



EUROPEAN COMMISSION

Brussels, 15/06/2011
C (2011) 3052 final

PUBLIC VERSION

This document is made available for
information purposes only.

Subject: State aid N 44/2010 – Latvian Republic
Public financing of port infrastructure in Krievu Sala

1. PROCEDURE

- (1) By electronic notification dated 5 February 2010, the Latvian Republic notified, according to Article 108(3) of the TFEU, a public financing measure within the project Development of infrastructure on Krievu Sala for reallocation of port activities out of the city centre. The notification has been registered under case number N 44/2010.
- (2) The Commission requested additional information on the proposed measure on 11 March 2010, 17 May 2010, 23 June 2010, 13 September 2010, 22 December 2010 and 18 March 2011. The Latvian authorities provided the information requested on 15 April 2010, 26 May 2010, 13 July 2010, 22 September 2010, 28 October 2010, 26 November 2010, 20 January 2011 and 22 March 2011.
- (3) Additionally, several meetings between the Commission services and the Latvian authorities have been held. Updated information and further clarifications have also been informally submitted to the Commission.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Objective

- (4) The project foresees the relocation of current Freeport of Riga (hereinafter *the Freeport*) activities from the city centre to the currently unused port area named Krievu Sala, located downstream on the River Daugava, thus allowing for expansion of the city of Riga.
- (5) The notified measure aims to address this relocation and ensure that the Freeport maintains its competitiveness within the Baltic Sea.

2.2. Beneficiary

- (6) The direct beneficiary of the public financing under scrutiny is Riga Freeport Authority (hereinafter *the Port Authority*).
- (7) In accordance with the Latvian Law on Ports the port authority is a non-profit public body established by the relevant city council. Port authorities ensure the overall maintenance and development of port infrastructure. In particular, port authorities:
 - (a) determine port dues and tariff ceilings for port services;
 - (b) ensure the collection of port dues and charges and lease fees;
 - (c) monitor the compliance with port regulations;
 - (d) monitor the activities of undertakings located in port in accordance with the port equipment safety plans;
 - (e) manage the property transferred to its possession - hydrotechnic structures, fairways, navigation equipment and devices in the port, as well as the aquatorium and navigation devices in management districts specified by the Ministry of Transport, as well as infrastructure related to the port activities;
 - (f) organise construction work in the port and construction of infrastructure related to the activities of the port, in conformity with the development programme of the port.
- (8) Part of the infrastructure built by means of the public financing in question will be subsequently operated by private undertakings on the basis of concession contracts concluded by the port authority.

2.3. Description of the Riga port

- (9) The port is operated as a free economic zone offering favourable business incentives in terms of tax rebates. According to the Law on Tax Application in Free Ports and Special Economic Zones¹, companies can apply for permission to operate in the Freeport Regime, which entitles them to significant tax reductions.

¹ State aid XR 20/07, OJ C 239, 11.10.2007.

- (10) According to the Latvian authorities, in 2008 the Freeport handled approximately 8% of total throughput in the East Baltic Sea region. In terms of dry bulk cargo handling operations, the Freeport is a leading port in the region, with a cargo turnover of 15,458.2 million tonnes.

2.4. Legal basis

- (a) the City Development Plan for 2006–2018 approved by Riga City Council in 2005² (hereinafter *the RCDP*);
- (b) Regulation of the cabinet of Minister No. 690 *Regulation on determination of the Freeport's Borders*, 138(3506), 30.08.2006;
- (c) the project “Development of Infrastructure on Krievu Sala for Relocation of Port Activities out of the City Centre” developed within the National Strategic Reference Framework of Latvia for 2007-2013, Operational Programme Infrastructure and Services.³

2.5. Context of the measure

- (11) The RCDP laid down a significant reduction of the port territory by excluding two areas, called Andrejsala and Eksportosta (hereinafter *A&E*) from the Freeport borders. This territory is located on the right bank of the River Daugava, occupying more than 3 km of the riverside and partly overlapping the protected Riga City Historic Centre (RHC) zone.⁴ Following proposal by the RCDP, the Latvian Government amended the Freeport's borders by excluding 123 ha of the port territory (Andrejsala 39 ha and Eksportosta 84 ha).⁵
- (12) A&E throughput increased sharply during 2004-2007, from 8.5 to 13.3 million tonnes, currently accounting for 40-45% of the total cargo handled at the port, and nearly 30% of the gross tonnage of the ships served. The E&A account for approximately 35% of the port's revenues.
- (13) Currently mostly dry cargoes (coal, sugar, grain, construction materials, and scrap metal) and general cargoes (heavy metal, timber and products, and containers) are handled in these territories.
- (14) Based on the decision to terminate cargo operations in the vicinity of the city centre, it is expected that the territory will be designated for urban development no later than 2013.

² Riga City Development Plan consists of Riga City Long term Development Strategy until 2025, Riga City development program for 2006 – 2012 and Riga Territory Planning for 2006 – 2018 (Riga City Council decision Nr. 749 of 20 of December, 2005 on Approval of Riga City Territory Planning for 2006 – 2018).

³ CCI: 2007LV161NS001, approved by the Cabinet of Ministers on 23 October 2007.

⁴ RHC has been included in the UNESCO List of World Heritage in December 1997.

⁵ Regulation of the Cabinet of Ministers No. 690 *Regulation on determination of the Freeport of Riga borders*, 138 (3506), 30.08.2006.

2.6. Budget, form and intensity of the aid

- (15) The project will be developed in two phases:
- (a) the first phase concerns the construction of 4 dry bulk cargo berths and will be completed by 2012 (hereinafter *the first phase*);
 - (b) the second phase concerns three additional berths, for the handling of general cargo, which will be constructed by 2015 (hereinafter *the second phase*).
- (16) The total eligible costs of the two phases amount to EUR 195 380 916.

2.6.1. First phase of the project

- (17) As far as first phase of the project is concerned, the eligible costs are to be financed by means of the Cohesion Fund contribution up to approximately 61.2%, i.e. EUR 91 325 093. The remaining will be ensured by means of own resources of the port authority.

2.6.2. Second phase of the project

- (18) The eligible costs of the second phase amount to EUR 46 171 655, with a public financing up to EUR 28 062 565.
- (19) According to the Latvian authorities, this public financing could take the form of:
- (a) Additional Cohesion Fund contribution amounting to EUR 28 062 565;
 - (b) Direct grant; soft loan; State guaranteed credit; other sources (State budget).
- (20) The difference, EUR 18 109 090, will be ensured by the port authority by means of:
- (a) commercial loans (possibly from the EIB);
 - (b) Freeport's own revenues;
 - (c) State Treasury loan on market conditions.

2.7. Commitment of the Latvian authorities

- (21) Irrespective of the form the public financing in support of the second phase of the project will take, the Latvian authorities have committed to observe all applicable EU rules. A maximum ceiling of 50% will be observed as regards public financing of user-specific infrastructure.
- (22) In addition, the Latvian authorities have undertaken to submit to the Commission a full report on the sources of financing of the project, both private and public, and the observance of the maximum intensity ceiling.

2.8. Detailed description of the project

2.8.1. Site selection

- (23) According to the Latvian authorities there are at least three arguments why the A&E cargo flow cannot be transferred to existing terminals in the Freeport:
 - (a) No existing terminal could handle similar volumes even with significant investments;
 - (b) No existing terminal has either appropriate cargo handling facilities or adequate access to take over the required cargo flow;
 - (c) No existing terminals could serve vessels of the dimensions expected in future.
- (24) In addition, further development of A&E terminals and the increase in their capacities is limited by constraints related to the necessity to protect the City centre, which are already now hindering the cargo flow. According to the Latvian authorities an increasing risk exists that terminal operators redirect cargo flows to competing ports. Therefore, the international competitiveness of the Freeport is directly linked to the implementation of the notified project.
- (25) Several key criteria have been taken into account in order to identify a suitable site, amongst which:
 - (a) Publicly-owned, underdeveloped/unoccupied territory;
 - (b) Proximity to the sea and separation from residential areas and protected natural reserves, historic buildings or monuments of historical and cultural interest;
 - (c) Proximity to the city's railway and motorway infrastructure;
 - (d) Appropriate water depth;
 - (e) Minimal investment required and length of the development project.
- (26) KS has been subsequently identified as the only feasible geographic location. The territory is located on the left bank of the River Daugava, 8.6 kilometres from the City centre in the North West direction. The total area of KS is 90 ha.

2.8.2. The foreseen investments

2.8.2.1. First phase

- (27) According to the Latvian authorities, currently general cargo only accounts for a low percentage of the total cargo throughput in A&E. However, according to the FR Development Programme, there is significant growth potential for this type of cargo.

(28) The breakdown of the eligible costs and the sources of financing is shown below:

Investment	Public (%)	EUR	Private (%)	EUR	Total (EUR)
Capital dredging and land reclamation	100%	16 191 062	0	0	16 191 062
Riverbank enforcement and access waterways	100%	16 248 893	0	0	16 248 893
Construction of quays 1,2,3,4 for dry bulk cargo	50%	34 372 357	50%	34 372 357	68 744 714
Access railroads in KS to the terminals	50%	2 033 333	50%	2 033 333	4 066 666
Access roads in KS to the terminals	50%	6 282 876	50%	6 282 876	12 565 753
Access road reconstruction to KS	100%	5 322 423	0	0	5 322 423
Infrastructure for utilities in KS (electricity, water supply networks, sewerage networks, sewerage pumping station, telecommunication networks, gas supply outside and within port territory)	50%	6 491 951	50%	6 491 951	12 983 902
Safety and security facilities (3 administrative buildings for custom control services, railway services, port security, first aid station).	100%	480 481	0	0	480 481
Environmental protection measures (development of nesting places for relocation of Black-headed Gulls (<i>Chroicocephalus ridibundus</i>) from KS to Milestiba salina and Zurku sala)	100%	165 883	0	0	165 883
Terminal railway check point	50%	9 968	50%	9 968	19 936
Related costs	30%	3 725 866	70%	8 693 683	12 419 549
Total eligible costs	61.2%	91 325 093	38.80 %	57 884 168	149 209 261
NON ELIGIBLE COSTS (external electricity networks 4900m, electrical power supply station, VAT, Environmental Impact Assessment)				36 242 265	36 242 265
TOTAL INVESTMENT COSTS					185 451 526

Table 1- First phase

2.8.2.2. Second phase

(29) As mentioned above, the second phase includes three additional general cargo berths.

(30) The breakdown of the eligible costs is shown in the table below. The public financing takes into account an additional Cohesion Fund financing.

Investment	Public (%)	EUR	Private (%)	EUR	Total (EUR)
Riverbank enforcement and water access roads	100%	11 435 264	0	0	11 435 264
Construction of quays 5,6,7 for general cargo	50%	11 488 245	50%	11 488 245	22 976 493
Access railroads in KS to the terminals	50%	885 566	50%	885 566	1 771 132
Access roads in KS to the terminals	50%	601 175	50%	601 175	1 202 351
Infrastructure for utilities (external electricity networks outside port territory, electrical networks in port territory, water supply networks, sewerage networks)	50%	2 782 569	50%	2 782 569	5 565 139
Related costs	30%	869 746	70%	2 351 535	3 221 281
TOTAL	60.77%	28 062 565	39.23%	18 109 090	46 171 655
NON ELIGIBLE COSTS (VAT)				9 696 057	9 696 057
TOTAL INVESTMENT COSTS					55 867 712

Table 2 – Second phase⁶

(31) The eligible costs of the overall project are as follows:

	Public financing EUR	Private financing EUR	Total EUR
First phase	91 325 093	57 884 168	149 209 261
Second phase	28 062 565	18 109 090	46 171 655
TOTAL	119 387 658	75 993 258	195 380 916

Table 3 – Total eligible costs

2.8.3. The operation of the newly built port infrastructure

2.8.3.1. Operation of the 4 dry-bulk cargo berths

(32) A&E areas currently offer a total of 17 berths. The A&E port areas are currently used by two major port operators, namely Strek Ltd. and Riga Central Terminal (RCT) Ltd, loading and unloading essentially dry bulk and break bulk commodities. A third coal

⁶ The breakdown of the costs in the table assumes an additional Cohesion Fund contribution as public financing.

cargo handling company is currently operating in the port. The Latvian authorities underlined that the latter is already now located on the left side of the river Daugava.

- (33) The A&E traffic reached 13.3 million tonnes in 2008, following an average growth of above 8% per year over the last three years. As mentioned above, this accounted to 45% of total FR traffic, and 35% of its revenues. The main commodity, representing above 90% of total tonnage, is Russian coal shipped to North-Western Europe.
- (34) The port service providers operating in these areas have legal expectations based on their current concession contracts up to 2034.⁷ As a consequence of the decision to reallocate this portion of port land, they currently face several problems.
- (35) First and foremost, the operators can temporarily perform cargo handling activities but they are restricted in terms of future investment and development. As a consequence, their investment in cargo handling technologies is economically unviable. In addition, these companies will be found in breach of the contracts concluded with the port users. Substantial losses in cargo volumes transported via the Freeport, as well as a significant decrease in port annual income are foreseen as a result.
- (36) Secondly, due to this port land reallocation, the companies have lost the status of the free economic zone.⁸ According to the Latvian authorities, it is expected that this would result in a significant competitive disadvantage.
- (37) In addition, according to the *Reconstruction of Riga Railway Junction* project detailed in the *Riga City Development Plan for 2006 – 2018*, the railway station Riga – Krasta serving the terminal operators located in A&E will be put out of operation. A temporary railway line will be only provided until the termination of cargo handling operations in the area.
- (38) The port authority intends to award the new concession contracts for the operation of the four berths to the two existing port operators, i.e. Strek Ltd and Riga Central Terminal Ltd. The Latvian authorities argue that this is the only commercially viable option at the disposal of the port authority.
- (39) Taking into consideration the fact that the chosen port operators will be requested to provide substantial investments on the new site, the Latvian authorities consider that the length of the concession should be 35 years. A tender procedure will be carried out at the end of the term of the contract in order to further award the right of operation of the port infrastructure.

⁷ The contracts have been concluded in 2000.

⁸ In accordance with the Article 11 of the Freeport of Riga Law “a free zone regime shall apply only to such companies whose territory in the Freeport is demarcated and secured by one or more adequately organised customs border entry and exit points and by guards who ensure that the movement of goods and persons to and from the territory of the licensed company complies with customs requirements. Each licensed company shall ensure the security of its territory. Companies to which a free zone regime is applied may not carry out commercial activities outside the territory of the Freeport”.

- (40) The concession contracts will stipulate that, if additional infrastructure is built after granting of the concession contract, the financial terms are to be re-negotiated accordingly. All superstructures will be provided by the concession holders on their own expenses.
- (41) The concession fee to be paid by the two port service providers has been established beforehand on the basis of an evaluation carried out by an independent expert. The port service providers will pay the port authority a concession fee, amounting to 2.95 LVL per square meter per year for the operation of the berths.
- (42) The Latvian authorities have also undertaken to include a 10-year review clause of the concession fee in the concession contracts and, if necessary, to adjust the fee accordingly.

The expert's valuation

- (43) Given that the four dry bulk berths have the same capacity, a common valuation has been carried out.
- (44) The assessment of the independent expert is based on two methods, i.e. the benchmarking method and discounted cash flow method.

The benchmarking method

- (45) The concession contracts are benchmarked against concessions for the operation of similar berths in Riga, Ventspils and Liepaja ports.
- (46) The average concession fee is EUR 1.20 per square meter and EUR 1.10 per square meter per year in Ventspils and Liepaja ports respectively. However, according to the expert, precise information on concession fees in neighbouring ports is not easily accessible and detailed information on various concession contracts has only been provided by Riga port authority itself. Consequently, the appraised property has been benchmarked against three ongoing contracts considered as comparable having as object port plots and infrastructure in Riga Freeport.
- (47) Taking into consideration the specific features and characteristics of the infrastructure subject to these contracts, the independent expert used correction quotients in order to establish an adequate concession fee. The resulting value was 2.15 LVL per square meter per year.

The discounted cash flow method

- (48) The discounted cash flow method is based on calculations provided for in a Feasibility study carried out by Baltkonsults Ltd.
- (49) The underlying assumptions for the purpose of the calculation of the concession fee were as follows:

- (a) The total eligible costs for the first phase have been considered as basis for the purpose of the calculation. Subsequently the costs associated with the hydro-technical structures, berths and access waterways have been assigned to four dry bulk cargo concession holders; the remaining costs have been allocated to seven concession holders (it is assumed that each berth, including general cargo berths, is operated by one different concession holder).
 - (b) The investment costs associated with the hydro-technical structures, berths and access waterways are considered as directly linked to vessel maintenance and service and should therefore be recovered by port dues whilst the remaining investment costs should be recovered by means of concession fees;
 - (c) The income derived from the operation of the berths should cover the investment costs allocated to the concession holders operating the four dry bulk cargo as detailed above, and ensure a certain return rate.
- (50) The annual income required for recovery of the investments allotted to the four concession holders amounts to LVL 5 302 836.⁹
- (51) Given that the investment costs for the hydro-technical structures, berths and access waterways amount to approximately LVL 59 733 000 (approximately 69% of the investment costs allocated to four concession holders), it was considered that 69% of the overall investment should be covered by port dues, whilst 31% should be recovered by means of the concession fees for the operation of the infrastructure.
- (52) Thus, an annual income from concession fees required to recover 31% of the investment costs at a 5% discount rate is LVL 1 662 053. The resulting concession fee is 2.95 LVL per square meter per year.
- (53) The independent expert proposed to take the average of the results of both methods and established the concession fee at 2.55 LVL per square meter per year. The port authority decided however that the highest amongst the two abovementioned values would be applied, i.e. an annual concession fee of 2.95 LVL per square meter per year.

2.8.3.2. Operation of the 3 general cargo berths

- (54) The right of operation of the three general cargo berths will be granted on the basis of an open, non-discriminatory tender procedure. The contracts will be awarded to the most economically advantageous tender. All superstructures will be provided by the concession holders on their own expenses.

⁹ A 5% real discount rate was applied.

3. ASSESSMENT

3.1. Existence of aid

- (55) 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 favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market".
- (56) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the notified measure constitutes State aid within the meaning of Article 107(1) TFEU, all the abovementioned conditions need to be fulfilled. Namely, the financial support:
- (a) is granted by the State or through State resources,
 - (b) favours certain undertakings or the production of certain goods,
 - (c) distorts or threatens to distort competition,
 - (d) affects trade between Member States.
- (57) In the present case, State aid has to be considered at the level of the infrastructure-owner, i.e. the port authority, at the level of the concession-holders, as well as at the level of the port users.

3.1.1. Existence of aid at the level of the port authority

3.1.1.1. Notion of undertaking

- (58) The Court has consistently held that 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 purpose of competition law.¹⁰
- (59) As detailed above, pursuant to the Latvian law on ports, port authorities are non-profit entities aiming to ensure the overall maintenance and development of port infrastructure. To that end, the financial resources at the disposal of a port authority may be used exclusively for the management of the port and for the performance of the functions attributed to it by the law. The Court has already established that the fact that an entity is a non-profit body or that it seeks non-commercial objectives is not in itself conclusive on the non-economic character of the activities pursued by it.¹¹

¹⁰ Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21; C-160/91 Poucet and Pistre v AGF and Cancava [1993] ECR I-637, paragraph 17; Case C-35/96 Commission v Italy [1998] ECR I-3851, paragraph 36.

¹¹ Judgement of the Court in Case C-205/03 P Case C-205/03 P FENIN v Commission, [2006] ECR I-6295.

- (60) The Commission has already considered that the construction and operation of some types of infrastructure can be considered as economic.¹²
- (61) In this case, as detailed above, port authorities are entrusted with *inter alia*, the supervision of the activities of undertakings located in the port in accordance with the port equipment safety plans, the control and security of navigation, tasks which are clearly in the public interest.
- (62) The Commission notes that the notified project partially covers certain types of infrastructure, in particular access waterways, access roads to KS, riverbank strengthening works, dredging works, infrastructure for utilities. The Commission has already found¹³ that such investments are required in order to render the commercial operation of the port possible and therefore they may be considered as commercial as well.¹⁴
- (63) In any event, the Commission notes that it is not necessary to definitely decide in the present case whether the construction and operation of these types of infrastructure should be considered as economic insofar as even if an aid element was present in this public financing, such aid would be compatible with the internal market as detailed below.
- (64) The project also covers the construction of access railroads and roads in KS, up to the berths. Since it appears that the access routes in KS will at least partially serve the berths themselves, this part can be considered as directly linked to the commercial exploitation of the port since it is basically related to the development of user-specific infrastructure.
- (65) On the contrary, the Commission considers that safety and security measures are part of the essential function of the State and as such public financing of safety and security infrastructure should fall outside the scope of State aid rules. In this case, the three administrative buildings will exclusively serve the port authority itself and will support the carrying out of certain activities falling under the public policy remit, such as custom control, port security, first aid. The same applies for the environmental protection measures detailed above. The Court has already ruled¹⁵ that environmental protection duties are considered as being typically those of a public authority and are thus part of the essential function of the State as regards protection of the environment.
- (66) As regards the land reclamation and the construction of the railway check point, the Commission notes that they are linked to the exploitation of the user-specific infrastructure.

¹² Decision of the Commission of 15.12.2009 in State aid case N 385/2009 - Public financing of port infrastructure in Ventspils Port, OJ C72, 20.03.2010 Case N60/2006, *Port of Rotterdam*, paras 42-52. Case N520/2003 *Flemish ports*, paras 34-54. Case N478/2004 *Coras Iompair Eireann (CIE)*, paras 24-34.

¹³ Decision of the Commission of 15.12.2009 in State aid case N 385/2009 - Public financing of port infrastructure in Ventspils Port, OJ C72, 20.03.2010.

¹⁴ See also Judgement of the Court of 24 March 2011 in case T-443/08 and T-445/08 *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*.

¹⁵ Judgement of 18 March 1997, case C-343/95, *Diego Cali&Figli*, ECR – 1547.

- (67) Finally, the public financing partially covers investments in seven new berths. Such infrastructure is commercially exploited by the port authority, which awards the concession for its operation against concession fees and thus this construction and operation has to be considered as an economic activity.
- (68) In the light of the above, and consistent with the Commission's decisional practice¹⁶, the Commission concludes that the port authority is engaged in economic activities and should be considered an undertaking for the purposes of competition law as far as the economic activities are concerned.

3.1.1.2. State resources

- (69) The resources of the Cohesion Fund which are transferred to the relevant national authority or body designated for that purpose by the Member State before being paid to the port authority are considered to be at the disposal of the Latvian authorities and therefore amount to State resources.
- (70) As regards the imputability to the State of the public financing, the Commission notes that the Latvian authorities enjoy a high degree of decision-making powers in the selection at national level of the subsidised projects and that the notified measures are directly chosen by – and thus imputable to – the Latvian State.
- (71) As regards the different types of financing detailed under paragraph (19) above, the Commission notes that these undoubtedly amount to State resources.

3.1.1.3. Selectivity

- (72) Since the measure is only granted to the Riga Freeport port authority, it is selective.

3.1.1.4. Economic advantage

- (73) To the extent that the construction and operation of certain port infrastructure is considered an economic activity, its public financing may result in an economic advantage to the owner of the infrastructure in question if the public contribution allows it to avoid having to bear costs which would normally have to be borne by means of the undertaking's own financial resources, and thereby prevent market forces from having their normal effect.¹⁷
- (74) However, in order to conclude on whether the State resources granted to the port authority provide it with an economic advantage, the Commission has first to assess whether the measure complies with the market economy investor test. The Court has clarified that it should be determined "whether in similar circumstances a private shareholder, having

¹⁶ Decision of the Commission of 15.12.2009 in State aid case N 385/2009 - Public financing of port infrastructure in Ventspils Port, OJ C72, 20.03.2010; Decision of the Commission in State aid case N 105/2008, N 168/2008, N 169/2008 - Greece – Public financing of infrastructure and equipment at the Port of Pireus (C21/2009), OJ C245, 13.10.2009.

¹⁷ Judgement of 14 February 1990, case C-301/87 France/Commission [1990] ECR I-307, point 41.

regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question".¹⁸ The conduct of such private investor must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy and guided by prospects of profitability in the longer term.¹⁹

- (75) In this case, the Commission has to assess whether the investment of the State in the port infrastructure is likely to yield a rate of return that would be acceptable to a private investor in a market economy. To this end the Commission has to consider the financial assessment of the project.
- (76) In this respect, the *Guide to cost-benefit analysis of investment projects* (hereinafter the Guide)²⁰, places particular emphasis on two financial indicators to evaluate the financial sustainability of the investment, i.e. the financial net present value (FNPV) and the financial internal rate of return (FRR). The indicators measure the present amount of the net benefits flow generated by the investment and the capacity of the net revenues to remunerate the investment cost, respectively. In this case, the financial data shows a negative value of the FNPV, i.e. the generated revenues do not cover the investment costs of the projects.
- (77) Given the result of the financial analysis submitted by the Latvian authorities, such investment would not have been carried out by a private investor. The Commission thus concludes that in the case at stake the State did not act in conformity with the market economy investor principle and that the measure in question confers an economic advantage to the port authority.

3.1.1.5. Distortion of competition and impact on trade

- (78) According to the established case law, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.²¹
- (79) Riga Freeport is currently one of the leading ports on the Baltic Sea. In terms of total throughput, Primorsk and St. Petersburg are the primary ports in the East Baltic Sea region, followed by Klaipeda, Tallinn and Ventspils. In terms of dry bulk and general cargo handling Riga Freeport's main competitors are Hamina, Helsinki, Kotka (Finland), Kaliningrad, St. Petersburg, Ust –Luga (Russia), Tallinn (Estonia), Ventspils and Liepaja (Latvia). Klaipeda (Lithuania), Gdansk, Gdynia (Poland). Of these Riga, St. Petersburg,

¹⁸ Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* [1999] ECR II-17, paragraph 120.

¹⁹ Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 20.

²⁰ Guide to cost-benefit analysis of investment projects, Structural Funds, Cohesion Fund and Instrument for Pre-Accession, Final Report, 16/06/2008.

²¹ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11; Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21; and Case C-372/97 *Italy v Commission*, [2004] ECR I-3679, paragraph 44.

Klaipeda, Ventspils and most recently Ust-Luga ports are the largest in terms of dry bulk cargo turnover.

- (80) According to the Latvian authorities, in terms of dry bulk cargo handling operations the FR is a leading port with a market share of 43%. At the same time, in terms of general cargo FR market share is rather small (5.2%) and in 2008 decreased by 14.5% in comparison with 2007.
- (81) The Commission thus considers that the aid in question is capable of affecting competition and intra-Union trade.

3.1.2. Existence of the aid at the level of the concession-holders

- (82) The Commission notes that in this case the port authority will conclude concession contracts in order to grant the right of operation of the newly-built port infrastructure to private undertakings.
- (83) In what follows, the Commission will assess whether undue advantages arise at the level of the concession holders.

3.1.2.1. General cargo berths

- (84) As explained above, a tender procedure will be carried out in order to award the right of operation of the general cargo berths to port service providers. According to the Latvian authorities, the tender will observe the transparency and non-discrimination criteria, and the economically most advantageous offer will be selected.
- (85) In the present case the Commission does not need to decide whether or not there is aid at the level of the concession holders of the general cargo berths, because the tender that the Latvian authority will carry out will either exclude or minimise any potential State aid element in favour of the concession holders to what is strictly necessary to ensure the operation of the port infrastructure.

3.1.2.2. Dry cargo berths

- (86) In the case at hand, the Commission notes that the concession fee has been unquestionably established beforehand, by means of an evaluation carried out by an external expert. The Latvian authorities have provided evidence to the effect that the expert has suitable degree and experience as pursuant to the Communication.
- (87) As detailed above, the assessment is based on two methods, i.e. the benchmarking method and discounted cash flow method.
- (88) First, as detailed above, the concession fee has been compared with the ones set for contracts considered as comparable in Riga, Ventspils and Liepaja ports. The concession fee has been found in line with benchmarks in Ventspils and Liepaja ports. However, since sufficient information has only been provided by Riga port authority, the concession

has been benchmarked against three ongoing contracts considered as comparable having as object port plots and infrastructure in Riga Freeport.

- (89) Taking into consideration the specific features and characteristics of the infrastructure subject to these contracts, the independent expert used correction quotients in order to establish an adequate concession fee. The resulting value was 2.15 LVL per square meter per year.
- (90) The Commission considers that the benchmarking exercise, exclusively based on ongoing contracts in Riga Freeport, is not sufficiently reliable and thus cannot be sufficient to exclude that the concession holders will benefit of an advantage.
- (91) According to the second method, the concession fees and the other revenues of the port authority would ensure recovery of the costs allocated to the concession holders and a certain rate of return.
- (92) The Commission does not find any manifest error in the costs allocation followed by the Latvian authorities, therefore the concession fees and the other revenues of the port authority would ensure recovery of the costs allocated to the concession holders and a certain rate of return.
- (93) The Commission has assessed the business plans of the concession holders in order to check whether the latter benefit from excessive profits. The financial assessment shows an internal rate of return (IRR) in the range of 8% and 9% respectively for the concession holders.
- (94) The Latvian authorities have not provided a clear benchmark regarding the average IRR. Nevertheless, according to publicly available information, an IRR of 9% does not appear excessive.²²
- (95) In addition, the inclusion of review clause enables the concession fee to be reviewed periodically.
- (96) In view of the above, the Commission is of the view that in the present case, it can be concluded that the concession fee established as detailed above does not grant any advantage to the concession holders of the dry cargo berths.
- (97) This decision in no way prejudices any possible further analysis by the Commission as far as the respect for the EU public procurement rules or other general principles of the Treaty are concerned.

3.1.3. Non-discriminatory access to ship-owners

- (98) According to the Latvian authorities, in the case under scrutiny, all potential freight forwarders and ship-owners will have equal, non-discriminatory access to the port infrastructure.

²² ACCC Regulatory conference. The changing face of the terminal operator business. Gold Coast July 2007.

3.1.4. Conclusion

- the public financing of the safety, security and environmental protection measures does not involve State aid within the meaning of Article 107(1) TFEU;
- the public financing of the access roads and railroads in KS, the railway check point, land reclamation and the berths involves State aid within the meaning of Article 107(1) TFEU at the level of the port authority;
- it is not necessary to definitely decide in this case whether the public financing of the access waterways, access roads to KS, riverbank strengthening works, dredging works, infrastructure for utilities involves State aid within the meaning of Article 107(1) TFEU at the level of the port authority;
- no advantage, and consequently no aid can be ascertained at the level of the future concession holders of the dry cargo berths. As regards the concession holders of the general cargo berths, in the present case the Commission does not need to decide whether these concession holders will benefit from any State aid, as in any case it would be compatible for the reasons set out in the following section;
- port users will enjoy equal, non-discriminatory access to the infrastructure.

3.2. Compatibility of the aid

- (99) To the extent that the notified public financing amounts to aid at the level of the port authority, its compatibility must be assessed in the light of the exceptions laid down in Articles 107(2) and 107(3) TFEU.
- (100) The Commission considers that the appropriate legal basis for assessment of the aid to the port authority is Article 107(3)(c) TFEU directly, 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 considered to be compatible with the internal market.
- (101) Therefore, the Commission has to examine whether the notified public funding meets a clearly defined objective of common interest, is necessary and proportional to this objective and does not affect trade to an extent contrary to the common interest.

Objective of common interest

- (102) The Commission has emphasized the crucial relevance of sea ports for an efficient and sustainable transport network. The recently published Commission's Communication *A sustainable future for transport: Towards an integrated, technology-led and user friendly system* underlined that concerning freight transport, an intelligent and integrated logistic system must become a reality, where development of ports and intermodal terminals is

key element. The Communication also emphasises the importance of the modal shift towards more environmentally friendly modes.²³

- (103) Commission's Communication *Strategic goals and recommendations for the EU's maritime transport policy until 2018*²⁴ underlines that providing new port infrastructure as well as improving the use of existing capacities is essential to ensure that ports can cope efficiently with their gateway function.
- (104) The port ensures the connection between the TEN-T motorway network, TEN-T railway network and the Motorways of the Baltic Sea. In addition, the impact assessment commissioned by the port authority shows that important benefits in terms of environmental protection. First and foremost, significant environmental benefits will derive from the relocation of the coal handling activities outside the city centre. Secondly, the emission of coal dust will be significantly decreased due to the use of environmentally friendly coal processing technology.
- (105) Accordingly, the Commission considers that the measure facilitates the development of certain economic activities.

Necessity and proportionality of the measure

- (106) The negative FNPV of the overall project shows that the net revenues derived by the total investment do not remunerate the investment costs at the end of the 35 years term of the concession.
- (107) In addition, the Latvian authorities have clarified that absent of the aid, in order to finance the entirety of the investment, the port authority would need to contract a loan. The Latvian authorities contend that the port authority cannot obtain the required financial resources from commercial banks because no financial institution, including the European Investment Bank, the European Reconstruction and Development Bank and Nordic Investment Bank would consider granting such loan. In addition, taking into consideration the current economic situation in Latvia, and the Latvian Government agreements with the EU and IMF, Latvia is not allowed to increase the level of the budget deficit, including the amount of the State guarantees, in 2010 and 2011.
- (108) In the light of the above, the Commission thus concludes that the aid at the level of the port authority is necessary to address a market failure and has an incentive effect because it allows the port authority to invest in an infrastructure it would not be in a position to realise in the absence of the aid.
- (109) In addition, the Commission has constantly considered that port infrastructure projects require substantial capital investments that can only be recovered in the very long term

²³ COM(2009) 279/4, paragraph 46 therein.

²⁴ 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's maritime transport policy until 2018", COM(2009) 8.

and thus their economic viability may not normally be ensured without public funding. In the case at stake, the Commission notes that the port authority contributes itself 50% to the investments in the user-specific infrastructure.

Distortion of competition and effect on trade

- (110) As regards inter-port competition, the port is clearly in competition with the neighbouring ports, such as Tallinn, Ventspils, Liepaja or Klaipeda for the dry bulk cargo traffic. However, the Commission notes that the objective of the measure is to relocate port activities outside city centre and not to increase competitiveness of the port itself by creating additional capacity.
- (111) In this sense the Latvian authorities have detailed the operating conditions applicable in KS, as compared to A&E:

	A&E	KS
Area (ha)	123	50
Berths (m)	3 128	1 180

- (112) The Commission therefore considers that the potential impact that the aid may have on distorting the inter-port competition is outweighed by the wider benefits that the aid will provide in supporting a more sustainable transport system.
- (113) As regards intra-port competition, the Commission notes that the newly built infrastructure will be made available to the existing operators under the same conditions.
- (114) Therefore, the Commission considers that the State financing of such port infrastructure will not distort competition nor affect trade between Member States to an extent which is contrary to the common interest.

Conclusion

- (115) On the basis of the foregoing, the Commission considers that the notified measure is necessary to address a market failure and provides positive externalities. The advantage conferred by the aid is not disproportionate so as to have an impact on competition and on Union trade contrary to the common interest. On these grounds the Commission concludes that the aid is compatible with the TFEU.

3.3. Conclusion

- (116) The notified measure relating to financing of the project Development of infrastructure on Krievu Sala for relocation of port activities out of the city centre is compatible with the internal market under Article 107(3)(c) TFEU.

4. DECISION

- (117) The Commission has accordingly decided to raise no objection with regard to the notified public financing of port infrastructure on the ground that any aid is compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- (118) This decision only concerns State aid aspects and is without prejudice to the application of other Treaty provisions, particularly regarding service concessions.
- (119) The current decision does not in any way prejudice any assessment by the Commission of the observance of the provisions of Articles 101 and 102 TFEU by Riga Port Authority.
- (120) The Commission reminds the Latvian authorities that in case of co-financing through Structural Funds and the Cohesion Fund of the Union, the rules applicable to these Funds must be respected, and in particular the provisions laid down in Council Regulation (EC) No 1083/2006 ("General Regulation on Structural Funds") and in Council Regulation (EC) No 1084/2006 ("Cohesion Fund Regulation").
- (121) This decision (and any further amendments to it) does not prejudice the decision of the Commission on the major project, which will be taken by the Commission in accordance with Articles 40 and 41 of Council Regulation (EC) No 1083/2006.
- (122) 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/eu law/state_aids/state_aids_texts_lv.htm.

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

European Commission
Directorate-General for Competition
B-1049 Brussels
Fax No: 0032 (0) 2 296 12 42.

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-President