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Competition DG

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Subject: SA.37265 (2014/NN) – Croatia - Alleged aid to Jadrolinija

Madam,

I. PROCEDURE

- (1) On 22 August 2013, Trajektna Luka Split d.d., ("Trajektna" or "the Complainant") lodged with the Commission a complaint alleging that the Split Port Authority is providing unlawful State aid to the State-owned Croatian ferry operator Jadrolinija ("Jadrolinija").
- (2) The Commission sent a preliminary assessment letter to the Complainant on 4 October 2013 stating, that on the basis of a *prima facie* examination the measure subject to the complaint does not involve the transfer of State resources and thus does not constitute aid under Article 107(1) Treaty on the Functioning of the European Union ("TFEU").
- (3) On 4 November 2013, the Complainant provided comments to the Commission's preliminary assessment letter.

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- (4) On 18 December 2013, the Commission forwarded a copy of the complaint to Croatia together with a request for additional information. Croatia replied on 17 January 2014.

II. BACKGROUND

2.1 The Port of Split and the Split Port Authority

- (5) The Port of Split is the largest Croatian passenger port. The Port of Split is managed by the Split Port Authority.
- (6) In accordance with the Croatian Maritime Domain and Seaports Act¹, port authorities are non-for-profit legal entities which manage, build and operate ports open to public traffic that are of particular economic importance to the Republic of Croatia.
- (7) The main activities of a port authority include: management, construction, maintenance, protection and improvement of a maritime domain constituted by a port area.

2.2 The Complainant

- (8) Trajektna is the private operator of the passenger terminal in the Port of Split. The company was privatized in 2003.
- (9) The core activity of the Complainant concerns passenger terminal operations in domestic and international traffic. The port services which the Complainant is providing concern mostly mooring and unmooring of ships as well as embarkation and disembarkation of passengers and vehicles. The provision of the port services by Trajektna is subject to port fees paid by the port users.

2.3. The Complaint and the alleged State aid measure

- (10) According to the complaint, in 2003 the Split Port Authority granted to Trajektna a concession to provide port services in the Port of Split. The concession was granted for duration of 12 years.
- (11) In accordance with the Maritime Domain and Seaports Act, the Split Port Authority is authorized to set the maximum port fees for port services provided by concessionaires in the Port of Split. As concessionaire, Trajektna is obliged to comply with those maximum port fees.
- (12) According to the complaint, the Split Port Authority set the maximum port fees for port services in domestic traffic at a level that is at least 40 % lower than those applied in other ports of Croatia.

¹ Narodne novine (NN; Official Gazette of the Republic of Croatia) Nos 158/2003, 100/2004, 141/2006, 38/2009 and 123/2011) - Zakon o pomorskom dobru i morskim lukama – Zakon.hr.

- (13) In addition, according to the complaint, the maximum port fees for port services in international traffic set by the Split Port Authority are significantly higher than those in domestic traffic. According to the estimates provided by the complainant, the fees for domestic traffic are, for the most part, between 45 and 70% lower than those for international traffic.
- (14) In consequence, considering that the provision of the port services in domestic traffic constitutes approximately 80 % of Trajektna's operations, the Complainant is forced to carry out its activities below cost.
- (15) The Complainant explains further that 90 % of domestic traffic in the Port of Split is operated by the State-owned ferry operator Jadrolinija. Considering that the maximum port fees in domestic traffic set by the Split Port Authority are significantly below those set in other Croatian ports, Jadrolinija receives a "direct substantial economic advantage", according to the Complainant. The advantage is allegedly the difference between (i) the port fees set on domestic traffic in other ports of Croatia, which the Complainant considers "market based port fees"; and (ii) the port fees set on domestic traffic by the Split Port Authority in the Port of Split.
- (16) Taking into account that the Split Port Authority granted to Trajektna the concession to provide the port services in the Port of Split, Trajektna should be regarded as having been granted special and exclusive rights in the meaning of Article 106 TFEU.
- (17) In accordance with Article 106 (1) TFEU in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
- (18) In view of the above, according to the complaint, Croatia by granting exclusive rights to Trajektna cannot circumvent its obligations under Article 107 TFEU. Consequently, the provision of Article 106 (1) TFEU would be void of any value in conjunction with Article 107 TFEU if it would not be applicable to resources of the undertaking which has been granted exclusive rights. Therefore, according to the Complainant, the resources of an undertaking which has been granted exclusive rights should be treated in the same way as the resources of public undertakings and thus should generally be seen as State resources.
- (19) Moreover, in the Complainant's view, as the State can impose on Trajektna the application of maximum port fees, Trajektna's resources in the form of income for port services are effectively under State control and to be seen as State resources.
- (20) The resources of Trajektna should be thus, according to the Complainant, considered imputable to the State. By selectively lowering the port fees in domestic traffic significantly below those charged in other Croatian ports (which the Complainant sees as the "market level"), the Republic of Croatia grants State aid to domestic passenger transport operators, in particular to State-owned Jadrolinija.
- (21) According to the complainant's estimations, the aid to Jadrolinija thus granted amounts to approximately EUR 4 million per year. The complainant argues that there is no legal basis

on which this aid can be considered compatible and that it thus constitutes illegal and incompatible State aid.

III. ARGUMENTS RAISED BY THE CROATIAN AUTHORITIES

3.1 Port fees and port charges

- (22) According to the Croatian authorities, in Croatian ports open to public traffic, port tariffs comprise of port charges and port fees:

Port charges

- (23) Port charges are adopted and made public by a port authority² on the basis of criteria laid down by the Minister responsible for maritime affairs following a proposal from the Management Board of the port authority, and comprise charges for using the quay, for demurrage and for berth. Port charges constitute the revenue of the port authority.

Port fees

- (24) Port fees are paid by port users for the port services provided and are made public by the concession holders that provide such services in ports. Port fees are revenue that belongs to the holder of the concession for the provision of port services. The maximum level of port fees is determined by the port authority³, but the holders of the concession (for example Trajektna) provide port services on a commercial basis and are free to set the level of the port fee that they charge users for a particular service, up to the maximum level set by the port authority.
- (25) According to the Croatian authorities the provision stipulating that the maximum level of the port fee is to be set by the port authority was adopted solely in order to protect the public interest, specifically to protect the interests of port users against any arbitrary setting of the level of port fees by concessionaires providing services in the port. When setting the maximum level of a port fee, port authorities must use the criterion of protecting the public interest, specifically the interest of the users of the port and the interest of the concessionaire providing services in the port area, in such a way that port services are accessible to users and that it is profitable for the concessionaire to provide these services.

3.2 Status of Trajektna

- (26) According to the Croatian authorities the right to provide port services in Croatian ports is granted on the basis of a concession awarded by the port authority following a public invitation to tender or on the basis of an application, depending on the type of concession.

² First paragraph of Article 62 of the Maritime Domain and Seaports Act.

³ Second paragraph of Article 63 the Maritime Domain and Seaports Act.

- (27) Furthermore the Croatian authorities explain that Trajektna is not the holder of the concession in the Port of Split, but can only lay claim to a priority concession⁴.
- (28) Trajektna obtained a priority concession for the provision of port services in the Port of Split on the basis of Decision No 2176 of 21 June 2004 (Priority Concession Contract No 2749 of 6 September 2004).
- (29) However, the Decision No 2176 of 21 June 2004 was annulled by a Judgment of the Administrative Court of the Republic of Croatia dated 5 January 2011⁵. The Split Port Authority filed an appeal against that Judgment to the Constitutional Court of the Republic of Croatia. The Constitutional Court by its Decision of 25 May 2011⁶ temporarily suspended the enforcement of that Judgment until the proceedings concerning the constitutional appeal had been completed.
- (30) In view of the above, according to the Croatian authorities, Trajektna is currently using the port area managed by the Split Port Authority without a valid legal basis.
- (31) Furthermore, the Croatian authorities' underline that Trajektna is an undertaking that is 100 % privately owned. The revenues of Trajektna do not constitute State resources but its own revenue. In the Croatian authorities' view, even if Trajektna obtains a concession to provide port services in the Port of Split, the resources earned through the payment of port fees by the port users would constitute the revenue of this company and not State resources.

IV. ASSESSMENT – EXISTENCE OF STATE AID

- (32) According to Article 107 (1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.
- (33) State aid within the meaning of Article 107 (1) TFEU is therefore present only if all the conditions stipulated therein are fulfilled, i.e. the measure is imputable to the State, involves a transfer of State resources, provides a selective advantage to the beneficiary, distorts or threatens to distort competition and affects trade between Member States.
- (34) Article 106 (1) TFEU provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

4.1 Transfer of State resources

⁴ Priority concessions were issued for a period of 12 years on the basis of the Maritime Ports Act (NN No 108/95, later replaced by the Maritime Domain and Seaports Act) and following a written application of the previously State-owned port operators. The aim of priority concessions was to give former social enterprises the time to adapt to competition.

⁵ Judgment No Us-12056/2010-3.

⁶ Decision No U-III-1202/2011.

- (35) For advantages to be capable of being categorised as aid within the meaning of Article 107 (1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State⁷.
- (36) First, the Commission analyses whether the requirement concerning the transfer of State resources has been fulfilled in the case at hand.
- (37) According to the Croatian Maritime Domain and Seaports Act⁸, exclusive rights are rights "*by which a part of maritime domain is partially or fully excluded from general use and is given for [...] economic exploitation to physical and legal persons registered for operating a business.*" A concessionaire obtains therefore exclusive rights for the economic exploitation of a part of a port and thus the right to provide port services to its users and to charge port fees for the provision of those services. The port fees charged constitute the revenue of the concessionaire.
- (38) In the Complainant's view, Croatia by granting exclusive rights to Trajektna in accordance with Article 106 TFEU cannot circumvent its obligations under Articles 101 – 109 TFEU. The provision of Article 106 (1) TFEU in conjunction with Article 107 TFEU would be void of any value if it would not be applicable to resources of undertakings which have been granted exclusive rights. According to the Complainant, the resources of an undertaking which has been granted exclusive rights should be treated in the same way as the resources of public undertakings, and thus should generally be seen as State resources.
- (39) In view of the information provided by the Croatian authorities, the Commission notes that the existence and scope of the Trajektna concession is subject to the pending legal dispute between the Split Port Authority and Trajektna. Nevertheless, it appears that in practice Trajektna provides port services in the Port of Split and that the Split Port Authority generally accepts this *status quo*, as it is currently obliged pursuant to the suspension Decision of the Croatian Constitutional Court⁹. Therefore, irrespective of the outcome of the pending legal dispute, Trajektna at present can be considered to be at least the *de facto* concessionaire in the Port of Split¹⁰.
- (40) However, public undertakings are defined differently than undertakings with exclusive or special rights. Specifically, public undertakings are undertakings "*over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it*"¹¹. The Commission notes that this is not the case for Trajektna, which is 100% privately owned.

⁷ Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium and Forum 187 ASBL v Commission of the European Communities* [2006] ECR I-5479, paragraph 127 and the case law cited.

⁸ Article 16 of the Maritime Domain and Seaports Act.

⁹ See recital (29) of the present Decision.

¹⁰ If in the end of the legal dispute the Croatian Courts consider that Trajektna has not been the lawful concessionaire in the present period, Trajektna will have been at least the *de facto* concessionaire during that period. If, however, the Croatian Courts consider that Trajektna has been the lawful concessionaire in the present period, Trajektna will have also been the *de jure* concessionaire during that period.

¹¹ The concept of public undertakings can be defined by reference to Commission Directive 2006/111/EC, of 16 November 2006, on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

- (41) There are significant differences between private undertakings enjoying exclusive rights and public undertakings. State aid rules can apply to public undertakings, since the resources of public undertakings can be considered State resources. On the contrary, State aid rules do not apply in principle to private undertakings, since their resources are not considered State resources. The mere fact that a private undertaking has an exclusive right cannot by itself alter this general rule.
- (42) Therefore the resources of the Complainant cannot be treated in the same way as those of a public undertaking.
- (43) Furthermore, the Commission notes that the granting of exclusive rights should be distinguished from the prerogative of the Port of Split to set the maximum port fees for the provision of port services. Without prejudice to the legality of such port fees with internal market rules, the determination of those maximum port fees by the Split Port Authority should be regarded as regulation imposed by the State on providers of the port services operating in Croatian ports. As specified by the Croatian authorities¹², this regulation has the legitimate aim of protecting port users from a certain degree of market power that Trajektna may enjoy as concessionaire in the Port of Split. The possible impact of such regulation on Trajektna's revenues does not in itself mean that its revenues should be considered State resources.
- (44) In accordance with settled case law, a regulation that leads to financial redistribution from one private entity to another without any further involvement of the State does not involve a transfer of State resources, if the money flows directly from one private entity to another, without passing through a public or private body designated by the State to administer the transfer¹³.
- (45) In the present case, the financial resources flow directly between the 100% privately-owned Trajektna and its customers who would otherwise (without the maximum limit for the port fees) have been charged higher prices. Therefore, the financial resources flow directly from one private entity to another, without passing through a public or private body designated by the State to administer the transfer.
- (46) In light of the above, the Commission concludes that the measure subject to the complaint does not involve the transfer of the State resources within the meaning of Article 107 (1) TFEU.
- (47) The above assessment is not affected by the fact that Trajektna enjoys *de facto* exclusive rights within the meaning of Article 106 (1) TFEU. Undertakings to which Member States grant exclusive rights cannot be solely for this reason regarded as being under public control, and thus it cannot be assumed for that reason alone that their private resources

¹² See recital (25) of the present Decision.

¹³ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 58 to 62. The Court held that the imposition of a purchase obligation on private undertakings does not constitute a direct or indirect transfer of State resources and that this qualification does not change because of the lower revenues of the undertakings subject to that obligation which is likely to cause a reduction of tax revenues because this constitutes an inherent feature of the measure. See also the judgment of 15 January 2013 in case T-182/10 *Concessioni Autostradale Veneti (Aiscat)*.

become State resources. Moreover, there is no risk of circumvention of State aid rules by the mere existence of exclusive rights in favour of a private undertaking. In principle, market forces oblige private undertakings to conduct their economic activity in a sustainable manner; otherwise they can be forced to exit the market. In the present case, Trajektna, as any private operator, assesses the business risks and profitable opportunities that are available in the market and acts accordingly. The Croatian authorities would not be able to use the mere grant of exclusive rights as a tool to circumvent State aid rules by forcing a private concessionaire to charge port fees at a level not sustainable for private undertakings, because in that case no private undertaking (that does not itself receive State aid) would ever be willing to enter into such a concession contract next time it is tendered.

- (48) Therefore, in the case at hand, the cumulative conditions for existence of State aid under Article 107 (1) TFEU are not fulfilled and the measure subject to the complaint cannot be considered contrary to Article 107 TFEU in conjunction with Article 106 (1) TFEU.

4.2 Fulfilment of the other conditions of Article 107 TFEU

- (49) Taking into account that the condition concerning the transfer of State resources to the alleged beneficiary is not fulfilled in the present case, the analysis on whether the Croatian authorities provide a selective advantage which distorts or threatens to distort competition and affects trade between Member States becomes redundant.

V. CONCLUSION

- (50) The Commission therefore concludes that the measure subject to the complaint does not constitute State aid within the meaning of Article 107(1) TFEU.

VI. DECISION

- (51) The Commission has accordingly decided that the measure subject to the complaint does not constitute State aid.

If this letter contains confidential information, which should not be disclosed to third parties, please inform the Commission within fifteen working days of receipt. If the Commission does not receive a reasoned request within that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site [http: http://ec.europa.eu/competition/elojade/isef/index.cfm](http://ec.europa.eu/competition/elojade/isef/index.cfm).

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition

Directorate for State Aid
State Aid Greffe
B - 1049 Brussels
Fax No: +32 2 296 12 42

We would ask you to state the case name and number in all correspondence.

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-president of the Commission