

## **INFRASTRUCTURE ANALYTICAL GRID N° 8 <sup>1</sup> – INFRASTRUCTURES FOR WASTE MANAGEMENT SERVICES**

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

### **General principles**

#### **Introduction to the waste management services market**

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

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

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

treated and the polluter pays principle according to which undertakings generating waste should be held liable for the cost of its treatment, are core principles of Union legislation. As described more fully below, the most relevant Union State aid instruments include: (i) the General Block Exemption Regulation (GBER)<sup>3</sup> (ii) the Guidelines on State aid for environmental protection and energy (EEAG)<sup>4</sup>; (iii) the Regional Aid Guidelines (RAG)<sup>5</sup>; (iv) the SGEI Decision<sup>6</sup>; and (v) the SGEI Framework<sup>7</sup>.

6. Certain State-aided waste management projects (for example projects involving waste incineration infrastructure) may lead to energy production. Such projects may be supported in accordance with the specific provisions of the GBER and/or the EEAG and this grid does not apply to those projects<sup>8</sup>.

#### **Instances in which the existence of State aid is excluded**

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

7. Whenever a market is open to competition, public financing can affect competition and therefore State aid rules are likely to apply.
8. If markets are closed to competition State aid is not present. No potential effect on competition and trade may occur if the beneficiary holds an exclusive right in the waste management services market and is not and cannot be active on other markets (e.g. energy generation) or geographic areas open to competition. The assessment depends on national/regional/local rules in the Member State concerned. If the recipient is active on other markets, the financing of infrastructure that falls within the reserved area may constitute State aid. Keeping separate accounts<sup>9</sup> for operations in different markets allows the identification of possible cross-subsidisation between/among markets.

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<sup>3</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

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

<sup>5</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1. See also, for example, Commission decision of 24 February 2010 in case N 495/2009 - Latvia – *Electric and electronic waste sorting and recycling facility in Tume*, OJ C 94, 14.4.2010, p. 9, [http://ec.europa.eu/competition/state\\_aid/cases/232806/232806\\_1080784\\_34\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/232806/232806_1080784_34_1.pdf). Despite "positive spill-over effects" on other undertakings and "efficiency improvement in the regional waste collection system", the measure was notified primarily under RAG principles on the basis that it would contribute to regional development in Latvia.

<sup>6</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

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

<sup>8</sup> See sections 3.3, 3.4 and 3.5 of the EEAG.

<sup>9</sup> According to the principles set out in Commission Directive 2006/111/EC of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

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

9. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>10</sup>.

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

10. The provision of "universal" waste management services for households and businesses alike<sup>11</sup> may be entrusted as an SGEI<sup>12</sup>. In such a case, the existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of waste management service that can be considered as a genuine service of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of the providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require<sup>13</sup>.

### **SGEI *de minimis* Regulation<sup>14</sup>**

11. Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

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

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

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<sup>10</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

<sup>11</sup> See by contrast Commission decision of 25 April 2012 in case SA.25051 – Germany – Association for disposal of dead animal bodies, OJ L 236, 1.9.2012, p. 1, [http://ec.europa.eu/competition/state\\_aid/cases/237074/237074\\_1323831\\_302\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/237074/237074_1323831_302_2.pdf) and Case C-126/01 Ministère de l'Economie, des Finances et de l'Industrie v GEMO, EU:C:2003:622.

<sup>12</sup> Mainly waste collection and possibly waste treatment in duly justified cases.

<sup>13</sup> See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 8.

<sup>14</sup> Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

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

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

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

**General Block Exemption Regulation (GBER)<sup>15</sup>**

14. The measure may be exempted from notification if it is granted in compliance with the conditions of the GBER. A number of GBER provisions may be applicable.
15. **Article 47 of the GBER** allowing investment aid for waste recycling and re-utilisation up to EUR 15 million (per undertaking per investment project) can apply, subject to compliance with certain conditions reflecting core Union environmental rules<sup>16</sup> – namely that: (i) the aid is granted for the recycling and re-utilisation of waste generated by other undertakings; (ii) without the aid, the recycled or re-used materials treated would be disposed of, or be treated in a less environmentally friendly manner; (iii) the aid is not granted to waste recovery operations other than recycling; (iv) the aid does not indirectly relieve the polluters from a burden that should be borne by them under Union law, or from a burden that should be considered a normal company cost; (v) the investment does not merely increase demand for the materials to be recycled without increasing collection of those materials; and (vi) the investment goes beyond the state of the art.
16. **Article 36 of the GBER** allowing investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards up to EUR 15 million. Only the part of the investment which is linked to the achievement of a higher level of environmental protection going beyond the Union standards can be covered by Article 36 of the GBER. Subject to certain exceptions, aid may not be granted under this provision for projects simply involving early implementation of Union standards that have already been adopted but are yet to enter into force.
17. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area and that aid intensities established in the regional aid map are not exceeded and that all the conditions of Article 14 are complied with<sup>17</sup>.
18. **Article 56 of the GBER** allowing investment aid for local infrastructures up to EUR 10 million of aid or up to EUR 20 million of total costs. It covers only investment aid granted for the

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<sup>15</sup> See footnote 3.

<sup>16</sup> See EEAG, in particular section 3.5.

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

construction or upgrade of infrastructure contributing towards the improvement of the local business and consumer environment. Operating aid is not exempted. Aid for dedicated infrastructure is not permissible under Article 56 of the GBER<sup>18</sup>. It is important to note that Article 56 GBER will only apply where other GBER provisions (e.g. Article 47 – see point 155) are not applicable.

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

#### **Service of General Economic interest: SGEI Decision<sup>19</sup>**

20. If the infrastructure is necessary for the provision of "universal" waste management services for households and businesses alike that are entrusted as an SGEI, it may be considered as part of the SGEI mission. State aid for the compensation of such an SGEI up to EUR 15 million per year (on average over the whole duration of the entrustment<sup>20</sup>) may be exempted from notification on the basis of the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of an SGEI, parameters of compensation established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

#### **Instances in which notifying for State aid clearance is necessary**

21. If the measure constitutes State aid and does not meet the conditions allowing an exemption from notification, a notification to the Commission for State aid clearance is required.

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

23. Waste management infrastructure may also be assessed as aid for going beyond Union standards or increasing the level of environmental protection in the absence of Union standards, or aid for early adaptation to future Union standards<sup>22</sup>, provided that the conditions detailed in section 3.2 of the EEAG are met.

#### **Service of General Economic Interest: SGEI Framework<sup>23</sup>**

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<sup>18</sup> Investment aid for the construction or upgrade of dedicated infrastructure is not exempted under Article 56 GBER as per Article 56(7) GBER. In case SA.36147 – Germany – Infrastructure aid implemented by Germany in favour of Propapier (Commission decision of 1 October 2014), OJ L 89, 1.4.2015, p. 72, the Commission decided that a wastewater plant that was used by several investors and open to all users on a non-discriminatory basis did not constitute a dedicated infrastructure although it was built in an industrial park that mainly served the needs of one company.

<sup>19</sup> See footnote 6.

<sup>20</sup> Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of the investments) as SGEI compensation.

<sup>21</sup> See footnote 4.

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

<sup>23</sup> See footnote 12.

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

**Regional Aid Guidelines (RAG)<sup>24</sup>**

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

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*References:*

- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Commission Directive 2006/111/EC](#) of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, p. 1.
- [Guidelines on State aid for environmental protection and energy 2014-2020](#) OJ C 200, 28.6.2014, p. 1.

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<sup>24</sup> See footnote 10.