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PUBLIC VERSION
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Subject: State Aid SA.42701 – (2016/N) – Germany  
Port of Kiel

Sir,

1. **PROCEDURE**

(1) On 13 October 2016 Germany formally notified public support for an infrastructure project in the port of Kiel. The project had been pre-notified to the Commission on 28 July 2015.

2. **DESCRIPTION**

2.1. **Objective**

(2) The notified project concerns the extension of the port area in the port of Kiel, more specifically in the eastern part called Ostuferhafen. Since the last extension of the Ostuferhafen in the years 1999-2004, several measures intended to adapt this part of the port to the requirements of a modern port (such as the adaptation of the port to the requirements under the ISPS-code) limited the areas available for the handling of goods and, as such, in effect prevented the Ostuferhafen from reaching the maximum capacities foreseen in the planning of the port. The notified extension is, therefore, intended to enable the port to overcome the bottlenecks created by these measures and to reach the originally foreseen capacity for handling of goods, in order to meet the existing demand in the market.

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The Port of Kiel used to be the main navy base of the imperial German navy from 1871 onwards. The area of land on which the notified project is foreseen to be carried out was used as an ammunition depot since 1877. As of 1933 the area was exclusively dedicated to the needs of the German navy and military ship building. In addition, a submarine bunker was located in the area during the Second World War. As such, the area was a primary target for air strikes by allied forces during the war. An analysis of the area carried out by the German authorities, therefore, showed that a large amount of ammunition as well as numerous bombs and other remains of the war and the navy base were still left in the soil. As a precondition to the extension of the port area and for reasons of public safety, these leftovers of the war must, thus, be removed from the soil.

2.2. The beneficiary

The Seehafen Kiel GmbH & Co KG ("Port of Kiel") is a public undertaking and is fully owned by the City of Kiel. It is the owner of the infrastructures in the port. It will also own and operate the notified extension of the port area and is, as such, the beneficiary of the notified measure.

2.3. The planned investments

The total investment costs of the notified project will be EUR 16.548 million.

The planned project consists of the extension of the area of the Ostuferhafen by 64,103 m², including the removal of the leftovers of the war and the navy base. Out of the area, 46,303 m² are planned to be used as public port areas for handling of goods. The remaining 17,800 m² will be, as part of the project, prepared to be usable in the future for other port functions.

The port area will be open on non-discriminatory terms to all users. All users in the port of Kiel are charged the same port and quay usage fees, which are established and published in a transparent manner. The quay usage fee also covers the use of the new port area. As such, there are no individual and additional fees for the usage of this new port area, unless it is used for a period of time exceeding what is regarded as normal usage of a quay (period of up to two days). In this case Port of Kiel charges storage fees, which are established and published in a transparent manner.

The German authorities showed that these fees correspond to the level of fees charged in comparable ports and are set at the highest level possible within the market context without jeopardizing the attractiveness of the port.

2.4. Financing of the project, duration and cumulation of the aid

The German authorities submitted a calculation of the estimated funding gap of the project, calculated as the difference between the discounted expected net operating profits of the investment (EUR 3.3 million) and the discounted investment costs (EUR 16.5 million) during a reference period of 25 years.

The calculations show that the project would be loss-making without public support, since, over a period of 25 years, the financial net present value is significantly negative (– EUR 13.2 million). This shows that the project is not financially sustainable without public support.
The project will be financed through a direct grant of EUR 9.9 million by the German Federal State Schleswig-Holstein. The remaining part of the investment costs amounting to around EUR 6.6 million will be financed by the Port of Kiel through loans on market terms.

According to the notification, a cumulation of the aid with other aid for the same eligible costs is excluded. The grant is planned to be paid out to the beneficiary in one single instalment.

2.5. Competition context

Germany submitted information concerning the potential effects on competition following the implementation of the notified project for ports in Denmark (in particular Fredericia, Aarhus, Copenhagen and Aabenraa), Sweden (Malmö and Gothenburg) and Poland (Gdansk and Gdynia).

Germany argues that notified project will not significantly affect competition in this market. Its main intention is to overcome bottlenecks in the port to enable it to reach its originally foreseen capacities by extending the port area by around 46 000 m². Germany submits that while this extension is of crucial importance to the Port of Kiel, the area by which the port is to be extended is nevertheless objectively relatively small.

According to the information provided by Germany, the port has a market share of around 5.5-6.5% within its catchment area. Any increases in volume of traffic linked to the notified project are expected to be in line with the future increase in demand in that market.

2.6. Legal basis

The foreseen national legal basis for the grant are §§ 23 and 44 of the Landeshaushaltsordnung Schleswig-Holstein (budget regulation of Schleswig-Holstein).

2.7. Transparency

Germany committed to publish, within six months of the granting act, on a comprehensive State aid website at national or regional level, the following information, which will be kept for at least 10 years and will be available to the general public without restrictions:

(a) the full text of the individual aid granting decision and its implementing provisions, or a link to it,

(b) the identity of the granting authority/(ies),

(c) the identity of the beneficiary, the form and amount of aid granted, the date of granting, the type of undertaking (SME/large company), the region in which the beneficiary is located (at NUTS level II) and the principal

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1 The remaining part of the overall extension of the port, namely around 18 000 m², will not be used as a port area for handling of goods, but will only be prepared, as part of the project, for a future use for other port functions (see recital (6) above).
economic sector in which the beneficiary has its activities (at NACE group level).

3. **Assessment**

3.1. **Existence of aid**

(18) 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.

(19) 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.

(20) In the present case, the existence of State aid must be examined on the level of the Port of Kiel, which manages and operates the infrastructure, and on the level of the users of the port.

3.1.1. **Existence of aid on the level of the Port of Kiel**

3.1.1.1. **Notion of undertaking**

(21) 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 is to be considered as an undertaking for the purposes of EU competition law. The Court has consistently held that any activity consisting of offering goods or services on a market is an economic activity.\(^3\)

(22) The Port of Kiel commercially exploits the port by making infrastructure and land available against remuneration and will continue to do so also as regards the infrastructure that is the object of the notification. There is undoubtedly competition between ports for the provision of transport related port services. The Port of Kiel thus provides services on a market in competition with other ports.

(23) Thus, the Port of Kiel engages in an economic activity, and must therefore be considered an undertaking for the purposes of the present decision with regard to the notified project.

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3.1.2. State resources and imputability

As stated above, the project will be partly funded through a direct grant by Schleswig-Holstein and, as such, is partly financed through State resources.

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.

3.1.3. Selectivity

As the public financing is granted to an individual beneficiary, namely the Port of Kiel, for the purposes of an individual project, the measure is selective.

3.1.4. Economic advantage

The public funding will be provided through a grant. 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.

The public financing to be provided, therefore, confers an economic advantage to the beneficiary.

3.1.5. Distortion of competition and affectation of trade

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.

The grant under assessment will be used to expand the area of the port of Kiel in order to increase its capacities for the handling of goods. As such, it will strengthen its competitive position and, therefore, at least potentially distort competition between different ports in Europe. Thus, the project is capable of affecting competition and trade between Member States by potentially diverting commerce away from other Member States.

3.1.6. Conclusion on the existence of aid to the Port of Kiel

In light of the above, the Commission concludes that the notified measure constitutes aid in the meaning of Article 107 TFEU to the owner of the planned infrastructure, namely the Port of Kiel.

3.1.2. Existence of State aid to the users

According to the information provided, the fees charged to the port users correspond to the level of fees charged in comparable ports. Port users shall also enjoy equal and non-discriminatory access to the infrastructure. In addition, according to the submissions the fees could not be further increased without jeopardizing the attractiveness of the port on the market.

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4 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.
Thus, the Commission concludes that no advantage will be granted to port users and that there is, therefore, no aid granted to those users.

### 3.2. Compatibility of the aid

According to well-established case practice, the appropriate legal basis for assessing 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.

It must be examined, in line with said well-established case practice, whether the State aid to the Port of Kiel meets a clearly-defined objective of common interest, is necessary and proportional to this objective, has an incentive effect, does not affect competition and intra-EU trade to an extent contrary to the common interest and complies with the transparency principles.

#### 3.2.1. Objective of common interest

In the established case practice mentioned in recital (34), the Commission has considered that improved port infrastructure contributes to common objectives of the EU. Furthermore, and more specifically, the trans-European transport networks (TEN-T) Regulation includes the seaport of Kiel as part of the European comprehensive network.

These elements show that investment aid to the project contributes to an objective of common EU interest.

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

The negative NPV (funding gap) of –EUR 13.2 million over a reference period of 25 years shows that the expected net profit of the Port of Kiel does not cover the investment costs of EUR 16.5 million. The Port of Kiel contributes with EUR 6.6 million to the funding of the project. It is unlikely that it would be able to obtain the amount necessary to cover the investment costs exceeding its contribution at market terms. Therefore, the aid is necessary for this project.

The Port of Kiel applied for the aid before the commencement of the works. In addition, the aid makes it possible for the Port of Kiel to carry out a project that it would not have been able to fund on a commercial basis, meaning that the project

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could not be carried out in absence of the aid. It follows that the aid must be regarded as having an incentive effect.

(40) According to the established case practice referred to in recital (34), aid to port infrastructures is considered to be proportionate if its amount does not exceed the funding gap of the project. The amount of aid foreseen to be granted to the Port of Kiel is EUR 9.9 million. It follows from the calculations shown at recitals (9) and (10) that this amount does not exceed the funding gap of EUR 13.2 million. The aid is, therefore, proportionate.

(41) In the light of the above, the aid is necessary, proportionate and has an incentive effect.

3.2.3. Avoidance of undue negative effects on competition and trade between Member States

(42) The German authorities have submitted information regarding the market and the competition context within which the Port of Kiel operates. The market information as well as projections contained therein are reasonable and can, as such, be accepted.

(43) This information, in particular, shows that any increase in handling capacities in the Port of Kiel will be in line with the future increase in demand in the market and will, therefore, be counterbalanced by market growth.

(44) Based on the above elements, the Commission concludes 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.

3.2.4. Transparency of the aid

(45) Lastly, the Commission observes that Germany committed to comply with the transparency principles.

4. CONCLUSION

The Commission has accordingly decided:

- not to raise objections to the aid 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.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by 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://ec.europa.eu/competition/elojade/isef/index.cfm.
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