



## The EU Guidelines on Environmental and Energy State aid for 2014-2020 and the Remediation of Contaminated Sites

**CABERNET 2014**

14th – 16th October 2014

Frankfurt am Main,  
Germany

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# A. Introduction



# Introduction – Financial Relevance

- Concerning the cost of contaminated sites, a new report issued by the European Commission gives evidence that the **allocation of financial contributions** for handling contaminated sites in the EU is quite different: “On average, **42 % of total expenditure** on the management of Contaminated Sites comes from **public budgets** in the countries surveyed, ranging from 90 % in Estonia to about 25 % in Belgium (Flanders). Annual national expenditures for the management of Contaminated Sites are on average about €10 per capita, ranging from approximately €2 in Serbia to more than €30 in Estonia. This corresponds to an average of €0.4 per million Euros of national GDP. Around 81 % of the annual national expenditures for the management of Contaminated Sites is spent on remediation measures, while only 15 % is spent on site investigations.”
- The presentation focus on the restrictions of the **European Union State aid law** for the remediation of contaminated sites and the recycling of derelict land, both key elements of the land resource management.



# Introduction: „What is SAM“?

- Financial state aids for the support of the cleaning-up of contaminated sites should be in line with the **EU-state aid law**, see Article 107 TFEU +:
  - *de minimis*-Regulation (18.12.2013)
  - General Block Exemption Regulation VO 651/2014 (17.6.2014)
  - State aid guidelines for environmental protection (09.04.2014)
- All these regulations are part of the current **state aid modernisation (“SAM”) agenda** by the European Union announced in summer 2013. The essay concentrates on the compatibility of national subsidies and other contributions to responsible parties. Taking the decisions of the EU-Commission dealing with brownfield reuse programmes into account, I undertake an analysis in particular of the new “Guidelines on environmental and energy State aid for 2014-2020”, which were adopted by the European Commission on April 9<sup>th</sup>, 2014. This will provide evidence that these new guidelines show shortcomings in the field of an intensive reuse of former contaminated sites.



# Key mechanism

1. Limited aid amount (< EUR 200,000 per beneficiary over three fiscal years, according to the ***de minimis* aid regulation**)
2. or limited aid intensity ( $\leq$  EUR 20 Mio. €) for investment aid (see **Section 4 of the General Block Exemption Regulation**). Measures covered by this Regulation include: Article 45 – Investment aid for remediation of contaminated sites
3. Other measures going beyond those thresholds (> EUR 20 Mio. €), or which concern other specific aid measures, have to be notified to the Commission and can be examined under:
  - a) the **2014-20 Guidelines on State aid for Environmental protection**, which encourage Member States to:
    - support the production of renewable energy and energy efficient cogeneration by allowing them to grant operating aid to renewable energy producing companies, covering the full difference between production costs and market price;
    - support for a whole range of measures increasing environmental protection, e.g. energy saving, district heating, going beyond Community standards, waste management or other measures.
  - b) If an aid category is not covered by special guidelines, it may still be directly assessed under and declared compatible with the **Treaty rules**.
    - Balancing of the positive effects of the aid (achieving the environmental protection objective, appropriate instrument, necessity and proportionality of aid) against the negative ones (distortions of competition and of trade between Member States).





# Listing of Regulations

- Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to **de minimis aid**, OJ L 352/1.
- Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (**“General Block Exemption Regulation”**), OJ L 187, 26.06.2014, p. 1–78 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>
- European Commission, Communication from the Commission: **Guidelines on State aid for environmental protection and energy 2014-2020** of 9 April 2014, C(2014) 2322, [http://ec.europa.eu/competition/sectors/energy/eeag\\_en.pdf](http://ec.europa.eu/competition/sectors/energy/eeag_en.pdf)



## B. *De minimis* rules





# De minimis-rules

- Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to ***de minimis* aid**, OJ L 352/1.
- The aid above the ***de minimis*-threshold, € 200.000** as the amount of *de minimis* aid that a single undertaking may receive per Member State over any period of three years, “can only be caught by the prohibition laid down” in Article 107 TFEU (ex-Article 87 EC), “if caused by them impairment of trade, which are noticeable”.



# C. General Block Exemption Regulation



# General Block exemption regulation (GBER)

17.6.2014

- The **Guidelines on environmental and energy State aid for 2014-2020** cover several categories of aid measures. The focus of the Guidelines is of course in the field of renewable energy. However, the public consultation brought a call to embrace aid on contaminated sites to the **General Block Exemption Regulation (GBER)**.
- Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (“General Block Exemption Regulation”), OJ L 187, 26.06.2014, p. 1–78
- (+), now included in the revised GBER making it quicker for public authorities to implement such measures without the need to obtain prior approval by the European Commission. Measures to be covered by the new Regulation include certain forms of aid to clean up of contaminated sites.
- **Guidelines are tailored in an interaction with the GBER**, which define grants up to 20.0 million EUR, which shall be exempted from the notification requirement of Article 108(3) TFEU.



# General Block exemption regulation (GBER)

## 17.6.2014

### In a nutshell:

- **Article 45 – “Investment aid for remediation of contaminated sites”**
- Remediation of polluted and contaminated sites may also be awarded aid of up to €20M (notification threshold, Art 4 No. 1 lit. u GBER). Only undertakings which are not liable for the damage caused may receive aid. The eligible costs are the total cost of remediating the land minus any increase in the value of the land and the maximum aid intensity is 100%.
- **Effect:** This leads to a reduced administrative burden for the authorities who support middle-sized redevelopment projects on brownfield.



# General Block exemption regulation (GBER)

## 17.6.2014

### Remediation of contaminated sites - Keywords

- (a) **Investment aid** to undertakings repairing environmental damage by remediating contaminated sites.
- (b) The investment shall lead to the **repair of the environmental damage**, including damage to the quality of the soil or of surface water or groundwater.
- (c) Where the legal or physical **person liable** for the environmental damage under the law applicable in each Member State without prejudice to the Union rules in this matter is identified, that person must finance the remediation in accordance with the 'polluter pays' principle, and no State aid shall be granted. Where the person liable under the applicable law is not identified or cannot be made to bear the costs, the person responsible for the remediation or decontamination work may receive State aid.
- (d) The **eligible costs** shall be the costs incurred for the remediation work, less the increase in the value of the land. All expenditure incurred by an undertaking in remediating its site, whether or not such expenditure can be shown as a fixed asset on its balance sheet, may be considered as eligible investment in the case of the remediation of contaminated sites.
- (e) Evaluations of the **increase in value of the land** resulting from remediation shall be carried out by an independent expert.
- (f) The **aid intensity** shall not exceed 100% of the eligible costs.





# General Block exemption regulation (GBER)

## 17.6.2014

- First requirement is the **absolute validity of the polluter-pays-principle** in No 65 of the preamble:  
“Aid for the remediation of contaminated sites is justified in cases where the person liable under the applicable law for the contamination cannot be identified. However, the conditions on environmental liability with regard to the prevention and remediation of environmental damage as defined in the Directive 2004/35/EC (...) of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage as amended by Directive 2006/21/EC (...) of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC and Directive 2009/31/EC (...) of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, (...) Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 should apply. Therefore, to facilitate the correction of existing environmental damage, this type of aid should be covered by the block exemption under certain conditions.”
- The Notification **thresholds (Article 4 I) control the interaction with the Guidelines on environmental and energy State aid for 2014-2020**. The GBER “shall not apply to aid which exceeds the following thresholds”. The first proof is lit. (u), dealing with “for investment aid for remediation of contaminated sites: EUR 20 million per undertaking per investment project” That means that the Guidelines on environmental and energy State aid for 2014-2020 remain applicable if the remediation costs and/or grant exceeds 20.0 million EUR – a quite normal sum in cases of heavily contaminated industrial sites.



## D. Guidelines on State aid for environmental protection and energy 2014-2020



# Former Guidelines 2008-2014

## ■ *The experiences with the former guidelines for grants for environmental protection 2008-2014*

- The guidelines 2008 picked up the considerations by the Commission **distinguishing between aid for remediation and aid for the relocation of enterprises**:
  - **Aid for the remediation of contaminated sites** (1.5.9.) “is intended to create an individual incentive to counterbalance the effects of negative externalities, where it is not possible to identify the polluter and make it pay for repairing the environmental damage it has caused. In such cases, State aid may be justified if the cost of remediation is higher than the resulting increase in the value of the site.”
  - **Aid for the relocation of undertakings** (3.1.11. ,No. 135): “Investment aid for relocation of undertakings to new sites for environmental protection reasons will be considered compatible with the common market within the meaning of ex-Article 87(3)(c) EC provided that the following conditions are met: a) the change of location must be dictated by environmental protection or prevention grounds and must have been ordered by the administrative or judicial decision of a competent public authority or agreed between the undertaking and the competent public authority; b) the undertaking must comply with the strictest environmental standards applicable in the new region where it is located”. The beneficiary can be (No. 136): a) an undertaking established in an urban area or in a special area of conservation designated under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, which lawfully carries out (that is to say, it complies with all legal requirements including all environmental standards applicable to it) an activity that creates major pollution and must, on account of that location, move from its place of establishment to a more suitable area; or b) an establishment or installation falling within the scope of the Seveso II Directive.” The idea is to reduce external costs by less harmful impacts.. “The aid intensity” (No. 137) “must not exceed 50 % of the eligible investment costs. The aid intensity may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises, as set out in the table”. The range of aid intensity for relocation is from 50% for large enterprises to 70% for small enterprises. In order to determine the amount of eligible costs (No. 138) in the case of relocation aid, the Commission will take into account a benefit-cost-consideration. Under consideration are in particular the profit from the selling or renting of the plant or abandoned property and the compensation paid in the event of expropriation. Furthermore, the commission will see i.e. the “the costs connected with the purchase of land or the construction or purchase of new plant of the same capacity as the plant abandoned”.



# Former Guidelines 2008-2014

- Based on this guidelines, the European Commission looked further into whether the plans e.g. of a municipality to finance remediation should be designated as state aid and if so, whether these plans are consistent with the internal market. **If in the single case the intended grant constitutes investment aid exceeding the threshold of € 7.5 million** above, a comprehensive assessment is required according to No. 160(b)(i) of the Environmental Aid Guidelines. According to the Environmental Aid Guidelines, a detailed assessment is to be conducted based on the negative and positive elements of the aid in question.
- The Commission proofs the compatibility of the Aid with Article 107(3)(c) TFEU following a **four-step-approach** (No. 167-171):
  - **market failure** by having a substantial impact on environmental protection.
  - **no other less distortive instruments** to achieve the same results
  - **Incentive Effect and Necessity** (the recipients changing its behaviour to increase the level of environmental protection)
  - **proportionality of the aid** (eligible extra investment costs necessary to carry out the remediation of the contaminated site)



# 1. Example: Saxonian Aid Scheme

- In 2009, the German Land **Saxony notified his “Aid Scheme for the Remediation of Contaminated Sites in Saxony (DE)”**. In the decision “State aid N 620/2009 – Germany”, the Commission decided on 10.12.2009 that the state aid is in line with the Community law. The established direct aid scheme granted 10 million € between 2009 and 2013 to undertakings in Saxony for the remediation of contaminated sites. The government of Saxony wanted to “give an incentive to undertakings who are looking for additional sites for new projects to (re)use existing contaminated sites instead of purchasing new uncontaminated ('green') sites.” Concerning the polluter-pays-principle, the requirements are fulfilled: „The German authorities confirmed that the aid will only be granted where the polluter responsible for the contamination of the site cannot be identified or cannot be made to bear the costs. According to the Soil and Groundwater Protection Regulation as a rule, the owner of the contaminated site or the person having caused the contamination is responsible for the remediation of contaminated sites as long as they can be made liable under the relevant German laws. Therefore State aid may only be granted where it is not possible for factual or legal reasons to make the polluter pay for the costs of the measure”. Furthermore, “the German authorities further confirmed that the increase in the value of the land is deducted from the eligible costs”.
- Related to case “State aid N 620/2009 – Germany” (see above), the government of Saxony notified a second time “SA.37901 Aid Scheme for the Remediation of Contaminated Sites in Saxony (DE)” under the EU Environmental Aid Guidelines 2008-2014. The new notification at DG Competition on 05.12.2013 deals with the **prolongation of the Saxonian Scheme from 01.01.2014 to 31.12.2014**. The Commission decided on 10.01.2014 regarding Article 4(3) not to raise objections.





## 2. Example: 3 Austrian cases regarding the polluter-pays-principle

- „State aid N135/2009 – Austria Aid for the Remediation of a Contaminated Site in Linz (AT) dealing with **Voestalpine Stahl GmbH**. The Commission decided on 12.10.2010. The grant was notified to pay € 146.27 million to the Voestalpine Stahl GmbH, a steel plant, for the remediation of a site contaminated i.e. with polycyclic aromatic hydrocarbons and mineral oil hydrocarbons for groundwater reasons. Regarding the polluter-pays-principle, we have to regard that according to Austrian legislation the beneficiary is not responsible for the contaminations until 1959. Therefore, the beneficiary is not liable under Austrian law for the contaminations caused on the site in question before the end of 1959. Austria has revised its Funding Guidelines in 2008 to ensure compatibility with the European provisions. The Commission paid special attention to the existence of a market failure: “According to point 167 of the Environmental Aid Guidelines, the Commission will verify ‘... whether State aid is targeted at [a] market failure by having a substantial impact on environmental protection’. In this context, particular attention must be paid to the expected contribution of the measure to environmental protection.”
- “State aid 197/2010 – **Austria**” deals with an individual aid for the remediation of the contaminated site in Unterkaernten. The Commission stated on 20.07.2010 that the grant of € 29.30 million to the Donau Chemie AG (a manufacturer of chemical products) for the remediation of a closed landfill site contaminated with hazardous substances is in line with EU law. The authorities found ca. 633 tons of chemical waste and estimated that the remediation costs will amount to € 45.28 million.
- SA.33496 (2011/N) – Austria – Single Case, Contaminated site, **DECON Umwelttechnik GmbH**. The Commission decided on 17.10.2012 that this grant is in line with the EU state aid law. The case concerns the remediation (removal of contamination) and the protection (solidification of contamination) of a contaminated site in Styria, resulting in the guaranteed restoration of a good quality of groundwater and of the waters of the adjacent Weiz River. The central legal question is whether we can identify a universal legal successor, who is liable for the damage. This was not the case.



### 3. Example: U.K. scheme

- The recent decision by the Commission is SA.37830 Prolongation of aid scheme “Support for Land Remediation” (N 221/2006) until 30/06/2014, which focuses on the United Kingdom.
- The U.K. scheme shifted in 2006/2007 from loans to grants. In the following years, the grants decreased significantly: While e.g. 2009/2010 the amounted grant was £12.92 million (the bids have been for £26.25 million), in 2013/2014 the amounts were £2 million only. The direct grant scheme has the primary goal of environmental protection. The scheme is valid from 01.01.2014 to 30.06.2014 and was notified at the DG Competition on 26.11.2013.
- The Commission stated in her decision of 17.12.2013 that the grant scheme is in line with the exception under Art. 107(3)(c) TFEU and regarded the related cases N221/2006 and N385/2002. The UK confirmed “that all other conditions and commitments set out in the Commission decision approving the State aid scheme N 221/2006 remain unchanged”. Therefore the conclusion was not surprising: “The Commission has accordingly decided to declare the prolongation of the State aid scheme N 221/2006 compatible with the internal market pursuant to Article 107(3)(c) TFEU.”



# New Guidelines 2014-2010

- On 17.01.2013, the European Parliament adopted a Resolution on State aid modernisation, after, the Commission set out an ambitious State aid reform agenda in the Communication on State aid modernisation **“SAM-State aid modernisation”** of 08.05.2012. The Commission saw the need for environmental measures continues. The European Commission revised the guidelines. The submitted draft for the consultation of 11.03.2013 contained some shortening in the field of state aid related to the remediation of contaminated sites. The Commission send in a second step “Draft Guidelines on environmental and energy State aid for 2014-2020” to a public consultation. The period of consultation was from 18.12.2013 to 14.02.2014. **Finally, the Guidelines were concluded on 09.04.2014 and are applied since 01.07.2014.**
- European Commission (ed.), **Communication from the Commission: Guidelines on State aid for environmental protection and energy 2014-2020**, C(2014) 2322, OJ No. C 200, 28.06.2014, p. 1–55, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628%2801%29>.



# New Guidelines 2014-2010

- In the Guidelines on environmental and energy State aid for 2014-2020, applicable on bigger projects exceeding 20.0 million EUR (see the preference for the GBER in Section 4 No. 244), the definition of a contaminated site (see section 1.3. No. 29) remains unchanged. Section 1.2 No. 18, lit. g calls “Aid for the remediation of contaminated sites” as one of the “environmental and energy measures for which State aid under certain conditions may be compatible with the internal market under Article 107(3)(c) of the Treaty”.
- According to section 3.0 No. 25 lit. b, for “aid for the remediation of contaminated sites” section 3.2. defines “general compatibility conditions”.
- The guidelines underline the dogma that state aid cannot be given, if a responsible party has to and is able to take the costs. In Fn. 40 to section 3.2.3 No. 44 we see:
  - “In particular, the Commission will consider that aid for contaminated sites can be granted only when the polluter – i.e. the person liable under the law applicable in each Member State without prejudice to the Environmental Liability Directive (Directive 2004/35/EC) and other relevant Union rules in this matter – is not identified or cannot be held legally liable for financing the remediation in accordance with the ‘polluter pays’ principle.”



# New Guidelines 2014-2010

- The aid intensities (Annex 1) **is now 100%** for all types of enterprises. The eligible costs (Annex 2) for the remediation of contaminated sites incurred according 3.2.5.1. (No. 73 lit. a and Fn. 47) the **costs for the remediation work, less the increase in the value of the land**. This is the same situation like with the previous guidelines. In the field of remediation, the benefit of the renewed guidelines 2014-2020, that have generally strengthened the rules of incentive effects and proportionality, is therefore not relevant.
- In Fn. 3 of Annex 2 we find the details: “The environmental damage to be repaired shall cover damage to the quality of the soil or of surface water or groundwater. All expenditure incurred by an undertaking in remediating its site, whether or not such expenditure can be shown as a fixed asset on its balance sheet, may rank as eligible investment in the case of the remediation of contaminated sites.” Moreover, Footnote 4 requires a professional evaluation: “Evaluations of the increase in value of the land resulting from remediation have to be carried out by an independent expert.”





# New Guidelines 2014-2010

- The most important aspect for the re-development of derelict land is, however, that in the Guidelines draft an **aid for the relocation** of enterprises (second type in the 2008 guidelines) **was not planned any longer!** Facing the critic (e.g. by the U.K. government), the European Commission re-integrated in section 3.11 the “aid for the relocation of undertakings”. However, No. 238 requires the following conditions: “The aim of investment aid for the relocation of undertakings is to create individual incentives to reduce negative externalities (indeed same wording like No. 54 of the 2008-Guidelines) by relocating undertakings that create major pollution to areas where such pollution will have a less damaging effect which will reduce external costs. The aid may therefore be justified if the relocation is made for environmental reasons, but it should be avoided that the aid is granted for relocation for other purpose.” This, i.e. the closed-list-requirement of an extra environmental protection (or energy utilisation), makes clear **that the relocation for reasons of re-developing land is included on the guidelines!**
- **Attention: However, this Aid for the relocation is not ruled in the GBER! No Relevance for cases  $\leq 20$  Mio. €!**



# New Guidelines 2014-2010

## ■ Two Examples:

1. In the Cork port relocation case (Ireland), funding was used to terminate the presence of the Seveso sites in the area, which was the major obstacle to the development of the Cork Docklands. The relocation of the Seveso activities, funded by a relocation grant was the precondition of the regeneration of the Docklands with increasing the population from before almost 500 to a target of some 22,000 residents, with 27,000 jobs, in the years to 2027.
2. Hamburg plans to develop its East (“Hamburger Osten”) including ca. 20.000 new flats; several Seveso sites and other industrial sites are located in this planning area.



# New Guidelines 2014-2010: Development concept „Hamburg East“





# New Guidelines 2014-2010

- Besides, my interpretation of the GBER leads to the **conclusion that we can include relocations caused by the distance requirements of the Seveso III-Directive 2012/18/EU**. It makes no real sense in the framework of environmental protection, to limit investment aid for remediating derelict or contaminated sites to contamination only. This should be extended to allow for rectification of brownfield land to enable a change in use. Only by using this opportunity, big cities can re-develop abandoned or less-used areas!
- This **shortcoming seems to be the biggest disadvantage of the new state Aid regulation system** for 2014-2020.



# New Guidelines 2014-2010

- In my opinion both, the GBER and the new Guidelines on environmental and energy State aid for 2014-2020 **should be interpreted in that way that the land-use-relocation grant is included in the regulations.** The main argument for this broad interpretation is the systematic reasoning as well as the goal of these regulations. The Notification thresholds (Article 4 (u)) GBER, dealing with “investment aid for remediation of contaminated sites”, and the Guidelines Section 3.11 No. 238, should be understood in that way that the terms “relocating undertakings that create major pollution” and “environmental reasons” should include Seveso-caused relocations (No. 239 b) **for reasons of re-developing land (change-in-use!)**. This can be justified because Directive 2012/18/EU of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, OJ 2012 L 197/1 sets-up rules for the prevention of major accidents which might result from certain industrial activities and the limitation of their impacts on human health and the environment. This not a violation of the principle of proportionality, because the relation between potential substantial damages and the grant is not critical.
- E.g. in Germany, pressure for permission authorities by Article 50 of the Federal Immission Control Act and the 12th. Ordinance to this act rule and the Judgment of the European Court (First Chamber) of 15.09.2011, C-53/10, Land Hessen v Franz Mücksch OHG [2011] OJ 2011 C 319, p. 5.





# E. Outlook



# Outlook

- The **logic of the Treaties Financial limits grants by the state in the remediation sector as state aids (Article 107 TFEU). The EU General Block Exemption Regulations 2014 and the Community Guidelines on State aid for environmental protection 2001-2014 give a clear framework** to investigate the preconditions of the exception according to Article 107(3)(c) TFEU to the general exclusion of state aid in the field of re-development of contaminated sites. The European Commission is thereby enabled to undertake a careful and even restrictive analysis on the preconditions of state aid not disturbing competition. In particular, the regulations frame the consideration of the benefits and disadvantages of direct grants by the state to remediation works effectively.
- The analysis of the development of the guidelines showed some exceeding, i.e. for the relocation of enterprises with a high emission level. It would be a wise decision, to amend the GBER and to **endure the relocation aid for an effective granting of brownfield redevelopment**. Besides, my interpretation of the GBER/Guidelines-system leads to the conclusion that we can **include relocations caused by the distance requirements of the Seveso III-Directive 2012/18/EU in the context development of contaminated sites**.







# Thanks for your attention!

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