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**Subject: State Aid SA.46569 (2016/N) – Germany
Extension of the inland port of Magdeburg**

Sir,

1. PROCEDURE

- (1) On 7 October 2016, Germany notified public support for an infrastructure project in the port of Magdeburg.

2. DESCRIPTION

2.1. Objective of the notified project

- (2) The port of Magdeburg is located in the German State of Sachsen-Anhalt at the river Elbe and the Rothensee canal (*Rothenseer Verbindungskanal*). It is after Hamburg the second largest inland port along the river Elbe. It is among the inland ports in the trans-European network a TEN-T core port and part of the

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corridors NORTHSEA/BALTIC and ORIENT/EAST-MED. As a trimodal port hub, it is well connected with the interregional road and rail network. Moreover, the port of Magdeburg serves as a hinterland hub for several sea ports located at the North and the Baltic Sea, including Cuxhaven, Hamburg (both in Germany) and Szczecin (in Poland).

- (3) The objective of the notified project is to improve the existing infrastructure of the port, in particular by enabling the use of the port throughout the year independently of the water levels of the river Elbe. As a consequence, industrial and commercial undertakings located in the proximity of the port shall have an incentive even greater than presently to use the waterways.

2.2. Planned investment

- (4) The total investment cost of the notified project amounts to EUR 39 773 500.
- (5) The notified project consists of the following measures:
- Construction of a cofferdam (*Fangedamm*) and drawing of a separation dam (*Trenndamm*);
 - Construction of quay facilities (*Kaianlagen*);
 - Construction of a port basin floor (*Sollsohle*) and renovation of the angular waterside (*Schrägufer*).

2.3. Financing of the investment project

- (6) The project will be financed through a direct grant by the *Investitionsbank Sachsen-Anhalt*, amounting to EUR 35 796 150. The remaining part of the investment cost, amounting to EUR 3 977 350, will be financed by the aid recipient through own funds.
- (7) The German authorities provided an analysis based on the funding gap¹ of the project, calculated as the difference between the discounted value of the expected net operating profits of the investment (EUR [...]*) plus the discounted residual value of the infrastructure (EUR [...]) and the discounted investment costs of the project (– EUR 39.056 million), which shows that over the estimated lifetime of the investment, the project has a negative financial net present value (NPV) of – EUR 37.289 million. The negative NPV indicates that the project is not financially sustainable without public support.
- (8) As regards the main revenues stemming from the investment, the German authorities indicated that port dues (*Hafen-/Ufergelder*) will be levied for the usage of the infrastructure.

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

* Confidential information

2.4. The beneficiary

- (9) The *TRANSPORTWERK Magdeburger Hafen GmbH* ("MHG") is a public undertaking. 90% of the company are owned by the City of Magdeburg and 10% by the *Städtische Werke Magdeburg GmbH & Co KG* (54% of which are owned by the city of Magdeburg).
- (10) The MHG is the owner of the infrastructure in the port. It will also own and operate the infrastructure that is subject of the present notification and is, as such, the direct beneficiary of the notified measure.
- (11) The infrastructure will be accessible to any interested user on a non-discriminatory basis. All users will be charged the same port dues in accordance with established and published tariffs.
- (12) The German authorities provided data showing that the port fees to be charged in the future are in the same range as fees charged in ports located in the vicinity of Magdeburg.

2.5. Competition context

- (13) According to the notification, the planned investment is meant to increase the capacity of the port of Magdeburg. The capacity increase will be achieved in particular by enabling the use of the port throughout the year independently of the water levels of the river Elbe.
- (14) Germany indicated that the most significant inland ports directly competing with the port of Magdeburg include Hamburg, Berlin, Salzgitter, Brunsbüttel, Bülstringen, Hohenhameln, Hannover, Brandenburg an der Havel and Haldensleben.
- (15) According to Germany, no negative impact on competition is to be expected following implementation of the improved infrastructure. The port of Magdeburg primarily ([55-70]%) handles dry goods, including agricultural and food products, metals, scrap, fertilisers and general cargo. In Germany, the sector of transporting dry goods grew by [0.5-2]% yearly in the period from 2009 to 2014. According to Germany, this sector is forecasted to continue growing at the same rate in the years until 2030. With regard to the port of Magdeburg, Germany expects a yearly growth rate of [0.5-2]% in the sector of handling dry cargo. Germany submits that the planned capacity increases in the port will be in line with the foreseen future increase in demand in the market. Germany argues that the notified project will, therefore, not lead to any increase of the port of Magdeburg's market share or any possible diversion of traffic from other ports.

2.6. Legal basis

- (16) The national legal basis applicable to the notified aid consists of the following:
 - *Koordinierungsrahmen der Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur" ab 1. Juli 2014*

2.7. Form and duration of the aid

- (17) As indicated above, the funding takes the form of a direct grant by the *Investitionsbank Sachsen-Anhalt*. The funding is foreseen to be disbursed in three instalments as of 2017 (after the aid is approved by a Commission Decision) until the foreseen completion of the investment project in 2019.

2.8. Transparency

- (18) Germany committed to ensure the publication of the following information on a comprehensive State aid website, at national or regional level:
- the full text of the individual aid granting decision and its implementing provisions, or a link to it,
 - the identity of the granting authority,
 - 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).
- (19) The information will be published within 6 months from the granting act and the information will be kept for at least 10 years and will be available to the general public without restrictions.

3. ASSESSMENT

3.1. Existence of aid

- (20) 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.
- (21) 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.
- (22) In the present case, the existence of State aid must be examined at the level of the owner and operator of the infrastructure (the MHG) and at the level of the port users.

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

3.1.1.1. Notion of undertaking

- (23) According to established case law by the Court,² whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered 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
- (24) As regards infrastructure financing, the Court, in its judgment in Leipzig-Halle,⁴ established that it is the future use of the infrastructure, *i.e.* its economic exploitation or not, which determines whether the funding of the construction of such infrastructure falls within the scope of EU state aid rules or not. In line with this case law the Commission established in a series of decisions that the construction and exploitation of some types of port infrastructures constitute economic activities.⁵
- (25) The notified project concerns the construction of infrastructure in the port of Magdeburg, which is commercially exploited by the MHG by providing port services on the market against remuneration. There is undoubtedly competition between inland ports, as was also confirmed by the information provided by Germany. As such, there is a market for port services, on which the MHG, through its operation and economic exploitation of the infrastructure in question, is in competition with other inland ports.
- (26) Thus, in the construction of the improved infrastructure and in its subsequent operation, the MHG engages in an economic activity and must, therefore, be considered an undertaking within the meaning of Article 107(1) TFEU.

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

³ See e.g. judgment in *Commission v. Italy*, 118/85, EU:C:1987:283, para. 7; judgment in *Commission v. Italy*, C-35/96, EU:C:1998:303, para. 36; judgment in *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, EU:C:2000:428, para. 75.

⁴ Judgment of 24 March 2011, *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v. Commission*, T-455/08, and *Feistaat Sachsen and Land Sachsen Anhalt v. Commission*, T-443/08, EU:T:2011:117, confirmed by the Court of Justice, judgment in *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission*, C-288/11 P, EU:C:2012:821; see also judgment of 12 December 2000, *Aéroports de Paris v. Commission*, T-128/89, EU:T:2000:290, confirmed by the Court of Justice, C-82/01P, EU:C:2002:617; judgment of 17 December 2008, *Ryanair v. Commission*, T-196/04, EU:T:2008:585, paragraph 88.

⁵ Since 2012, the Commission has adopted numerous decisions raising no objections to investment aid to port infrastructures based on Article 107(3)(c) TFEU; see *ex multis* 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 27 March 2014 in State aid case no. SA.38302 – Italy – *Port of Salerno*, OJ C 156 of 23.05.2014, p. 1; Commission Decision of 30 April 2015 in State aid case no. SA.39608 – Germany – *Seaport extension Wismar*, OJ C 203 of 19.06.2015, p. 3; Commission Decision of 30 April 2015 in State Aid case no. SA.39637 – Germany – *Extension of the cruise ship terminal in Wismar*, OJ C 203 of 19.06.2015, p. 3; Commission Decision of 26 November 2015 in State aid case no. SA.43250 – Portugal – *Cruise ship terminal Porto de Leixões*, OJ C 66 of 19.02.2016, p. 9.

3.1.1.2. State resources and imputability

- (27) As stated above, the project will be partly funded through a direct grant by the *Investitionsbank Sachsen-Anhalt*, which is the central financing and promoting bank entrusted with public tasks in Sachsen-Anhalt. In that regard, the funding of the notified direct grant will stem from public funds.
- (28) The *Investitionsbank Sachsen-Anhalt*, being the central financial support institute of the State, implements the support policy objectives of the Regional Government. Decisions by the *Investitionsbank Sachsen-Anhalt* to grant financial support, such as for the notified project, are therefore imputable to the State.

3.1.1.3. Selectivity

- (29) As the public financing is granted to an individual project, the measure is selective.

3.1.1.4. Economic advantage

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

3.1.1.5. Distortion of competition and affectation of trade

- (32) 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 competition and trade between Member States.⁶
- (33) In the present case, the financial support granted by Germany will be used for improving the infrastructure in the port of Magdeburg to adapt it to meet demand in a growing market. After completion of the project the port of Magdeburg will increase its capacity and will, therefore, at least potentially increase competition between ports in the internal market. Moreover, as the port of Magdeburg is located in the catchment area of at least one seaport located in a Member State outside Germany (Szczecin in Poland), cross-border trade is likely to be affected once the improved infrastructure has started operating. Thus, the project is capable of affecting competition and trade between Member States by potentially diverting commerce away from other Member States.

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

- (34) In light of the above, the Commission concludes that the notified measure constitutes aid to the owner and operator of the planned infrastructure.

⁶ 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.

- (35) The aid corresponds to the total amount of the public grant by the *Investitionsbank Sachsen-Anhalt* of EUR 35 796 150.

3.1.2. Aid at the level of port users

- (36) The information provided by the German authorities shows that the fees charged to the port users correspond to the level of fees charged in comparable ports and, therefore, constitute market prices. In addition, the Port of Magdeburg is in competition with other ports and can only increase prices in line with the price developments on the market.
- (37) Furthermore, port users shall enjoy equal and non-discriminatory access to the infrastructure.
- (38) 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

- (39) Germany submits that the proposed aid is compatible with the internal market under 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. While the Commission has previously assessed similar measures for inland ports under Article 93 of the Treaty, it considers that Article 107(3)(c) of the Treaty can also be used if the conditions for the application of that provision are met.
- (40) It must therefore be examined if the notified public funding meets a clearly-defined objective of common interest, if it is necessary, proportionate and has an incentive effect, if the aid does not lead to distortions of competition contrary to the common interest and if it complies with the transparency principles.

3.2.1. Objective of common interest

- (41) In the Communication entitled "A Sustainable Future for Transport: Towards an integrated, technology-led and user-friendly system,"⁷ the Commission underlined that the development of ports and intermodal terminals is key to achieving an integrated and intelligent logistic system in the EU.
- (42) 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 2018,⁸ 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.

⁷ COM(2009) 279/4, paragraph 46.

⁸ 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.

- (43) According to the trans-European transport networks (TEN-T) Regulation,⁹ the Port of Magdeburg is considered as part of the European core network. According to this Regulation, the TEN-T could be best developed through a dual-layer approach, consisting of a comprehensive network and a core network. The comprehensive network constitutes the basic layer of the new TEN-T and consists of all existing and planned infrastructure meeting the requirements of the TEN-T Regulation. The core network consists of those parts of the comprehensive network which are of the highest strategic importance for achieving the objectives of the trans-European transport network policy, and shall reflect evolving traffic demand and the need for multimodal transport. It shall, in particular, contribute to coping with increasing mobility and ensuring a high safety standard as well as contributing to the development of a low-carbon transport system.¹⁰
- (44) Further, according to the market study provided by Germany, the planned investment is projected to create a total of approximately 227 new jobs and is as such important for the development of the regional economy.
- (45) The above elements indicate that the project contributes to an objective of common EU interest and to the development of both an economic activity and an economic area.

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

- (46) The negative NPV (Funding Gap) of – EUR 37.289 million shows that the expected net revenues of the MHG do not cover the investment costs. The negative NPV indicates that the project is not viable without public support. It should also be noted that the MHG makes an effort to partially fund the project itself, by contributing EUR 3 977 350 to the project from own resources. It is unlikely that the MHG would be able to obtain the full remaining amount exceeding its planned own contribution on the market. Therefore, the Commission considers that the requested aid is necessary for this project.
- (47) With regard to the incentive effect of the aid, according to the information provided in the notification, the application for the aid will be submitted once the aid has been approved by a Commission decision. Works on the project beyond planning activities have not been initiated yet and the aid will only be granted by the *Investitionsbank Sachsen-Anhalt* once the Commission has taken a decision declaring the aid to be compatible with the internal market. In addition, as shown above, the MHG would not be able to raise the funding required for carrying out the project itself, meaning that the project could not be carried out in the absence of the aid. It follows that the aid must be regarded as having an incentive effect.
- (48) As regards proportionality (i.e. keeping public funding down to the minimum necessary), the discounted amount of the aid (EUR 35 796 150) is below the funding gap identified for the project (—EUR 37.289 million). Therefore, the aid is proportionate.

⁹ 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>.

¹⁰ See Article 38(1) of the Regulation quoted under footnote 9.

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

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

- (50) The information provided by the German authorities shows that the notified project will lead to an increase in capacity and market share of the port of Magdeburg. However, an infrastructure project like the present one by its nature leads to a sudden (upon completion) increase in capacity. Yet, in the present case, the information provided by the German authorities shows that this increase will be proportionate to and counterbalanced by market growth.
- (51) 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.

3.2.1. Transparency of the aid

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

4. CONCLUSION

- (53) 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 in the meaning of Article 107(1) 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