EUROPEAN COMMISSION

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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 […].		PUBLIC VERSION This document is made available for information purposes only.

Subject: State aid SA.29584 (ex N 541/2010) – Poland – Shadow toll compensation to Stalexport Autostrada Malopolska S.A. (SAM S.A.) – A4 motorway (Katowice – Krakow)

Dear Sir,

1. PROCEDURE

(1) By electronic notification of 18 November 2010, registered on the same day, Poland notified to the Commission the above-mentioned measure for reasons of legal certainty. The Commission requested further information by letters dated 14 January 2011 and 5 April 2011. Poland provided the requested information by letters dated 9 February 2011 and 5 May 2011. By letter of 4 July 2011, the Commission asked Poland for agreement to extend the two-month period foreseen for adopting a decision until 5 August 2011[1]. The Polish authorities gave their agreement by letter dated 6 July 2011. On 11 July 2013, the Commission and Poland had a meeting to discuss the measure, after which the Commission requested further information by letter dated 22 August 2013. Poland provided the requested information by letter dated 20 September 2013.

2. DESCRIPTION OF THE PROJECT AND THE AID MEASURE

(2) The measure consists in financial compensation to Stalexport Autostrada Małopolska S.A. (hereafter: "SAM S.A."), the concession holder of the section

[1] Two-month period foreseen in Article 4 (5) 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, OJ L 83, 27.3.1999, p. 1–9.

of Polish A4 motorway, between Krakow and Katowice. The financial compensation is the result of excluding heavy goods vehicles from the obligation to pay a toll for using the motorway in the period from 1 September 2005 to 30 June 2011.

(3) The concession for construction and operating of this section of A4 Motorway was granted to SAM S.A. on 15 March 1997 as a result of public tender[2]. The concession was given for a period of 30 years i.e. until 15 March 2027.

(4) In the first phase, the concession holder was responsible for the renovation of A4 Motorway between Krakow and Katowice (built in 70ies and 90ies) and upgrading it to the standard of a toll motorway. After having fulfilled these tasks, the concession holder was responsible for operating the motorway, granting access to motorway users and the maintenance works.

(5) According to the concession agreement, the renovation risk is mainly borne by the concession holder. The concession holder takes the risks of unpredictable events such as construction cost overrun, design deficiency, necessary additional construction works, ground conditions, availability of labour and materials, etc. Moreover, the traffic, availability and financial risks are also borne by the concession holder. The State took a risk of change of law which directly or indirectly affects the concession holder. […]

(6) From 3 April 2000 until the agreement's expiry date, the concession holder is authorised to collect tolls from users of the motorway. Proceeds from tolls represent the concession holder’s revenue.

Reasons for the introduction of compensation mechanism

(7) In 2005, the Polish law on toll motorways was modified to eliminate a double payment by heavy goods vehicles for use of the same road section[3] (hereafter: "the Amendment"). This change was the transposition of Directive 1999/62/EC[4] into national law. According to its Article 7, paragraph 3: "Tolls and user charges may not both be imposed at the same time for the use of a single road section." As the result, heavy goods vehicles paying the vignette (a toll card) for using national roads in Poland became exempted, as from 1 September 2005, from tolls on motorways covered by concession agreements.

[2] Initially, the concession was granted to the undertaking Stalexport S.A. (hereafter: "STX"). Due to requirements set by potential lenders, on 26 January 1998, STX established a company of special purpose, entirely linked to STX - SAM S.A. who took over all rights and obligations resulting from the concession. This fact was confirmed with the agreement signed on 30 June 2004 by the Ministry of Infrastructure, STX and SAM S.A.

[3] The Act of 28 July 2005 amending the Act on Toll Motorways and the National Road Fund, and the Act on Road Transport (Journal of Laws No 155, item 1297)

[4] Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, OJ L 187, 20.7.1999, p. 42 as amended.

(8) The Amendment provided for revenue loss as a result of the change of law to be reimbursed to motorway operators by the National Road Fund (hereafter: "NRF"). The compensation was to be based on a shadow toll mechanism[5].

(9) The detailed compensation method and the level of shadow toll were to be agreed between the State, represented by the General Directorate for National Roads and Motorways (hereafter: "GDDKiA"), and each concession holder separately. As a consequence, the concession agreement for A4 motorway was modified through Annex No 5 (and enclosures) and heavy goods vehicles became exempted from tolls on the Krakow - Katowice A4 Motorway. In return, the concession holder started to receive every month the compensation for loss of revenue calculated on the basis of shadow toll.

Calculation of the initial shadow toll and its adjustment

(10) Poland informed that the compensation method was set up with the basic assumption that the financial situation of the concession holder should not change. It means that its financial situation should be neither better nor worse compared to the situation before the change of law. It was agreed that this objective is met, if the Internal Rate of Return[6] (hereafter: "IRR") for the investment of SAM S.A. in this section of A4 motorway stays at the same level as it would have been without the change of law ([…]).

(11) The concession holder and GDDKIA agreed that the calculation of compensation to the concession holder would be the outcome of a two-step procedure conducted on the basis of a financial model (bank model, hereafter: "BM") prepared by an independent expert.

(12) The BM showed the foreseen cash flow (i.e. foreseen costs to be covered by the concession holder and foreseen revenues from tolls) and allowed to calculate IRR for the investment as well as the appropriate level of shadow toll.

(13) Setting up the shadow toll level, the parties were obliged to respect the requirement stipulated in the Amendment, that the compensation should be calculated as an agreed shadow toll multiplied by 70% of the number of heavy goods vehicles passing the motorway in a given period.

<u>Step one – Negotiated Toll Rate</u>

(14) Before 1 September 2005 (i.e. before the introduction of the compensation mechanism), the last available BM for this motorway project, prepared for a situation without the change of law (i.e. an initial scenario in which the

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5 A shadow toll is a contractual payment made by a government per driver using a road to a private company that operates a road built or maintained using private finance initiative funding. Payments are based, at least in part, on the number of vehicles using a section of road. The shadow tolls or per vehicle fees are paid directly to the company without intervention or direct payment from the users.

6 The internal rate of return (IRR) or economic rate of return (ERR) is a rate of return used in capital budgeting to measure and compare the profitability of investments. The higher a project's IRR, the more desirable it is to undertake the project.

concession holder would collect tolls from all vehicles passing its motorway until the end of the concession), was revised taking into account traffic projections prepared for a scenario after the change of law (i.e. a scenario, in which the heavy goods vehicles with vignettes are toll-exempted[7]).

(15) On this basis, the shadow toll for the motorway was calculated in such a way that it did not lead to a change (i.e. increase or decrease) of the initial IRR (i.e. the IRR established on the basis of the initial scenario without the change of law) for the investment, that was equal to […]%. The calculated shadow toll, called Negotiated Toll Rate (hereafter: NTR), amounted to PLN […].

(16) It was also agreed that the concession holder would be able to index[8] the NTR only to the level of the maximum toll rate (PLN […]) that was not to be indexed.[9]

(17) As from 1 September 2005, the concession holder started to receive monthly compensations calculated with NTR.

<u>Step two – adjusted Negotiated Toll Rate</u>

(18) Pursuant to Annex No 5 to the concession agreement, the parties proceeded with adjusting the NTR. Until 31 July 2006, SAM S.A. was obliged to present GDDKiA the following comparison:

(a) […]

(b) […]

(19) If the abovementioned comparison showed that […].

(20) The traffic predicted in item (a) was: […] vehicles/day while the actual traffic referred to in item (b) was: […] vehicles/day. Therefore, the parties proceeded with renegotiating (adjusting) the NTR used to calculate the compensation amount.

(21) The traffic forecasts were replaced in the BM with actual traffic data for toll-exempted vehicles registered by the concession holder in the period 1 September 2005 – 30 June 2006. Afterward, assuming unchanged costs and the IRR of the BM, the new NTR was calculated at PLN […][10].

Results of compensation mechanism

(22) As the result of adjusting the NTR, the concession holder was obliged to pay back the difference between the compensation received on the basis of traffic forecasts (i.e. calculated with the shadow toll equal PLN […]) and the

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7 The traffic projections showed that exempting heavy goods vehicles possessing a vignette from the obligation to pay a toll on motorways would result in sharp increase of their traffic on motorways and related costs for concession holders.

8 The index formula is specified in the concession agreement. It is based on changes in […].

9 As the result the negotiated toll rate amounted to: […].

10 In terms of prices valid as at 1 July 2008.

compensation calculated on the basis of actual traffic (i.e. calculated with the shadow toll equal to PLN […]). This difference amounted to PLN […] million (EUR […] million[11]).

(23) However, after the test period, it appeared that the actual operating and maintenance costs of the concession holder were higher than projected in the BM.

(24) Consequently, after taking into account the costs increase due to more intensive heavy goods vehicle traffic, SAM S.A. paid back to the State PLN […] million (EUR […] million).

(25) In the subsequent years (i.e. until end of June 2011), the compensation to the concession holder was paid out based on the adjusted NTR (that was indexed - based on […]) [12].

End of compensation mechanism

(26) The need for shadow toll compensation expired on 30 June 2011 due to the fact that on 1 July 2011, Poland introduced the electronic toll collection system "via TOLL" that replaced the vignettes. The "via TOLL" system is obligatory for all heavy goods vehicles and allows its users to perform electronic payment settlement for the use of toll road networks based on kilometres and on a road category.

(27) Since the system covers only selected roads and not the whole road network in Poland (as the vignettes did) the possibility of double payment has been eliminated. Therefore, the concession holders could again charge all heavy goods vehicles entering toll motorways according to the rules set up in the concession agreements.

3. ASSESSMENT

(28) The Commission's assessment in the given case is limited to the modification of the concession agreement with SAM S.A. concerning compensation for excluding heavy goods vehicles from the obligation to pay a toll for using the motorway in the period from 1 September 2005 to 30 June 2011.

3.1. Existence of State aid

(29) Pursuant 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 internal market.”

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11 The exchange rate used: EUR 1 = PLN 4.

12 On 1 July 2009, the aforesaid toll rate was indexed and set at PLN […]. A subsequent indexation took place on 1 July 2010 – and as a result thereof the toll rate at PLN […] was determined.

(30) The qualification of a measure as State aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be financed through State resources and be imputable to the State; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.

3.1.1. Selective economic advantage

(31) The Commission notes that the suppression of tolls for heavy goods vehicles, due to the amendment of the law on toll motorways[13], implied a loss of revenues for the concession holders.

(32) In addition, the Commission has verified that according to the concession agreement for the given section of A4 motorway, the State is responsible for risk related to the change of law which directly or indirectly affects the concession holder. […]

(33) Thus, the Commission considers that the concession holder had the right to be compensated for excluding heavy goods vehicles from the obligation to pay a toll for using the motorway in the period from 1 September 2005 to 30 June 2011.

(34) The Commission notes that such a compensation for the lost revenues would not contain any State aid element if it is limited to the loss suffered by the concession holder. Any overcompensation would constitute State aid.

(35) The parties agreed that the compensation (through a shadow toll mechanism) should be set at such a level that the situation of the concession holder is neither better nor worse than it would have been, if it could still collect tolls from heavy goods vehicles. The parties also agreed that this objective is met, if the compensation does not alter the IRR of the project (i.e. the compensation does not increase or decrease IRR of the project).

(36) Taking into account that IRR is a commonly used indicator to measure and compare the profitability of investments the Commission considers that choosing IRR is an appropriate criterion for calculating the compensation level that the concession holder was entitled to receive under the concession agreement.

(37) The Commission also considers that setting up the shadow toll level in two-steps procedure with a financial model is acceptable. The Commission notes that the second step allowed verification of the shadow toll level depending on real traffic change due to the change of law and therefore reflected a prudent and conservative approach.

(38) Consequently, the methodology put in place by the Polish authorities, if applied correctly, is acceptable and should not give any advantage to the concession holder within the meaning of Article 107(1) TFEU.

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[13] See footnote 3.

(39) As regards the actual application of the methodology, the Commission notes that the update of the BM that led to the adjustment of NTR did not cover updating the costs. Since the risk of traffic and related costs, according to the concession agreement, should be borne by the concession holder, the Commission finds it, in principle, appropriate.

(40) However, the Commission notes that the State was responsible for the increase in costs directly related to the increase of heavy good vehicle traffic (i.e. due to the change of law). This cost increase, which was the direct consequence of the legislative amendment, in the operating and maintenance costs was not taken into account in the update of BM, when the adjusted NTR was calculated.

(41) The higher operating and maintenance costs due to the change of law amounted to PLN […] million (EUR […] million). Therefore the State reduced the amount to be paid back by the Concession holder, by the same amount.

(42) Taking into account that heavy goods vehicle traffic level has a strong impact on operational and maintenance costs and the increase in traffic can be directly linked to the change in law, the Commission finds that the State was entitled to reduce the amount to be paid back by the concession holder of the above amount. Indeed, the increase in operational and maintenance costs was not taken into account when the shadow toll level was adjusted.

(43) Moreover, the Commission notes that the amount of compensation represents only […]% of the difference between the projected and the real costs registered in the period between September 2005 and May 2007. Over this period, the heavy goods vehicles traffic projection was […] heavy goods vehicles per day, while the real traffic amounted to […] heavy goods vehicles per day (increase of […]%).

(44) Thus, the Commission considers that the amount of PLN […] million (EUR […] million) that was kept by the concession holder did not give any advantage to the concession holder, notably because it did not increase the IRR for the project to the level above the one existing before the introduction of the compensation mechanism.

(45) Moreover, the Commission observes that the shadow toll mechanism did not alter the economic balance of the concession agreement by transferring all the risk of the concession to the State. Demand/traffic risk concerning light vehicle traffic (accounted for […] % of all the motorway's users) was still borne by SAM S.A, whilst only the additional risk directly consequent to the change in the law was neutralised for the concession holder.

(46) Taking the above into consideration, the Commission finds that the State compensated only losses that occurred as a result of the changes in the public law, in accordance with the provisions of the concession agreement and it did not increase the actual IRR of the project for the concession holder. Therefore the State did not grant any advantage that the concession holder would not

have received under normal market conditions but simply complied with its obligations under the agreement

(47) As the measure does not provide selective economic advantage, there is no need to examine the other cumulative conditions for the existence of State aid within the meaning of Article 107(1) of the Treaty.

4. CONCLUSION

The Commission has accordingly decided that the measure does not constitute aid within the meaning of Article 107(1) of the Treaty.

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Directorate-General for Competition
State Aid Registry
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Fax (32-2) 296 12 42
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Yours faithfully,

For the Commission

Joaquín ALMUNIA

Vice-President of the Commission