



EUROPEAN COMMISSION

Brussels, 10.3.2017
C(2017) 1718 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>	<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: State Aid SA.46644 (2016/N) - Aid for the construction of railway tracks in the port of Lübeck

Sir,

1. PROCEDURE

- (1) On 12 September 2016, Germany notified public support for a seaport infrastructure project in the port of Lübeck.
- (2) On 31 October 2016, the Commission requested additional information from Germany, which was provided on 29 November 2016. The Commission requested more additional information on 10 January 2017 which Germany provided on 8 and 22 February and on 6 March 2017.
- (3) On 22 February 2017, Germany agreed that the present decision would be adopted and notified in English.

2. DESCRIPTION

2.1. Objective of the notified project

- (4) The notified project concerns the decommissioning and construction of railway tracks complementing an EU-funded project for the redevelopment of the port

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areas for storage and transmission of liquefied natural gas ("LNG"). The project aims at enabling the delivery of LNG to the port of Lübeck by train and subsequently to increase the long-term use of LNG as ship fuel.

2.2. The beneficiary

- (5) The port of Lübeck is located at the Baltic Sea in Northern Germany. The port of Lübeck is the most South-Western transshipment centre at the Baltic Sea and is linked to the transport corridors between Southern, Western and Central Europe and the Baltic economic area. It is considered as a part of the European core network.
- (6) The beneficiary of the aid will be the Lübeck Port Authority ('LPA'), which operates the port and which is part of the municipality administration of the Hanseatic City of Lübeck. The railway tracks, as well as the land on which they will be built, will be owned by LPA. LPA will also operate the railway tracks.
- (7) Germany claims that the public funding of the notified project does not constitute State aid to any beneficiary because it does not relate to any economic activity. Moreover, the newly built infrastructure will be accessible to all users on a non-discriminatory basis at market prices comparable to other ports in the region, as required under regulatory laws, although it does not form part of the general German rail network. Germany further argues that a market failure exists and that the public support would therefore be necessary.
- (8) Alternatively, should the Commission consider that the funding of the notified project constitutes State aid, Germany considers the aid would be compatible with the internal market in accordance with Article 107(3)(c) of the Treaty.

2.3. Planned investment

- (9) The total project costs amount to EUR 1 177 045.
- (10) Based on the information submitted by Germany, the project consists of three sections (building lots):
 - Lot 1 (cost of EUR [...]*): central phase of decommissioning of old and construction of new rail tracks on an area of approximately 2 740 m².
 - Lot 2 (cost of EUR [...]): dismantling of tracks on an area of approximately 1.100 m².
 - Lot 3 (cost of EUR [...]): extension of the tracks in direction south-west from lot 1 over an area of approximately 1.000 m².
- (11) An additional amount of EUR [...] is kept aside and includes a [...] % margin for unforeseen cost, planning cost of [...] %, framework planning and developer's cost. Germany confirmed that the margin for unforeseen cost could not be used to cover expenses outside the notified investment project. Once the project has been completed, expenditure evidence ("*Verwendungsnachweis*") has to be submitted

* Business secret

to the granting authority, i.e. the Land Schleswig-Holstein. Only expenses related to the notified investment project will be eligible for aid.

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

- (12) The project will be financed through (i) a direct grant by the Land Schleswig-Holstein (through the Investitionsbank Schleswig-Holstein)), amounting to EUR 509 069, and (ii) a loan provided by the Hanseatic City of Lübeck to LPA on market terms, amounting to EUR 377 789, and (iii) EU funds provided by the EU's Innovation and Network Executive Agency INEA, amounting to EUR 290 187.
- (13) The funding is planned to be disbursed in the course of the year 2017.
- (14) The German authorities submitted a calculation of the estimated funding gap of the project, calculated as the difference between the discounted value of the expected net operating profits of the investment of EUR [...] and the discounted investment costs of the project of EUR 1 177 045, over a reference period of 26 years.
- (15) The calculations show that the project would be loss-making without public support, since over 26 years the financial net present value (NPV) is significantly negative (– EUR [...]). Without public support the project is therefore not financially sustainable.
- (16) National funds will be cumulated with EU funds, without however exceeding the actual investment costs.

2.5. Competition context presented by the German authorities

- (17) According to the German authorities, the project will not significantly affect competition. Germany argues that the project will not lead to an increase of the handling capacity of the port of Lübeck and that therefore it would not undermine the competitive interests of other Baltic ports. The measure would merely support the environmentally-friendly use of the existing port capacity by ensuring the appropriate connection to the future LNG terminal.
- (18) Germany further argues that, if present at all, a minor impact on competition and trade between Member States would be counterbalanced by the fact that the LNG supply by train could incentivise other ports in Europe, especially in the Baltic region, to use more environment-friendly solutions.

2.6. Legal basis

- (19) Public funding for this project has been awarded by the *Koordinierungsrahmen der Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur"* ("GWR").

2.7. Transparency

- (20) Germany committed to publish, within 6 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,
- 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 economic sector in which the beneficiary has its activities (at NACE group level).

3. ASSESSMENT

3.1. Existence of aid

- (21) Article 107(1) of the Treaty on the Functioning of the European Union (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 to an extent contrary to the common interest, be incompatible with the internal market.
- (22) 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.
- (23) In the present case the existence of State aid must be examined at the level of the owner and operator of the port infrastructure (LPA) and at the level of the port users.

3.1.1. Existence of Aid at the level of the owner and operator

3.1.1.1. Notion of undertaking

- (24) The notified project concerns the construction of rail infrastructure in the port of Lübeck which is commercially exploited by LPA by operating the infrastructure and providing railway port services against remuneration.
- (25) Thus, as regards the construction and the operation of the port infrastructure LPA engages in an economic activity, and must therefore be considered an undertaking in the meaning of Article 107(1) TFEU.
- (26) Germany claims however that the railway infrastructure in the port area does not relate to an economic activity (see recital (7)).
- (27) In this regard, the Commission recalls that the construction of railway infrastructure that is made available to potential users on equal and non-discriminatory terms, indeed, typically does not affect trade between Member States or distorts competition, since such infrastructure (i) typically does not face direct competition, (ii) is typically subject to only insignificant private financing in the Member State concerned and (iii) typically is not designed to selectively

favour one specific undertaking or sector but rather society at large.¹ However, in the present case, the aforementioned condition (iii) is not met because the rail tracks in question are located within the area of the port of Lübeck and will be used exclusively to transport LNG to the port's LNG terminal, thereby enabling the port to provide fuel for LNG fuelled ships and increasing the port's ability to attract demand from ships using it.

- (28) In this context, the information provided by Germany, in particular, shows that due to the location of the end points of the tracks within the port no transit traffic can be carried out via the tracks. The information provided by Germany neither shows that passenger transport through these tracks is foreseen. Therefore, trains will not use them for any other purpose than the delivery of LNG. As such, the rail tracks will exclusively be used in connection with the economic activity carried out by the LPA, i.e. providing port services against remuneration and, in particular, allowing LNG fuelled ships to tank in the port. It follows that these tracks cannot be regarded as constituting part of the general and comprehensive rail network of Germany, as Germany also admits (recital 7) but must be considered as being intended to solely favour the activity of the port of Lübeck. The Commission has already taken this position in similar cases involving aid to construction of rail tracks in ports².
- (29) The Commission, therefore, concludes that the rail tracks in question are solely dedicated to the economic activity of the port and that, therefore, also their construction and operation is an integral part of the economic activity carried out by the port of Lübeck. By subsidising their construction costs, the planned public funding is thus liable to favour an undertaking within the meaning of Article 107(1) TFEU.

3.1.1.2. State resources and imputability

- (30) As stated above, the project will be partly funded through a direct grant by the German authorities and it is therefore partly financed through State resources. The EU funds provided by INEA are not regarded as stemming from State resources.
- (31) As regards imputability to the State, the decision to fund the project was directly taken by the German authorities. Therefore, the notified measure is imputable to the State.

3.1.1.3. Selective economic advantage

- (32) The public funding will be partly provided through a grant by the Land Schleswig-Holstein. 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.

¹ Reference is made to the explanations of the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, OJ C 262 of 19.7.2016, points 211 and 219.

² Commission decision of 30 April 2015 in State aid case No. SA.39608 Sea port extension Wismar, recital 31; OJ C 203 of 19.6.2015, Commission decision of 30 April 2015 in State aid case No. SA.39637 Cruise ship terminal Wismar, recital 34, OJ C 203 of 19.6.2015.

- (33) As regards the loan provided by the Hanseatic City of Lübeck to LPA, Germany submitted relevant information confirming that the terms of the loan correspond to market terms. Therefore, this part of the funding is not considered to constitute State aid.
- (34) The public financing in the form of a grant is planned to be granted specifically to LPA for carrying out a specific and individual project and is, therefore, selective.
- (35) The public financing, therefore, confers a selective economic advantage not available at market terms to LPA.

3.1.1.4. Distortion of competition and affectation of trade

- (36) 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 distortion of competition.³
- (37) In the present case, the financial support granted by Germany will be used for upgrading the rail infrastructure in the Port of Lübeck to promote the use of LNG instead of traditional fuel. This may well increase the attractiveness of the port compared to other seaports around the Baltic Sea, which may not necessarily have – or subsidise - the infrastructure needed for the provision of LNG as fuel for ships. It can therefore be concluded that the public funding of the project will, at least potentially, distort competition to the detriment of the seaports located outside Germany around the Baltic Sea. Germany seems to acknowledge this potential effect on competition and trade between Member States (see recital 16).
- (38) Therefore, the public funding is liable to distort competition and affect trade between Member States by potentially diverting traffic away from other Member States' seaports, especially from ports located around the Baltic Sea.

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

- (39) In light of the above the Commission, therefore, concludes that the notified support granted by the Land Schleswig-Holstein, amounting to EUR 509 069 constitutes aid to the benefit of LPA within the meaning of Article 107(1) TFEU.

3.1.2. Existence of Aid at the level of the port users

- (40) Port users shall enjoy equal and non-discriminatory access to the infrastructure. Germany confirmed that the usage fees for the port of Lübeck will be charged in line with fees charged in comparable ports and, therefore, constitute market prices.
- (41) 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 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.

3.2. Legality of the aid

- (42) The Commission takes note of the commitment of the German authorities to respect the stand-still obligation laid down in Article 108(3) TFEU and not to grant the aid until the Commission adopts a decision authorising the notified measure.

3.3. Compatibility of the aid

- (43) 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.
- (44) In line with well-established case practice⁴, the Commission examines whether the State aid to LPA meets a clearly-defined objective of common interest, is necessary and proportionate 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.

3.3.1. Contribution to an objective of common interest

- (45) In its well-established case practice (see recital (44)), the Commission has found that improved port infrastructures contribute to common objectives of the EU.
- (46) 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*,⁵ 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. Furthermore, in light of the EU environmental objectives, both the combustion of LNG as compared to the combustion of alternative conventional fuels such as heavy fuel oil and transport of LNG by train as compared to transport of LNG by road are preferable options.
- (47) According to the trans-European transport networks (TEN-T) Regulation⁶, the Port of Lübeck is considered as part of the European core network. TEN-T could be best developed through a dual-layer approach, consisting of a comprehensive

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.

⁵ 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.

⁶ 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>.

network and a core network. The core network should be developed by 2030 as a priority. The core network should constitute the backbone of the development of a sustainable multimodal transport network and should stimulate the development of the entire comprehensive network.

- (48) The above elements indicate that the aid contributes to an objective of common EU interest.

3.3.2. Necessity, proportionality and incentive effect of the aid

- (49) The negative NPV (funding gap) of – EUR [...] over a reference period of 26 years shows that the expected net revenues of LPA do not cover the investment costs of EUR 1 177 045. LPA contributes to the funding of the project with a loan granted on market terms up to nearly one third of the total investment costs. It is unlikely that LPA would be able to obtain the amount necessary to cover the investment costs exceeding its own contribution at market terms. Therefore, the aid is necessary for this project.
- (50) The Commission notes that LPA has applied for aid and that the works have not yet started. As such, the application for the aid was made before commencement of the project. Moreover, as shown above, the LPA would not be able to raise the required funds itself. This means that the project could not be carried out in the absence of the aid. It follows that the aid must be regarded as having an incentive effect.
- (51) According to the established case practice referred to in recital (44), aid to port infrastructure is considered to be proportionate if the amount of aid does not exceed the funding gap of the project. The total amount of public funding to LPA is EUR 799 256 (consisting of the grant by Schleswig-Holstein and the EU funds provided by INEA). This amount is below the funding gap identified for the project – EUR [...]. The aid is therefore proportionate.
- (52) In the light of the above, the Commission concludes that the aid is necessary, proportionate and has an incentive effect.

3.3.3. Distortion of competition and affectation of intra-EU trade

- (53) Germany submitted information regarding the competition context within which the port operates. In line with established case practice mentioned in recital (44), the information submitted by Germany allows the Commission to assess the extent of possible undue negative effects on competition and trade between Member States.
- (54) The information submitted by Germany indicates that the funding of the rail infrastructure will have a potential impact on competition between ports located around the Baltic Sea only. Such impact would be marginal since it would result from a possible preference of some shipping carriers to use LNG instead of heavy fuel oil and thus needing LNG supply in the port and lower supply costs of subsidised rail track infrastructure in Lübeck. There is however no indication that shipping companies would be unevenly affected and, as indicated above, the port of Lübeck is only one of several seaports around the Baltic Sea.
- (55) Based on these 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.

3.3.1. Transparency of the aid

(56) Lastly, the Commission observes that Germany committed to comply with the transparency conditions (see recital (20)).

4. CONCLUSION

(57) The Commission has accordingly decided:

- not to raise objections to the aid granted to the owner and operator of the planned infrastructure, 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.
- that the notified measure does not constitute State aid to port users within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

The Commission notes that Germany has agreed that the present decision would be adopted, notified and published in the English language.

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

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