COMMISSION DECISION (EU) 2015/508

of 1 October 2014

on the alleged infrastructure aid implemented by Germany in favour of Propapier PM2 GmbH — State aid SA.36147 (C 30/10) (ex NN 45/10; ex CP 327/08)

(notified under document C(2014) 6847)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having regard to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union [1],

Having called on interested parties to submit their comments pursuant to the provisions cited above [2] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 29 October 2008 the Commission received a complaint from the Smurfit Kappa Group (hereinafter: 'Smurfit Kappa', or 'the complainant'), alleging that infrastructure aid had been granted to Propapier PM2 GmbH. The complaint was registered under the reference CP 327/08 and transferred to the register for unlawful aid (with reference NN 45/10).

(2) By letter dated 27 October 2010 the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the alleged aid.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the alleged aid.

(4) Germany submitted comments by letter dated 28 January 2011 (non-confidential version received on 31 January 2011). The Commission also received comments from the following interested parties: a joint comment from the German municipal associations Deutscher Städtetag, Deutscher Landkreistag and Deutscher Städte- und Gemeindebund, as well as the association of municipal undertakings (*Verband kommunaler Unternehmen —VKU*) on 11 February 2011, and from the complainant on 14 February 2011 (non-confidential version received on 1 March 2011). The Commission forwarded these to Germany, which was given the opportunity to react; Germany's comments were received on 13 April 2011 (non-confidential version received on 26 April 2011).

(5) On 17 January 2013 a meeting took place between the Commission's departments and the German authorities. By letter of 25 February 2013 the German authorities provided further information. The Commission departments requested additional information by letter dated 26 April 2013, which Germany provided by letter dated 14 May 2013.

(6) By e-mail dated 23 May 2013 the Commission requested further information, which was provided by Germany by e-mails dated 24 May 2013, 27 May 2013 and 28 May 2013.

(7) After a meeting on 6 June 2013 between the Commission's departments, the German authorities and representatives of the beneficiary company, and also technical experts, Germany announced potential further comments. Following a further information request dated 15 October 2013, Germany provided extensive additional comments by e-mails dated 4 November 2013, 13 December 2013 and 18 December 2013, and 6 January 2014 and 24 April 2014.

[1] OJ L 83, 27.3.1999, p. 1.
[2] OJ C 7, 12.1.2011, p. 10.
[3] Cf. footnote 2.

2. DESCRIPTION OF THE MEASURES

(8) Propapier PM2 GmbH (hereinafter: 'Propapier') belongs to Progroup AG (hereinafter: 'Progroup'). Progroup produces and sells corrugated case material (CCM) and corrugated board through its subsidiaries. The complainant, Smurfit Kappa, is one of the largest paper producers in the European Union.

(9) On 2 April 2008 the Commission approved ([4]) regional aid for the construction of a paper mill for producing CCM and of a related power plant by Propapier in a newly opened extension of the existing industrial park 'Industriegebiet am Oder-Spree-Kanal' in Eisenhüttenstadt/Brandenburg, an area which at the time was eligible for regional aid pursuant to Article 107(3)(a) TFEU.

(10) The complainant alleged that certain infrastructure projects financed by State resources in the newly extended industrial park where the new Propapier plant is situated are exclusively intended for the paper mill and therefore should qualify as dedicated infrastructure and State aid for the benefit of Propapier.

(11) The complainant specified the following infrastructure projects (see Section 2.1 below): the construction of a waste water treatment plant, the construction of a car park, a new connecting road and the widening and deepening of the Oder-Spree Canal.

(12) Furthermore, the complainant argued that the tariffs charged for the use of the waste water treatment plant are advantageous to Propapier (see Section 2.2 below).

2.1. AID FOR THE CONSTRUCTION OF THE WASTE WATER TREATMENT PLANT AND OTHER INFRASTRUCTURE

(13) In July 2008 the *Land* of Brandenburg awarded a direct grant of EUR 33 808 200 ([5]) from resources of the Joint Federal/*Länder* programme 'Improvement of Regional Economic Structures' (*Ausbau der kommunalen wirtschaftsnahen Infrastruktur im Rahmen der Gemeinschaftsausgabe — GA*) (hereinafter: 'Gemeinschaftsausgabe scheme' ([6])) for the construction of a new waste water treatment plant in an extension of the industrial area on the Oder-Spree Canal in Eisenhüttenstadt. It should be noted in this connection that the Gemeinschaftsaufgabe scheme for the financing of the construction or extension of waste water treatment plants was the subject of State aid case N 644e/02 ([7]) in which the Commission in 2003 established for the programming period 2004 to 2006 that public support from the scheme did not constitute State aid within the meaning of Article 107(1) TFEU in favour of the owner and operator of the waste water treatment plant.

(14) In this 2003 decision, the Commission considered the grants from the version of the scheme applicable from 2004 to 2006 to be an internal transfer of State resources and not State aid to owners and operators primarily because the recipients were not economic operators and the service was a typical public service of general interest to be provided by the municipalities. Under the scheme's conditions, the recipient must be either a local authority (*Gebietskörperschaft*) or a municipal special purpose association under public law (*Zweckverband*) which is subject to supervision by the municipality. For eligibility, no legal, personal or business relationship may exist between the beneficiary of the measure, i.e. waste water treatment plant, and the user of the plant.

(15) The grant covered 80 % of the total eligible costs of EUR 42 260 340. The beneficiary of the grant is the *'Trinkwasser- und Abwasserzweckverband Oderaue Eisenhüttenstadt'* (hereinafter: TAZV), an inter-municipal association governed by public law, which is in charge of the supply of drinking water and the treatment of waste water. TAZV is both the owner and operator of the waste water treatment plant and bore the remaining 20 % of the total public financing of the investment.

([4]) Commission decision in State aid case N 582/07 (OJ C 131, 29.5.2008, p. 6). After a challenge by competitor Smurfit Kappa, the General Court annulled the Commission decision by judgment of 10 July 2012 in Case T-304/08 *Smurfit Kappa Group plc* v *Commission*. On 15 May 2013 the Commission opened a formal investigation into the notified regional aid granted to Propapier (State aid case SA.23827 (2013/C), OJ C 230, 8.8.2013, p. 39). The opening decision in State aid case SA.23827 (2013/C) stated that if, after a formal investigation in State aid case SA.36147 (C 30/10), the Commission were to conclude that other aided investments constituted a single investment project together with the Propapier paper plant investment, or that additional aid was granted to Propapier in the form of infrastructure measures, then the combined aid package would have to be assessed for compliance with point 67 of the RAG.

([5]) Germany reported in its submission of 15 May 2013 that an amount of EUR 30 849 271 had been paid out for eligible costs amounting to EUR 38 561 588.

([6]) Development of municipal economic infrastructure pursuant to Part II, Section 7(e) of the Framework plan under the joint Federal Government/*Länder* scheme for improving regional economic infrastructure: Construction or extension of waste water and refuse elimination and processing installations.

([7]) Commission Decision C(2003)1999 of 9 July 2003 in State aid case N 644e/02 (OJ C 197, 21.8.2003, p. 12).

(16) The granting was subject to the condition that by 15 August 2008 the legal and financial requirements for the settlement of a main investor (in this case, Propapier) were proven. Construction of the plant began in October 2008 and its entry into service took place in March 2010.

(17) The complainant claims that the TAZV plant constitutes dedicated infrastructure, as Propapier will use practically all of its waste water treatment capacity. According to the complainant, the plant was originally designed for Propapier as a waste water treatment plant and was a condition precedent for the establishment of a paper mill in the region (paper production being highly water-intensive).

(18) As regards the other infrastructure projects, the complainant argues that the creation of a car park adjacent to Propapier's site, the construction of a new road connecting the industrial area with the B-112 motorway, and the widening/deepening of the Oder-Spree Canal were infrastructure measures dedicated to Propapier. In the opening decision, the Commission came to the preliminary conclusion that these did not provide a selective advantage to Propapier and hence did not constitute dedicated infrastructure, but it nevertheless invited third parties to comment on these measures as well.

2.2. REDUCED FEES FOR USE OF THE WASTE WATER TREATMENT PLANT

(19) A further element of the complaint concerning the waste water treatment plant is that the tariff of EUR 0,95 per cubic metre to be charged to Propapier for the use of the plant is lower than what a private investor would charge for such services.

(20) The calculation of the user fees is governed by the relevant act, the Brandenburg Municipal Charges Act, (*Kommunalabgabengesetz für das Land Brandenburg* ([8])) (hereinafter: KAG Brandenburg). Paragraph 6 of the KAG Brandenburg provides that the calculation of the charges for the use of the plant has to cover, but must not exceed, all eligible costs of the relevant waste water treatment plant (construction, maintenance and repair, operating, personnel and charge management costs), imputed interest and cost-accounting depreciation. However, subsidies which the municipality receives from other public sources (in this case, the grant of EUR 33,8 million from the Gemeinschaftsaufgabe scheme) must not ([9]) be taken into account in calculating the imputed interest on capital invested. The complainant takes the view that the subsidy received by TAZV from resources of the Gemeinschaftsaufgabe scheme is passed on from the beneficiary TAZV to the users of the waste water treatment plant in the form of reduced waste water fees.

3. **GROUNDS FOR INITIATING THE PROCEDURE** ([10])

(21) The alleged measures qualify as State aid if the following conditions are met: (i) the aid has to be granted by an act of a Member State or out of State resources; (ii) it has to confer an economic advantage on the undertaking; (iii) the advantage has to be selective; and (iv) the measure distorts or threatens to distort competition and affect inter-State trade. The existence of State aid is established when the conditions laid down in Article 107(1) TFEU are met on a cumulative basis.

(22) It was undisputed in the opening decision that all the measures in question involved the use of State resources and that they could potentially distort competition in the internal market.

(23) The Commission noted that, with respect to the elements of the allegation, it is necessary to distinguish between: (1) potential State aid to TVAZ for the construction of the waste water treatment plant; and (2) potential aid to Propapier in the form of reduced waste water treatment charges.

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

([9]) Paragraph 6 of the KAG in force at the time of the opening decision reads in this respect:
Bei der Ermittlung der Verzinsung und der Abschreibungen bleibt der aus Beiträgen und bei der Verzinsung zusätzlich auch der aus Zuschüssen Dritter aufgebrachte Eigenkapitalanteil außer Betracht.
(Translation: When calculating interest rates and depreciation, no account shall be taken of the share of equity derived from contributions or, in the case of interest rates, the share of equity derived from third-party subsidies.)
The KAG as amended on 5 December 2013 (GVBl.I/13, [40]) reads:
Bei der Ermittlung der Verzinsung und der Abschreibungen bleibt der aus Beiträgen aufgebrachte Eigenkapitalanteil außer Betracht (Abzugskapital). Die Gemeinden und Gemeindeverbände können ganz oder teilweise 1) Zuschüsse Dritter als Abzugskapital behandeln, 2) von einer Auflösung des Abzugskapitals zur Ermittlung der Verzinsung absehen, soweit dadurch die dauerhafte Bedienung des Kapitaldienstes nicht gefährdet wird.
(Translation: When calculating interest rates and depreciation, no account shall be taken of the share of equity derived from contributions (deducted capital). The municipalities and municipal associations can treat all or part of grants from third parties as deducted capital, and can exclude deducted capital from bearing interest, in so far as the permanent principal repayment is not compromised).

([10]) The opening decision discussed extensively EU and German legislation applicable to waste water treatment, i.e. Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ L 135, 30.5.1991, p. 40), Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1), the German Federal Water Act (*Wasserhaushaltsgesetz*), the Brandenburg Water Act (*Brandenburgisches Wassergesetz*) and the KAG Brandenburg. See more in recital 40 of the present Decision.

(24) The opening decision also examined whether the construction of

(i) the waste water treatment plant; and

the other infrastructure projects in the newly extended industrial park where the new Propapier plant is situated, namely:

(ii) the new car park;

(iii) the new road; and

(iv) the widening and deepening of the Oder-Spree Canal;

created a selective advantage or constituted infrastructure dedicated to Propapier ([11]). Given that, under Article 107(1), a measure can only qualify as State aid if it is selective (i.e. it must treat differently undertakings that are in a comparable legal and factual situation with regard to the objective of the measure, the Commission had to assess whether Propapier has been selectively favoured by the measures.

(25) The Commission has already approved regional investment aid for Propapier. Given that the measures for the other infrastructure projects are to be carried out in an assisted region eligible for regional aid pursuant to Article 107(3)(a) TFEU and are alleged to be closely linked/dedicated to an investment project which benefits from regional aid, the Commission took the preliminary view that, if they are proven to be selective in favour of Propapier, they would form part of the investment project of Propapier and would therefore need to meet the requirements of the Guidelines on National Regional Aid for 2007-2013 ([12]) (hereinafter: RAG). The Commission expressed doubts regarding the compatibility of any investment aid in the form of dedicated infrastructure, in particular with regard to compliance with the rules on maximum State aid intensity and incentive effect.

(26) Under the applicable rules of the RAG, aid beneficiaries who have received investment aid may benefit from additional operating aid. The compatibility of the operating aid with the internal market, however, has to be assessed independently of the compatibility of the investment aid, on the basis of the criteria laid down in Section 5 of the RAG. The Commission concluded in the opening decision that, should Propapier benefit from operating aid in the form of reduced waste water treatment charges which did not reflect the market economy investor principle, this operating aid could not be considered to be in conformity with the rules of the RAG and the Commission's practice in approving operating aid. Indeed, although the aid beneficiary was situated in a region which was eligible for operating aid (Article 107(3)(a) TFEU-region), other key criteria for the compatibility of the operating aid with the internal market were not met. There was no indication that the operating aid would be justified in terms of its contribution to regional development or its nature, or that its level was proportional to the handicaps it sought to alleviate. In addition, the operating aid would neither be temporary, nor reduced over time. The Commission therefore raised doubts as to the fundamental compatibility with the internal market of any operating aid in the form of reduced charges.

3.1. GRANTS FOR PUBLICLY FUNDED INFRASTRUCTURE PROJECTS, INCLUDING THE WASTE WATER TREATMENT PLANT

3.1.1. **Car park, widening/deepening of the Oder-Spree Canal, new road**

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

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

([12]) OJ C 54, 4.3.2006, p. 13.

the municipality to close down car parks for trucks in the city centre. Besides, Propapier was constructing its own car park which would also be accessible to trucks. For these reasons, it seemed that the construction of the car park probably did not give Propapier a selective advantage.

(28) With regard to the construction of the new road connecting the industrial area with the B-112 motorway, the Commission noted that the construction of the road reduced traffic and air pollution in the centre of Eisenhüttenstadt since trucks heading for the industrial area could avoid the city centre, and that it shortened the time needed to drive to the nearest regional centre. Therefore, it seemed that the construction of the new road probably did not constitute a selective advantage for Propapier.

(29) As regards the widening and deepening work on the Oder-Spree Canal, the Commission noted that this was not undertaken in order to provide a selective advantage to Propapier, but that it was part of the necessary regular maintenance of the waterway system. Therefore, it seemed that the widening and deepening of the Oder-Spree Canal probably did not constitute a selective advantage for Propapier.

(30) At the time, however, the Commission considered that it could not be entirely excluded that Propapier benefited from these infrastructure measures to a greater extent than other undertakings.

(31) Before taking a final view on the presence of aid with respect to these measures, the Commission invited interested third parties to present their views. At the same time, it invited Germany to provide, during the formal investigation procedure, more information on the creation of the car park, the construction of the new road and the widening/deepening of the Oder-Spree Canal.

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

(32) In its opening decision, the Commission concluded that, if the aid scheme in case N 644e/02 were to be regarded as aid in the meantime due to the development of the internal market, it would be seen as existing aid to TAZV.

(33) The Commission expressed doubts, however, as to whether or not the waste water treatment plant constituted dedicated infrastructure. In this connection it was noted that, besides Propapier, there were only two additional users of the plant, namely the Canadian photovoltaic component supplier 5N PV and the energy provider EnBW. Furthermore, it was not known how much of the capacity of the waste water treatment plant was actually allocated to these two customers. On the basis of the information available at the time, the Commission was not in a position to assess whether the construction of the new waste water treatment plant was necessary with regard to only these two undertakings. Furthermore, one of these two additional users, the power plant operated by EnBW, was directly involved in the Propapier project as the power plant provided the energy supply for the production processes of the paper mill ([13]).

(34) The Commission further noted that, if the actual share of Propapier amounted to 90 % of the sewage capacity as alleged by the complainant, it should be questioned whether this fact in itself did not provide sufficient evidence that the plant actually was solely or at least predominantly intended (and thus dedicated) to serve Propapier. Germany's argument in this respect that the construction of the waste water treatment plant would be used by additional users in the future therefore had to be examined further.

(35) It was also noted that it should be taken into account how many investors could be located in the industrial park 'Industriegebiet am Oder-Spree-Kanal' and how much capacity on average they would use. In this regard Germany was requested to provide more detailed information on the overall plan for the development of the industrial area and the remaining capacity of the waste water treatment plant which could be allocated to potential users. Germany was also requested to provide more information as regards the technical feasibility of the modular approach in building the treatment plant ([14]).

(36) As explained above, the Commission took the preliminary view that, if the measures for the infrastructure projects were proven to be selective, they would form part of the investment project of Propapier and would need to meet the requirements of the RAG, in particular its rules on the State aid intensity ceiling and incentive effect.

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

([14]) See recitals 87 and 88 of the opening decision.

3.2. REDUCED FEES FOR USE OF THE WASTE WATER TREATMENT PLANT

(37) Germany took the view that, as with the measure for the construction of the waste water treatment plant, if the fees to be charged by Propapier entailed aid it would constitute existing aid. Germany expressed the view that the Commission's decision in case N 644e/02, which authorised the 'Gemeinschaftsaufgabe' scheme, also covered indirect effects of the scheme.

(38) The Commission, however, concluded in the opening decision that possible aid in the form of reduced fees was not covered by decision N 644e/02, and if the fee constituted State aid that State aid would be new aid.

(39) In trying to assess whether the charges set provided an economic advantage to Propapier, the Commission in its opening decision expressed doubts as to whether the fees charged by TAZV reflected the full costs and whether a private investor would have set the charges at the same level.

(40) The Commission expressed the view that the fees charged to Propapier did not cover the full cost for the waste water treatment, as Germany acknowledged that these fees covered only 20 % of imputed interest on capital invested, since the 80 % subsidy which the municipality received from other public sources for the construction of the plant must not be taken into account for the calculation of imputed interest. In this respect, the Commission in its opening decision first established that neither Directive 2000/60/EC (hereinafter: 'the EU Water Framework Directive') ([15]), nor the KAG Brandenburg appeared to require that fees for the use of a waste water treatment facility should cover the full costs ([16]). The opening decision, however, referred to the InfraLeuna ([17]) and Kimberly-Clark/Scott ([18]) cases, in which charges set at the level of full costs were considered to correspond to the costs normally included in the budget of an undertaking.

(41) The complainant argued that, in order to establish the advantage, the level of the charges actually paid by Propapier should be compared with the level of the charges that a private investor, placed in the same situation as TAZV, would have charged.

(42) Germany suggested comparing the fees paid by Propapier to the average price observed in the sector and quoted a study which found the average price in the sector to be between EUR 0,24 and EUR 1 ([19]).

(43) The Commission observed in the opening decision that it appeared that the private investor principle might be applicable to the present case. However, it expressed doubts as to whether the use of a benchmark could exclude the presence of aid as the data presented appeared to be skewed. Even if the quoted fees from other municipalities were to reflect the full costs, different prices appeared to reflect different local realities, which for a private investor would justify different price levels. As a result, the Commission at the time doubted that the presence of an advantage for Propapier could be excluded on the basis of these data.

(44) As explained in recital 26, if the measure indeed constitutes new State aid within the meaning of Article 107(1) TFEU, the Commission has doubts about its compatibility with the internal market under Article 107(3) TFEU. If the fees turn out to constitute regional operating aid, there are doubts as to their compatibility as they are neither temporary nor reduced over time, nor do they seem to be targeted to compensating specific (unproven) handicaps of the region.

4. **COMMENTS BY GERMANY AND THIRD PARTIES ON THE OPENING DECISION**

4.1. DO THE PUBLICLY FUNDED INFRASTRUCTURE PROJECTS CONSTITUTE DEDICATED INFRASTRUCTURE FOR THE BENEFIT OF PROPAPIER?

4.1.1. **Car park**

Comments from the complainant

(45) In its opening decision the Commission did not accept the number of parking spaces submitted by the complainant. According to the complainant these figures (parking for 186 cars and 71 trucks) are taken from the preliminary development plan commissioned by the city of Eisenhüttenstadt.

([15]) Regarding the recovery of the costs for water services, Article 9 of the EU Water Framework Directive states that 'Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle'.
([16]) See recital 69 of the opening decision.
([17]) OJ L 260, 6.10.1999, p. 1, in particular Section II.4.4 and Section IV.3.3.1.
([18]) OJ L 12, 15.1.2002, p. 1, in particular recitals 196 and 201.
([19]) Germany also argued prior to the opening decision that in the Lenzing Lyocell case (OJ L 38, 8.2.2001, p. 33, recital 41), the Commission accepted evidence submitted by Austria showing that, in the second half of the 1990s, EUR 0,50 per cubic meter was the normal market price for waste water treatment. However, the Commission in the opening decision held that the Lenzing Lyocell case concerned a factual situation that pre-dated the present case by more than 10 years, and concerned a different Member State.

(46) The complainant argues that Propapier's original building plans do not mention the construction of a private car park, and that, even if Propapier is building its own car park, the so-called public car park still predominantly benefits Propapier: there is a sign allocating parking spaces to trucks for the power plant and the paper mill. In addition, the car park is in the immediate vicinity of Propapier's premises (extending right up to the paper mill boundaries and adjacent to the power plant, which was initially part of Propapier's project). The car park does not offer any rest facilities that can normally be expected from a public car park of this kind.

(47) The complainant claims that the location of the car park is inconvenient and too remote to serve other inner-city commercial locations and allow the municipality to close down car parks for trucks in the city centre.

Comments from Germany

(48) According to Germany, the car park does not constitute a selective advantage for Propapier. It is generally accessible and serves not only the Oder-Spree-Kanal industrial area. Germany adds that Propapier has its own parking space (213 spaces for cars and 27 for trucks) and that a building permit has already been issued for additional space for 120 cars.

(49) Germany disagrees with the complainant's allegations that the car park is predominantly benefiting Propapier and that the location of the car park is inconvenient and too remote to serve other inner-city commercial locations in the city of Eisenhüttenstadt.

(50) Germany explains that the sign — allocating parking spaces to trucks for the power plant — to which the complainant refers, was temporary and resulted from construction works in the power plant. These works were completed at the end of March 2011. Access to the car park is indicated along the new road, and does not refer to any specific company or installation.

4.1.2. **Road**

Comments from the complainant

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

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

Comments from Germany

(53) Germany argues that the new road will connect the current industrial park 'Industriegebiet am Oder-Spree-Kanal' and its northern expansion areas to the B-112 motorway. It reduces traffic and air pollution in the centre of Eisenhüttenstadt, enables trucks to avoid the city centre, and will reduce journey times for industrial and commercial traffic to Frankfurt (Oder) by at least one third. It is part of the overall development of the industrial area, which was planned back in 1993, and also gives enterprises in Frankfurt better access to Eisenhüttenstadt inner port. Germany claims that the road was already planned in the Oder programme of the *Land* government.

(54) It offers further development options for the ArcelorMittal and other industrial areas. The road was built in two stages; after some delay due to technical difficulties, the last Section was completed in 2013.

4.1.3. **Widening/deepening of the Oder-Spree Canal**

(55) In 2008, the City of Eisenhüttenstadt extended the industrial park 'Industriegebiet am Oder-Spree-Kanal' with a view to attracting firms. Germany argues that the widening and deepening work on the Oder-Spree Canal is part of the necessary regular maintenance of the waterway (which constitutes part of the Trans European Network TEN). Since 2003, sluices have been developed along the entire canal (currently the Kersdorf sluice, the construction of the Fürstenwalde sluice has been postponed). Germany claims that there is no link with the establishment of Propapier and no selective advantage for Propapier.

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

Comments from the complainant

(56) The complainant claims that the aid cannot fall under the scheme declared to be non-aid in the decision in case N 644e/02 since this scheme was not applicable when the investment aid for the construction of the TAZV waste water treatment plant was granted, as it expired at the end of 2006.

(57) The complainant also points out that the scheme is also not applicable because the waste water treatment plant does not provide a public service, but was built solely for predominant use by Propapier.

(58) The complainant suggests that the paper industry normally has its own waste water treatment plants for recycled paper mills, also in Germany, and therefore the German argument that companies are obliged to connect to the public sewage system is not valid.

(59) The complainant argues that the waste water treatment plant does not constitute part of a general economic development plan of the industrial area that would include all the potential investors in the park, but was developed and presented at the same time as the Propapier paper mill and the power plant, back in 2007. The Eisenhüttenstadt municipal draft decision on the development of the industrial park, dated 7 November 2007, refers to only two or three investors. The complainant claims that Eisenhüttenstadt only started promotional activities for the industrial area in 2010, and suggests that the city only started to look for new investors after Smurfit Kappa lodged its complaint.

(60) The complainant considers that the specific construction features of the TAZV plant clearly show that it was specifically tailored to the needs of Propapier. The technical characteristics of waste water treatment plants are very sector-specific. Waste water treatment plants for recycled paper mills normally comprise an anaerobic and an aerobic treatment phase, whereas standard communal sewage systems often only provide the aerobic treatment phase. The fact that the TAZV waste water treatment plant comprises both phases provides for the complainant an additional argument that it cannot be regarded as serving the public interest, but constitutes dedicated infrastructure for Propapier.

(61) The complainant is of the opinion that it is highly unlikely that capacity needs other than those of the Propapier paper plant (and its complementary power plant, now owned by EnBW) were taken into account when the plant was designed. The complainant argues that EnBW is not an independent user, since the power plant investment is in fact closely linked to the paper plant project and would not exist without the Propapier plant.

(62) The complainant remarks that the other investor in the area, 5N PV, uses only a negligible percentage of the available sewage capacity of the TAZV, and that its waste water treatment needs could have been covered by the already existing waste water treatment plant. In fact, as 5N PV had already been operating since May 2008, two years before the new TAZV plant became operational, it had initially used the existing waste water treatment plant.

(63) The complainant alleges that no forecasts exist of the expected sewage capacity needs for potential new investors, and that no information is given on whether and when this additional capacity would be operational. The complainant notes that currently there is in any case hardly any spare capacity left. The complainant also refers to a press article (*Märkische Oderzeitung* of 3 February 2011) reporting on a technical fault in an aeration tank, indicating that all the available tanks are needed for the current industrial users.

(64) According to the complainant, Germany implicitly confirmed that no other company will use the waste water treatment plant, by stating that the fees for the new TAZV plant are lower than those for the existing plant because the new plant does not require an expensive system of sewers between single users (hereby confirming that no new user will be added).

(65) According to the complainant, TAZV figures show that Propapier uses at least 90 % of the daily capacity of the plant.

(66) The complainant alleges that the modularity of the waste water treatment plant claimed by Germany is purely theoretical and does not lead to economies of scale, since a second module would cost 80-90 % of the first. The relatively high costs for adding modules support the finding that the initial investment of EUR 42 million principally benefits Propapier as a selective measure.

(67) The complainant suggests that the fact that the new TAZV plant is built in the immediate vicinity of the Propapier plant, next to the power plant and the paper mill, allows Propapier to reuse the biogas resulting from the anaerobic treatment of its waste water.

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

Comments from Germany

(69) Measures granted under scheme N 644e/02 are not aid.

Public infrastructure available to all under the same conditions

(70) Germany argues that the waste water treatment plant is not dedicated to Propapier: it constitutes public infrastructure falling under hazard defence and serves environmental protection as well as protection of the population against diseases. All current and future undertakings established in the Oder-Spree-Kanal area have the right to connect to and use the municipal waste water treatment plant under the same conditions. Fees are calculated according to the same principles defined by law. Waste water treatment in Germany is the responsibility of the municipalities, and connection to and use thereof is obligatory. Users cannot opt for any other service provider than the municipal body.

(71) Germany rejects the complainant's assertion that paper mills normally have their own sewage systems and are not obliged to connect to the communal sewage system, and states that Propapier is obliged by law ([20]) to connect to and to use the TAZV plant. Exceptions to the obligation to connect are very limited (only when impossible or unreasonable). There are only limited publicly available data on waste water treatment of paper producers, but those data show that a large number of paper mills are connected to communal waste water treatment plants.

Infrastructure not specifically set up for Propapier

(72) Germany disagrees with the complainant's statement that the TAZV plant was tailored to the technical needs of Propapier: the two-stage treatment of waste water is not specific to the paper industry but is common in many different industrial sectors, and several communal sewage plants comprise treatment of the waste water in two stages. The technical characteristics of the TAZV plant (two-stage biological process) were based on current technical standards, taking into account that a substantial part of the waste water would be highly polluted. Germany admits that communal sewage plants which treat only sanitary waste water or lightly polluted water do not normally have an extra pretreatment stage, but emphasises that the two-stage treatment is common practice for those which have to treat industrial waste water. Germany provided a list of 18 paper plants in Germany producing recycled paper and connected to communal sewage plants, claiming that both types of communal sewage plants (one-stage or two-stage) are in use in the paper sector.

(73) According to Germany, the waste water treatment plant forms part of a bundle of general infrastructure measures undertaken to develop the Oder-Spree-Kanal area. None of these measures are dedicated to any single undertaking. Decisions about construction, connection to and use of the plant fall outside the discretion of Propapier or potential users.

(74) Germany rejects the allegation that the TAZV waste water treatment plant was constructed specifically for Propapier. Germany explains that the construction was already planned in the context of other potential investments in 2004-2006, long before the arrival of Propapier.

(75) Germany explains that the existing capacity of waste water treatment infrastructure outside the industrial area was limited, and that its residual available capacity would only be sufficient to cover the needs of one additional (minor) investor; Germany confirms that 5N PV was indeed initially connected to the existing plant.

(76) Germany argues that the fact that the establishment of Propapier prompted the start on construction of the long-planned waste water treatment plant cannot be understood as a selective advantage for Propapier. Germany refers to the Opinion of Advocate General van Greven, who confirmed in Case C-255/91 (*Matra* v *Commission*) ([21]) that it is inevitable that in the start-up period the infrastructure is mainly used by the first company that has settled in the newly set-up industrial zone. This will however change if the region develops, as hoped for.

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

([21]) Opinion of Advocate General van Gerven of 28 April 1993 in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 28.

(77) Germany reports that all three undertakings currently established in the industrial park 'Industriegebiet am Oder-Spree-Kanal', namely Propapier, 5N PV and the EnBW power plant, are connected to and use the waste water treatment plant. Germany explains that several further establishments have been considered at different times (one or two fuel surrogate plants, a photovoltaic glass plant, investment proposals made to several investors in different sectors, and several potential investors have visited the site) but that, especially in the light of the crisis which has affected disadvantaged areas particularly badly, the further development of the industrial area will take time.

Current capacity

(78) Germany rejects the allegations by the complainant that Germany has not indicated the waste water capacity for the TAZV plant users, that Propapier uses at least 90 % of the available capacity, and that there is no spare capacity.

(79) Germany maintains that, in its current configuration, the TAZV waste water treatment plant does have spare capacity for potential new investors. The three current users together use a capacity of (< 500) (*) m^3/h, and the maximum capacity of the TAZV plant is 638 m^3/h. The total capacity use is thus approximately (60-80) % and there is spare capacity of approximately (150-250) m^3/h. The average capacity used by Propapier is (300-500) m^3/h, and the maximum is (400-500) m^3/h. Propapier thus uses (< 70) % on average and a maximum of (< 70) % of the total capacity of the TAZV plant.

Modular design of the TAZV plant

(80) Germany argues that the TAZV plant was intended from the outset to be extended in modular stages along with the step-by-step development of the Oder-Spree-Kanal industrial area. The modular planning of the plant is reflected in the 2007 TAZV abstract, which refers to potentially highly polluted water from the paper industry, bio-ethanol production and other industrial sectors.

(81) Germany explains that essential parts of the plant in the current phase are already dimensioned for maximal capacity after expansion: e.g. the nominal diameter of the 5 km pipe conducting the water to the Oder after treatment is more than three times larger than necessary for the current construction phase (it can carry a volume of 1 945 m^3/h, whereas the current maximum capacity of the plant is only 638 m^3/h), and TAZV has an option to expand the waste water treatment plant on a 3,3 ha adjacent land plot. Potential users will also have equal access to the waste water treatment plant after such modular expansion.

(82) Germany therefore maintains that the current high capacity utilisation share of the waste water treatment plant by Propapier is not proof of a selective advantage, but reflects only a snapshot picture, as the infrastructure is designed — through modular expansion — to serve further users under the same conditions. This will take time, because the waste water treatment plant is part of an overall economic development plan for the region, involving several expansion areas in different phases. The current situation with only three established investors is a transitional phase in the development of the industrial areas in this region since 1994. Approximately half of the Oder-Spree-Kanal industrial area (35 ha) is still available for new investors. Germany estimated in 2011 that this space would be occupied within a period of five years, and adds that further expansion would then still be possible in the new areas 'Nordost' (40 ha) and 'Nord' (160 ha).

(83) Germany rejects the complainant's view that the modular design of the TAZV plant will not lead to economies of scale. The German authorities explain that the modular extension of the TAZV plant is feasible in three phases, and for substantially lower costs per added m^3 capacity compared with the initial investment:

— Phase 1 (capacity increase of 33 %, adding 213 m^3) is feasible within a few months and would cost EUR 1,2 to 1,5 million, for an extra industrial area of approximately 19 ha,

— Phase 2 (capacity increase of 69 %, adding 426 m^3) is feasible within a few months and would cost EUR 5,3 to 5,6 million, for an extra industrial area of approximately 38 ha,

(*) Covered by the obligation of professional secrecy.

— Phase 3 (expansion on adjacent land; capacity increase of 100 %, adding 638 m^3) would cost EUR 17-18 million, for an extra industrial area of approximately 57 ha. A 100 % capacity increase would require exercising the option on the adjacent land plot and would cost up to EUR 18 million.

(84) Germany argues that the modular design of the waste water treatment plant is in line with the need to use resources efficiently and economically, and is to be seen in the context of previous over-dimensioning of waste water treatment plants in the new German *Länder*. To sanction such modular design as a selective advantage would in fact be an invitation to uneconomically oversize public infrastructure. In addition, the fees would not cover the costs for such oversizing.

(85) To characterise the current limitation of the plant as a selective advantage would result in encouraging uneconomic oversizing of infrastructure.

(86) Germany claims that the press article referred to by the complainant (see recital 63) is not relevant. According to Germany, to install an additional unused basin just for technical incidents would be contrary to the rules of frugal and economic planning imposed by the Gemeinschaftsaufgabe.

(87) The complainant stated that users of the new TAZV plant pay lower fees than those of the existing municipal plant because the new plant does not need an extensive pipe system to connect all users. Germany rejects the conclusion by the complainant that this shows that no new users can be added to the new plant. Germany holds that new industrial users can easily be connected, and that any limitation is mainly defined by the size of the pipe conducting the treated water to the Oder.

(88) Germany rejects the allegation by the complainant that Propapier can use the biogas produced by the TAZV plant. There is no possibility for the waste water treatment plant users to use the biogas. TAZV uses the biogas in its own 3 MW power plant.

(89) Germany rejects the allegation that it only started to promote the industrial park to other potential investors after Smurfit Kappa's complaint: as early as 1998, Eisenhüttenstadt entrusted the Investor Centre Ostbrandenburg with the promotion of industrial and commercial areas, including the Oder-Spree-Kanal area. Planning documents for the industrial park 'Industriegebiet am Oder-Spree-Kanal' have existed since 1995.

(90) Germany concludes that the TAZV plant does not constitute dedicated infrastructure to the benefit of Propapier.

(91) Germany also concludes that the infrastructure measures in the extended industrial park 'Industriegebiet am Oder-Spree-Kanal' (construction and provision of waste water treatment plant and the other measures — parking, road, deepening/widening of the canal) are general development measures which do not constitute a selective advantage for Propapier and are not dedicated to the use of Propapier. In Germany's view, the fact that the infrastructure is currently used only by a limited number of primary settlers is a normal transitional stage in such a development process.

4.2. IS THERE AN ADVANTAGE TO PROPAPIER THROUGH REDUCED FEES FOR THE USE OF THE WASTE WATER TREATMENT PLANT?

Comments from the complainant

(92) The complainant agrees with the Commission's position as expressed in the opening decision (see recital 63 of the opening decision and recital 38 of this Decision) that aid scheme N 644e/02 does not cover the fees for the use of the waste water treatment plant. The fees should therefore reflect the total cost of the use. The fact that the calculation of the fees is based on legislation (Kommunalabgabengesetz) does not justify lower fees and the resulting advantage for Propapier.

(93) The complainant argues that the waste water treatment plant does not provide a public service, but was built solely for predominant use by Propapier.

(94) According to the complainant, the three tests (full cost test, private investor test, benchmark prices) proposed by the Commission in its opening decision all show that the fees charged provide Propapier with an economic advantage.

Full cost test

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

Private investor test

(96) The complainant considers that, normally, a private operator or a paper mill owner wants to at least cover their full costs, and therefore this test corresponds to the above full cost analysis.

Benchmark prices

(97) The complainant agrees with the Commission's position as expressed in the opening decision that it is not likely that the use of benchmark prices can exclude the presence of aid. Comparing only paper mills using municipal sewage systems would not be representative, because most paper mills have their own waste water treatment plant.

(98) The complainant claims that Germany submitted only highly selective information on sewage fees paid by other paper mills (a study, a comparison with Spreetal/Schwarze Pumpe tariffs, and an old decision from 1990), and that these examples cannot constitute a basis for establishing a benchmark, inter alia, because these fees depend on subsidies and investment costs, and legislation may differ from one region to another. The complainant makes a comparison with its own plant using the municipal sewage system in (confidential information), and calculates that taking into account a construction investment of EUR 42 million (as in Eisenhüttenstadt) Propapier would have to pay EUR 4/m^3, which is far above what it now pays.

(99) The complainant claims that the article quoted by Germany was published in 2004 and is based on a study published in 2002 using data from 2000/2001. The complainant refers here to Annex 6 to Germany's submission of 30 January 2009, containing an article from the online news source 'Das Papier 2004-T174' ([22]). According to the complainant, the study covers only seven anonymous paper mills, and it is unclear whether they operate their own waste water treatment plant or are connected to the municipal system, and whether the costs considered include operational costs only (excluding capital or other non-operational costs). If the study compares only paper mills using their own waste water treatment facilities, capital costs should be included.

Comments from Germany

(100) Germany maintains its view that any State aid advantage resulting from the fees charged for the use of the TAZV plant would not constitute State aid as, in Germany's view, the Commission's decision in case N 644e/02 also covers indirect effects of the Gemeinschaftsaufgabe scheme, i.e. the fees). Germany further argues that the measure, which was considered in case N 644e/02 not to constitute State aid, could not become State aid at the level of the user. According to Germany, the Commission changed its approach regarding the issue of whether or not aid to an infrastructure operator can be passed on to the user of an infrastructure only after the General Court ruled on the Flughafen Leipzig-Halle GmbH case ([23]).

(101) Germany admits that the decision in case N 644e/02 had expired when the support was granted to TAZV. However, it points out that the relevant legal provision on which the decision in case N 644e/02 was based was identical to the one on the basis of which the measure for TAZV was granted. The legal basis has merely been updated, but its content has remained unchanged. Therefore, Germany argues, the mere updating of a legal basis does not automatically lead to qualification as State aid.

(102) Germany emphasises that the cost calculation is transparent and defined by law.

No economic advantage for Propapier

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

([22]) Available online at www.ipwonline.de

([23]) Joined Cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG* v *Commission* and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, later confirmed by the judgment of the Court of Justice of 19 December 2012 in Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*.

Applying the full cost method, there is no advantage

(104) Germany disagrees that the fee paid by Propapier does not cover the full cost. The cost calculation is prescribed by law (according to which it should in principle cover the costs, except that subsidies from third parties are not taken into account for the calculation of imputed interest ([24])). The law lays down that costs should be covered but must not be exceeded. All costs incurred by TAZV are covered, including interest on the TAZV part of the capital invested. Calculation of fictitious interest on subsidies from the *Land* would not be justified because TAZV did not incur such costs.

(105) Propapier enjoys no selective advantage as the fees are the same for all users of the newly built plant.

(106) Whether the fee would have been higher without the subsidies from the Gemeinschaftsausgabe scheme for the construction of the waste water treatment plant depends on many factors, such as the availability of other financing, among other things.

(107) Neither the 'polluter pays' principle nor the EU Water Framework Directive obliges the authorities to include subsidies in the calculation of interest on capital invested. The EU Water Framework Directive stipulates that costs of the water services should be recovered, but gives the Member States leeway regarding the manner of implementation. In the present case all costs of TAZV (the water service) are covered. The polluter pays principle is not absolute but has to be 'taken into account'. In the present case, it is taken into account through the calculation of all TAZV costs.

(108) The EU Water Framework Directive refers to an 'adequate' contribution. Germany notes that, compared with other regions in Germany or the European Union, the fee for Propapier is relatively high. Germany further notes that the EU Water Framework Directive also states that Member States may have regard to the social, environmental and economic effects of covering costs as well as the geographic and climatic conditions of the regions affected.

(109) Germany claims that comparison with the Kimberly-Clark or InfraLeuna cases (see also recital 70 of the opening decision) is not appropriate. The Kimberly-Clark case concerned a preferential tariff for one company, which gave rise to the suspicion that not all costs were covered. In the present case, all costs are covered and tariff conditions are the same for all users. In the Kimberly-Clark case an industrial zone was being developed for the specific needs of one company, while in the present case the industrial area is being developed for several settlers.

(110) The InfraLeuna decision concerns the price setting of private companies for the use of private infrastructure, while the present case relates to the use of municipal infrastructure and non-market-related fees which are prescribed by law. In the present case, the users bear all the costs which a waste water service company would normally have to bear. In a non-liberalised waste water treatment market, the cost items to be taken into account are the same for all companies and are prescribed by law (the Brandenburg KAG).

(111) The Wagner and Weida Leder decisions cited in the opening decision (recital 71 and footnote 19) concern subsidies for the construction of private waste water treatment plants. In the present case, however, Propapier does not receive subsidies for voluntary private investments, but it pays user fees which are imposed on it by law.

The private investor test is not applicable

(112) Germany considers that water is not a normal commercial product. The waste water treatment sector in Germany is organised as a regional monopoly of public municipal bodies. Waste water treatment in Germany is therefore not an economic activity but a mandatory public authority task for the municipalities. TAZV acts as a public authority and not as an undertaking whose conduct can be analysed applying the market investor test. In Germany, there is an obligation to connect and use. Users cannot opt for a service provider other than the municipal body. The fees are prescribed by law and decided by the authorities. The fees cannot exceed costs.

(113) The waste water treatment sector in Germany is accessible to private enterprises only to a limited degree. They can act only as manager, operator or concessionaire of a waste water treatment plant in the technical fulfilment of the legal provisions. Responsibility for the task remains, however, with the municipality and the municipality is not legally obliged to put the contract out to tender. Besides, private companies can execute technical tasks (or, in exceptional cases, charge fees), but the fees cannot exceed their costs in this case either. TAZV has not transferred any technical tasks to third parties.

([24]) Germany submitted a summary of German legislation and the texts of laws relating to the fee calculation in all 16 federal states. Imputed interest on subsidies cannot be taken into account according to any of these laws. See Annex 10 to the submission by Germany dated 1 November 2013.

(114) As the fees are prescribed by law and cannot exceed the costs of the infrastructure, there is no market in which waste water fees can be set by private companies with a view to profit-making. There is no competition between private companies or between private and public companies to have more users.

(115) Germany is of the opinion that in such a case it is not possible to compare the operator's conduct with the conduct of a private investor. The private investor test is therefore not applicable.

Benchmark prices

(116) Because of the obligation to connect to the waste water treatment plant, there is no competition and to that extent no market price either that could be used as a benchmark for assessing advantage under the State aid rules.

(117) Germany rejects the complainant's statement that only a few paper mills use municipal waste water sewage systems and that therefore it would not be representative for the sector to only use data from those paper mills as a benchmark.

(118) In its comments, Germany made the correction that Propapier does not pay a fee of EUR 0,95/m^3 (as stated in recitals 72 and 80 of the opening decision), but since 2010 a fee of EUR 1,18/m^3. Compared with other locations in the European Union, this is high or at least not unusual. According to a survey by the German association of paper producers, undertaken among 77 German paper companies, representing 68 % of the sector, the average fee for the year 2007 was EUR 1,12/m^3 (varying between EUR 0,31/m^3 and 2,20/m^3). The fee paid by Propapier is within the spread and above the average of that sample.

(119) In later submissions, Germany informed the Commission that the fee was increased in 2012 to EUR 1,41/m^3, in order to cover losses in the start-up years of the waste water treatment plant. As there had been some savings related to energy costs, and in line with the legal obligation that the fees have to cover but must not exceed the costs, since the beginning of 2013 the fee had been set at EUR 1,39/m^3. In addition, Propapier has to pretreat the waste water before conducting it into the TAZV plant. The costs for the pre-treatment amount to approximately EUR (…)/m^3, which brings the total cost for waste water treatment for Propapier to EUR (…)/m^3, compared with an average cost in the sector (in 2010) of EUR 1,27/m^3.

(120) Germany claims that comparison with fees paid by other paper producers in the European Union is the correct benchmark for verifying whether there is an economic advantage, and that the Commission's doubts that such a comparison would not be correct are unfounded.

(121) Germany indicates that the examples it communicated to the Commission are average prices based on full cost values. It claims that it had no reason to believe that these fees contained State aid.

(122) Germany argues that the example of Lenzing Lyocell ([25]) is valid, even if related to 10 years ago (Propapier pays more than double the fee but the fees have not risen by more than 100 % in the last 10 years).

Existing aid

(123) Germany advances two arguments in support of its view that the fees, if they constitute aid, would constitute existing aid pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999.

(124) Germany explains that the Commission concluded in 2003 in its decision in case N 644e/02 that the Gemeinschaftsausgabe scheme did not constitute State aid to the operators of waste water treatment plants, if they were constituted — as in the case of TAZV — in the form of a 'Zweckverband' (a municipal association under public law for a special purpose). The Commission based this assessment on the fact that the 'Zweckverband' was subject to oversight by the municipality, and that it was carrying out a public service. However, as the Commission itself pointed out in recital 57 of the opening decision, even if the scheme should have been seen in the meantime as aid due to the evolution of the internal market, it would be existing aid pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999.

([25]) See footnote 19 for an explanation of the relevance of this case.

(125) As explained in recital 100 of the present Decision, according to Germany, the decision in case N 644e/02 also covers indirect effects of the Gemeinschaftsaufgabe scheme, i.e. the fees. The fees never required separate notification, as the regulation relating to the fee calculation constitutes implementation of the scheme.

(126) With reference to the line of argument that the fees constitute existing aid, Germany states that the fees constitute aid that existed before the entry into force of the Treaty establishing the European Economic Community on 1 January 1958. Aid that existed before the entry into force of that Treaty also remains existing aid in the event of subsequent modifications, as long as the actual substance of the original aid scheme is not altered ([26]). Clarifications of general specifications applicable before 1 January 1958 do not constitute new aid that should be notified to the Commission ([27]).

(127) Germany explains that municipal charges laws already existed prior to the entry into force of the EEC Treaty in 1958 and continued to be applicable thereafter. §6(2) of the current KAG Brandenburg dates back, due to the fact that Brandenburg is situated in a part of the territory of the former Kingdom of Prussia, to the municipal charges law for the Kingdom of Prussia of 14 July 1893 (PrKAG) and the municipal charges law for Bavaria (BayGAG). Germany based this argument on the following sub-arguments:

(a) These laws continued to be in force between 1919 and 1933 and from 1933 to 1945.

(b) Today's Municipal Charges Acts of the old German *Länder* date back to the PrKAG.

(c) There is historical continuity between the KAG Brandenburg and the PrKAG, regardless of the special position of the new states due to the division of Germany.

Sub-argument (a):

(128) The PrKAG already included the possibility for municipalities to charge fees for the use of public infrastructure. The municipal charges regulation that has been in force in Bavaria since 1938 (and was the basis for a series of similar regulations in other states of southern Germany) also provides for this possibility ([28]). Pursuant to the PrKAG, the fees are normally calculated in such a way that the management and operational costs of the facility, including expenditure on interest and repayment of capital, are covered. Although the text of the PrKAG states only that the fees must cover the interest on capital (used for the infrastructure), later interpretations from the post-war period on the PrKAG implied that an interest rate on grants from third parties was not provided for under the PrKAG.

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

Sub-argument (b):

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

(131) After the creation of the Federal Republic of Germany in 1949, the PrKAG was gradually replaced in individual West German *Länder* by the various Municipal Charges Acts. With the replacement of the PrKAG by these state laws in the 1960s and 1970s, the system was clarified and the terminology adapted, but the actual substance of the law remained intact. In particular, third party subsidies remained outside the scope of imputed interest ([29]). Under the PrKAG interest was only to be calculated for debt. The calculation of interest in the state laws was extended to equity, but neither the PrKAG nor the German *Länder* laws provided for calculated interest on grants.

([26]) See *Gibraltar* v *Commission*, judgment of the Court of First Instance in Joined Cases T-195/01 and T-207/01 [2002] ECR II-2309, paragraph 111.

([27]) Judgment of the Court of Justice in Case C-44/93 *Namur-Les Assurances du Crédit SA* v *Office National du Ducroire et al.* [1994] ECR I-3829, paragraph 29.

([28]) Although the Bavarian law only states that municipalities are entitled to collect charges, a court ruling on its implementation refers to the relevant paragraph of the PrKAG for the principles of calculation of the charge.

([29]) See page 36 of the Legal Reasoning behind the Municipal Charges Act of North Rhine-Westphalia, LT-Drs 5/810.

(132) Germany therefore considers that today's Municipal Charges Acts of the old German *Länder* constitute a continuation of the provisions of the PrKAG. Germany suggests that for the purposes of this case it is particularly important to look at the Municipal Charges Act of North Rhine-Westphalia of 1969 ([30]), which served as a model for the KAG Brandenburg, and which replaced the PrKAG of 1906. The substance of the KAG Brandenburg remains the same as that of the PrKAG despite the necessary adaptation of the terminology (see recital 128 of the present Decision). It is important to note that the municipal charges acts of other federal states are also based on the PrKAG, which they also replaced (e.g. Rhineland-Palatinate, Schleswig Holstein, Hessen).

Sub-argument (c):

(133) Germany considers that the KAG Brandenburg has a special status resulting from the post-war division of Germany. The years following the foundation of the German Democratic Republic (GDR) put an end to municipal self-government with its independent sphere of activity in Brandenburg and the other East German *Länder*. Regulations were enacted at central government level. However, the Law on Municipal Constitution ([31]) of 17 May 1990 (enacted by the national chamber of the GDR before German reunification on 3 October 1990) restored municipal self-government and provided that municipalities must cover the costs of their operation from their own resources. For this, they became entitled to collect remuneration and charges for the provision of services.

(134) The KAG Brandenburg of 27 June 1991 was modelled on the Municipal Charges Act of North Rhine-Westphalia with virtually identical provisions.

(135) Germany argues that, despite the different evolution of the law in the former GDR, it would not be justified to treat the municipal charges acts of the East German States and those of the West-German States differently. It is clear that the KAG Brandenburg follows the legal tradition of the PrKAG and breaks with the legal heritage of the former GDR. There is also no institutional continuity between the GDR (waste) water treatment system and the current Brandenburg waste water treatment system. The Law on Municipal Constitution of 17 May 1990 was the foundation for the enactment of municipal charges acts in the new federal states. These acts were similar to those of the old federal states, which in turn date back to the PrKAG. This was an inevitable consequence of the new federal states joining the Federal Republic of Germany under the Constitution ([32]). This is especially clear from the development of the KAG Brandenburg, as described above. The KAG Brandenburg is in line with the legal tradition of the Municipal Charges Act of North Rhine-Westphalia and the PrKAG. The division of Germany and the resulting discontinuation of legal development in the East German federal states should not be allowed to lead to a disadvantage in the context of the interpretation of the KAG Brandenburg.

(136) Hence there is historical continuity between the KAG Brandenburg and the PrKAG.

(137) Germany further argues that the both the principle of equivalence and that of cost recovery existed already before the EEC Treaty came into force in 1958. The principle of equivalence requires that a charge should be proportionate to the service provided by the public authority. This is part of the concept of the rule of law, which is enshrined in the German Constitution. The principle of cost recovery follows from the PrKAG. Even if the principle is not strictly applied in all charge calculations, the charges revenue of a municipality would not significantly exceed its costs.

Observance of the principle of protection of legitimate expectations and the general principle of equal treatment

(138) Germany also claims that, if the Commission were to consider that the fees charged to Propapier contained operating aid, recovery of these aid components would be contrary to both the principle of legitimate expectations and the general principle of equal treatment.

(139) The principle of legitimate expectation means that: (1) a Union body must have given rise to justified expectations: and (2) a prudent economic operator could not have predicted the adoption of a measure likely to affect its interests.

(140) Given that the Gemeinschaftsaufgabe scheme (approved by the decision in case N 644e/02) was not considered to be aid, Propapier could have a justified expectation that it was not benefiting from State aid. Earlier, there was no doubt about the compatibility of these measures with Union law as no similar measures had been subject to scrutiny by the European Commission.

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

([31]) Gesetz über die Selbstverwaltung der Gemeinden und Gemeindeverbände in der DDR vom 17 Mai 1990.

([32]) Under Article 23, second sentence of the Basic Law in the version dated 23 May 1949.

(141) Recovery of the aid element not included in these fees after a finding that they constituted operating aid would also be contrary to the principle of equal treatment, which requires that identical facts be treated in the same manner. Recovery would provide an advantage to the competitors of Propapier.

4.3. COMMENTS FROM THE GERMAN MUNICIPAL ASSOCIATIONS AND THE VKU

(142) The German municipal associations and the VKU fully embrace the comments made by Germany in its submission of 28 January 2011, for which they collaborated. They specifically refer to the comments stating that waste water treatment in Germany is a sovereign non-economic task of the municipalities. The municipalities carry out the organisation and the financing of this task within the framework of their constitutional local self-government, in the interest of the citizen.

(143) The German municipal associations and the VKU explain that §6(2)(5) KAG Brandenburg, according to which the charges for the waste water treatment plant have to cover the costs, imputed interest and imputed depreciation, but subsidies are not to be taken into account for the calculation of interest on capital invested, is in the interest of the consumer. Since subsidies from third parties do not constitute own capital invested by the municipalities, consumers should not pay interest to the municipalities on these subsidies.

5. **ASSESSMENT OF THE MEASURE UNDER THE STATE AID RULES**

(144) The measures in question qualify as State aid if the following conditions are met: (i) the aid has to be granted by a Member State or out of State resources; (ii) it has to confer an economic advantage on undertakings; (iii) the advantage has to be selective, and (iv) the measure distorts or threatens to distort competition and affect trade between Member States. The existence of State aid is established when the conditions laid down in Article 107(1) of the TFEU are satisfied on a cumulative basis.

(145) Already in the opening decision, it was undisputed that all the measures in question involved the use of State resources and that they could potentially distort competition and trade in the internal market.

(146) The Commission notes that, with respect to the elements of the complaint, it is necessary to distinguish between: (1) alleged State aid to Propapier through dedicated infrastructure measures (construction of the waste water treatment plant, as well as certain other infrastructure projects in the newly extended industrial park where the new Propapier plant is situated); and (2) alleged aid to Propapier in the form of reduced waste water treatment charges.

5.1. ARE THE PUBLICLY FUNDED INFRASTRUCTURE PROJECTS GENERAL INFRASTRUCTURE OR INFRASTRUCTURE DEDICATED TO THE BENEFIT OF PROPAPIER ONLY?

(147) The Commission has considered in the past that public authorities can carry out work to develop their land. They can, for instance, finance investments into infrastructure which will benefit the population as a whole. Moreover, the Commission considers that the reason for setting up such infrastructure is irrelevant, provided it is in the interests of the local community as a whole. However, if such infrastructure will serve the needs of a private company only, that company is responsible for funding it. This follows from the fact that, where State aid is concerned, the Commission's remit is to analyse the impact of the measures concerned in practice, rather than the objectives pursued. In the present case, the Commission therefore takes the view that it is a matter of analysing which infrastructure is of benefit to the community as a whole (including Propapier) and which is of use only to Propapier. It is only the latter which should be financed by Propapier ([33]).

(148) The Commission observes that the car park, the road and the Oder-Spree Canal are not operated by undertakings within the meaning of EU competition law, because their use is free of charge. Therefore, the issue of State aid to the owners and operators of those infrastructures does not arise in this case.

5.1.1. **Car park**

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

([33]) Commission Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in 'Terra Mítica SA', a theme park near Benidorm (Alicante) (OJ L 91, 8.4.2003, p. 23), recital 64.

(150) Germany has submitted sufficient evidence that the car park was not built specifically for Propapier but was part of the economic development plan for the industrial park. Moreover, Propapier has private parking for 27 trucks and 213 cars. An additional 120 parking spaces for cars are planned (the building permit has been issued). Germany confirmed already at the time of the opening decision that Propapier's own parking capacity was sufficient to accommodate its employees, suppliers and visitors.

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

5.1.2. **Road**

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

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

5.1.3. **Widening/deepening of the Oder-Spree Canal**

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

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

5.1.4. **Waste water treatment plant**

(156) The Commission notes that the capacity of existing waste water treatment infrastructure outside the extended Oder-Spree-Kanal industrial area is limited. The residual available capacity of the existing waste water treatment plant in Eisenhüttenstadt could only fulfil the needs of a small additional investor, but would not be sufficient to meet needs if a large or several smaller industrial investors were to settle in the new area.

(157) The Commission also notes that the TAZV waste water treatment plant was not constructed specifically for Propapier. The construction was already planned in the context of other potential investments in 2004-2006, long before the arrival of Propapier. Germany submitted evidence showing that the waste water treatment plant was planned as part of the economic development of the industrial park 'Industriegebiet am Oder-Spree-Kanal'. Germany also produced evidence of several publicity campaigns to attract investors to the extended Oder-Spree Canal industrial area, which have however not been successful to date since the regional authorities have not yet managed to attract additional investors to the area (apart from Propapier, EnBW and 5N PV).

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

(159) Although as currently sized the TAZV plant mainly serves the needs of Propapier, it is also used — under the same conditions — by the two other companies settled in the area. Its modular design allows for its extension to additional users. Even without modular expansion, there is currently some (20-40) % spare capacity available for additional investors, with potential for doubling the present total capacity (see recitals 80 to 84). The waste water treatment plant is open to all users on a non-discriminatory basis — new investors settling in the park are obliged by law to connect to and use the plant — and it can also deal with waste water from companies not involved in paper production.

(160) The Commission is of the view that the fact that the TAZV plant is at present predominantly ((< 70) % on average and (< 70) % maximum) used by Propapier does not therefore necessarily mean that it constitutes dedicated infrastructure, as its modular design makes sense from an economic point of view in times of limited public budgets. Contrary to the complainant's claim, the cost of doubling the capacity of the TAZV plant, which is estimated by Germany to amount to less than 50 % of the initial investment cost, shows that the modular concept allows for realising economies of scale.

(161) The fact that the regional aid for the construction of the plant was granted subject to the settlement of a main investor, in this case Propapier, in the extended business park, is considered by the Commission to constitute good public management of scarce resources since it makes sense not to start building a major public infrastructure without ensuring that it will be used, and not to over-dimension it.

(162) The statement that paper mills normally have their own waste water treatment plants can be rejected on the basis of the figures presented by Germany. Although in-house waste water (pre-)treatment plants exist in the paper industry as well as in other industries, this in itself is not an indication that, in cases where industrial users use the municipal waste water treatment plant, an advantage is transferred from the State to the users, as users cover the costs over time with their fees.

(163) The Commission therefore concludes that **the waste water treatment plant constitutes general infrastructure** and thus the grant to TAZV does not constitute investment aid to Propapier. Unlike in the case of the car park, the road and the Oder-Spree Canal, the operator of the waste water treatment plant exercises an economic activity, because it offers a service (waste water treatment) against remuneration in the market. The Commission has found, however, that any aid granted to TAZV would in any event constitute existing aid (recitals 51 to 57 of the opening decision). Therefore, there is no need to further assess potential aid to TAZV in the present Decision.

(164) To sum up, the Commission concludes that the various infrastructure projects financed by State resources in the newly extended industrial park where the Propapier plant is situated are **not exclusively dedicated to the paper mill and therefore should not qualify as dedicated infrastructure and State aid to the benefit of Propapier.** This means that these aided investments do not constitute a single investment project within the meaning of paragraph 60 of the RAG with the regional investment aid approved for the paper mill of Propapier in the final Decision SA.23827 (2013/C) (see footnote 4). Thus, the assessment of the investment aid for Propapier which was the subject matter of that decision remains unaffected by the present Decision.

5.2. DO THE REDUCED FEES FOR THE USE OF THE WASTE WATER TREATMENT PLANT CONSTITUTE STATE AID?

(165) Regarding Germany's argument that, if a measure was granted to the operator under a scheme found to be a non-aid scheme, no 'aid' could be passed on to the user of the infrastructure, the Commission would point out again that the decision on scheme N 644e/02 did not state whether or not fees charged for the use of the infrastructure might constitute State aid to the users of the infrastructure. The Commission maintains its position expressed in the opening decision that no regulation on charges, which would be applicable to the grants under the notified scheme, had been brought to its attention and that therefore the decision authorising the scheme cannot be viewed as implicitly authorising possible aid of which the legal basis would be the Municipal Charges Act.

(166) Article 107(1) TFEU lays down that any aid granted by a Member State or through State resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the internal market.

(167) It must be pointed out that the existence of State aid has to be established irrespective of: (1) whether or not the EU Water Framework Directive and German legislation implementing the directive require the recovery of full costs of the provision of waste water treatment services; and (2) whether the fees comply with the provisions of these laws. In other words, measures fully complying with both the EU Directive and the applicable German legislation may still constitute State aid, if all the conditions laid down in Article 107(1) TFEU (see recital 144) are satisfied.

State resources and imputability

(168) The charges to be paid for using the waste water treatment plant are determined and collected by the municipality, in accordance with paragraph 6 of the *Kommunalabgabengesetz Brandenburg*. Setting the rate of the fees below the level a private investor would have charged would entail the municipality foregoing revenues.

(169) Thus, the measure would be granted by the State or through State resources as determined by Article 107(1) TFEU since the income of the municipality would fall owing to the advantage granted to Propapier.

(170) Setting the fees at an advantageous level would also be imputable to the State, as it is the result of an act of a public authority, i.e. the municipality of Eisenhüttenstadt.

Economic advantage

(171) As explained in the opening decision ([34]) the Commission was to assess whether the level at which the waste water treatment charges for Propapier are set provides a (selective) economic advantage to Propapier.

(172) It is established case law that the concept of 'advantage' embraces not only positive benefits, such as subsidies, but also measures which, in various forms, reduce the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect ([35]).

(173) Applied to the present case, the question therefore arises whether the waste water treatment charges for Propapier are lower than what a similar undertaking would have to pay under normal market conditions, in other words, whether the level of charges is in line with the market economy operator principle. This can, in the Commission's view, be determined in two alternative ways:

— comparing the price paid by Propapier to a benchmark price which can be typically observed in the Member State in question for waste water treatment,

— an *ex ante* profitability analysis that shows that a private operator would have charged the same level of prices.

Benchmark price

(174) In view of the organisation of the market, as described by Germany (see recitals 112-113), and in view of the fact that operators, even if private, cannot set the prices for their services freely since they are bound by law by the KAG Brandenburg, the Commission is of the view that it is not possible to establish benchmark prices that a private operator would have charged under normal market conditions.

(175) The Commission further notes that Germany provided data on prices paid by undertakings in the sector where Propapier is active. Although Germany claims that the benchmark prices it presented are averages which reflect full costs, there is no indication as to whether or not these fees contain State aid. The Commission's doubts regarding the usefulness of these data as a basis for comparison have not been alleviated. This is primarily because the Commission believes these prices may reflect different cost realities and may or may not include State aid.

([34]) See recitals 66 to 68 of the opening decision.

([35]) Judgment of the Court of Justice in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority of the European Coal and Steel Community* [1961] ECR 1; Case C-200/97 *Ecotrade* v *AFS* [1998] ECR I-7907, paragraph 34; and Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981, paragraph 15.

Ex ante profitability analysis

(176) Given the absence of reliable market benchmarks, the Commission takes the view that the fact that a transaction is in line with market conditions can be established on the basis of another generally accepted, standard assessment methodology. The Commission considers that, for infrastructure which is open to all and not dedicated to a specific user, the market investor/operator test is satisfied if the users of the infrastructure incrementally contribute, from an *ex ante* viewpoint, to the profitability of the operator ([36]).

(177) This is the case where the operator's commercial arrangement with the individual user allows the operator to cover all costs stemming from this arrangement with a reasonable profit margin on the basis of sound medium-term prospects ([37]).

(178) This assessment should moreover take into account all revenue and all expected incremental costs incurred by the operator in relation to the activity of the specific user ([38]).

(179) Such incremental costs encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs, arising from the presence of the user ([39]). In contrast, costs which the operator would have to incur anyway, independently of the arrangement with the user, should not be taken into account.

(180) On the basis of these factors, the Commission takes the view that the market investor/operator test is satisfied, i.e. **the reduced fee does not confer an advantage on Propapier** for the following reasons:

(a) it is concluded above that the waste water treatment plant is open to all and is not dedicated to Propapier;

(b) the fee paid by Propapier includes operating costs, maintenance and repair costs, personnel and charge management costs, imputed depreciation, and also imputed interest on 20 % of the investment capital invested in the waste water treatment; it thus covers all incremental costs incurred by the operator of the waste water treatment plant in relation to the activity of Propapier.

(181) As regards the reasonable profit margin that the user fees should cover in addition to the incremental costs, the charges in the present case cover not only the incremental costs but also imputed interest on 20 % of the investment capital. Whereas this is not expressly identified as reasonable profit for the purposes of the incremental cost approach defined above, it provides the operator with additional income just as a reasonable profit would do.

(182) Given that the fee does not confer an advantage and therefore does not constitute State aid, it was not necessary for the Commission to evaluate the question whether or not the fees constitute existing aid (see recitals 123 to 137) or operating aid (see recital 26), or to address the issue of compatibility of such operating aid with the internal market. In view of this finding, the Commission can also leave open the question whether or not recovery of the fees (had they been found to constitute operating aid) would be contrary to the principles of legitimate expectations and equal treatment.

6. **CONCLUSION**

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

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

([36]) See point 63 of the Commission Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
([37]) Idem.
([38]) For instance, if the operator needs to expand or adapt the infrastructure mainly to accommodate the needs of a specific user, such costs should be taken into consideration when calculating the incremental costs. See sentence 4 of Paragraph 64 of the Commission Guidelines on State aid to airports and airlines.
([39]) See point 64 of the Commission Guidelines on State aid to airports and airlines and recital 94 of the Commission decision in case SA.1885 — C 5/08 (ex NN 58/07) — Denmark — Illegal subsidy arrangements by Aarhus Airport Ltd in favour of Ryanair.

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 1 October 2014.

For the Commission
Joaquín ALMUNIA
Vice-President