

INFRASTRUCTURE ANALYTICAL GRID N° 7¹ – CONSTRUCTION OF ENERGY INFRASTRUCTURE

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

General principles

1. This analytical grid only covers investment aid for the construction, including modernisation and upgrade, of energy infrastructure.
2. For the purpose of the present document, the definition of energy infrastructure means any physical equipment or facility located within the Union or linking the Union to one or more third countries and falling under the categories defined in the Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG)². That definition covers, for instance electricity transmission, distribution and storage infrastructure; electricity smart grids, gas transmission and distribution pipelines; underground storage facilities of gas; regasification or decompression facilities for liquefied natural gas; oil pipelines and pumping stations; CO₂ networks of pipelines. The exhaustive list of network elements falling under energy infrastructure has been enumerated in points (19) to (31) EEAG.
3. For the purpose of the present document, the definition of energy infrastructure does not cover aid for energy production units or aid for the construction or operation of district heating and cooling³.

Existence of State aid

Economic activity

4. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules. Energy infrastructure is usually rolled-out with a view to

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

² Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1.

³ Such projects may be supported in accordance with the specific provisions of the GBER and/or the EEAG. For instance, among other indications, the EEAG refer at footnote 6 to the European Council Conclusions from 23 May 2013 which *confirmed the need to phase out environmentally or economically harmful subsidies, including for fossil fuels, to facilitate investments in new and intelligent energy infrastructure.*

its commercial exploitation, i.e. transport, distribution, storage, etc. of energy products against payment. Public funding of energy infrastructure therefore relates to an economic activity and is hence in principle subject to State aid rules.

Potential to distort competition

5. To the extent that an energy market is liberalised, public financing can affect competition and therefore, State aid rules apply. Even in cases of so-called natural or legal monopolies (established in compliance with EU law) at local, regional or national level, distortion of competition cannot be excluded; in particular in situations in which the beneficiary is not precluded from being active on other geographic or service/products markets; or in which there is scope for competition for the market (for instance after the expiry of a licence). On markets closed to competition by law, such effects are still possible, once the given market undergoes liberalisation. Potential spill-over effects on neighbouring markets must also be taken into account. Such spill-over effects may include, for instance, (i) effects on upstream markets for energy supply (in particular in cases of vertically integrated undertakings, unless separate accounting is in place); (ii) effects on downstream markets for (local) distribution (such as the creation of barriers to market entry and the strengthening of the position of incumbents through increased sales to (new) customers); or (iii) effects on alternative markets for certain types of infrastructure (e.g. underground gas storage facilities as opposed to LNG terminals).
6. In addition, State aid for construction or modernisation of energy infrastructure may indirectly create a source of additional profits for operators such that the overall financial position of the beneficiary can be reinforced vis-à-vis its competitors. In case of interconnectors, there is a risk of discouraging possible market investors and deterring future interest from competing operators, or at least decreasing the value of other interconnection investments. Moreover, the aid, by strengthening the position of infrastructure operators and favouring the development of the infrastructure at hand, has the potential to influence the patterns of competition between energy sources that are partly substitutable (for instance between different forms of fossil fuels and renewable sources) for generation of electricity and heat.

Effect on trade

7. Effect on trade is present as the energy products are to a large extent traded across the European Economic Area and on global markets.

Instances in which the presence of State aid is excluded

No potential effect on trade between Member States: de minimis

8. 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 respected⁴.

⁴ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1

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

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

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. Energy infrastructure is to a large extent built by market actors and financed through user tariffs, in the case of regulated assets. In the majority of the Member States, no public financing of the general energy infrastructure can be observed. It is thus generally considered that it would not be appropriate to attach specific public service obligations to an activity that is satisfactorily provided by undertakings operating under normal market conditions.
11. However, in exceptional circumstances where the market cannot deliver the service in a satisfactory manner and under conditions (such as price, objective quality characteristics, continuity and access to the service) that are consistent with the public interest, the Member States may decide to compensate the service provider within the framework of a clearly defined and entrusted, genuine service of general economic interest. This could, for instance, be particularly relevant in situations where there is difficulty in providing access to energy infrastructure against affordable prices for end-users.
12. Thus, in such cases, the existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined⁵; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require⁶.

⁵ For example in areas with difficult access conditions.

⁶ See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

SGEI de minimis Regulation⁷

13. 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.

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

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

General Block Exemption Regulation (GBER)⁸

15. The measure may be exempted from notification if it is granted in conformity with the GBER. In particular, Article 48 GBER allowing investment aid for energy infrastructure⁹ up to EUR 50 million (per undertaking, per investment project) can apply. The provisions of Chapter 1 of the GBER in addition to the specific provisions in Article 48 GBER must be complied with. In particular Article 48 GBER lays down the following conditions:

- The energy infrastructure must be located in assisted areas;
- The energy infrastructure must be subject to full tariff and access regulation in accordance with internal energy market legislation;
- The eligible costs are investment costs;
- The aid amount cannot exceed the difference between the eligible costs and the operating profit of the investment. The operating profit can be deducted from the eligible costs *ex ante* or through a claw-back mechanism.

Service of General Economic Interest: SGEI Decision¹⁰

16. To the extent the construction of energy infrastructure accompanies a clearly defined and entrusted genuine SGEI, State aid for the compensation of such an SGEI up to EUR 15 million per year (average over the whole duration of the entrustment¹¹), may be exempted from notification on the basis of **SGEI Decision**, provided that the criteria of that decision are met: definition and

⁷ 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.

⁸ 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.

⁹ Except for electricity and gas storage projects and oil infrastructure.

¹⁰ 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 L7, 11.01.2012, p. 3.

¹¹ Initial support for investment on necessary infrastructure may be averaged as (annual) compensation for the duration of the entrustment as SGEI compensation: normally 10 years, unless justified by the amortisation of investments (those infrastructures may be depreciated for more than 10 years).

entrustment of SGEI, parameters of compensation¹² established ex ante, 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

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

Energy and Environmental Guidelines (EEAG)

18. The compatibility of State aid to energy infrastructure is normally assessed on the basis of the EEAG, provided that the conditions detailed in section 3.8 of the EEAG are met.

19. Energy infrastructure is excluded from the scope of application of the Regional Aid Guidelines¹³.

Service of General Economic Interest: SGEI Framework¹⁴

20. To the extent that the construction of energy 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.

References:

- [Guidelines on State aid for environmental protection and energy 2014-2020](#) (2014/C 200/01) OJ C 200, 28.6.2014, p. 1.
- [Guidelines on regional State aid for 2014-2020](#), OJ C 209, 23.07.2013, p. 1.
- [Commission Regulation \(EU\) No 651/2014](#) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.
- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- [European Union framework for State aid in the form of public service compensation](#), OJ C 8, 11.1.2012, p. 15.

¹² 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 investments) as SGEI compensation.

¹³ Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1. For the exclusion of energy infrastructure, see point 11.

¹⁴ European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

Indicative list of Commission decisions taken under State aid rules concerning energy infrastructure:

Indicative list of cases on the basis of Article 107(3)(c) TFEU before the adoption of the EEAG:

- N 55/2009 – PL - Aid for constructing and modernisation of electricity connection networks for renewable energies in Poland :
http://ec.europa.eu/competition/state_aid/cases/229627/229627_976404_32_1.pdf
- N 56/2009 – PL – Aid for modernisation and replacement of electricity distribution networks in Poland:
http://ec.europa.eu/competition/state_aid/cases/229628/229628_976408_32_1.pdf
- N 594/2009 – PL - Aid to Gaz-System SA for gas transmission networks in Poland:
http://ec.europa.eu/competition/state_aid/cases/233663/233663_1085184_36_1.pdf
- N 660/2009 – PL – Aid to PGNiG for underground gas storage in Poland:
http://ec.europa.eu/competition/state_aid/cases/234044/234044_1118402_56_1.pdf
- N 629/2009 – RO - Grants for investment in electricity and natural gas transmission networks:
http://ec.europa.eu/competition/state_aid/cases/233848/233848_1177808_84_2.pdf
- N 542/2010 – PL - Construction of interconnection and cross-border power line between Poland and Lithuania:
http://ec.europa.eu/competition/state_aid/cases/238433/238433_1191452_40_3.pdf
- SA. 31953 – PL - Construction of a LNG Terminal in Swinoujsciu:
http://ec.europa.eu/competition/state_aid/cases/241631/241631_1267250_72_3.pdf
- SA. 36740 – LT - Aid to Klaipedos Nafta – LNG Terminal:
http://ec.europa.eu/competition/state_aid/cases/250416/250416_1542635_190_2.pdf
- SA. 35977 – EL - 2nd Upgrade of LNG Terminal at Revithoussa:
http://ec.europa.eu/competition/state_aid/cases/247194/247194_1517529_163_2.pdf
- SA. 36890 – EL - 400 kV electric transmission connecting EHV S/S Lagada and EHV S/S Philippi:
http://ec.europa.eu/competition/state_aid/cases/249106/249106_1621479_71_2.pdf
- SA. 35197 – EL - High Pressure Natural Gas Pipeline to Ag. Theodori – Megalopoli:
http://ec.europa.eu/competition/state_aid/cases/247391/247391_1555138_113_2.pdf
- SA. 36892 – EL - EHV Megalopoli Substation:
http://ec.europa.eu/competition/state_aid/cases/249108/249108_1621450_69_2.pdf
- SA. 35975 – EL - Supply and installation of 150 kV Underground Cables for S/S Iraklio I feeding from the System (Transmission Line 150 kV Linoperaramata -Ierapetra):
http://ec.europa.eu/competition/state_aid/cases/247192/247192_1621488_119_2.pdf
- SA. 35695 – EL - Aid for the interconnection of Cyclades islands with the National Mainland Interconnected Transmission System:
http://ec.europa.eu/competition/state_aid/cases/252208/252208_1621522_59_2.pdf

Indicative list of cases adopted on the basis of the EEAG:

- SA. 36290 – UK - Extension of Northern Ireland Gas Pipeline to West and North West:
http://ec.europa.eu/competition/state_aid/cases/252947/252947_1580489_102_2.pdf
- SA. 38918 – SE - Loans to network operators to facilitate connection of renewable electricity production:
http://ec.europa.eu/competition/state_aid/cases/255685/255685_1664987_53_2.pdf