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C(2015) 2824 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State Aid SA.39637 (2014/N) – Germany
Extension of the cruise ship terminal in Wismar**

Sir, /Madam,

1. PROCEDURE

- (1) On 15 October 2014, Germany notified public support for a port infrastructure investment project in the port of Wismar. By letter dated 7 November 2014 the Commission requested additional information, which was provided by the German authorities on 14 January 2015.
- (2) By letter dated 20 February 2015 the Commission requested additional information on the notification, which was provided by the German authorities on 10 March 2015.

2. DETAILED DESCRIPTION OF THE AID

2.1. The objective of the notified project

- (3) The objective of the notified project is to upgrade the existing cruise ship terminal in the port of Wismar, located in northern Germany on the Baltic Sea. The cruise ship terminal is owned, administered and directly operated by the Hanseatic City of Wismar.

Seiner Exzellenz Herrn Frank-Walter STEINMEIER
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- (4) In the year 2002 the historic city centre of Wismar was recognized by the UNESCO as a World Heritage site, making the city more attractive for tourists. Following this and an increase of cruises in the Baltic Sea over the last decade, the objective of the project is to adapt the existing cruise ship terminal to meet demand in a growing market.
- (5) With this investment the Hanseatic City of Wismar hopes to increase the amount of calls of cruise ships in its port from 13 in the year 2014 to 18 in the year 2018.

2.2. Planned investments

- (6) The total investment cost of the notified project amounts to EUR 3 389 900.
- (7) The notified upgrade of the existing cruise ship terminal consists of the following measures and relevant investment costs:

Measure	Costs (EUR)
Dolphin pier extending the existing berth length to 240 meters	[...]*
Building for police and customs	[...]
Fresh water/waste water facility	[...]
ISPS security fence	[...]
Dredging	[...]
Supply area for cruise ships	[...]
Parking area for busses	[...]
Rain and waste water sewers	[...]
Road construction	[...]
Incidental building costs	[...]
Project total	3 389 900

2.3. Financing of the investment project

- (8) The project will be financed through a direct grant by the regional development institute of the Land Mecklenburg-Vorpommern (*Landesförderinstitut Mecklenburg-Vorpommern*) amounting to EUR 3.05 million. The remaining part of the investment cost, amounting to EUR 0.3399 million, will be financed by the Hanseatic City of Wismar through a loan on market terms.

* Confidential information.

- (9) The German authorities provided an analysis based on the funding gap¹ of the project, calculated as the difference between the discounted value of the expected net operating profits of the investment (EUR 143 361) and the discounted investment costs of the project (– EUR 3 026 318), which shows that over a reference period of 25 years (2015-2039) the project has a negative financial net present value (NPV) of – EUR 2 882 957. The negative NPV indicates that the project is not financially sustainable without public support.
- (10) For the analysis of the funding gap the German authorities provided information about the operating costs and revenues for the Hanseatic City of Wismar in the project scenario compared to the costs and revenues in the business as usual (BAU) scenario (i.e. without the investment).
- (11) As regards the costs, the German authorities compared the costs of operating the cruise ship terminal in the BAU scenario with the same costs in the project scenario.
- (12) As regards the revenues, the German authorities indicated port fees (*Hafenentgelte*) and quay-usage fees (*Kaibenutzungsentgelte*). The revenues from both categories of fees depend on the amount of calls of cruise ships in the port of Wismar. The port fees, furthermore, depend on the gross tonnage of the ships calling at the port and the quay-usage fees are charged per passenger and call of a cruise ship. In view of the expected increase of cruise ships after the investment, the German authorities compared the revenues from both categories in the BAU scenario with the revenues in the project scenario.

2.4. The beneficiary

- (13) The infrastructure, as well as the land on which it is built, is owned by the Hanseatic City of Wismar, which will also administer and operate the cruise ship terminal itself.
- (14) The terminal will be accessible for any interested user on a non-discriminatory basis. All users will be charged the same port fees in accordance with established and published tariffs. The German authorities provided data showing that the port fees charged in the port of Wismar are in line with fees charged in comparable ports in the Baltic Sea.

2.5. Competition context

- (15) According to the German authorities, the adaption of the cruise ship terminal in the port of Wismar will not significantly affect competition on the relevant market.
- (16) According to a market study provided by Germany, the relevant market must be seen as the market for cruises in the Baltic Sea. In this regard the market is defined by the nature of the services of cruises, which typically take place within a certain geographically predefined area (such as the Caribbean, the

¹ The funding gap is defined as the difference between the discounted operating profits of the investment (i.e. the profits deriving from the investment plus a possible residual value of the infrastructure at the end of its estimated economic life) and the total discounted investment costs during a given reference period.

Mediterranean or, as in the case at hand, the Baltic Sea), within which the cruise ships make calls at different ports. As such, while the Baltic Sea as such might compete with the Mediterranean for cruises, a port in the Baltic Sea does not compete with a port in the Mediterranean for calls by cruise ships.

- (17) Since the year 2000 the market for cruise ships in the Baltic Sea exhibited a strong growth. The number of passengers on cruise ships calling at ports in the Baltic Sea increased from 1.2 million in 2000 to 3.1 million in 2008 and 4.4 million in 2013. Thus, the average annual growth rate from 2000 to 2013 was 10.6% and in the period 2008 to 2013 7.5%.
- (18) The information submitted by Germany shows that in the year 2013 only 2 cruise ships called at the port of Wismar. In the year 2014, 13 cruise ships called at the port of Wismar, in line with the general trend of the growing market. This corresponds to a market share in the Baltic Sea of 0.5% of all calls of cruise ships. The market share of the port of Wismar with regard to total passengers corresponds to 0.35% of all cruise passengers in the Baltic Sea.
- (19) The investment project is projected to be completed in the summer of 2017. After completion of the project the estimated market share of the port of Wismar (in 2018) will correspond to 0.44% of all passengers and 0.7% of all calls in the Baltic Sea.

2.6. Legal basis

- (20) The national legal basis for the grant is the *Koordinierungsrahmen der Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur"*.

2.7. Form and duration of the aid

- (21) As indicated above, the funding takes the form of a direct grant by the regional development institute of the Land Mecklenburg-Vorpommern. The funding shall be disbursed in three tranches during the years 2015-2017. The last tranche shall be disbursed on 1 May 2017 and the investment project shall be completed by July 2017.

2.8. Cumulation

- (22) According to the notification a cumulation of the aid with other aid for the same eligible costs is excluded.

3. ASSESSMENT

3.1. Existence of aid

- (23) Article 107(1) TFEU provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (24) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must

confer an advantage on an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and must affect trade between Member States.

- (25) In the present case the existence of State aid must be examined on the level of the owner and operator of the terminal (Hanseatic City of Wismar) and on the level of the port users (cruise shipping companies).

3.1.1. *Existence of Aid on the level of the owner and operator of the terminal*

3.1.1.1. Notion of undertaking

- (26) According to established case law by the Court,² whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law.
- (27) As regards infrastructure financing the Court, in its judgment in *Leipzig-Halle*,³ established that it is the future use of the infrastructure, *i.e.* its economic exploitation or not, which determines whether the funding of the construction of such infrastructure falls within the scope of EU state aid rules or not. In line with this case law the Commission established in a series of decisions that the construction and exploitation of some types of port infrastructures constitutes an economic activity.⁴
- (28) The notified project concerns the extension of infrastructures at the cruise terminal of Wismar, which are commercially exploited by the Hanseatic City of Wismar by providing port services against remuneration (fees). There is undoubtedly competition between ports having cruise ship terminals in the Baltic Sea, which proves that there is a market for cruise ship related port services, on which the Hanseatic City of Wismar, through its operation of the cruise ship terminal, is in competition with other ports.
- (29) Thus, as regards the construction and operation of said cruise ship terminal the Hanseatic City of Wismar engages in an economic activity, and must therefore be considered an undertaking for the purposes of the present decision.

² See e.g. judgment in *Hofner and Elser*, C-41/90, EU:C:1991:161, paragraph 21; judgment in *Poucet and Pistre v. AGF and Cancava*, C-160/91, EU:C:1993:63, paragraph 17; judgment in *Commission v. Italy*, C-35/96, EU:C:1998:303.

³ Judgment of 24 March 2011, *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v. Commission*, T-455/08, and *Feistaat Sachsen and Land Sachsen Anhalt v. Commission*, T-443/08, EU:T:2011:117, confirmed by the Court of Justice, judgment in *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission*, C-288/11 P, EU:C:2012:821; see also judgment of 12 December 2000, *Aéroports de Paris v. Commission*, T-128/89, EU:T:2000:290, confirmed by the Court of Justice, C-82/01P, EU:C:2002:617; judgment of 17 December 2008, *Ryanair v. Commission*, T-196/04, EU:T:2008:585, paragraph 88.

⁴ See e.g. Commission Decision of 15 December 2009 in State Aid case no. N 385/2009 – *Public financing of port infrastructure in Ventspils Port*, OJ C 72 of 20.03.2010; Commission Decision of 2 July 2013 in State Aid case no. SA.35418 (2012/N) – Greece – *Extension of Piraeus Port*, OJ C 256 of 5.09.2013, p. 2; Commission Decision of 18 September 2013 in State Aid case no. SA.36953 (2013/N) – Spain – *Port Authority of Bahía de Cádiz*, OJ C 335 of 16.11.2013, p. 1; Commission Decision of 27 March 2014 in State aid case no. SA.38302 – Italy – *Port of Salerno*, OJ C 156 of 23.05.2014, p.1.

Economic vs. non-economic infrastructures

- (30) However, according to well established case-law, activities that normally fall under the State's responsibility in the exercise of its powers as a public authority are not of an economic nature and do not fall within the scope of the State aid rules.⁵ This may concern expenses for performing tasks of ensuring security, safety, police services,⁶ or anti-pollution surveillance in ports⁷ – insofar as they are not an intrinsic part of a project with a commercial end. The financing of such activities has to be limited to the costs to which they give rise and may not be used instead to fund other activities.
- (31) Thus, even if an entity that is engaged in an economic activity and must, therefore, be regarded as an undertaking for the purposes of State aid law receives public funding, it is possible that parts of its activities, due to their nature, fall under the State's responsibility in the exercise of its powers as a public authority. It follows that any funding received by an undertaking linked to such activities falling under the exercise of the State's public powers is not to be regarded as being linked to economic activities and, as such, does not constitute State aid.
- (32) In this regard, the German authorities argue that the construction of the police and customs building, amounting to costs of EUR [...], is not of an economic nature but falls under the State's powers as a public authority.
- (33) The Commission agrees with this assessment. Thus, the public funding related to its construction (EUR [...]) does not constitute State aid within the meaning of Article 107(1) of the Treaty.
- (34) As regards the financing of the road construction linked to the notified project the Commission recalls that public funding of general infrastructure that is not meant to be commercially exploited, such as public roads, bridges or canals, is in principle excluded from the application of the State aid rules, provided that it does not constitute dedicated infrastructure and is made available for public use without consideration on a non-discriminatory basis.⁸ This is not the situation in the case at hand. Germany, in its notification, stated that the road at issue is not a public road, the construction of which would fall under the State's powers as a public authority, but that it will be dedicated to the economic activity of operating the cruise ship terminal. The information provided by Germany indeed shows that the road to be constructed is located directly within the area of the cruise ship terminal. It will exclusively be used by the cruise ship terminal and in connection to its activity and, thus, constitutes dedicated infrastructure. The road construction in the present case therefore constitutes an economic activity.

⁵ See judgment in *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission*, C-288/11 P, EU:C:2012:821, paragraph 42.

⁶ Commission Decision N309/2002 of 19 March 2003 on *Aviation security - compensation for costs incurred following the attacks of 11 September 2001*.

⁷ Judgment in *Diego Cali & Figli*, C-343/95, EU:C:1997:160, paragraphs 22 and 23.

⁸ See Commission decision SA.38371 (2014/NN) of 15 October 2014 on *Tax advantages for the construction and operation of the Oresund Fixed Link*, para. 79.

3.1.1.2. State resources and imputability

- (35) As stated above, the project will be partly funded through a direct grant by the regional development institute of the Land Mecklenburg-Vorpommern (*Landesförderinstitut Mecklenburg-Vorpommern*) and, as such, is partly financed through State resources.
- (36) As regards imputability to the State, the decision to fund the specific construction project was directly taken by the German authorities. Therefore, the notified measure is imputable to the State.

3.1.1.3. Selectivity

- (37) As the public financing is granted specifically to an individual (construction) project used for carrying out an economic activity, the measure is selective.

3.1.1.4. Economic advantage

- (38) The public funding will be provided through grants. A grant is a non-refundable financial instrument which bears no financing cost. At market terms, such a financing instrument would not be available to the beneficiary.
- (39) The public financing to be provided, therefore, confers an economic advantage to the beneficiary.

3.1.1.5. Distortion of competition and affectation of trade

- (40) According to established case law, when financial support granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, there is at least a potential effect on trade between Member States and competition.⁹
- (41) In the present case, the financial support granted by Germany will be used for extending the existing cruise ship terminal in Wismar to adapt the port of Wismar to meet demand in the growing market of cruises in the Baltic Sea. It is expected that after completion of the project the cruise ship terminal in Wismar will be able to increase the number of calls by cruise ships. The project will, therefore, at least potentially distort competition between cruise ship terminals in the Baltic Sea.
- (42) Furthermore, the Commission observes that cruises in the Baltic Sea generally call at ports in different Member States. As such, due to the specific nature of the business model of cruises, the measure is at least potentially capable of affecting trade between Member States by potentially diverting commerce away from other Member States.

Conclusion on the existence of aid at the level of the owner and operator

- (43) In light of the above the Commission, therefore, concludes that the notified measure constitutes aid at the level of the owner and operator of the cruise ship terminal.

⁹ See e.g. judgment in *Philip Morris v. Commission*, Case 730/79, EU:C:1980:209, paragraph 11, and judgment in *Italy v. Commission*, C-372/97, EU:C:2004:234, paragraph 44.

- (44) As stated above, the public funding related to the construction of the police and customs building (EUR [...]) does not constitute State aid. It follows that out of the total amount of the public grant for the project (EUR 3.05 million) only EUR 2 776 300 are to be qualified as aid.

3.1.2. Aid at the level of port users

- (45) The Commission notes that port users shall enjoy equal and non-discriminatory access to the infrastructure. Furthermore, the information provided by the German authorities show that the fees charged to the port users correspond to the level of fees charged in comparable ports and, therefore, constitute market prices.
- (46) Thus, the Commission concludes that no advantage will be granted to port users and that there is, therefore, no aid present at the level of those users.

3.2. Compatibility of the aid

- (47) According to established case practice,¹⁰ the appropriate legal basis for assessing compatibility of State aid to port investment projects is Article 107(3)(c) of the Treaty, which stipulates that "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*" may be found compatible with the internal market.
- (48) It must therefore be examined if the notified public funding meets a clearly-defined objective of common interest, is necessary and proportional to this objective, has an incentive effect and does not affect competition and intra-EU trade to an extent contrary to the common interest.

3.2.1. Objective of common interest

- (49) In the Communication entitled *A Sustainable Future for Transport: Towards an integrated, technology-led and user-friendly system*,¹¹ the Commission underlined that the development of ports and intermodal terminals is key to achieving an integrated and intelligent logistic system in the EU.
- (50) In the Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Strategic Goals and Recommendations for the EU Maritime Transport Policy until 2018*,¹² the Commission underlines that providing new port infrastructures, as well as improving the use of the existing capacities, is essential to ensuring that EU ports can cope efficiently with their function.
- (51) According to the trans-European transport networks (TEN-T) Regulation,¹³ the Port of Wismar is considered as part of the European comprehensive network.

¹⁰ See Commission Decisions cited in footnote 4 above.

¹¹ COM(2009) 279/4, paragraph 46.

¹² See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Strategic Goals and Recommendations for the EU Maritime Transport Policy until 2018*, COM (2009) 8.

¹³ See Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, text available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32013R1315:EN:NOT>.

According to this Regulation, the TEN-T could be best developed through a dual-layer approach, consisting of a comprehensive network and a core network. The comprehensive network constitutes the basic layer of the new TEN-T and consists of all existing and planned infrastructure meeting the requirements of the TEN-T Regulation.

- (52) The above elements indicate that the project contributes to an objective of common EU interest and to the development of both an economic activity and an economic area.

3.2.2. *Necessity, proportionality and incentive effect of the aid*

- (53) The negative NPV (funding gap) of – EUR 2 882 957 over a reference period of 25 years shows that the expected net revenues of the Hanseatic City of Wismar do not cover the investment costs of EUR 3 116 200 (investment costs linked to the economic activity). The negative NPV indicates that the project is not viable without public support. It should also be noted that the Hanseatic City of Wismar makes an effort to fund the project itself, by contributing EUR 0.3399 million to the project with own resources financed through a loan on market terms. It is unlikely that the Hanseatic City of Wismar would be able to obtain the full remaining amount exceeding its planned own contribution on the market. Therefore, the Commission considers that the requested aid is necessary for this project.

- (54) With regard to the incentive effect of the aid, the Commission notes that the works for this project have not been initiated yet and that the application for the aid was, therefore, done before commencement of the project. In addition, as shown above, the Hanseatic City of Wismar would not be able to raise the funding required for carrying out the project itself, meaning that the project could not be carried out in absence of the aid. It follows that the aid must be regarded as having an incentive effect.

- (55) As regards proportionality (*i.e.* keeping public funding down to the minimum necessary), the Commission notes that the aid, *i.e.* the public funding provided for the part of the project qualified as an economic activity (EUR 2 776 300), is below the funding gap identified for the project (– EUR 2 882 957). Therefore, the aid is proportionate.

- (56) In the light of the above, the Commission concludes that the aid is necessary, proportionate and has an incentive effect.

3.2.3. *Distortion of competition and affectation of intra-EU trade*

- (57) As indicated above, the market share of the port of Wismar within the relevant market for cruises in the Baltic Sea currently corresponds to only 0.35% as regards passengers and 0.5% as regards callings of cruise ships.

- (58) This market share is estimated to increase, after the completion of the investment project, to 0.44% as regards passengers and 0.7% as regards callings of cruise ships.

- (59) The very low market shares held by the port of Wismar even after the completion of the investment project allow concluding that the aid for this project does not

affect competition and intra-EU trade to an extent that would be contrary to the common interest.

4. CONCLUSION

The Commission has accordingly decided:

- that the public funding related to the construction of the police and customs building (EUR [...]) does not constitute State aid; and
- not to raise objections to the aid amount of EUR 2 776 300 on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union

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Your request should be sent electronically to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission