received by

⁸ Kommunalabgabengesetz für das Land Brandenburg (KAG). The version in force at the time of the opening decision was the KAG of 31 March 2004 (GVBl.I/04, No 08, p. 174), as last amended by Article 1 of the law of 27 May 2009 (GVBl.I/09, No 07, p. 160).

⁹ Paragraph 6 of the KAG in force at the time of the opening decision reads in this respect:
Bei der Ermittlung der Verzinsung und der Abschreibungen bleibt der aus Beiträgen und bei der Verzinsung zusätzlich auch der aus Zuschüssen Dritter aufgebrauchte Eigenkapitalanteil außer Betracht.

(Translation: When calculating interest rates and depreciation, no account shall be taken of the share of equity derived from contributions or, in the case of interest rates, the share of equity derived from third-party subsidies.)

The KAG as amended on 5 December 2013 (GVBl.I/13, [40]) reads:

Bei der Ermittlung der Verzinsung und der Abschreibungen bleibt der aus Beiträgen aufgebrauchte Eigenkapitalanteil außer Betracht (Abzugskapital). Die Gemeinden und Gemeindeverbände können ganz oder teilweise 1) Zuschüsse Dritter als Abzugskapital behandeln, 2) von einer Auflösung des Abzugskapitals zur Ermittlung der Verzinsung absehen, soweit dadurch die dauerhafte Bedienung des Kapitaldienstes nicht gefährdet wird.

(Translation: When calculating interest rates and depreciation, no account shall be taken of the share of equity derived from contributions (deducted capital). The municipalities and municipal associations can treat all or part of grants from third parties as deducted capital, and can exclude deducted capital from bearing interest, insofar as the permanent principal repayment is not compromised.)

TAZV from resources of the Gemeinschaftsaufgabe scheme is therefore passed through from the beneficiary TAZV to the users of the waste water treatment plant in the form of reduced waste water fees.

3. Grounds for opening¹⁰

- (21) The alleged measures qualify as State aid if the following conditions are met: i) the aid has to be granted by an act of a Member State or out of State resources, ii) it has to confer an economic advantage to undertakings, iii) the advantage has to be selective, and iv) the measure distorts or threatens to distort competition and affect inter-state trade. The existence of State aid is established when the conditions laid down in Article 107(1) of the TFEU are satisfied on a cumulative basis.
- (22) It was undisputed in the opening decision that all measures in question involved the use of State resources and that they could potentially distort competition in the internal market.
- (23) The Commission noted that with respect to the elements of the allegation, it is necessary to distinguish between 1) potential State aid to TVAZ for the construction of the waste water treatment plant and 2) potential aid to Propapier in the form of advantageous waste water treatment charges (see recital 50 of the opening decision).
- (24) The opening decision also examined the questions of whether the construction of
- i. the waste water treatment plant and
the other infrastructure projects in the newly extended industrial park where the new Propapier plant is situated, namely
 - ii. a new parking lot,
 - iii. a road and
 - iv. the widening and deepening of the Oder-Spree-Kanal,
- provided a selective advantage or constituted dedicated infrastructure to Propapier¹¹. Given that State aid must be selective (i.e. must treat differently

¹⁰ The opening decision discussed extensively EU and German legislation applicable to waste water treatment, i.e. Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ L 135, 30.5.1991, p. 40), 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 (OJ L 327, 22.12.2000, p. 1), the German Federal Water Act (Wasserhaushaltsgesetz), the state level Brandenburg Water Act (Brandenburgisches Wassergesetz) and the KAG Brandenburg. See more in recital 40 of the present decision.

¹¹ The last three elements were expressly listed as specific grounds for the opening of the formal investigation procedure. Although the issue of whether or not the waste water treatment plant was dedicated infrastructure was raised only in the context of the issue of whether or not the reduced fees constituted aid (see recitals 86-89 of the opening decision), the complainant repeated this element of its original complaint during the formal investigation procedure. This element (together, of course, with all other elements of the complainant's arguments) was forwarded to Germany, which addressed in its responses also this issue. In view of the fact that Germany had ample opportunity to address the allegations relating to the dedicated nature of the waste water treatment

undertakings that with regard to the objective of the rule are in a comparable legal and factual situation), in accordance with Article 107(1) of the TFEU, the Commission had to assess whether Propapier has been selectively favoured by the measures.

- (25) The Commission approved already regional investment aid for Propapier. Given that the measures for the other infrastructure projects are carried out in an assisted region eligible for regional aid pursuant to Article 107(3)(a) of the TFEU, and are alleged to be closely linked/dedicated to an investment project which benefits from regional aid, the Commission took the preliminary view that if they are proven to be *selective* in favour of Propapier, they would form part of the investment project of Propapier and they would need to meet the requirements of the Guidelines on National Regional Aid for 2007-2013¹² (hereinafter RAG). The Commission expressed doubts regarding the compatibility of any investment aid in the form of a dedicated infrastructure, in particular with respect to the rules on maximum State aid intensity ceiling and on incentive effect.
- (26) Under the applicable rules of the RAG, aid beneficiaries who received investment aid may benefit from additional operating aid. The compatibility of the operating aid, however, has to be assessed independently of the compatibility of the investment aid, on the basis of the criteria laid down in Section 5 of the RAG. The Commission concluded in the opening decision that should Propapier benefit from operating aid in form of reduced waste water treatment charges which do not reflect the market economy investor principle, this operating aid could not be considered to be in conformity with the rules of the RAG, and the Commission's practice in approving operating aid. Indeed, although the aid beneficiary is situated in a region which is eligible for operating aid (Article 107(3)(a) TFEU-region), other key compatibility criteria for the granting of operating aid were not met. There was no indication that the operating aid would be justified in terms of its contribution to regional development and its nature, or that its level is proportional to the handicaps it seeks to alleviate. In addition, the operating aid would neither be temporary, nor reduced over time. The Commission therefore raised doubts as to the compatibility with the internal market of any operating aid in the form of reduced charges.

3.1. Grants for publicly funded infrastructure projects, including the waste water treatment plant

3.1.1. Parking lot, widening/deepening of the Oder-Spree-Kanal, new road

- (27) In the course of the preliminary assessment, it was established that the capacity of the parking lot did not correspond to the allegation of the complainant and that it was not located in an immediate proximity to Propapier's premises. In addition, it was established that it is generally accessible and serves not only the industrial park 'Industriegebiet am Oder-Spree-Kanal', but also other inner-city

plant, the Commission does not believe that the examination of this question should be outside the scope of the present decision.

¹² OJ C 54, 4.3.2006, p. 13.

commercial locations, and that its capacity should enable the municipality to close down parking lots for trucks in the city centre. Besides, Propapier was constructing its own parking lot which would be accessible also to trucks. For these reasons, it seemed that the construction of the parking lot did probably not confer a selective advantage to Propapier.

- (28) With regard to the construction of the new road connecting the industrial area with the motorway B-112, the Commission noted that the construction of the road reduced the traffic and the air pollution in the centre of Eisenhüttenstadt enabling the trucks heading to the industrial area to avoid the city centre, and that it shortened the time needed to access the nearest regional centre. Therefore, it seemed that the construction of the new road did probably not constitute a selective advantage for Propapier.
- (29) As regards the widening and deepening work in the Oder-Spree-Kanal, the Commission noted that this was not undertaken in order to provide a selective advantage to Propapier, but that it was part of the necessary regular maintenance of the waterway system. Therefore, it seemed that the widening and deepening of the Oder-Spree-Kanal did probably not constitute a selective advantage for Propapier.
- (30) However, at the time the Commission considered that it could not be entirely excluded that Propapier benefits from these infrastructure measures to a greater extent than other undertakings.
- (31) Before taking a final view on the presence of aid with respect to these measures, the Commission invited interested third parties to present their views. At the same time, it invited Germany to provide more information referring to the creation of the parking lot, the construction of the new road and the widening/deepening of the Oder-Spree-Kanal during the formal investigation procedure.

3.1.2. Grant for the construction of the waste water treatment plant

- (32) In its opening decision, the Commission concluded that if the aid scheme in case N 644e/2002 became aid in the meantime due to the development of the internal market, it would be existing aid in favour TAZV.
- (33) The Commission however expressed doubts as to whether or not the waste water treatment plant constitutes dedicated infrastructure. In this context it was noted that besides Propapier, there were only two additional users of the plant, i.e. the Canadian photovoltaic component supplier 5N PV and the energy provider EnBW. Furthermore, it was not known how much of the capacity of the waste water treatment plant was actually allocated to these two customers. On the basis of the available information at the time, the Commission was not in a position to assess whether the construction of the new waste water treatment plant was necessary with regard to only these two undertakings. Furthermore, one of these two additional users, the power plant operated by EnBW, was

directly involved in the Propapier project as it was operating the power plant providing the energy supply for the production processes of the paper mill¹³.

- (34) The Commission further noted that if the actual share of Propapier amounted to 90% of the sewage capacity as alleged by the complainant, it should be questioned whether this fact itself does not provide sufficient evidence that the plant actually is solely or at least predominantly dedicated to serve Propapier. Germany's argument in this respect that the construction of the waste water treatment plant will be used by additional users in the future had to be examined further.
- (35) It was also noted that it should be taken into account how many investors can be located in the industrial park 'Industriegebiet am Oder-Spree-Kanal' and how much capacity on average they would use. In this regard Germany was requested to provide more detailed information on the overall conception for the development of the industrial area and the remaining capacity of the waste water treatment plant to be allocated among the potential users. Germany was also requested to provide more information as regards the technical feasibility of the modular approach in building the treatment plant.¹⁴
- (36) As explained above, the Commission took the preliminary view that if the measures for the infrastructure projects are proven to be *selective*, they would form part of the investment project of Propapier and they would need to meet the requirements of the RAG, in particular its rules on State aid intensity ceiling and incentive effect.

3.2. *Reduced fees for the use of the waste water treatment plant*

- (37) Germany took the view that similarly to the measure for the construction of the waste water treatment plant, if there is aid in the form of reduced fees, it would constitute existing aid. Germany expressed the view that the Commission's decision in case N 644e/2002, which authorised the 'Gemeinschaftsaufgabe' scheme, included also indirect effects of the scheme.
- (38) The Commission however concluded in the opening decision that possible aid in the form of reduced fees is not covered by the decision N 644e/2002 and if the fee constitutes State aid, this State aid would be new aid.
- (39) In trying to assess whether the charges are set to provide an economic advantage to Propapier, the Commission in its opening decision expressed doubts as to whether the fees charged by TAZV reflect the full costs and whether a private investor would have set the charges at the same level.
- (40) The Commission expressed the view that the fees charged to Propapier do not allow to cover the full cost for the waste water treatment, as Germany acknowledges that these fees only allow to cover 20% of imputed interest of capital expenditure, since the 80% subsidy which the municipality received

¹³ It is to be noted that the complaint included elements relating to the power plant that was originally part of the notified project of the Propapier investment project. However, Germany has informed the Commission about the subsequent change of the project (eliminating the power plant from the scope of the notification) and reduced the aid that was originally approved. Thus, the Commission saw no reason to pursue the complaint with regard to this issue.

¹⁴ See recitals 87 and 88 of the opening decision.

from other public sources for the construction of the plant must not be taken into account for the calculation of imputed interest. In this respect, the Commission in its opening decision first established that neither Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy¹⁵ (hereinafter: 'the EU Water Framework Directive')¹⁶, nor the KAG Brandenburg appear to require that fees for the use of a waste water treatment facility cover the full costs¹⁷. The opening decision, however, referred to the *InfraLeuna*¹⁸ and the *Kimberly-Clark/Scott*¹⁹ cases in which charges set at the level of full costs have been considered to correspond to the costs normally included in the budget of an undertaking.

- (41) The complainant argued that in order to establish the advantage, one should compare the level of the charges actually paid by Propapier to the level of the charges that a private investor, placed in the same situation as TAZV, would have charged.
- (42) Germany suggested comparing the fee paid by Propapier to the average price observed in the sector and quoted a study which found the average price in the sector being between EUR 0.24 and EUR 1²⁰.
- (43) The Commission observed in the opening decision that it appeared that the private investor principle may be applicable to the present case. However, it expressed doubts as to whether the use of a benchmark could exclude the presence of aid as the data presented appeared to be skewed. Even if the quoted fees from other municipalities were to reflect the full costs, different prices appear to reflect different local realities, which for a private investor would justify different price levels. As a result, the Commission at the time doubted that the presence of an advantage for Propapier could be excluded on the basis of these data.
- (44) As explained in recital 26, if the measure indeed constitutes new State aid within the meaning of Article 107(1) of the TFEU, the Commission had doubts on its compatibility with the internal market as set by Article 107(3) of the TFEU. If the fees turn out to constitute regional operating aid, there are doubts as to their compatibility as they are neither temporary nor reduced over time, nor do they seem to be targeted to compensating specific (unproven) handicaps of the region.

¹⁵ OJ L 327, 22.12.2000, p. 1.

¹⁶ Regarding the recovery of the costs for water services, Article 9 of EU Water Framework Directive states that 'Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle'.

¹⁷ See recital 69 of the opening decision.

¹⁸ OJ L 260, 6.10.1999, p. 1, in particular section II.4.4 and section IV.3.3.1.

¹⁹ OJ L12, 15.1.2002, p. 1, in particular recitals 196 and 201.

²⁰ Germany also argued prior to the opening decision that in the *Lenzing Lyocell* case (OJ L 38, 8.2.2001, p. 33, recital 41), the Commission accepted evidence submitted by Austria, showing that in the second half of the 1990s, EUR 0.5 per cubic meter constituted the normal market price for waste water treatment. However, the Commission in the opening decision held that the *Lenzing Lyocell* case concerned a factual situation that pre-dated the present case by more than 10 years, and that it concerned a different Member State.

4. Comments from Germany and third parties on the opening decision

4.1. Do the publicly funded infrastructure projects constitute dedicated infrastructure for the benefit of Propapier?

4.1.1. Parking lot

Comments from the complainant

- (45) In its opening decision the Commission rejected the number of parking spaces submitted by the complainant. According to the complainant these figures (parking for 186 cars and 71 trucks) however stem from the preliminary development plan commissioned by the city of Eisenhüttenstadt.
- (46) The complainant argues that Propapier's original building plans do not mention the construction of a private parking lot, and that even if Propapier is building its own car park, the so-called public parking lot is still predominantly benefitting Propapier: there is a sign allocating parking spaces to trucks for the power plant and the paper mill. In addition, the parking lot is in the immediate vicinity of Propapier's premises (right up to the paper mill boundaries and adjacent to the power plant, which was initially part of Propapier's project). The parking lot does not offer any rest facilities that can normally be expected from such public parking.
- (47) The complainant claims that the location of the car park is inconvenient and too remote to serve other inner-city commercial locations and allow the municipality to close down parking lots for trucks in the city centre.

Comments from Germany

- (48) According to Germany, the parking does not constitute a selective advantage for Propapier. It is generally accessible and serves not only the Oder-Spree-Kanal industrial area. Germany adds that Propapier has own parking space (213 for passenger cars and 27 for trucks) and that a building permit was issued for additional space for 120 passenger cars.
- (49) Germany disagrees with the complainant's allegations that the parking lot is predominantly benefitting Propapier and that the location of the car park is inconvenient and too remote to serve other inner-city commercial locations in the city of Eisenhüttenstadt.
- (50) Germany explains that the sign - allocating parking spaces to trucks for the power plant - to which the complainant refers, was temporary and resulted from construction works in the power plant. These works were completed at the end March 2011. Access to the parking lot is indicated along the new road, and does not refer to any specific company or installation.

4.1.2. Road

Comments from the complainant

- (51) The complainant opposes Germany's claims that the new road was meant to connect the industrial area with the motorway B-112; according to the complainant the road stops a few meters behind the paper mill, without visible plans to continue it, and if it was ever continued, it would not serve other undertakings as none is located in the prolongation area.

- (52) Consequently, the complainant is of the opinion that the parking lot and the road provide Propapier with a selective advantage and are dedicated to the use of Propapier.

Comments from Germany

- (53) Germany argues that the new road will connect the current industrial park 'Industriegebiet am Oder-Spree-Kanal' and its northern expansion areas to the motorway B-112. It reduces the traffic and the air pollution in the centre of Eisenhüttenstadt, enables trucks to avoid the city centre, and will result in time savings of at least 1/3 of riding time for the industrial and commercial traffic to Frankfurt (Oder). It is part of the overall development of the industrial area, which was already planned in 1993, and serves also a better access for enterprises in Frankfurt to the Eisenhüttenstadt inner port. Germany claims that the road was already foreseen in the Oder programme of the Land government.
- (54) It offers further development options for the ArcelorMittal and other industrial areas. The road was built in two steps; after some delay due to technical difficulties, the last part was finalized in 2013.

4.1.3. Widening/deepening of the Oder-Spree-Kanal

- (55) The City of Eisenhüttenstadt indeed extended in 2008 the industrial park 'Industriegebiet am Oder-Spree-Kanal' in view of attracting firms. Germany argues that the widening and deepening work in the Oder-Spree-Kanal is part of the necessary regular maintenance of the waterway (which constitutes part of the Trans-European Network TEN). Since 2003 sluices are built along the entire canal (currently the Kersdorf sluice, the construction of the Fürstenwalde sluice is postponed). Germany claims that there is no link with the settlement of Propapier and no selective advantage for Propapier.

4.1.4. Does the waste water treatment plant constitute dedicated infrastructure to the benefit of Propapier?

Comments from the complainant

- (56) The complainant claims that the aid cannot fall under the scheme declared to be non-aid in the decision N 644e/2002 since this scheme was not applicable when the investment aid for the construction of the TAZV waste water treatment plant was granted, as its duration expired end 2006.
- (57) The complainant also pointed out that the scheme would also not be applicable because the wastewater treatment plant does not provide a public service, but was built for the sole and predominant use of Propapier.
- (58) The complainant suggests that the paper industry normally has own wastewater treatment plants for recycled paper mills, also in Germany, and therefore the German argument that companies are obliged to connect to the public sewage system is not valid.
- (59) The complainant argues that the waste water treatment plant does not constitute part of a general economic development plan of the industrial area that would include all the potential investors in the park, but was developed and presented concurrently with the Propapier paper mill and the power plant, already in 2007. The Eisenhüttenstadt city proposal (Beschlussvorlage) regarding the

development of the industrial park, dated 7 November 2007, refers to only two or three investors. The complainant claims that Eisenhüttenstadt only started promotional activities for the industrial area in 2010, and suggests that the city only started to look for new investors after Smurfit Kappa lodged its complaint.

- (60) The complainant considers that the construction specificities of the TAZV plant clearly show that it was specifically tailored to the needs of Propapier. The technical characteristics of wastewater treatment plants are very sector specific. Wastewater treatment plants for recycled paper mills normally comprise an anaerobic and an aerobic treatment phase, whereas standard communal sewage systems often only provide the aerobic treatment phase. The fact that the TAZV wastewater treatment plant comprises both phases, provides for the complainant an additional argument that it cannot be regarded as serving the public interest, but constitutes dedicated infrastructure for Propapier.
- (61) The complainant is of the opinion that it is highly unlikely that other capacity needs than those of the Propapier paper plant (and its complementary power plant, now owned by EnWB) have been taken into account by TAZV when designing the plant. The complainant argues that EnWB is not an independent user, since the power plant investment is in fact closely linked to the paper plant project and would not exist without the Propapier plant.
- (62) The complainant remarks that the other investor in the area, 5N PV, only uses a negligible percentage of the available sewage capacity of the TAZV, and that its waste water treatment needs could have been covered by the already existing waste water treatment plant. In fact, as the 5N PV had already been operating since May 2008, two years before the new TAZV plant became operational, it had initially used the existing waste water treatment plant.
- (63) The complainant alleges that there exists no forecast of the expected sewage capacity needs for identified potential new investors, and that no information is given on whether and when this additional capacity would be operational. The complainant notes that currently there is in any case hardly any spare capacity left. The complainant also refers to a press article (Märkische Oderzeitung 3.2.2011) reporting on a technical fault in an aeration basin, indicating that all the available basins are needed for the current industrial users.
- (64) According to the complainant, Germany implicitly confirmed that no other company will use the waste water treatment plant, by admitting that the fees for the new TAZV plant are lower than those for the existing plant because the new plant does not require an expensive system of sewers between single users (herewith confirming that no new user will be added).
- (65) According to the complainant, TAZV figures show that Propapier uses at least 90% of the daily capacity of the plant.
- (66) The complainant alleges that the modularity of the waste water treatment plant argued by Germany is purely theoretical and does not lead to economies of scale, since a second module would cost 80-90% of the first. The relatively high costs for adding modules support the finding that the initial investment of EUR 42 million principally benefits Propapier as a selective measure.
- (67) The complainant suggests that the fact that the new TAZV plant is built in direct vicinity of the Propapier plant, next to the power plant and the paper mill,

allows Propapier to re-use the biogas resulting from the anaerobic treatment of its waste water.

- (68) On the basis of the above, the complainant concludes that the TAZV plant constitutes dedicated infrastructure to the benefit of Propapier, and that the public funding of the construction of the waste water treatment plant constitutes investment aid to Propapier. The complainant claims that the Commission should therefore assess whether this measure, in combination with the regional investment aid granted for the Propapier paper mill (State aid case SA.23827), meets all the requirements of the RAG.

Comments from Germany

- (69) Measures granted under scheme N 644e/2002 which is a no aid measure, will not become aid.

Public infrastructure available to all under equal conditions

- (70) Germany defends the view that the waste water treatment plant is not dedicated to Propapier: it constitutes public infrastructure falling under hazard defence, and serves environmental protection as well as protection of the population against diseases. All current and future undertakings settled in the Oder-Spree-Kanal area have the right to connect to and to use the municipal waste water treatment plant under equal conditions. Fees are calculated according to the same principles defined by law. Waste water treatment in Germany is a mandatory task for the municipalities, with an obligation to connect and use. Users in fact cannot opt for another service provider than the municipal body.
- (71) Germany rejects the complainant's statement that paper mills normally have their own sewage systems and are not obliged to connect to the communal sewage system, and states that Propapier is obliged by law²¹ to connect to and to use the TAZV plant. Exceptions to the obligation to connect are very limited (only when impossible or unreasonable). There are only limited publicly available data on waste water treatment of paper producers, but those data show that a large number of paper mills are connected to communal waste water treatment plants.

Infrastructure not specifically set up for Propapier

- (72) Germany disagrees with the complainant's statement that the TAZV plant was tailored to the technical needs of Propapier: the two-stage treatment of waste water is not specific to the paper industry but is common in many different industrial sectors, and several communal sewage plants comprise a treatment of the waste water in two stages. The technical characteristics of the TAZV plant (two-stage biological process) were based on the current technical standards, taking into account that a substantial part of the waste water would be highly polluted. Germany admits that communal sewage plants which only treat sanitary waste water or light polluted water do normally not have an extra pre-treatment stage, but emphasises that the two-stage treatment is common practice for those which have to treat industrial waste water. Germany provided a list of

²¹ Cf. paragraph 12(2) of the Kommunalverfassung des Landes Brandenburg (BbgKVerf) in connection with paragraphs 7(1) and 8f of the statutes of the TAZV waste water treatment plant in the industrial area Eisenhüttenstadt.

18 paper plants in Germany producing recycled paper and connected to communal sewage plants, claiming that both types of communal sewage plants (one-stage or two-stage) are in use in the paper sector.

- (73) According to Germany, the waste water treatment plant forms part of a bundle of general infrastructure measures undertaken to develop the Oder-Spree-Kanal area. None of these measures is dedicated to any single undertaking. Decisions about construction, connection to and use of the plant fall outside the discretion of Propapier or potential users.
- (74) Germany rejects the allegation that the TAZV waste water treatment plant was constructed specifically for Propapier. Germany explains that the construction was already planned in the context of other potential investments in 2004-2006, long before the arrival of Propapier.
- (75) Germany explains that the existing capacity of waste water treatment infrastructure outside the industrial area was limited, and that its residual available capacity would only be sufficient to cover the needs of one additional (minor) investor; Germany confirms that 5N PV was indeed initially connected to the existing plant.
- (76) Germany argues that the fact that the settlement of Propapier was taken as an initiation to start the construction of the long-planned waste water treatment plant, cannot be understood as a selective advantage for Propapier. Germany refers to the Opinion of Advocate General van Gerven who confirmed in case C-255/91 (Matra/Commission)²² that it is inevitable that in the start-up period the infrastructure is mainly used by the first company that has settled in the newly set-up industrial zone. This will however change if the region develops, as hoped for.
- (77) Germany informs that all three undertakings currently settled in the industrial park 'Industriegebiet am Oder-Spree-Kanal', namely Propapier, 5N PV and the EnBW power plant are connected to and use the waste water treatment plant. Germany explains that several further settlements have been considered at different times (one or two fuel surrogate plants, a photovoltaic glass plant, investment proposals made to several investors in different sectors, and several potential investors have visited the site) but that, especially in light of the crisis which had affected even stronger the disadvantaged areas, the further development of the industrial area will need time.

Current capacity

- (78) Germany rejects the allegations from the complainant that Germany has not indicated the waste water capacity for the TAZV plant users, that Propapier uses at least 90% of the available capacity, and that there is no spare capacity.
- (79) Germany indicates that in its current setting, the TAZV waste water treatment plant has free capacity for potential new investors. The three current users together use a capacity of [<500]* m³/h, and the maximum capacity of the TAZV plant is 638 m³/h. The total capacity use is thus ca. [60-80]% and there is

²² Opinion of Advocate General van Gerven of 28 April 1993, Rs. C-225/91 (Matra/Commission), Slg. 1993, I-3202, I-3222 (I-3235, paragraph 28).

* Covered by the obligation of professional secrecy.

a spare capacity of approx. [150-250] m³/h. The average capacity used by Propapier is [300-500] m³/h, and the maximum is [400-500] m³/h. Propapier thus uses [< 70]% on average and maximum [< 70]% of the total capacity of the TAZV plant.

Modular concept of the TAZV plant

- (80) Germany claims that the TAZV plant was conceived from the beginning to be extended in modular phases along with the step-by-step development of the Oder-Spree-Kanal industrial area. The modular planning of the plant is reflected in the 2007 TAZV Kurzbeschreibung, which refers to potentially highly polluted water from the paper industry, bio-ethanol production and other industrial sectors.
- (81) Germany explains that essential parts of the plant in the actual phase are already dimensioned for the maximal capacity after expansion: e.g. the nominal diameter of the 5 km pipe conducting the water to the Oder after treatment is more than three times larger than necessary for the current construction phase (it can pass a volume of 1 945 m³/h, whereas the current maximum capacity of the plant is only 638 m³/h), TAZV has an option to expand the waste water treatment plant on a 3.3 ha adjacent land plot. Potential users will also have equal access to the waste water treatment plant after such modular expansion.
- (82) Germany therefore maintains that the current high capacity utilisation share of the waste water treatment plant by Propapier is not proof of a selective advantage, but reflects only a snapshot picture, as the infrastructure is designed – through modular expansion – to serve further users under equal conditions. This will need time, because the waste water treatment plant is part of an overall economic development plan for the region, involving several expansion areas in different phases. The current situation with only three settled investors is a transitional phase of the development of the industrial areas in this region since 1994. Approximately half of the Oder-Spree-Kanal industrial area (35 ha) is still available for new investors. Germany estimated in 2011 that this space will be occupied within a period of 5 years, and adds that further expansion is then still possible in the new areas 'Nordost' (40 ha) and 'Nord' (160 ha).
- (83) Germany rejects the allegations from the complainant that the modular concept of the TAZV plant will not lead to economies of scale. Germany explains that the modular extension of the TAZV plant is feasible in three phases, for substantially lower costs per added m³ capacity compared with the initial investment:
- Phase 1 (capacity increase of 33%, adding 213 m³) is feasible within a few months and would cost EUR 1.2 to 1.5 million, for an extra industrial area of ca. 19 ha;
 - Phase 2 (capacity increase of 69%, adding 426 m³) is feasible within a few months and would cost EUR 5.3 to 5.6 million, for an extra industrial area of ca. 38 ha;
 - Phase 3 (expansion on adjacent land; capacity increase of 100%, adding 638 m³) would cost EUR 17-18 million, for an extra industrial area of ca. 57 ha. A 100% capacity increase would require calling the option on the adjacent land plot and would cost up to EUR 18 million.

- (84) Germany argues that the modular design of the waste water treatment plant corresponds to the requirement of efficient and economical use of resources, and is to be seen in the context of previous over-dimensioning of waste water treatment plants in the new German Länder. To sanction such modular design as a selective advantage would in fact be an invitation to uneconomically oversize public infrastructure. In addition, the fees would not cover the costs for such oversizing.
- (85) To characterize the current limitation of the plant as a selective advantage would result in encouraging uneconomic oversizing of infrastructure.
- (86) Germany claims that the article in the press referred to by the complainant (see recital 63) is not relevant. According to Germany, to foresee an additional unused basin only for technical incidents would be contrary to rules of frugal and economic planning imposed by the Gemeinschaftsaufgabe.
- (87) The complainant stated that users of the new TAZV plant pay lower fees than those of the existing communal plant because the new plant does not need an extensive pipe system to connect all users. Germany rejects the conclusion from the complainant that this shows that no new users can be added to the new plant. Germany holds that new industrial users can easily be connected, and that the limitation is mainly defined by the size of the pipe conducting the treated water to the Oder.
- (88) Germany rejects the allegation from the complainant that Propapier can use the biogas produced by the TAZV plant. There is no possibility for the waste water treatment plant users to use the biogas. TAZV uses the biogas in its own 3 MW power plant.
- (89) Germany rejects the allegation that it only started to promote the industrial park to other potential investors after Smurfit Kappa's complaint: already in 1998, Eisenhüttenstadt charged the Investor Center Ostbrandenburg with the promotion of industrial and commercial areas, including the Oder-Spree-Kanal area. Planning acts for the industrial park 'Industriegebiet am Oder-Spree-Kanal' exist since 1995.
- (90) Germany concludes that the TAZV plant does not constitute dedicated infrastructure to the benefit of Propapier.
- (91) Germany also concludes that the infrastructure measures in the extended industrial park 'Industriegebiet am Oder-Spree-Kanal' (construction and provision of wastewater treatment plant and the other measures – parking, road, deepening/widening of the canal) are general development measures which do not constitute a selective advantage for Propapier and are not dedicated to the use of Propapier. In the view of Germany, the fact that the infrastructure is currently only used by a limited number of primary settlers is a normal transitional stage in such development perspective.

4.2. *Is there an advantage to Propapier through reduced fees for the use of the waste water treatment plant?*

Comments from the complainant

- (92) The complainant agrees with the Commission position expressed in the opening decision (see recital 63 of the opening decision and recital 38 of this decision)

that the aid scheme N 644e/2002 does not cover the fees for the use of the wastewater treatment plant. The fees should therefore reflect the total cost of the use. The fact that the calculation of the fees is based on legislation (Kommunalabgabengesetz) does not justify lower fees and the resulting advantage for Propapier.

- (93) The complainant argues that the wastewater treatment plant does not provide a public service, but was built for the sole and predominant use of Propapier.
- (94) According to the complainant, the three tests (full cost test, private investor test, benchmark prices) proposed by the Commission in its opening decision all show that the fees charged provide Propapier with an economic advantage.

Full cost test

- (95) The complainant further argues that not only Article 9 of the EU Water Framework Directive, but also the fact that most recycled paper mills have their own wastewater treatment plant, favour the calculation of full costs. The fee paid by Propapier only covers 20% of imputed interest of capital expenditure, and does not take account of the share of equity derived from the 80% public contribution to the construction cost of the wastewater treatment plant.

Private investor test

- (96) The complainant considers that normally, a private operator or a paper mill owner would want to recuperate at least their full costs, and therefore this test would be the same as the above full cost analysis.

Benchmark prices

- (97) The complainant agrees with the Commission position expressed in the opening decision that it is not likely that the use of a benchmark can exclude the presence of aid. Comparing only paper mills using communal sewage systems would not be representative, because most paper mills have their own wastewater treatment plant.
- (98) The complainant claims that Germany only submitted very selective information on sewage fees paid by other paper mills (a study, comparison with Spreetal/Schwarze Pumpe tariffs, and an old decision of 1990), and that these examples cannot constitute a basis for establishing a benchmark, amongst others because these fees depend on subsidies and investment costs, and the legislation may differ from one region to another. The complainant compares with its own plant using the communal sewage system in (... confidential information), and calculates that taking into account a construction investment of EUR 42 million (as in Eisenhüttenstadt) Propapier would have to pay EUR 4/m³, which is far above what it now pays.
- (99) The complainant claims that the article quoted by Germany was published in 2004 and is based on a study published in 2002 based on data from 2000/2001. The complainant refers here to Anlage 6 to Germany's submission of 30 January 2009, in which an article from the on-line news source 'Das Papier 2004-T174'²³. According to the complainant, the study covers only 7 anonymous paper mills, it is unclear whether they operate an own waste water treatment

²³ Available on line under www.ipwonline.de.

plant or are connected to the communal system, and if the costs considered only include operational costs (excluding capital or other non-operational costs). If the study only compares paper mills using their own waste water treatment facilities, capital costs should be included.

Comments from Germany

- (100) Germany maintains its view that any State aid advantage resulting from the fees charged for the use of the TAZV plant would not constitute State aid as, in Germany's view, the Commission's decision in case N 644e/2002 covers also indirect effects of the Gemeinschaftsaufgabe scheme, i.e. the fees). Germany further argues that the measure, which was considered in the case N 644e/2002 not to constitute State aid, could not become State aid at the level of the user. According to Germany, the Commission changed its approach regarding the issue of whether or not aid to an infrastructure operator can be passed on to the user of an infrastructure only after the General Court ruled on the 'Flughafen Leipzig-Halle GmbH' case²⁴.
- (101) Germany admits that the decision of N 644e/2002 had expired when the support was granted to TAZV. However, Germany points out that the relevant legal provision, which was the subject matter of the decision N 644e/2002, was identical to the one on the basis of which the measure for TAZV was granted. The legal basis has been merely been updated, but remained, in its content, unchanged. Therefore, Germany argues that that the mere actualisation of a legal basis does not automatically lead to its qualification as State aid.
- (102) Germany emphasises that the cost calculation is transparent and defined by law.

No economic advantage for Propapier

- (103) Germany explains its views on the three possibilities to calculate the fee for a company using waste water treatment services (recital 68 of the opening decision): full cost method, private investor price, benchmark price.

Applying the full cost method, there is no advantage

- (104) Germany disagrees that the fee paid by Propapier does not cover the full cost. The cost calculation is defined by law (according to which it should in principle cover the costs, except that subsidies from third parties are not taken into account for the calculation of imputed interest²⁵). The law foresees that costs should be covered but must not be exceeded. All costs incurred by TAZV are covered, including interest on the TAZV part of the capital invested. Calculation of fictive interest on subsidies from the Land would not be justified because TAZV did not incur these costs.

²⁴ Joint Cases T-455/08 Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG c/ Commission and T-443/08 Freistaat Sachsen and Land Sachsen-Anhalt c/ Commission, later confirmed by Judgment of the Court of Justice of 19 December 2012, Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH/Commission, C-288/11 P.

²⁵ Germany submitted a summary of State level legislation and the actual texts of laws referring to the fee calculation in all the 16 federal states. Imputed interest on subsidies cannot be taken into account in any one of these laws. See Annex 10 to the submission of Germany dd. 1 November 2013.

- (105) Propapier has no selective advantage as the fees are the same to all the users of the newly erected plant.
- (106) Whether the fee would have been higher without the subsidies from the Gemeinschaftsausgabe scheme for the construction of the waste water treatment plant depends on many factors, such as the availability of other financing, among other things.
- (107) Neither the 'polluter pays' principle nor the EU Water Framework Directive obliges the authorities to include subsidies in the calculation for interest on capital invested. The EU Water Framework Directive stipulates that costs of the water services should be recovered, but leaves leeway to the Member States to determine the manner of implementation. In the present case all costs of TAZV (the water service) are recovered. The polluter pays principle is not absolute but has to be 'taken into account'. In the present case, it is taken into account through the calculation of all TAZV costs.
- (108) The EU Water Framework Directive refers to an 'adequate' contribution. Germany notes that compared to other regions in Germany or the Union, the fee for Propapier is rather high. Germany further notes that the EU Water Framework Directive also states that Member States may have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the regions affected.
- (109) Germany claims that comparison with the Kimberly-Clark or InfraLeuna cases (see also recital 70 of the opening decision) is not appropriate. The Kimberly-Clark case refers to a preferential tariff for a company, which may lead to a situation that not all costs are covered. In the present case all costs are covered and tariff conditions are the same for all users. In the Kimberly-Clark case an industrial zone is developed for the specific needs of one company, while in the present case the industrial area is developed for several settlers.
- (110) The InfraLeuna decision concerns the price setting of private companies for the use of private infrastructure, while the present case refers to the use of municipal infrastructure and non-market related fees which are defined by law. In the present case, the users bear all costs which a waste water service company would normally have to bear. In a non-liberalised waste water treatment market, the costs items to be taken into account are the same for all companies and are defined by law (the Brandenburg KAG).
- (111) The decisions Wagner and Weida Leder quoted in the opening decision (recital 71 and footnote 20) concern subsidies for the construction of private waste water treatment plants. In the present case, however, Propapier does not receive subsidies for voluntary private investments, but it pays user fees which are imposed on it by law.

The private investor test is not applicable

- (112) Germany considers that water is not a normal commercial product. The waste water treatment sector in Germany is organised as a regional monopoly of public municipal bodies. Waste water treatment in Germany is therefore not an economic activity but a mandatory task for the municipalities, which is related to the exercise of sovereign prerogatives. TAZV acts as a public authority and not as an undertaking whose conduct can be analysed applying the market

investor test. In Germany, there is an obligation to connect and use. Users cannot opt for another service provider than the municipal body. The fees are defined by law and decided by the authorities. The fees cannot exceed costs.

- (113) The waste water treatment sector in Germany is accessible to private enterprises only to a limited degree. They can act as a manager, operator or concessionaire of a waste water treatment plant, but their activity can only encompass the technical fulfilment of the legal provisions. The responsibility for the task however remains with the municipality and there is no legal responsibility of the municipality to tender the contract. Besides, private companies can execute technical tasks (or in exceptional cases charge the fees), but fees cannot exceed their costs in this case either. TAZV has not transferred any technical tasks to third parties.
- (114) As the fees are defined by law and cannot exceed the costs of the infrastructure, there is no market on which waste water fees can be set by private companies in view of profit making. There is no competition between private companies or between private and public companies to have more users.
- (115) Germany is of the opinion that in such a case it is not possible to compare the operator's conduct with the conduct of a private investor. The private investor test is therefore not applicable.

Benchmark price

- (116) Because of the obligation to connect to the waste water treatment plant, there is no competition and insofar also no market price that could be used as a benchmark for assessing the advantage under State aid rules.
- (117) Germany rejects the complainant's statement that only few paper mills use communal waste water sewage systems and that therefore it would not be representative for the sector to only use data from those paper mills as a benchmark.
- (118) In its comments, Germany corrected that Propapier does not pay a fee of EUR 0.95/m³ (as stated in recitals 72 and 80 of the opening decision), but since 2010 a fee of EUR 1.18/m³. Compared with other locations in the Union, this is high or at least not unusual. According to a survey by the German association of paper producers, undertaken among 77 German paper companies, representing 68% of the sector, the average fee for the year 2007 was EUR 1.12/m³ (spread between EUR 0.31/m³ and 2.20/m³). The fee paid by Propapier is within the spread and above the average of that sample.
- (119) In later submissions, Germany informed that the fee was increased in 2012 to EUR 1.41/m³, in order to cover losses in the start-up years of the waste water treatment plant. As there had been some savings related to energy costs, and in line with the legal obligation that the fees have to cover but must not exceed the costs, since the beginning of 2013 the fee was set at EUR 1.39/m³. In addition, Propapier has to pre-treat the wastewater before leading it into the TAZV plant. The costs for the pre-treatment amount to approximately EUR [...] /m³, which brings the total cost for waste water treatment for Propapier to EUR [...] /m³, compared to an average cost in the sector (in 2010) of EUR 1.27/m³.
- (120) Germany claims that the comparison with fees paid by other paper producers in the Union is the correct benchmark in order to verify if there is an economic

advantage, and that the Commission's doubts that such comparison would not be correct are unfounded.

- (121) Germany indicates that the examples it communicated to the Commission are average prices based on full cost values. Germany claims that it had no indication that these fees contain State aid.
- (122) Germany argues that the example of Lenzing Lyocell²⁶ is valid, even if related to 10 years ago (the fee is twice lower than the fee paid by Propapier, but fees have not doubled in 10 years).

Existing aid

- (123) Germany advances two arguments in support of its view that the fees, if they constitute aid, would constitute existing aid pursuant to Article 1(b)(v) of Council Regulation (EC) No 659/1999.
- (124) Germany explains that the Commission concluded in 2003 in its decision N 644e/2002 that the Gemeinschaftsausgabe scheme did not constitute State aid to the operators of waste water treatment plants, if they were constituted – as in the case of TAZV - in the form of a 'Zweckverband' (a municipal association under public law for a special purpose). The Commission based this assessment on the fact that the 'Zweckverband' was subject to oversight by the municipality, and that it was carrying out a public service. However, as the Commission itself pointed out in recital 57 of the opening decision, even if the scheme should have become in the meantime aid due to the evolution of the internal market, it would be existing aid pursuant to Article 1(b)(v) of Council Regulation (EC) No 659/1999.
- (125) As explained in recital 100 of the present decision, according to Germany, the decision N 644e/2002 covers also indirect effects of the Gemeinschaftsaufgabe scheme, i.e. the fees. The fees never required a separate notification, as the regulation relating to the fee calculation constitutes an implementation of the scheme.
- (126) According to the other line of argumentation that the fees constitute existing aid, Germany states that the fees constitute aid that existed before the entry into force of the Treaty establishing the European Economic Community on 1 January 1958. Aid that was existing before the entry into force of that Treaty also remains existing aid in the event of subsequent modifications, as long as the actual substance of the original aid scheme is not altered²⁷. Clarifications of general specifications applicable before 1 January 1958 do not constitute new aid that should be notified to the Commission²⁸.
- (127) Germany explains that municipal charges laws already existed prior to the entry into force of the Treaty in 1958 and continued to be applicable. The provision of §6(2) of the current KAG Brandenburg which is situated in a part of the territory of the former Kingdom of Prussia, goes back to the municipal charges

²⁶ See footnote 20 for an explanation of the relevance of this case.

²⁷ See *Gibraltar v. Commission*, Judgment of the Court of First Instance of 30 April 2002 in Joined Cases T-195/01 and T-207/01, recital 111.

²⁸ C-44/93 (*Namur-Les assurances du crédit SA. Office national du ducroire at al.*) ECJ, 9 August 1994, recital 29.

law for the Kingdom of Prussia of 14 July 1893 (PrKAG) and the municipal charges law for Bavaria (BayGAG). Germany based this argument on the following sub-arguments:

- a) These laws continued to be in force between 1919 and 1933 and from 1933 to 1945.
- b) Today's Municipal Charges Acts of the old German Länder state back to the PrKAG, and
- c) the KAG Brandenburg is - regardless of the special position of the new states due to the division of Germany - in historical continuity with the PrKAG.

Sub-argument a):

(128) The PrKAG already included the possibility for municipalities to charge fees for the use of public infrastructure. The municipal charges regulation that exists since 1938 in Bavaria (and formed the basis for a series of similar regulations in other States of Southern Germany), also provided this possibility²⁹. Pursuant to the PrKAG, the fees were normally designed in a way that the management and operational costs of the facility, including expenditure on interest and repayment of capital were covered³⁰. Although the text of the PrKAG only states that the fees must cover the interest on capital (used for the infrastructure) later interpretations from the post-war period on the PrKAG implied that an interest rate on grants from third parties was not foreseen under the PrKAG.

(129) The PrKAG or comparable existing state laws were not expressly repealed either by the Weimar Republic or after the seizure of power by the national socialists. Thus, these laws stayed in force after 1918.

Sub-argument b):

(130) After the Second World War, the PrKAG continued to be in force in the form of State laws through the German Constitution of 1949, which permitted the continuation of laws that did not contradict the Constitution (Article 123 GG) and through provisions which allowed the federal states to enact laws in certain areas. This development makes it clear that the PrKAG was in force in the German Länder before the entry into force of the Treaty that established the European Economic Community.

(131) After the creation of the Federal Republic of Germany in 1949, the PrKAG was gradually replaced in individual West German Länder by the various State laws that regulated the municipal fees. With the replacement of the PrKAG by these State laws in the 1960s and 1970s, the system had been clarified and the terminology adapted, but the actual substance of the law remained intact. In particular, third party subsidies remained outside the scope of imputed

²⁹ Although the Bavarian law only stated that municipalities are entitled to collect charges, a court judgment ruling on its implementation referred to the relevant paragraph of the PrKAG for the principles of calculation of the charge.

³⁰ Die Gebührensätze sind in der Regel so zu bemessen, dass die Verwaltungs- und Unterhaltungskosten der Veranstaltung, einschließlich der Ausgaben für die Verzinsung und Tilgung des aufgewandten Kapitals, gedeckt werden.

interest³¹. Under the PrKAG interest was only to be calculated for debt. The calculation of interests in the state laws was extended to equity, but neither the PrKAG nor the German Länder laws provided for a calculatory interest on grants.

- (132) Germany therefore considers that today's Municipal Charges Acts of the old German Länder constitute a continuation of the provisions of the PrKAG. Germany suggests that for the purpose of this case, it is particularly important to look at the Municipal Charges Act of Nordrhein Westfalen of 1969³², which served as a model for the KAG Brandenburg, and which expressly repealed the PrKAG of 1906, and the substance of which remains the same as that of the PrKAG despite the necessary adaptation of the terminology (see recital 128 of the present decision). It is important to point out that the municipal charges acts of other federal states are also based on the PrKAG, which these laws also repealed (e.g. Rheinland Pfalz, Schleswig Holstein, Hessen.)

Sub-argument c):

- (133) Germany considers that the KAG Brandenburg has a special status resulting from the post-war division of Germany. Germany informs that the years following the foundation of the German Democratic Republic (GDR) put an end to municipal self-governments and their independent sphere of activity in Brandenburg and the other east-German Länder. Regulations were enacted at a central government level. However, the Law on Municipal Constitution³³ of 17 May 1990 (enacted by the national chamber of the GDR, before the German unification on 3 October 1990) restored municipal self-government and provided that municipalities must cover the costs of their operation from own resources. For this, they became entitled to collect remuneration and fees for the provision of services.
- (134) The KAG Brandenburg of 27 June 1991 was modelled on the Municipal Charges Act of Nordrhein-Westfalen with literally identical provisions.
- (135) Germany argues that despite the diverse evolution of the law in the former GDR, it would not be justified to treat the municipal charges acts of the East German States and those of the West-German States differently. It is clear that the KAG Brandenburg follows the legal tradition of the PrKAG and breaks with the legal heritage of the former GDR. An institutional continuity between the

³¹ See e.g. page 36 of the Legal Reasoning for the Municipal Charges Act of Nordrhein-Westfalen, LT-Drs 5/810.

³² Paragraph 6(1) KAG NW and Paragraph 6 KAG Brandenburg: The estimated fees shall not exceed the estimated cost of the device or installation ('Die veranschlagten Gebühren sollen die voraussichtlichen Kosten der Einrichtung oder Anlage nicht überschreiten'). (...) Paragraph 6(2) KAG NW and Paragraph 6(2) KAG Brandenburg: The costs include (...) charges for third party services, depreciation and amortization, which are to be applied evenly on the anticipated useful life or performance of the facility, as well as a reasonable return on the capital invested. Interest on contributions or grants of third parties remain out of consideration. ('Zu ansatzfähigen Kosten gehören (...) Entgelte für in Anspruch genommene Fremdleistungen, Abschreibungen, die nach der mutmaßlichen Nutzungsdauer oder Leitungsmenge gleichmäßig zu bemessen sind, sowie eine angemessene Verzinsung des aufgewandten Kapitals. Bei der Verzinsung bleibt der aus Beiträgen und Zuschüssen Dritter aufgebrauchte Eigenkapital außer Betracht').

³³ Gesetz über die Selbstverwaltung der Gemeinden und Gemeindeverbände in der DDR vom 17. Mai 1990.

GDR (waste) water treatment system and the current Brandenburg waste water treatment system does not exist either. The Law on Municipal Constitution of 17 May 1990 created the ground for the enactment of municipal charges acts in the new federal states. These acts were to have similar characteristics to the ones in the old federal states, which in turn go back to the PrKAG. This was an unavoidable consequence of the Act of joining the new federal states under the Constitution of the Federal Republic of Germany³⁴. This is demonstrated through the specific development of the KAG Brandenburg, as described above. The KAG Brandenburg is construed in the legal tradition of the Municipal Charges Act of Nordrhein-Westfalen and the PrKAG. The division of Germany and the resulting discontinuation of legal development in the Eastern parts of Germany should not be allowed to lead to a disadvantage in the context of the interpretation of the KAG Brandenburg.

- (136) Thus, the KAG Brandenburg is in historical continuity with the PrKAG.
- (137) Germany further argues that the both the principle of equivalence and the one of cost recovery existed already before the foundation of the EEC in 1958. The principle of equivalence requires that a fee is proportionate to the service provided by the public authority. This is part of the concept of the rule of law, which is enshrined in the German Constitution. The principle of cost recovery follows from the PrKAG. Even if the principle is not strictly applied to all fee calculations, the fee revenue of a municipality would not exceed significantly the costs of the municipality.

Protection of legitimate expectations and equal treatment

- (138) Germany also claims that, in case the Commission would consider that the fees charged to Propapier contained operating aid, a recovery of these aid elements would be contrary to both the principle of legitimate expectations as well as of equal treatment.
- (139) The principle of legitimate expectation means that 1) a Union institution must have given rise to justified expectations, and 2) a prudent economic operator may not have been able to predict the adoption of a measure that is likely to affect its interests.
- (140) Given that the Gemeinschaftsausgabe scheme (approved in the case N 644e/2002) was considered to be no aid, Propapier could have legitimate expectation to the effect that it does not benefit from State aid. Earlier, there was no doubt about the compatibility of these measures with Union law as no similar measures had been subject to scrutiny.
- (141) A recovery of the aid element not included in these fees after a finding that they constituted operating aid would also be contrary to the principle of equal treatment which requires that identical fact patterns are treated in the same manner. A recovery would provide an advantage to the competitors of Propapier.

³⁴ Under Article 23, sentence 2 of the Basic Law as amended on May 23, 1949.

4.3. Comments from the German municipal associations and the VKU

- (142) The German municipal associations and the VKU fully embrace the comments made by Germany in its submission of 28 January 2011, to which they have collaborated. They specifically refer to the comments stating that waste water treatment in Germany is a sovereign non-economic task of the municipalities. The municipalities carry out the organisation and the financing of this task in the framework of their constitutional local self-government, in the interest of the citizen.
- (143) The German municipal associations and the VKU explain that § 6 Abs. 2 Satz 5 KAG Brandenburg, according to which the fees for the waste water treatment plant have to cover the costs, imputed interest and imputed depreciation, but subsidies are not to be taken into account for the calculation of interest on capital invested, is in the interest of the consumer. Since subsidies from third parties do not constitute own capital invested by the municipalities, consumers should not pay interest to the municipalities on these subsidies.

5. Assessment of the measure

- (144) The alleged measures qualify as State aid if the following conditions are met: i) the aid has to be granted by an act of a Member State or out of State resources, ii) it has to confer an economic advantage to undertakings, iii) the advantage has to be selective, and iv) the measure distorts or threatens to distort competition and affect inter-state trade. The existence of State aid is established when the conditions laid down in Article 107(1) of the TFEU are satisfied on a cumulative basis.
- (145) Already in the opening decision, it was undisputed that all measures in question involved the use of State resources and that they could potentially distort competition and trade in the internal market.
- (146) The Commission notes that with respect to the elements of the allegation, it is necessary to distinguish between 1) potential State aid to Propapier through dedicated infrastructure measures (construction of the waste water treatment plant, as well as certain other infrastructure projects in the newly extended industrial park where the new Propapier plant is situated), and 2) potential aid to Propapier in the form of advantageous waste water treatment charges.

5.1. Are the publicly funded infrastructure projects general infrastructure or infrastructure dedicated to the benefit of Propapier only?

- (147) The Commission has considered in the past that public powers can carry out work to develop their land. They can, for instance, finance investments into infrastructure which will benefit the population as a whole. Moreover, the Commission considers that the reason for which such infrastructure is set up is indifferent, provided that it is done in the interests of the local community as a whole. However, if such infrastructure will serve the needs of a private company only, that company is responsible for funding it. This follows from the fact that, where State aid is concerned, the Commission's remit is to analyse the impact of the measures concerned in practice, rather than the objectives pursued. In the present case, the Commission therefore takes the view that, what matters is to analyse which infrastructure is of benefit to the community as a

whole (including Propapier) and which is of use to Propapier only. It is only the latter which should be financed by Propapier.³⁵

- (148) The Commission observes that the parking lot, the road and the Oder-Spree-Kanal are not operated by undertakings in the sense of Union competition law, because their use is free of charge. Therefore, the issue of State aid to the owners and operators of those infrastructures does not arise in the present case.

5.1.1. Parking lot

- (149) The complainant claims that the location of the car park is inconvenient and too remote to serve other inner-city commercial locations and allow the municipality to close down parking lots for trucks in the city centre. Germany has indeed not demonstrated the opposite, but the fact that a parking lot is in the immediate vicinity of an undertaking, does not automatically mean that it is dedicated to that undertaking or would benefit predominantly that undertaking. The sign to which the complainant refers (see recital 46), allocating parking spaces to trucks for the power plant, was only used on a temporary basis due to construction works in the power plant, which were completed at the end of March 2011. The Commission notes that the parking lot is freely accessible and access to it is indicated along the public road without referring to a specific company. And whether it offers rest facilities or not is not relevant for its qualification as general infrastructure.

- (150) Germany brought sufficient evidence that the parking lot was not built specifically for Propapier but was part of the economic development plan for the industrial park. Moreover, Propapier has own parking space for 27 trucks and 213 passenger cars. An additional 120 parking spaces for passenger cars are planned (the building permit was issued). Germany confirmed already at the time of the opening decision that Propapier's own parking volume was large enough to cover the space necessary for its employees, suppliers and visitors.

- (151) On the basis of the above, the Commission confirms its provisional view expressed in the opening decision and decides that **the parking lot is not dedicated to Propapier and involves no State aid.**

5.1.2. Road

- (152) The road is a public road. It is part of the overall development of the industrial area, which was already planned in 1993, long before the settlement plans of Propapier. Contrary to what is argued by the complainant, the road does not stop a few meters behind the Propapier paper mill, but it connects the current Oder-Spree-Kanal industrial area and its northern expansion areas to the motorway B-112. The last part was finalized in 2013. The new road may serve other undertakings since it offers further development options for the ArcelorMittal and other industrial areas. It may save riding time for the industrial and commercial traffic to Frankfurt (Oder), and serves also a better access for enterprises in Frankfurt to the Eisenhüttenstadt inner port.

³⁵ Commission Decision of 2 August 2002 on various measures and the State aid invested by Spain in "Terra Mítica SA", a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), recital 64.

(153) The Commission therefore confirms its provisional view expressed in the opening decision and decides that **the road is not dedicated to Propapier and involves no State aid.**

5.1.3. Widening/deepening of the Oder-Spree-Kanal

(154) The complainant alleged in its complaint that the infrastructure works for the widening and deepening of the Oder-Spree-Kanal were exclusively dedicated to Propapier and involved State aid to Propapier. The City of Eisenhüttenstadt indeed extended in 2008 the industrial park 'Industriegebiet am Oder-Spree-Kanal' in view of attracting firms. Since 2003 sluices are built along the entire canal (which constitutes part of the Transeuropean Network TEN). There is however no indication of a causal link between these infrastructure works and the settlement of Propapier or that these works would offer a selective advantage to Propapier, and the Commission agrees with Germany that the widening/deepening of the Oder-Spree-Kanal is part of the necessary regular maintenance of the waterway.

(155) The Commission therefore confirms its provisional view expressed in the opening decision and decides that **the widening/deepening of the Oder-Spree-Kanal does not constitute a selective advantage for Propapier and involves no State aid.**

5.1.4. Waste water treatment plant

(156) The Commission notes that the capacity of existing waste water treatment infrastructure outside the extended Oder-Spree-Kanal industrial area is limited. The residual available capacity of the existing waste water treatment plant in Eisenhüttenstadt would only fulfil the needs of a small additional investor, but was insufficient to fulfil the needs as soon as a large or several smaller industrial investors would be settling in the new area.

(157) The Commission also notes that the TAZV waste water treatment plant was not constructed specifically for Propapier. The construction was already planned in the context of other potential investments in 2004-2006, long before the arrival of Propapier. Germany submitted evidence showing that the waste water treatment plant was planned in the context of the economic development of the industrial park 'Industriegebiet am Oder-Spree-Kanal'. Germany also brought evidence of several promotion initiatives to attract investors to the extended Oder-Spree-Kanal industrial area, which were however unsuccessful to date, since the regional authorities have not yet succeeded in attracting additional investors to the area (in addition to Propapier, EnWB and 5N PV).

(158) Even though the waste water treatment plant is technically - through its anaerobe first treatment stage - designed to deal with waste water from heavy industrial polluters such as producers of CCM from recycled fibre, an anaerobe first treatment stage would also be useful for other users with industrial waste water with high organic pollution, such as companies from the beverages and food industry. Furthermore, for industrial waste water with high organic pollution, waste water treatment plants with an anaerobe first stage offer a number of important economic and environmental advantages.

- (159) Although in its present dimensions the TAZV plant mainly serves the needs of Propapier, it is also used – under the same conditions – by the two other companies settled in the area. Its modular design allows to extend it to additional users. Even without modular expansion, there is currently some [20-40]% spare capacity available for additional investors, with a potential to double the present total capacity (see recitals 80 to 84). The waste water treatment plant is open to all users on a non-discriminatory basis – new investors settling in the park are obliged by law to connect and use the plant – and it can deal with waste water from non-paper production.
- (160) The Commission is of the view that the fact that the TAZV plant is at present predominantly ([< 70]% on average and [< 70]% maximum) used by Propapier does therefore not necessarily mean that it constitutes dedicated infrastructure, as its modular design makes sense from an economic point of view in times of limited public budgets. Contrary to what the complainant alleged, the cost to double the capacity of the TAZV plant which is estimated by Germany to amount to less than 50% of the initial investment cost, shows that the modular concept allows to realise economies of scale.
- (161) The fact that the regional aid for the construction of the plant was granted subject to the settlement of a main investor, in casu Propapier, in the extended business park, is considered by the Commission to constitute good public management of scarce resources since it makes sense not to start building a major public infrastructure without ensuring that it will be used, and not to over-dimension it.
- (162) The statement that paper mills normally have their own waste water treatment plants can be rejected by the figures presented by Germany. Although own waste water (pre-)treatment plants exist in the paper industry as well as in other industries, this in itself is not an indication that in the cases where industrial users use the municipal waste water treatment plant, an advantage is transferred from the State to the users, as users cover the costs over time with their fees.
- (163) The Commission therefore concludes that **the waste water treatment plant constitutes general infrastructure** and therefore, the grant to TAZV does not constitute investment aid to Propapier. Contrary to the parking lot, the road and Oder-Spree-Kanal, the operator of the waste water treatment plant exercises an economic activity, because it offers a service (waste water treatment) against remuneration on the market. The Commission has found, however, that any aid granted to TAZV would in any event constitute existing aid (recitals 51 to 57 of the decision to initiate the formal investigation procedure). Therefore, there is no need to further assess in the present decision potential aid to TAZV.
- (164) In sum, the Commission concludes that the various infrastructure projects financed by State resources in the newly extended industrial park where the new Propapier plant is situated are **not exclusively dedicated to the paper mill and therefore should not qualify as dedicated infrastructure and State aid to the benefit of Propapier**. This means that these aided investments do not constitute a single investment project within the meaning of paragraph 60 of the RAG with the regional investment aid approved for the paper mill of Propapier in the final Commission decision SA.23827 (2013/C) (see footnote 4). Thus, the

assessment of the investment aid for Propapier which was the subject matter of that decision remains unaffected by the current decision.

5.2. *Do the reduced fees or the use of the waste water treatment plant constitute State aid?*

- (165) Regarding Germany's arguments that, if the measure was granted to the operator from a scheme that was found to be a non-aid scheme there cannot be 'aid' passed on to the user of the infrastructure, the Commission would like to point out again that the scheme N 644e/2002 was silent on the issue of whether or not the fees charged for the use of the infrastructure may constitute State aid to the users of the infrastructure. The Commission maintains its position expressed in the opening decision that the fee regulation to be applicable to the grants from the notified scheme was not brought to its attention and that therefore, the decision authorising the scheme cannot be viewed as authorising implicitly possible aid the legal basis of which would be the Municipal Charges Act.
- (166) Article 107(1) of the TFEU lays down that any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the internal market.
- (167) It must be pointed out that the existence of State aid has to be established irrespective of the question of 1) whether or not the EU Water Framework Directive and German legislation implementing the directive require the recovery of full costs of the provision of waste water treatment services, and 2) whether the fees are in compliance with the provisions of these laws. In other words, measures fully complying with both the EU Directive and the applicable German legislation may still constitute State aid, if the conditions laid down in Article 107(1) of the TFEU (see recital 144) are satisfied on a cumulative basis.

State resources and imputability

- (168) The charges to be paid for using the wastewater treatment plant are determined and collected by the municipality, in accordance with paragraph 6 of the Kommunalabgabengesetz Brandenburg. Setting the rate of the fees below the level a private investor would have chosen would therefore entail that the municipality foregoes revenues.
- (169) Thus, the measure would be granted by the State or through State resources as determined by Article 107(1) of the TFEU due to the fact that the advantage granted to Propapier would respectively lower the income of the municipality.
- (170) The setting of the rate of the fees at an advantageous level would also be imputable to the State, as it is the result of an act of a public authority, i.e. the municipality of Eisenhüttenstadt.

Economic advantage

- (171) As explained in the opening decision³⁶ the Commission was to assess whether the level at which the waste water treatment charges for Propapier are set provides a (selective) economic advantage to Propapier.
- (172) It is established law that the concept of 'advantage' embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect³⁷.
- (173) Applied to the present case, the question therefore arises whether the waste water treatment charges for Propapier are lower than what a similar undertaking would have to pay under normal market conditions, in other words, whether the level of charges is in line with the market economy operator principle. This can, in the Commission's view, be determined in two alternative ways:
- Comparing the price paid by Propapier to a benchmark price which can be typically observed in the Member State in question for waste water treatment.
 - An ex ante profitability analysis that shows that a private operator would have charged the same level of prices.

Benchmark price

- (174) In view of the organisation of the market, as described by Germany (see recitals 112-113), and in view of the fact that operators, even if private, cannot set the prices for their services freely since they are bound by law, the KAG Brandenburg, the Commission is of the view that it is not possible to establish benchmark prices that a private operator would have charged on normal market conditions.
- (175) The Commission further notes that Germany provided data on prices paid by undertakings in the sector where Propapier is active. Although Germany claims that the benchmark prices it presented are averages which reflect full costs, there is no indication as to whether or not these fees contain State aid. The Commission's doubts regarding the usefulness of these data as a basis for comparison have not been alleviated. This is primarily because the Commission believes these prices may reflect different cost realities and may or may not include State aid.

Ex ante profitability analysis

- (176) Given the absence of reliable market benchmarks, the Commission takes the view that the fact that a transaction is in line with market conditions can be established on the basis of another generally accepted, standard assessment methodology. The Commission considers that, for infrastructure which is open to all and not dedicated to a specific user, the market investor/operator test is

³⁶ See recitals 66 to 68 of the opening decision.

³⁷ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1, 19, and Case C-200/97 *Ecotrade v AFS* [1998] ECR I-7907, paragraph 34; Case C-6/97, *Italy/Commission*, ECR 1999 I-02981, para 15.

satisfied if the users of the infrastructure incrementally contribute, from an ex ante viewpoint, to the profitability of the operator³⁸.

- (177) This is the case where the operator's commercial arrangement with the individual user allows the operator to cover all costs stemming from this arrangement with a reasonable profit margin on the basis of sound medium-term prospect³⁹.
- (178) This assessment should take into account all revenue and all expected incremental costs incurred by the operator in relation to the activity of the specific user⁴⁰.
- (179) Such incremental costs encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs, induced by the presence of the user⁴¹. In contrast, costs which the operator would have to incur anyway, independently of the arrangement with the user, should not be taken into account.
- (180) On the basis of these factors, the Commission takes the view that the market investor/operator test is satisfied, i.e. **the reduced fee does not confer an advantage to Propapier** for the following reasons:
- a) It is concluded above, that the waste water treatment plant is open to all and is not dedicated to Propapier.
 - b) The fee paid by Propapier includes operating costs, maintenance and repair costs, personnel and charge management costs, imputed depreciation, and, in addition imputed interest on 20% of the investment capital invested into the waste water treatment; it thus covers all incremental costs incurred by the operator of the waste water treatment plant in relation to the activity of Propapier.
- (181) As regards the reasonable profit margin that the user fees should cover in addition to the incremental costs, the charges in the present case do not only cover the incremental costs but also imputed interest on 20% of the investment capital. Whereas this is not expressly identified as reasonable profit for the purposes of the incremental cost approach defined above, it provides the operator with additional income just as a reasonable profit would do.
- (182) Given that the fee does not contain an advantage and therefore it does not constitute State aid, it was not necessary for the Commission to evaluate the question of whether or not the fees constitute existing aid (see recitals 123 to 137) or operating aid (see recitals 26), or to address the issue of a possible compatibility of such operating aid. In view of this finding, the Commission can

³⁸ See point 63 of the Commission Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

³⁹ Idem.

⁴⁰ For instance, if the operator needs to expand or adapt the infrastructure mainly to accommodate the needs of a specific user, such costs should be taken into consideration when calculating the incremental costs. See sentence 4 of Paragraph 64 of the Commission Guidelines on State aid to airports and airlines.

⁴¹ See point 64 of the Commission Guidelines on State aid to air ports and airlines and recital 94 of Commission decision SA.1885 – C 5/2008 (ex NN 58/07) – Denmark - The 1999 Agreements between Aarhus Airport and Ryanair.

also leave open the question of whether or not a recovery of the fees (had they been found to constitute operating aid) would be contrary to the principles of legitimate expectations and equal treatment.

6. Conclusion

(183) The Commission thus concludes that neither the construction of the TAZV waste water treatment plant, nor the construction of the parking lot, nor the new road, nor the widening and deepening of the Oder-Spree-Kanal constitute a dedicated infrastructure.

(184) The Commission also concludes that the waste water treatment fees do not contain State aid. The market investor/operator principle is satisfied, therefore, no economic advantage is provided to Propapier PM2 GmbH.

HAS ADOPTED THIS DECISION:

Article 1

The infrastructure measures implemented by Germany do not constitute dedicated infrastructure in favour of Propapier PM2 GmbH. The fees charged by TAZV to Propapier for the use of the waste water treatment plant do not involve State aid. Therefore the infrastructure measures and fee setting rules do not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to Germany.

Done at Brussels, 1.10.2014

For the Commission

Joaquín ALMUNIA

Vice-president

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
B-1049 Brussels
Belgium
Fax (32-2) 2961242