State aid in water and wastewater sector in Poland

The Polish authorities consider that, on the basis of the Polish law provisions, granting of resources for the water and wastewater infrastructure, including new construction as well as modernisation and rehabilitation of an existing infrastructure, does not involve State aid.

In this respect, in order to conclude about the project and to grant the financial support, the following general and sector-specific issues were taken into account:

1. The Act on collective water supply and waste water treatment of June 7, 2001 (with further amendments) gives special powers to the municipalities to shape the water and waste water sector in its area, which include:
   a. The local authorities (municipalities) are obliged by law to organise water and waste water service provision on a local (municipal) market.
   b. A freedom to decide on an institutional and organisational set-up that would secure reliable and sustainable services e.g. in-house or outsource.
   c. Granting the licenses (zezwolenie) to provide collective water supply and sewage treatment services:
      i. Without such a license water and waste water activities cannot be carried out;
      ii. A license can only be obtained by a company with the necessary technical infrastructure to conduct business;
      iii. A license is granted for a specific range of services and within specifically defined area (can be a part of a municipality), so there can be several licences granted in a municipality with the services and area of operations specifically defined and not overlapping;
      iv. A license is granted for an indefinite period unless the operator requests otherwise;
   d. A power to control a service provider in terms of compliance of the activities performed with the license granted;
   e. Adopting the rules for water supply and waste water treatment service provision, including the rights and obligations;
   f. A single power to approve the tariffs for services.

2. The main characteristics of the institutional and organisational set up of the water and waste water services is as follows:
   a. Typically water and waste water services system is organised in either of the following set-ups:
      i. A company (or the municipality itself) which owns and operates the assets and provides the water and waste water services;
      ii. An asset holding company (or the municipality itself) owning the assets and the operator which is responsible for a proper maintenance of the assets and service provision;
   b. In both general set-up cases there can be a private or public or private-public or a combination of any of these entities involved;
   c. The municipality may decide to hold the ownership of the assets and grant a concession for a service provision only;
   d. There can be either separate water and waste water entities or combined entities providing both services in a municipality / geographic area;
   e. In case the municipality decides to outsource water and waste water services it needs to be assigned to through an open tender for a market price, which duly remunerates the public investment;
   f. In case the municipality decides to provide services in-house, it is typically done by either of:
      i. A municipally owned company established for water and waste water service provision;
ii. An association of municipalities established by several municipalities;
iii. A department within the municipality or other type of a municipal entity;

3. With regards to a potential competition on the water and waste water market the following aspects were considered:
   a. The water and waste water market is not liberalised and is regulated with a municipality playing a role of a regulator e.g. granting licences, setting the rules and conditions for services provisions, approving tariffs;
   b. The local markets of water and wastewater provision is closed to competition. An entry on the local market / geographic area of a new player, where at least one player is already present, is excluded. The municipality will not grant an operating licence to that new player as this would go against the rules applicable to the provision of water and wastewater services on the local level. According to the Act on collective water supply and waste water treatment of June 7, 2001 (with further amendments):
      i. A license can only be granted to a company which possess adequate technical means (e.g. infrastructure) to provide water and/or waste water services. Due to the natural monopoly character of the water and waste water industry it is not economically justified to maintain two (or more) parallel water / waste water systems in a predefined geographic area.
      ii. Based on the law provisions the municipality refuses to grant a license if there is already an operator chosen based on the public procurement procedure or the municipality itself or its organisational unit provides water and waste water services in-house

4. With regards to a potential distortion of competition on other markets than water and waste water, the following was taken into account:
   a. In case the water and waste water company is active on other markets open to competition, separate accounts are put in place refraining from and allowing verification of possible cross-subsidisation between different markets;
   b. According to the rules applicable to water and wastewater market in Poland, the beneficiary’s activity on that market will have no impact on other competitive markets, and in particular on the way the prices are set in those competitive markets;
   c. Tariffs are calculated according to the law on tariff setting which explicitly defines what costs can be included in the tariffs and that can only be costs related to a water and waste water service provision;
   d. The law also imposes that a full cost recovery principle is applied in tariff calculation;
   e. The tariffs proposal must be submitted to a municipality for approval and in case there are some justified doubts, a municipality has a right to reject tariffs and ask for a revision;
   f. Water companies are also obliged to adopt International Financial Reporting Standards (IFRS) / International Accounting Standards (IAS) which enforce clear record and allocation of costs as well as a principle of matching the costs and revenues;
   g. The accounting policies and practise of the water companies, including their financial statements are subject to an audit as per adequate regulation on accounting;

5. With regards to a potential distortion of competition on other geographical markets, the following was taken into account:
   a. Geographic boundaries of different local markets for water and wastewater services do not and will not overlap (natural monopoly). As a result, there is one player per predefined local market holding an operating licence (for provision of water and/or waste water services on that particular geographical market) granted by the responsible municipality;
   b. Mainly due to historical reasons, there may be several companies operating in a municipality; however every company has its own predefined geographic area of operations as well as their areas of activities are precisely defined and separated and never overlap;
   c. The entity holding a licence and operating water and waste water assets is the only one providing water and/or waste water services to final customers with a use of defined assets on a defined geographic area;
d. In case the company operates in more than one geographic area it needs to be granted a license (exclusive rights) by all municipalities concerned to operate in their respective areas;
Therefore, in case of the Polish water and waste water companies, the application of Article 107.1 TFEU could be excluded in the instances:

- The water companies hold exclusive rights in the local water market so the water market of their operation is closed to completion thus no risk of distortion of competition exists;

- In case the operation (e.g. concession) of infrastructure or services is outsourced it needs to be assigned to through an open tender for a market price, which duly remunerates the public investment. At a market-conform or cost-covering price the service provider active downstream may thus not derive an economic advantage from the operation of the infrastructure, and State aid rules do not apply (i.e. because there is no "economic advantage");

- If the water company is active on other product and geographic markets there are regulations in place enforcing separate accounts being implemented and preventing from any potential cross subsidisation therefore securing that granting of resources for the water and wastewater infrastructure will have no impact on other competitive markets;

In any case, the full responsibility for compliance with State aid rules lies with the Polish authorities. The beneficiaries are aware that the application of Article 107(1) TFEU cannot be completely ruled out in case the beneficiary is, or will become, active on other markets or geographic areas open to competition, therefore they run the risk of being required to notify the project in the future; hence, it therefore cannot be excluded that this may result in a lower than expected EC-grant (and possibly some grant repayment).

The Polish authorities are also aware that the financial measures may be considered State aid and may nonetheless be automatically compatible with EU rules and need not to be notified if the possible aid meets the conditions laid down in the Commission Decision concerning public service compensation for operation of service of general economic interest. This is however not considered to be implemented in Poland at this stage. Nevertheless it needs to be noted that if the application of the SGEI Decision would have been considered the projects and the beneficiaries of granting resources for the water and waste water infrastructure in Poland would have already met the criteria of the decision as regards entrustment, compensation and control of overcompensation.