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C(2021) 1736 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, 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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**Subject: State Aid SA.48706 (2018/FC) – Germany  
Alleged aid to RVV and Nordwasser GmbH**

Excellency,

**1. PROCEDURE**

- (1) On 17 July 2017, the Commission received a complaint by C<sup>1</sup> ("the complainant").
- (2) On 8 September 2017, the German authorities were informed about the complaint and a non-confidential version of documents was disclosed. The deadline for submission of information by the German authorities was extended to 15 November 2017 on 6 October 2017 following a request from the same day. Accordingly, the German authorities submitted information on 15 November 2017.
- (3) On 4 October 2017 and on 21 November 2017, the complainant provided, on his own initiative, clarifications and amendments to his complaint. The non-confidential version of these documents, provided by the complainant on 6 December 2017, was forwarded to the German authorities on 7 December

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<sup>1</sup> The complainant requests that his identity be kept confidential for reasons of professional secrecy.

Seiner Exzellenz Herrn Heiko MAAS  
Bundesminister des Auswärtigen Amts  
Werderscher Markt 1  
D - 10117 Berlin

2017. On 18 December, the German authorities provided comments to the Commission services.

- (4) On 18 December 2017, the complainant provided additional information to the Commission and on 20 December 2017, a meeting took place in Brussels between the complainant and the Commission services. On 30 January 2018, a meeting took place between the German authorities and the Commission services in Brussels.
- (5) On 25 January 2018, 14 February 2018, 1 March 2018, 7 March 2018, 26 March 2018, 9 May 2018 and 20 July 2018 the complainant submitted numerous additional documents related to the case. A second meeting between the Commission services and the complainant took place on 30 May 2018.
- (6) On 3 September 2018, the complainant announced that he would bring an action for failure to act under Art. 265 TFEU. On 23 October 2018, German authorities provided clarifications on the case following a Commission request dated 4 October 2018.
- (7) On 17 December 2018, a preliminary assessment letter was sent to the complainant. In this letter, the Commission services took the view that neither of the two measures subject to the complaint appears to constitute State aid.
- (8) The complainant responded to the Commission by letter dated 18 December 2018. The complainant called on the Commission to take a formal decision by the end of January 2019. He announced he would otherwise submit an action for failure to act before the Court, which he did, but that action was rejected as manifestly inadmissible by the General Court. The complainant called on the Commission again to take action by letter dated 16 October 2020.
- (9) On 23 July 2019 and on 23 October 2019, two further requests for information were sent to the German authorities, with replies provided on 23 August 2019, 11 September 2019 and on 22 November 2019 respectively.

## **2. DETAILED DESCRIPTION**

### **2.1. Description of the measures**

- (10) The measures to be assessed in this case concern the provision of (fresh) water and waste water services.
- (11) According to the German authorities, the provision of water and waste water services is governed by European,<sup>2</sup> national<sup>3</sup> and regional<sup>4</sup> legislation,

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<sup>2</sup> Cf. EU Water Framework Directive: "Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy".

<sup>3</sup> E.g. Gesetz zur Ordnung des Wasserhaushalts (Wasserhaushaltsgesetz vom 31. Juli 2009).

<sup>4</sup> E.g. Landeswassergesetz des Landes Mecklenburg-Vorpommern (LWaG) vom 30. November 1992.

prescribing its status based on public policies to ensure public health and a high level of hygiene as well as a high level of environmental protection.

- (12) German federal law specifies that the provision of water and waste water services are essential public services which fall among the responsibilities of the municipalities as a matter of local nature.<sup>5</sup> The Hansestadt Rostock has organised its water and waste water services accordingly.
- (13) The Warnow-Wasser und Abwasserverband (WWAV) is a cross-municipal public entity (*Körperschaft des öffentlichen Rechts*) and its members are the German town Hansestadt Rostock and the *Zweckverband<sup>6</sup> Wasser Abwasser Rostock Land* (likewise a cross-municipal public entity, *Körperschaft des öffentlichen Rechts*) consisting of 28 municipalities<sup>7</sup> of the Landkreis Rostock. Under the German legal system,<sup>8</sup> the WWAV is the competent authority responsible, among others, for water and waste water services within the jurisdictional boundaries of its members. It was set up by its members in 1994. According to WWAV's statute (*Verbandssatzung*), the founding municipalities decided that the public obligation of water supply and waste water services incumbent on each of them<sup>9</sup> was to be carried out by the WWAV in the area of competence of its members.
- (14) From the time of its creation, WWAV used the third party service provider Eurawasser Nord GmbH (“Eurawasser”) to provide these water and waste water services based on an operating contract with the WWAV, signed on 22 December 1992.<sup>10</sup>
- (15) On 7 March 2012 and on 5 March 2014 the *Hansestadt Rostock*, and on 14 April 2014 the *Zweckverband Wasser Abwasser Rostock Land* respectively, as competent local authorities, decided not to renew the existing contract with Eurawasser nor to launch a new tender, but to set up an in-house provider<sup>11</sup> for the purpose of providing water and waste water services in the Rostock region. Following these decisions on member level, on 8 May 2014, the members of the WWAV agreed in their general assembly to exercise their contractual right not to renew the existing contract with Eurawasser, which was set to expire in 2018. In line with the provisions of this contract, WWAV informed Eurawasser on 9 May 2014 of its decision not to renew the contract. As a result, the contract ended with effect of 30 June 2018.

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<sup>5</sup> Cf. Section 2.2. below.

<sup>6</sup> Cross-municipal public entity.

<sup>7</sup> Until 31.Dec 2017, the *Zweckverband* comprised of 29 municipalities. On 1 Jan 2018, Klein Kussewitz left the *Zweckverband*, because it merged with the municipality of Bentwitsch.

<sup>8</sup> Cf 2.2. below.

<sup>9</sup> Cf. 2.2 below.

<sup>10</sup> Cf. 2.3. below; in 1992, *Hansestadt Rostock* and *Zweckverband Wasser Abwasser Rostock Land* entered into a contract with Eurawasser. When they set up WWAV in 1994, the contract was transferred to the latter.

<sup>11</sup> § 108 *Gesetz gegen Wettbewerbsbeschränkungen*.

- (16) The members of the WWAV also decided on 8 May 2014 to set up an in-house structure for the provision of water and waste water services in the region.
- (17) To this end, on 23 March 2015, WWAV and Rostocker Versorgungs- und Verkehrs-Holding GmbH (“RVV”) founded Nordwasser GmbH (“Nordwasser”) as a separate legal entity governed by private law. RVV is a state-owned entity set up under and subject to private law, whose single shareholder is Hansestadt Rostock. RVV is responsible, via various subsidiaries or shareholdings, for a broad range of municipal services (such as water and waste water services, local public transport, municipal waste management). Nordwasser was not operative from its establishment in 2015 until end of June 2018, when it took over services from Eurawasser.<sup>12</sup>
- (18) WWAV and RVV are the only two shareholders of Nordwasser, with RVV holding 51% of the shares and WWAV 49%. All decisions are taken by a three-fourth majority except for decisions on the use of Nordwasser’s earnings which require unanimity. Pursuant to § 14 of the shareholding agreement, their votes in the Nordwasser shareholder board correspond to the shares they hold.
- (19) When Nordwasser was set up, RVV was entitled to 80% of the profits, and WWAV to 20%. In the course of 2018, and before Nordwasser became operational as of 1 July 2018, the public shareholders decided to change Nordwasser’s legal set-up and aligned the participation in profits with their respective shareholdings. Consequently, RVV, which currently holds 51% of the shares is entitled to 51% of the benefits of Nordwasser GmbH. As far as the profits which are assigned to RVV are concerned, Rostock is obliged to ensure that they receive all the profits that are due to them, and therefore RVV has to pass them on without discretion. German authorities have confirmed that profits so far have been distributed accordingly.
- (20) In addition, WWAV amended its statute (*Verbandssatzung*) on 17 May 2018 (becoming effective on 25 May 2018) in order to include a provision which prohibits competition both on and for the market for water and waste water services in the WWAV region for an unlimited duration<sup>13</sup>, and excludes competition by way of delegating these services to Nordwasser from 1 July 2018 onwards. This amendment entered into force with retroactive effect as of 23 March 2015 (i.e. the point in time when Nordwasser was incorporated).
- (21) § 4 para 7 of the *Verbandssatzung* now reads as follows<sup>14</sup>:

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<sup>12</sup> In order to manage a seamless handover of operations Nordwasser took over Eurawasser’s employees.

<sup>13</sup> See § 4 para 7 of the *Verbandssatzung*.

<sup>14</sup> *Zur Erfüllung seiner Aufgaben der Wasserversorgung und Abwasserbeseitigung im Verbandsgebiet gründet der Verband zusammen mit der im Alleineigentum der Hanse- und Universitätsstadt Rostock stehenden Rostocker Versorgungs- und Verkehrs-Holding GmbH durch Gesellschaftsvertrag die Nordwasser GmbH und beauftragt diese mit der Betriebsführung im Bereich der Wasserversorgung sowie der Abwasserentsorgung ab dem 1. Juli 2018. Die Beauftragung der Nordwasser GmbH ist ausschließlich und umfasst die Erledigung aller Aufgaben für eine ordnungsgemäße Wasserversorgung und Abwasserentsorgung. Der Verband wird keinem Dritten den Betrieb oder den*

*In order to fulfil its tasks of water (supply) and waste water services in the Association's territory, the Association, together with Rostocker Versorgungs- und Verkehrs-Holding GmbH, which is solely owned by Hanse- und Universitätsstadt Rostock, establishes, by means of articles of association of a limited liability company, Nordwasser GmbH and entrusts it with the management of water supply and waste water disposal services from 1 July 2018. The commissioning of Nordwasser GmbH is exclusive and involves carrying out of all the tasks necessary for proper water (supply) and waste water services. The association shall not permit any third party to operate or set up a service network for the public supply of water or waste water services in its territory. This also applies in the event of an enlargement of the association's territory.*

- (22) The service contract between WWAV and Nordwasser concerning the provision of water and waste water services was signed on 1 February 2016 and became effective as of 1 July 2018, with Nordwasser succeeding Eurawasser as the sole provider of these services. This contract was published on 5 February 2016 in the EU Official Journal.
- (23) Based on this contract, Nordwasser has to provide water and waste water services, including maintenance of the infrastructure and stakeholder/ public relations and client communication. The service contract covers a period of 20 years until 2038, with an automatic prolongation for 5 years unless one of the parties decides to terminate it with two years' notice.

## **2.2. Allegations of the Complainant**

- (24) The complainant alleges that the decision by the WWAV to transfer responsibility for the provision of water and waste water services to an in-house provider involves state aid, both to the newly established in-house entity Nordwasser and to one of its public shareholders, RVV.
- (25) The complainant alleges that an economic advantage has been conferred on RVV during the set-up of Nordwasser, because RVV did not have to purchase Nordwasser's shares at market terms.<sup>15</sup> The complainant also claims that State aid law principles would have required to tender out a shareholding position concerning the company which was to be set up.
- (26) As regards Nordwasser, the complainant argues that the remuneration it would receive for the operation of the water supply and waste water networks is unduly high and involves incompatible State aid.
- (27) According to the complainant, based on the well-established EU internal market principle of non-discrimination, the introduction of a legal monopoly requires, at least, objective legislation by the Member State itself in order to ensure that a formerly liberalized market (such as for water supply and

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*Aufbau eines der öffentlichen Versorgung dienenden Leitungsnetzes für die Wasserversorgung oder Kanalnetzes für die Abwasserversorgung in seinem Verbandsgebiet gestatten. Dies gilt auch für den Fall einer Erweiterung des Verbandsgebiets.*

<sup>15</sup> According to the complainant, this is demonstrated by the agreed 80%/20% split of profits amongst RVV and WWAV, which would not correspond with the shareholding structure.

effluent disposal services) is closed only under non-discriminatory and transparent terms in line with the principles on the freedom to provide services (Art. 56 TFEU). The *Verbandssatzung* of WWAV, i.e. an entity on the demand side of the relevant services market, cannot, in his opinion, satisfy the principle of non-discrimination to introduce a legal monopoly in a former liberalized market.

### 2.3. Position of the German authorities

- (28) In relation to the alleged overcompensation of Nordwasser, the German authorities describe the mechanism to calculate the remuneration Nordwasser receives for its services as follows<sup>16</sup>: based on § 17 of the service contract, Nordwasser is entitled to receive a variable amount based on actual costs (*Selbstkostenerstattungspreis*) in the first three years (as of 1 July 2018). As of the fourth (full) calendar year (that is in 2022) it is entitled to a fixed amount (*Selbstkostenfestpreis*), determined on the basis of the cost calculations from the previous years. This mechanism and technicalities are determined on the basis of the German provisions on prices for public contracts.<sup>17</sup> According to the German authorities, Nordwasser's cost calculation (*Selbstkostenvorkalkulation*) amounts to a remuneration of approximately EUR [...] (\*) per year, more specifically [...]
- (29) Germany stated that this remuneration is market-conform, referring to a study carried out by the consultant [...] before Nordwasser became operative.<sup>18</sup> The study was commissioned by the WWAV in February 2018 and is based on the calculation of Nordwasser's *Selbstkostenvorkalkulation* and the underlying data.
- (30) Since there exist no generally available and directly comparable market prices for water and waste water services in Germany, due to significant differences in the infrastructure and geography of said services, the consultant applied two methods to establish a basis for comparison, namely (i) benchmarking<sup>19</sup> and (ii) comparison with the active service provider at that time (Eurawasser).
- (31) The benchmarking was carried out in compliance with applicable sectoral standards considering structural differences to ensure comparability. Based on 2015/16 data, Nordwasser's cost data was broken down per cubic meter water and was compared with the costs of a representative group of German water and waste water service providers. This benchmarking demonstrated, according to the German authorities, that Nordwasser's costs are in all instances well within the range of costs of the comparable German water and

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<sup>16</sup> Cf par. 17 of the contract between WWAV and Nordwasser.

<sup>17</sup> Verordnung PR Nr.39/53 über die Preise bei öffentlichen Aufträgen.

\* Confidential information

<sup>18</sup> Beurteilung der Marktüblichkeit des Betriebsführungsentgeltes der Nordwasser GmbH, 20.Juni 2018.

<sup>19</sup> Cf. NoA, rec. 98

waste water service providers. In all but one instance, Nordwasser's costs are below the median of the costs of the compare group.<sup>20</sup>

- (32) The comparison with Eurawasser by [...] took into account the different type of services requested from Eurawasser and Nordwasser. Eurawasser was entrusted with the operations of the water and waste water services including financing of investments, such as maintenance, modernisation and enlargements of the network (*Betreibermodell*). Nordwasser's contract foresees the operation of water and waste water services in the same way as Eurawasser, however excluding the financing of investments (*Betriebsführermodell*).
- (33) The result of the adjusted comparison between Nordwasser's planned remuneration and Eurawasser's remuneration showed that Nordwasser's remuneration would be [...] (or EUR [...]) lower [...] than Eurawasser's.
- (34) As regards the decision of the WWAV and its member municipalities to establish a legal monopoly for the provision of water and waste water services, the German authorities have provided the following information on the underlying national legal framework and competency set-up.
- (35) The German constitution (*Grundgesetz*) enshrines a guarantee for local self-government for municipalities. Art. 28 para 2 of the *Grundgesetz* provides that municipalities must be guaranteed the right to regulate all local affairs on their own responsibility within the limits prescribed by law, including water and waste water services.
- (36) Under German federal law, water supply and waste water services are declared essential public services (*Aufgaben der Daseinsvorsorge*) which have to be provided for by legal entities governed by public law.<sup>21</sup>
- (37) To complement federal legislation concerning the competent legal entities in that respect, on the level of the *Länder*, the regional code of the Land *Mecklenburg-Vorpommern* on municipalities and its Water Act (*Landeswassergesetz*) specify that the municipalities are the entities responsible for ensuring that these public services are provided within their area of competence.<sup>22</sup>
- (38) In doing so, municipalities can provide these public services either themselves, or they can cooperate with each other and establish water and ground associations (*Wasser- und Bodenverbände*, cross-municipal entities of public law).<sup>23</sup>

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<sup>20</sup> The only instance, where Nordwasser's cost were [...] above the median of the compare group [...]

<sup>21</sup> § 50 para 1 and § 55 para 1, 56 Wasserhaushaltsgesetz.

<sup>22</sup> SA.31296 (N 322/2010) Individual Aid to Water Supply Company, point 3; Kommunalverfassung Mecklenburg-Vorpommern, Teil 1 Gemeindeordnung, § 2 para 2, Aufgabe des eigenen Wirkungskreises; § 40 para 1, § 43 para 1 Landeswassergesetz Mecklenburg-Vorpommern.

<sup>23</sup> §§ 1 and 2 Wasserverbandsgesetz, § 40 para 4 and 43 para 2 Landeswassergesetz Mecklenburg-Vorpommern.

- (39) According to the *Landeswassergesetz* of Mecklenburg-Vorpommern<sup>24</sup>, municipalities or these associations and their members, may decide to delegate by contract to a third (auxiliary) person the operation and/or management of certain water supply and waste water services on their behalf. This includes the right to end such a delegation if they see fit.<sup>25</sup> Following the constitutionally enshrined competency set-up and the principle of local autonomy, the competent municipalities by default cannot be bound by any superior legislation to award a contract to a specific undertaking.
- (40) The German authorities have explained that in any event, according to the law, even where the operation of certain services has been assigned to third parties, it is always the municipalities themselves which remain legally responsible to offer water supply and waste water services to their citizens. Any assignment to third parties is by nature of a temporary character and does not change the public obligation incumbent on the municipality.

### **3. ASSESSMENT OF THE EXISTENCE OF AID**

- (41) In order for a measure to constitute State aid within the meaning of Article 107 (1) TFEU it has to fulfil four cumulative conditions. Firstly, the aid is granted by a Member State or through State resources. Second, the measure confers a selective advantage to certain undertakings or the production of certain goods. Thirdly, the measure must be liable to affect trade between Member States. Fourthly, the measure must distort or threaten to distort competition in the internal market.
- (42) In its assessment of whether a measure entails State aid or not, the Commission is bound by the interpretation of the Union Courts.

#### **3.1. Remuneration paid to Nordwasser**

- (43) In order to assess whether the remuneration paid to Nordwasser for the operation of water supply and waste water service networks constitutes State aid as described above, the Commission will first assess the notion of distortion of competition.
- (44) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. For all practical purposes, a distortion of competition within the meaning of Article 107(1) TFEU is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be competition.
- (45) The fact that an in-house entity provides the services in question, such as Nordwasser in the present case, does not as such exclude a possible distortion of competition concerning the operation of water supply and waste water networks.

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<sup>24</sup> §§ 40 para 4 and 43 para 2 Landeswassergesetz Mecklenburg-Vorpommern.

<sup>25</sup> §§ 40 para 4 and 43 para 2 Landeswassergesetz Mecklenburg-Vorpommern.



- (46) However, Germany argues that in the present case a valid legal monopoly has been established, which excludes any distortion of competition, either for or in the market. Indeed, as set out in the Commission Notice on the Notion of Aid (“NoA”)<sup>26</sup>, a distortion of competition, and therefore the presence of State aid, can be excluded when each of the following conditions<sup>27</sup> is met:
- (a) a service is subject to a legal monopoly (established in compliance with EU law),
  - (b) the legal monopoly must exclude competition not only on the market, but also for the market, in that it excludes any possible competition between different entities to become the exclusive provider of the service in question,<sup>28</sup>
  - (c) the service in question must not be in competition with other services, and
  - (d) if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation must be excluded. This requires that separate accounts are used, costs and revenues are allocated in an appropriate way and public funding is provided for the service subject to the legal monopoly cannot benefit other activities.
- (47) In order to assess whether the remuneration paid to Nordwasser for the operation of water supply and waste water service networks is liable to distort competition, the Commission must thus assess whether the four criteria mentioned above are complied with.

### *3.1.1 Existence of a legal monopoly, established in compliance with EU law*

- (48) The Commission will first assess whether a legal monopoly was established in compliance with EU law.
- (49) Such a legal monopoly exists where
- a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups)<sup>29</sup> (see 3.1.1.1);

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<sup>26</sup> Commission Notice on the Notion of State Aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19.7.2016

<sup>27</sup> See NoA, para 188; C-659/17, INPS, opinion of AG Hogan, 6 June 2019, recital 34.

<sup>28</sup> NoA, recital 188.

<sup>29</sup> NoA recital 188, footnote 272.

- the decision to close a market must be taken by the competent public authorities or entity, in line with the national competency set-up<sup>30</sup> (see 3.1.1.2);
- in doing so, the Member State or the competent public entity must act in compliance with EU law (see 3.1.13).

*3.1.1.1 Existence of a law or regulatory measure reserving the services to an exclusive provider with a clear prohibition for any other operator to provide such service.*

- (50) In order to assess the question whether a law or regulatory measure is in force reserving water and waste water services to an exclusive provider, the Commission assessed the legal and regulatory framework concerning these services.
- (51) The German authorities argue that by way of amending the *Verbandssatzung*, the WWAV re-established a legal monopoly for water and waste water services within its area of competence (see recital 35-41).
- (52) § 4 para 7 of the *Verbandssatzung* reads as follows<sup>31</sup>:

*In order to fulfil its tasks of water (supply) and waste water services in the Association's territory, the Association, together with Rostocker Versorgungs- und Verkehrs-Holding GmbH, which is solely owned by Hanse- und Universitätsstadt Rostock, establishes, by means of articles of association of a limited liability company, Nordwasser GmbH and entrusts it with the management of water supply and waste water disposal services from 1 July 2018. The commissioning of Nordwasser GmbH is exclusive and involves carrying out of all the tasks necessary for proper water (supply) and waste water services. The association shall not permit any third party to operate or set up a service network for the public supply of water or waste water services in its territory. This also applies in the event of an enlargement of the association's territory.*

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<sup>30</sup> SA. No N 356/2002 Network Rail, point 78; SA.35948 (2012/N) – railway transport Czech Republic, points 19 - 21.

<sup>31</sup> *Zur Erfüllung seiner Aufgaben der Wasserversorgung und Abwasserbeseitigung im Verbandsgebiet gründet der Verband zusammen mit der im Alleineigentum der Hanse- und Universitätsstadt Rostock stehenden Rostocker Versorgungs- und Verkehrs-Holding GmbH durch Gesellschaftsvertrag die Nordwasser GmbH und beauftragt diese mit der Betriebsführung im Bereich der Wasserversorgung sowie der Abwasserentsorgung ab dem 1. Juli 2018. Die Beauftragung der Nordwasser GmbH ist ausschließlich und umfasst die Erledigung aller Aufgaben für eine ordnungsgemäße Wasserversorgung und Abwasserentsorgung. Der Verband wird keinem Dritten den Betrieb oder den Aufbau eines der öffentlichen Versorgung dienenden Leitungsnetzes für die Wasserversorgung oder Kanalnetzes für die Abwasserentsorgung in seinem Verbandsgebiet gestatten. Dies gilt auch für den Fall einer Erweiterung des Verbandsgebiets.*

- (53) The Commission takes note that, pursuant to the revised § 4 para 7, its substantive content is
- first, to reserve water and waste water services to Nordwasser as an exclusive provider;
  - second, to spell out a clear prohibition for any other operator to provide such services within its area of competence.
- (54) The German authorities have explained that such byelaw is a legislative or regulatory measure in the meaning of the NoA.
- (55) According to the German authorities, municipalities, likewise any cross-municipal entity set up for this purpose by them, are legally entitled, based on the principle of local autonomy, to act and regulate local affairs by means of a *Satzung* (governed by public law) in that regard<sup>32</sup> and to determine how they organise the public obligations to which they are subject.
- (56) In the German legal order, these *Satzungen* which are enacted by autonomous (public) legal entities, are governed by public law,. They are of a general and binding nature and therefore qualify as “law” in a material sense (compared to “laws” in a formal sense which are enacted by parliament).<sup>33</sup> As a general rule, *Satzungen* governed by public law have to comply with EU law, with the German constitution, with federal and regional law.<sup>34</sup>
- (57) The NoA requires that a given service is reserved by law or regulatory measure to an exclusive provider (para 188 of the NoA, footnote 272). The *Verbandssatzung* qualifies as a regulatory measure and the Commission there concludes that it is an appropriate measure to set up a legal monopoly in the meaning of the NoA. The revision of the *Verbandssatzung* was intended to set up a legal monopoly for the provision of water and waste water services declaring Nordwasser the exclusive provider and prohibiting any other operator to provide the services in question.

### *3.1.1.2 Legal monopoly set up at the competent level of public administration*

- (58) Second, the Commission will assess whether the monopoly was set up at the competent level of public administration that is by the authority competent to do so.
- (59) The German authorities argue that the WWAV was the competent authority to set up this legal monopoly for water and waste water services, by means of

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<sup>32</sup> § 5 Kommunalverfassung Mecklenburg-Vorpommern; mentioned e.g. in BVerfG, 2 BvL 36/71, BVerfGE 32, 361, recital 66, 67; Mehde, in: Maunz/Dürig, Grundgesetz-Kommentar, Art. 28 GG, recital 63.

<sup>33</sup> BVerfG, 1 BVR 518/62, 1 BVR 308/64, BVerfGE 33, 125, recital 116, 118; BVerfG 2 BvR 373/60, 442/60, BVerfGE 11, 266, recital 34; BVerfG, 2 BvR 1619, 1628/83, BVerfGE 79, 127 headline 1 and 4; BVerfG 2 BvL 36/71, BVerfGE 32, 361, recital 66, 67; Lepsius, JuS 2018, p. 950 (951).

<sup>34</sup> Amongst many, BVerfG, 1 BVR 518/62, 1 BVR 308/64, recital 118, 124; procedurally, in Mecklenburg-Vorpommern, each *Satzung* has therefore to be notified for legal supervision to State authorities, §§ 5 para 4, 154 Kommunalverfassung Mecklenburg-Vorpommern.

amendment to the *Verbandssatzung* of the WWAV. They have explained that the WWAV acted in line with the German constitutionally enshrined federal and regional competency set-up<sup>35</sup> and the principle of local autonomy.

- (60) The Commission notes that Art. 28 para 2 of the German constitution (*Grundgesetz*) provides that municipalities must be guaranteed the right to regulate and organise all local affairs on their own responsibility within the limits prescribed by the laws as they see fit, see recitals 36-40.
- (61) The Commission understands that against this background, the Hansestadt Rostock and Zweckverband Wasser Abwasser Rostock Land (the latter consisting of 28 municipalities of the Landkreis Rostock) set up the WWAV. The Commission notes that these steps were taken in line with the legal requirements, since the WWAV qualifies as an entity governed by public law as required by federal law, see recital 39. The right of the municipalities to regulate local affairs on their own responsibility comprises such organisational measures of setting up an entity to jointly fulfil the public obligation, see recital 39.
- (62) The Commission notes that, following this organisational measure, for the case at hand, the public entity WWAV was entrusted by the municipalities to become the entity obliged by public law to carry out water and waste water services within the jurisdictional boundaries of its members.
- (63) The German authorities state that the municipalities and likewise any legal entities, to the extent that obligations are delegated to them, may entrust third parties to carry out these functions, see recital 40. According to German authorities, this option does not negate the possibility for municipalities to set up a legal monopoly. On the contrary, this option, which, based on the guarantee for local self-government,<sup>36</sup> entirely lies with the municipalities, includes taking the necessary regulatory measures to confer exclusive rights on one provider while at the same time prohibiting others from offering the services in question, see recital 40.
- (64) The Commission understands that this competence is enshrined in their constitutional right to regulate all local affairs under their own responsibility. The Commission notes that German municipalities are given such options and rights by the German constitution. The Commission understands that, following this constitutionally enshrined competency set-up and the principle of local autonomy, the competent local municipalities by default are not bound by any superior legislation to award a contract to a specific undertaking. The decision in that respect (concerning the organisation of the services in question) has to lie with the local municipalities and the public entities set up or this purpose rather than at regional or federal level.

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<sup>35</sup> According to the German authorities, Art. 74 para 1 point 32 GG and Art.72 para 3 point 5 GG are relevant for water and waste water services.

<sup>36</sup> Art. 28 para 2 German constitution (*Grundgesetz*).

- (65) Accordingly, the Commission finds that the criterion that the monopoly be set up at the competent level of public administration is fulfilled, as water and waste water services for the Hansestadt Rostock and neighbouring municipalities have been indeed declared a legal monopoly by the competent authority, namely by a byelaw enacted by the competent authority, the WWAV, following decisions taken at member level.

*3.1.1.3 Monopoly established in compliance with EU law, in particular with the market freedoms*

- (66) However, Member States, whether at national, regional or local level, are not free to impose monopolies on any activity they chose. Such a restriction of the market freedom provisions must always be justified by reference to strong public policy arguments and be in line with EU law.
- (67) More specifically, the Commission recalls that a valid legal monopoly must be set up in accordance with the market freedoms. Standing case law qualifies state monopolies or measures with a similar effect as an infringement of the freedom of services or goods. Nonetheless, such restrictions may be justified if certain conditions, expounded by the Court of Justice, can be satisfied. According to these decisions, the restrictions must be justified by imperative requirements in the general public interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it.<sup>37</sup> Furthermore, they must be applied without discrimination.<sup>38</sup>
- (68) The Court of Justice considers that infringements can be justified for reasons of public health, pursuant to Art. 52/56/62 TFEU, or over-riding requirements.<sup>39</sup> While arguments in that respect (e.g. public health, hygiene and environmental protection) might not be evident in many cases, they are in the case at hand.
- (69) The provision of water and waste water services as governed by European<sup>40</sup> legislation, is considered to be of a special kind based on public policies to ensure public health and a high level of hygiene as well as a high level of environmental protection, see recital 12.

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<sup>37</sup> C-243/0, Gambelli and Other, 6 November 2003, recital 64; C-19/92, Dieter Kraus v Land Baden-Württemberg, 31 March 1993, recital 32; C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 31 November 1995, recital 3; C-235/14, Safe Interenvios and Others, 10 March 2016, recital 100; C-168/04, Commission of the European Communities v Republic of Austria, 21 September 2006, recital 37; C-212/11, Jyske Bank Gibraltar Ltd v Administración del Estado, 25 April 2013, recital 60.

<sup>38</sup> C-243/0, Gambelli and Other, 6 November 2003, recital 65; G.A. Mengozzi in C-316/07, 3 March 2010, recital 33.

<sup>39</sup> 120/78, Cassis de Dijon; C-235/14, Safe Interenvios, SA v Liberbank, SA and Others; see also recital 27.

<sup>40</sup> Cf. EU Water Framework Directive: "Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy"

- (70) The Commission notes that, under German federal law water supply and waste water services are declared essential public services (*Aufgaben der Daseinsvorsorge*) which have to be offered by legal entities governed by public law.<sup>41</sup> They are, in compliance with EU legislation, an obligation of a special kind which falls on local municipalities to guarantee appropriate handling.
- (71) The Commission has already recognised the special and strategic nature Member states attribute to water and waste water services in its case practice.<sup>42</sup> It is of utmost importance that water and waste water services are offered at a high standard, all the more in view of the fact that the all households and companies connected to one single network would be affected and suffer from any shortcomings, just to mention public health and environmental risks associated with untreated sewage.
- (72) The Commission understands that WWAV, based on decisions at the level of its members, acted to ensure that public health and hygiene are properly safeguarded. In light of the foregoing, the Commission concludes that the German authorities acted for reasons that qualify as over-riding reasons in the meaning of standing case law.
- (73) As a second step, the Commission, in line with case law, must assess whether the measures taken by national authorities were proportionate.
- (74) In accordance with the case law, it lies within the discretion of the Member States to decide on the degree of protection which they wish to afford to public health and on how that protection is to be achieved,<sup>43</sup> as long as the conditions of proportionality and non-discrimination that apply to them are satisfied. In particular, for a measure to be in line with the market freedoms, the Court requires that the measure under assessment is appropriate, i.e. that it genuinely reflects a concern to attain the objective pursued in a consistent and systematic manner.<sup>44</sup> Standing case law has outlined that in order to assess whether national legislation is proportionate, it is necessary to determine the level of protection desired by the respective Member State and whether there are less restrictive means of achieving the same level of protection.<sup>45</sup>

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<sup>41</sup> § 50 para 1 and §§ 55 para 1, 56 Wasserhaushaltsgesetz.

<sup>42</sup> Commission decision SA N 588/06; SA.31296 (N 322/2010); N 644/E/2002; N 811/2001.

<sup>43</sup> C-262/02, Commission v France, recital 33; C-42/07, Liga Portuguesa de Futebol Profissional and Bwin International, 8 September 2009, recital 57; C-347/09, Dickinger and Ömer, 15 September 2011, recital 45; C-316/07, Stoß and others, 8 September 2010, recital 76 and cited case law.

<sup>44</sup> C-156/13, Digibet and Albers, 12 June 2014, recital 26; C-46/08, Carmen Media Group Ltd, 8 September 2010, recital 30,46,58; C-124/97, Läärä and Others, 21 September 1999, recitals 35.36 and 39; C-42/07, Liga Portuguesa de Futebol Profissional and Bwin International, 8 September 2009, recital 58; C-67/98, Zenatti, 21 October 1999, recitals 33 and 34.

<sup>45</sup> C-235/14, Safe Interenvios and Others, 10 March 2016, recitals 105 and 110; C-316/07, Markus Stoß, 8 September 2010, recital 79; C-156/13, Digibet and Albers, 12 June 2014, recital 72.

- (75) Based on case law, Member States have a wide discretion when it comes to setting up relevant measures, as long as the objective is pursued in a consistent and systematic manner.<sup>46</sup> This means that the Member State must actually pursue the public policy objectives, which the restrictive measure is intended to serve, and may not pursue other objectives.<sup>47</sup> At the same time, this requirement of consistency must not be interpreted as requiring uniformity of Member states measures.<sup>48</sup>
- (76) The Commission takes note that it is standing case law that a decision under assessment – or rather the reasoning of the acting State authorities – is not invalidated in that respect simply by reference to different decisions taken in other Member States or entities of the same Member State but competent for a different geographical region.<sup>49</sup> This means that the mere fact that a Member State (or an entity of the same Member State but competent for a different geographical region) has opted for a system of protection which differs from that adopted by another Member State or geographical region, cannot affect the assessment of the need for and proportionality of the relevant provisions. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure.<sup>50</sup> This clarification is particularly important in relation to Member States, such as Germany, whose constitutional principles include a federal division into regions (*Länder*) and municipalities on local level with their own legislative autonomy, as illustrated in Article 28(1) and (2), Article 79(3) and Article 23(1) of the German constitution (*Grundgesetz*). Standing case law has outlined that EU law allows Member States to adopt any internal allocation of competences that suits them.<sup>51</sup>
- (77) The Commission understands that the acting authorities regarded the re-municipalisation of the services in question and the exclusion for competition for this market in the jurisdiction of WWAV as adequate means to ensure the required level of protection of this good of a special kind. The German authorities have explained that, by means of the re-municipalisation, their aim was to discharge the public obligation resting upon them to the best extent possible. The Commission thus notes that the considerations the German local authorities put forward (recital 12) are consistent. Based on the case law concerning different systems of protection, the Commission notes

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<sup>46</sup> C-46/08, *Carmen Media Group Ltd*, 8 September 2010, recitals 55, 64 and 65; C- 67/98, *Zenatti*, 21 October 1999, recitals 36 and 37; C-360/04 *Placanica and Others*, 6 March 2007, recitals 52 and 53; C-243/01, *Gambelli and Others*, 6 November 2003, recital 67; *Ladbroke* recital 21, *Markus Stoß* recital 88.

<sup>47</sup> *Zenatti*, recital 35; C-243/01, *Gambelli*, recital 67; C-46/08, *Carmen Media Group Ltd*, recital 65.

<sup>48</sup> C-316/07, *Markus Stoß*, recital 95 et seq., C-46/08, *Carmen Media Group Ltd*, recital 62 et seq., C-169/07, *Hartlauer*, 10 March 2009, recital 60.

<sup>49</sup> C-46/08, *Carmen Media Group Ltd*; C-316/07, *Markus Stoß*.

<sup>50</sup> C-347/09, *Dickinger and Ömer*, 15 September 2011, recital 46; C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International*, 8 September 2009, recital 58 and cited case law.

<sup>51</sup> C-46/08, *Carmen Media Group Ltd* recital 70; Nonetheless, it has also been clarified that Member States may not rely on provisions, practices or situations of its internal legal order in order to justify non-compliance with its obligations under EU law, C-46/08, *Carmen Media Group Ltd* recital 69.

that in accordance with the regional code of the Land *Mecklenburg-Vorpommern* on municipalities and its Water Act (*Landeswassergesetz*), municipalities are responsible to ensure that public services, within their competence, are provided in line with public law requirements (recitals 36ff). The Commission acknowledges that decisions taken by other local authorities cannot have a bearing on the validity of the decision taken at the level of WWAV. Similarly, the fact that the acting public entities are not barred from putting an end to the measure at stake or modifying it over time, does not put into question the consistency of the considerations of the German local authorities. As a general principle, binding regulatory measures, notably law in the material sense, enacted by democratically legitimised bodies can be revised and modified by them as they see fit over the time, based on the democratic legitimacy they enjoy.<sup>52</sup>

- (78) In relation to the complainant's submission concerning non-discrimination and transparency, the Commission notes that the monopoly adopted by the German authorities, that is by the WWAV, is non-discriminative, since it excludes competition for national and European providers alike. In the context of direct awards for service concession contracts, the Court of Justice has indeed ruled that in case private shareholders are considered by the public authorities, which are to set up a semi-public inhouse provider, the tendering procedure concerning the shareholding shall be consistent with the principles of free competition, transparency and equal treatment.<sup>53</sup> However, the Commission notes that the entities founding Nordwasser as an in-house provider have not foreseen private shareholders and that there is no obligation which would have required them to do so.<sup>54</sup> Therefore, the Commission concludes that the establishment of the legal monopoly complies with the relevant standards and legal requirements expounded by case law.
- (79) In light of these considerations, the Commission concludes that the re-establishment of a legal monopoly was in line with the market freedoms, since the objective of protecting public health through the provision of a high level of water and waste water services were pursued in a proportionate and non-discriminative manner.
- (80) Accordingly, the Commission finds that the first criterion of the NoA is fulfilled.

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<sup>52</sup> See e.g. the theoretical considerations as laid down in *Heckmann*, *Geltungskraft und Geltungsverlust von Rechtsnormen* p.4 or *Hohnerlein*, *Recht und demokratische Reversibilität* *Verfassungstheoretische Legitimation und verfassungsdogmatische Grenzen der Bindung demokratischer Mehrheiten an erschwert änderbares Recht*, p 335ff as far as the German legal order is concerned.

<sup>53</sup> C-196/08, *Acoset SpA*, 15 October 2009, recitals 47ff.

<sup>54</sup> Also: no service concession in the case at hand (as in the underlying case which was decided by the Court).



### 3.1.2 Exclusion of competition not only on the market, but also for the market

- (81) Secondly, according to the NoA, the Commission must assess if the legal monopoly excludes not only competition on the market, but also for the market, in that it excludes any possible competition between different entities to become the exclusive provider of the service in question. In case a contract is awarded through a competitive procedure, there is competition for the market.<sup>55</sup>
- (82) The German authorities have confirmed that WWAV entered into a contract with Nordwasser based on an in-house set-up.<sup>56</sup> Thus, no competitive procedure took place to choose the future exclusive provider of the services in question amongst potential competitors.
- (83) As evident in the rulings in INPS and Arriva Italia, the Court of Justice considers that, as a general rule, following recital 188 NoA, a legal monopoly cannot be established merely based on the fact that the relevant authorities decided to enter into a contract by means of a direct award, unless they were required to award the operation of the services in question exclusively to one undertaking by legislative or regulatory measures. Only in such a case, based on legislative or regulatory measures, one could consider that there was no competition for the market.<sup>57</sup> In case the relevant authorities retain the right to tender out the services in question, one cannot conclude that competition was excluded for the market.<sup>58</sup>
- (84) The Commission notes that, WWAV as the responsible entity to organise water and waste water services has put, based on the *Verbandssatzung*, a self-binding commitment in place<sup>59</sup> concerning the direct contract to Nordwasser. This decision is explicitly spelled out in the byelaw enacted by the WWAV, § 4 para 7, 3<sup>rd</sup> sentence, which states that the association shall not permit any third party to operate or set up a service network for the public supply of water or waste water services in its territory.<sup>60</sup>
- (85) In consequence, as mentioned above, Nordwasser was able to effectively and lawfully start providing the services concerned in July 2018 on the basis of the measures specified above at recitals (17) to (23).
- (86) Moreover, the abovementioned Court rulings do not specify that the law or regulatory measure would need to be established by a different authority or at

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<sup>55</sup> NoA, footnote 273.

<sup>56</sup> The direct award of water and waste water services by WWAV to Nordwasser was challenged before the competent national Court under public procurement rules, but the case was dismissed by the Court on 6 June 2016, Vergabekammer Schwerin, Az.: 1 VK 02/16, and the appeal to the Rostock Higher Court (Oberlandesgericht Rostock) was eventually withdrawn.

<sup>57</sup> C-659/17, INPS, 29 July 2019, recital 38; C-385/18, 19 December 2019, Arriva Italia, recital 58.

<sup>58</sup> C-659/17, INPS, 29 July 2019, recital 38; C-385/18, 19 December 2019, Arriva Italia, recital 58.

<sup>59</sup> C-659/17, INPS, 29 July 2019, recital 38; C-385/18, 19 December 2019, Arriva Italia, recital 58.

<sup>60</sup> *Der Verband wird keinem Dritten den Betrieb oder den Aufbau eines der öffentlichen Versorgung dienenden Leitungsnetzes für die Wasserversorgung oder Kanalnetzes für die Abwasserversorgung in seinem Verbandsgebiet gestatten.*

a different level than the contracting authority, as brought forward by the complainant (see recital 28). More specifically, the Court has not stated or implied in a general way that legal monopolies cannot be established at regional or municipal level. In fact, the question which level or authorities would have been competent to enact measures to exclude competition for the market was not touched upon at all in either case. On substance, the Court has also not assessed a set-up similar to the case at hand, where a municipality would enjoy autonomy (as granted to it by the Constitution) in the organisation of certain services, including the possibility to impose certain obligations on itself, such as setting up a legal monopoly by means of a *Satzung*.

- (87) Hence, the Commission considers that competition for the market was successfully excluded and concludes that the second criteria is fulfilled.

### 3.1.3 *No competition with other services*

- (88) Thirdly, according to the NoA, the service in question must not be in competition with other services.
- (89) In the present case, there are no other services that would be in competition with the provision of water and waste water services in the relevant geographical area. The Commission has in various cases found that water and waste water infrastructure can be deemed a natural monopoly,<sup>61</sup> as high investment costs would make its replication prohibitively expensive.<sup>62</sup>
- (90) The Commission therefore concludes that the third criterion is also fulfilled, as the service is not in competition with other services.

### 3.1.4 *No cross-subsidisation*

- (91) Fourth, according to the NoA, a legal monopoly does not prevent the operator from conducting other activities than the ones in question. However, in such a case, the Commission recalls that cross-subsidisation must be excluded by allocating costs and revenues of different activities separately so that public funding provided for the service subject to the legal monopoly cannot benefit other activities.
- (92) The German authorities have demonstrated that Nordwasser has a separate accounting system in place as a means to exclude cross-subsidisation. In addition, Nordwasser's activities, which are not related to the provision of water and waste water services are of ancillary nature and minor from an economic point of view.<sup>63</sup>
- (93) In the light of this, the Commission concludes that this condition is complied with as well.

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<sup>61</sup> See Commission Notice on the notion of State aid communication, recital 221, 211.

<sup>62</sup> NoA recitals 221, 211.

<sup>63</sup> [...] % of Nordwasser's sales derive from these ancillary services.

### 3.1.5 Conclusion

- (94) In view of the above, the market for water and waste water services is not open for competition. As a result, there is no need to examine the other cumulative conditions for the existence of State aid within the meaning of Article 107(1) TFEU. The Commission therefore reaches the conclusion that the measure in question (the remuneration paid to Nordwasser) does not constitute State aid pursuant to Article 107 (1) TFEU.

### 3.2. Shareholding structure of Nordwasser

- (95) In order to assess whether the legal set-up and agreements in place between RVV and WWAV concerning the shareholding structure and split of profits generated by Nordwasser constitutes State aid as described above, the Commission considers it appropriate to assess first if, based on the shareholding agreement between RVV and WWAV concerning Nordwasser's profits, RVV benefits from an economic advantage through state resources.
- (96) The Hansestadt Rostock, a German municipality, is RVV's only shareholder, hence RVV is 100% publicly owned. The Commission notes that RVV is a set-up as a holding company. Through its operative subsidiaries, it is active in numerous activities,<sup>64</sup> several of which can be considered economic activities.
- (97) Against this background, the Commission concludes that any measures in favour of RVV have to be examined for State aid implications, as they may provide RVV with a potential competitive advantage. More specifically, RVV must be considered as a recipient of State aid in case state resources are allocated to the undertaking in a way that does not correspond with market terms.
- (98) As a matter of principle, if the State is able, by exercising its dominant influence over a public undertaking, to direct the use of its resources in order, as occasion arises, to finance specific advantages in favour of other undertakings, these resources are considered state resources.<sup>65</sup>
- (99) The Commission notes that in this case, only public authorities (municipalities) exercise supervision over the management of RVV, see recital 17 above. Against this background, RVV's public owner – Hansestadt Rostock – is able, by exercising its dominant influence over it, to direct RVV's profits gained based on the split of profits concerning Nordwasser, in order, as occasion arises, to finance specific advantages in favour of other undertakings, which are part of RVV holding structure.
- (100) Accordingly, the allocation of profits at the level of RVV must be considered as State resources.

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<sup>64</sup> Cf recital (16) above.

<sup>65</sup> C-150/16, *Fondul Proprietatea v Complexul Energetic Oltenia*, rec. 16, 17; seen at: <http://stateaidhub.eu/blogs/stateaiduncovered/post/8826>.

- (101) The Commission notes that when Nordwasser was set up, RVV held 51% of the shares, WWAV 49%. The latter was entitled to 20% of the profits, RVV to 80% of them.
- (102) Such a distribution of profits, which does not correspond to the shareholding structure, is not in line with the behaviour of two independent entities, which set up a jointly owned subsidiary in free competition, unless the shareholder, which is entitled to more profit than its corresponding shareholding, bears a higher risk (e.g. being the only shareholder to absorb losses) or contributes with additional assets to the newly established subsidiary so that the other, independent shareholder of the said subsidiary would accept such deviated profit allocation under conditions of free competition. The Commission did not receive any evidence by the German authorities that this holds true for RVV.
- (103) Accordingly, the Commission is of the view that, in principle, an allocation of 80% of Nordwasser's profits to RVV as 51% shareholder could convey an economic advantage on RVV. Based on the indicators concerning imputability laid down in case law,<sup>66</sup> in view of the 100 % public ownership of RVV, the actual dominant influence and involvement of Hanesstadt Rostock and the private law status of RVV, this advantage must be considered as imputable to the state.
- (104) However, the German authorities confirmed that this disproportionate allocation of Nordwasser's profit was amended by its shareholders before Nordwasser became operational on 1 July 2018.
- (105) By aligning the allocation of Nordwasser's profits to the corresponding shareholdings of RVV and WWAV, the shareholders agreed to a profit allocation that independent companies would establish in free competition.
- (106) This amendment of the profit allocation became effective before Nordwasser started its operations on 1 July 2018. A company cannot distribute its profits before it has generated them through its operations. Nordwasser was in a position to do so only after it started operations on July 2018. At this point in time, based on the revised shareholding structure, RVV was only entitled to a share of profits to an extent which independent companies would established in free competition.
- (107) The Commission therefore concludes that as of June 2018, based on the revised structure, RVV was not entitled to an economic advantage.

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<sup>66</sup> C-482/99, Stardust Marine, recital 45, 52, 55, 56.

- (108) As far as the period before June 2018 is concerned, even if RVV had requested a profit distribution by Nordwasser (quod non) and even if WWAV as second shareholder had agreed to it (quod non), Nordwasser was neither economically nor legally<sup>67</sup> in a position to distribute profits before 1 July 2018.
- (109) The Commission therefore concludes that no advantage was conferred to RVV before June 2018. Accordingly, the Commission concludes that neither during the period between when Nordwasser was established and before the allocation of profits was amended, nor thereafter, RVV benefitted from an economic advantage with regard to the profit allocation of Nordwasser.
- (110) In the context of the profit sharing agreement, the Commission also notes that German authorities have confirmed that profits so far have been distributed in line with the shareholding, and were passed on to the Hansestadt Rostock.
- (111) As far as the argument by the complainant is concerned that State aid law would have required a tender procedure concerning a potential shareholding of Nordwasser shares, the Commission notes that such principle to always invite private participants via a tender procedure to get involved when it comes to setting up an in-house company in the first place can only exist in cases where the public authorities chose a model with private participation upfront and accordingly set up such semi-private entity for this very purpose, see also recital 80.<sup>68</sup>
- (112) As a result of the above conclusions, there is no need to examine the other cumulative conditions for the existence of State aid within the meaning of Article 107(1) TFEU. The Commission therefore reaches the conclusion that the measure in question (shareholding structure) does not constitute State aid pursuant to Article 107 (1) TFEU.

#### 4. CONCLUSION

The Commission has accordingly decided that the measures do not constitute aid.

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President

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<sup>67</sup> Cf. Contract between RVV and WWAV to establish Nordwasser

<sup>68</sup> C-196/08, Acoset SpA, recital 49, 51, 63. In addition, such principle could only be considered in cases where public shares of an already existing company would be sold, in order to demonstrate that the price would equal the market price.