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<p>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 [...].</p>		<p>PUBLIC VERSION WORKING LANGUAGE This document is made available for information purposes only.</p>
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**Subject: State aid No C 39/2009 (ex N 385/2009) – Latvian Republic
Public financing of port infrastructure in Ventspils Port**

Sir,

The Commission wishes to inform the Latvian Republic that, having examined the information supplied by your authorities on the measures referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU)¹ as regards potential aid at the level of the concession holders. The Commission has decided to raise no objection with regard to the public financing of port infrastructure at the level of the port authority.

1. PROCEDURE

- (1) By electronic notification of 26 June 2009, the Latvian Republic notified, according to Article 108(3) TFEU, a measure providing for public financing for the construction of port infrastructure in Ventspils Port. The notification has been registered under case number N 385/2009.
- (2) The Commission requested additional information on the proposed measure on 23 July 2009 and 29 September 2009. The Latvian authorities provided the information requested on 31 July 2009 and 26 October 2009.

¹ With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

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2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Objective

- (3) The objective of the project is to upgrade the port infrastructure. The project consists of the following sub-projects to be developed during 2010-2014:
- (a) construction of a dry cargo terminal,
 - (b) construction of berth No 35,
 - (c) construction of berth No 12,
 - (d) reconstruction of the Northern breakwater,
 - (e) dredging of the port basin,
 - (f) construction of access railroads,
 - (g) renovation of mooring jetties for the port authority's vessels,
 - (h) fortification of the coast of the channel.

2.2. Description of Ventspils port

- (4) The port is operated as a free economic zone offering business incentives in terms of tax rebates. According to the Law On Tax Application in Free Ports and Special Economic Zones as approved by the Commission², companies can receive considerable indirect tax (value added tax, excise tax and customs duty) reductions, as well as direct tax (corporate income tax and real estate tax) reductions of up to 50% of the initial investment.
- (5) The area of the Free Port of Ventspils occupies 2623.94 ha, out of which more than 1000 ha are still available for setting up new production units and operating them under the customs free zone conditions. In 2008, the Free Port of Ventspils handled 28.57 million tones of cargo. It is known as a significant transport hub for cargoes such as crude oil, petroleum products, liquid chemical products, coal, various metals, fertilizers and timber products. Out of the transhipped cargo volume, 62.53% were liquid cargoes, 30.08% bulk cargoes and 7.39% general cargoes.
- (6) The port consists of 4 universal terminals, 3 dry cargo terminals, and 4 liquid bulk cargo terminals. 26 companies are operating in the territory of the port, 11 of which are terminals with special economic zone status.

2.3. Granting authority

- (7) The public financing will be granted by the Ministry of Transport of the Latvian Republic.

2.4. Legal basis

- (8) The national legal basis includes:
- (a) Latvian Law on Ports (1994);
 - (b) Law on Ventspils Free Port (1997);

² OJ C 239, 11.10.2007.

- (c) Law on Tax Application in Free Ports and Special Economic Zones (2002);
- (d) Republic of Latvia Cabinet of Ministers Regulation No 857 of 14 October 2008 *Regulation on the activity 3.3.1.3. Development of Infrastructure of Large Ports within the Framework of the “Motorways of the Sea” under the operational programme “Infrastructure and services”*;
- (e) Law on Public Procurement (2006).

2.5. Beneficiary

- (9) The direct beneficiary of the public financing under scrutiny is Ventspils Free Port Authority (hereinafter the Port Authority), chosen by restricted selection of project applications, as pursuant to Republic of Latvia Cabinet of Ministers Regulation No. 857 of 14 October 2008 *Regulation on the activity 3.3.1.3. Development of Infrastructure of Large Ports within the Framework of the “Motorways of the Sea” under the operational programme “Infrastructure and services”*. As exposed below (Heading 2.9) part of the infrastructure built by means of the public financing in question will be subsequently operated by concession holders, which can therefore be seen as potential indirect beneficiaries of the public financing.
- (10) The port authority is a non-profit public body established by the municipality of Ventspils.
- (11) As pursuant to the Latvian law on ports, 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 the 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.
- (12) Revenues of Ventspils Free Port Authority are formed by: port dues (80%), lease fees (15%) and others (5%).

2.6. Form of the aid

- (13) The public financing will be granted as a direct grant.

2.7. Budget and aid intensity

- (14) All sub-projects are to be co-financed by the European Cohesion Fund.
- (15) The total public financing amounts to EUR 31 397 433. In addition to the public contribution, the Port Authority shall contribute itself approximately 37% of the eligible costs, i.e. by means of own resources and loans. The Latvian authorities have confirmed that the loans would be contracted on commercial terms from private banks and without State guarantee.

Sub-project	Financing of eligible costs				
	CF grant		Own resources & loans		Total
	%	EUR	%	EUR	EUR
Dry cargo terminal	50%	4 926 227	50%	4 926 227	9 852 454
Berth No 35	50%	4 288 113	50%	4 288 113	8 576 226
Berth Nr 12	50%	6 584 645.5	50%	6 584 645.5	13 169 291
Northern breakwater	85%	4 293 021.9	15%	757 592.1	5 050 614
Dredging works	85%	3 947 130.55	15%	696 552.45	4 643 683
Construction of access railroads	85%	3 901 227.15	15%	688 451.85	4 589 679
Renovation of the mooring jetties	85%	2 736 094.75	15%	482 840.25	3 218 935
Bank fortification	85%	720 973.4	15%	127 230.6	848 204
Total	62.85%	31 397 433.25	37.14%	18 551 652.75	49 949 086

Table 1- Financing of the eligible costs

2.8. Detailed description of the projects

- (16) The total investments required for the implementation of the project amount to EUR 49,949,086. The breakdown of the investment costs is given below in relation to each of the sub-projects mentioned in paragraph (3) above.

2.8.1. Construction of dry bulk terminal (2010-2011)

- (17) The foreseen investments relate to the construction of a dry cargo terminal with a total turnover of 300-350 thousand tons per year.

Investment costs	EUR
Berth (length-315m, width-33m, depth-8m)	[...]*
Loading site (3 ha)	[...]
Related costs	[...]
Total costs	9 852 454

Table 2 – Breakdown of investment costs dry-bulk terminal

2.8.2. Construction of Berth No. 35 for liquid cargo (2011-2012)

- (18) The investment aims to renew discharge capacity of liquid cargoes and enable accommodation of vessels of greater gross tonnage. Berth No. 35 will replace the dismantled jetty No 1 (Berths No 28-29) where liquid cargoes were transhipped. The jetty is physically worn out and cannot currently be operated.

Investment costs	EUR
Berth No 35	[...]

* Covered by the obligation of professional secrecy.

Extraordinary costs	[...]
Related costs	[...]
Total costs	8 576 226

Table 3 – Breakdown of investment costs berth No. 35

2.8.3. Construction of Berth No. 12 for general and bulk cargo (2010-2013)

- (19) The project relates in fact to the re-construction of a bridge terminal with total turnover of general and bulk cargo of 250 thousand tons per year. The investment aims to increase discharge capacity of cargoes of higher value, i.e. general cargoes. The technical state of the existing berth is obsolete to the effect that currently it can only be used by the port authority itself and does not allow the handling of cargoes.
- (20) The public financing exclusively relates to the implementation of the first stage of the project. During the second stage of the project, an additional loading area of 4.1 ha will be built.

Investment costs	EUR
Construction of the sewage and communications cable (inverted siphon) across the river Venta and dismantling of the existing one	[...]
Construction of the berth (length 280m, depth 12.5m)	[...]
Surfacing of the berth and the adjoining territory, engineering networks. Area: 2ha	[...]
Extraordinary costs	[...]
Related costs	[...]
Total costs	13 169 291

Table 4 – Breakdown of investment costs berth No. 12

2.8.4. Renovation of the Northern breakwater (2013-2014)

- (21) The notified project relates to the first phase of the renovation of the breakwater.

Type of work	Amount, EUR
Preparatory works	[...]
Strengthening of the base construction	[...]
Extraordinary costs	[...]
Related costs	[...]
Total costs	5 050 614

Table 5 – Breakdown of investment costs Northern breakwater

2.8.5. Dredging of the port channel (2010-2012)

- (22) The dredging works in the port basin are in fact associated with the implementation of the three sub-projects detailed under paragraphs (17)-(20) above (construction of the dry bulk terminal and the two berths) and aim to ensure the access of vessels with gross tonnage of 25,000 tons to the terminal and the berths in the estuary of the river Venta.

Investment costs	EUR
Dredging works (dry cargo terminal, berth No. 35, berth No. 12)	[...]
Related costs	[...]

Table 6 – Breakdown of investment costs dredging works

2.8.6. Construction of access railroads (2010-2012)

- (23) With a view to ensure both loading and unloading of cargo and manoeuvring outside the territory of the *dry bulk terminal*, the reconstruction of the existing access railroads will be financed. The new access routes will be both used for the economic activities of the dry bulk terminal, and as common-use infrastructure for manoeuvres of engines and wagons for the transportation of cargoes of other terminals.
- (24) As regards *berth No 12* for general and bulk cargo, the foreseen works imply the reconstruction of the existing railway track to ensure connection to the infrastructure of JSC “Latvijas dzelzceļš” (Latvian railways).

Investment costs	EUR
Construction of the access railroad to the dry cargo terminal	[...]
Reconstruction of the existing railway and fixing of the access railroads to berth No 12	[...]
Related costs	[...]
Total costs	4 589 679

Table 7 – Breakdown of investment costs access railroads

[...] Map 1 – Access railroads-dry bulk terminal

2.8.7. Renovation of the mooring jetties (2013-2014)

- (25) According to the Latvian authorities, the technical condition of the jetties is unsatisfactory. Certain repair works of the façade wall structures were performed in 1960s. However, these works did not ensure the impenetrability of wall grounds. In addition, the damages in the Western jetty’s fundamental structure have only been repaired temporarily.
- (26) Therefore, the main task of this sub-project is to restore the impenetrability of façade wall grounds and therefore to ensure mooring security for the ships of the Port Authority, i.e. oil-collecting vessels, divers vessels, vessels measuring depth. The jetties will be exclusively used by the port authority itself.
- (27) The following works are foreseen:
- (a) construction of the Western jetty and the Western wall for mooring ships;
 - (b) construction of the section of the Southern wall for mooring ships;
 - (c) construction of the Eastern jetty and the Eastern wall for mooring ships, with expansion of port entrance gate (by shortening the length of the jetty).

- (28) The Latvian authorities have confirmed that following completion of the renovation works, the functionality of the jetties will not be altered in the sense that they would still serve for the mooring of small vessels of the port authority.

Investment costs	EUR
Western mole. Western wall for ship standing	[...]
Sector of Southern wall for ship standing	[...]
Eastern mole. Eastern wall for ship standing	[...]
Extraordinary costs	[...]
Related costs	[...]
Total costs	3 218 935

Table 8 – Breakdown of investment costs mooring jetties

2.8.8. Fortification of coast of the channel (2010-2011)

- (29) In order to protect the fishing boat pier from wind and rough sea, and to stop further destruction of hydro-engineering structures located in the fishing port, the construction of a 78.4 m long vertical type coast protection is foreseen in the area of berth No 40A.

Investment costs	EUR
Hydro-technical works	[...]
Construction and renovation works of surfacing	[...]
Extraordinary costs	[...]
Related costs	[...]
Total costs	848 204

Table 9 – Breakdown of investment costs fortification of the channel

2.9. Concession contracts

- (30) The dry-bulk terminal and the two berths will be operated by private parties. The port authority will conclude concession contracts for a period of 35 years. A tender procedure will be carried out in order to further grant the right to operate the newly built port infrastructure at the end of the term of the contract.
- (31) However, no tender will be carried out in order to grant the initial concession contracts. The concession fee to be paid by the chosen port services providers has been established beforehand on the basis of an evaluation carried out by an independent expert. The operators will pay the port authority an annual concession fee, amounting to EUR [...] per square metre for the operation of the dry-bulk terminal and berth No. 12 and EUR [...] per year as regards berth No. 35.
- (32) The Latvian authorities have confirmed that the expert's evaluation is binding for establishing the fee. In addition, a provision to the effect that if additional infrastructure is built after the granting of the concession contract, the financial terms are to be re-negotiated accordingly, will be included in the concession contracts.
- (33) The current situation is further detailed below by reference to each of the infrastructure elements subject to the contracts.

2.9.1. Construction of dry bulk terminal

- (34) It is the intention of the Latvian authorities to grant the concession contract for the operation of the newly built terminal to [...]. Currently the operator is carrying out cargo handling operations in the territory leased by the port authority to [...] on the basis of a sublease agreement concluded with the latter.
- (35) According to the Latvian authorities, [...] intends to extend its operations and use the leased territory in its entirety. Consequently, the Port Authority decided to construct a dedicated terminal and subsequently grant the concession to [...].

2.9.2. Berth No. 35 for liquid cargo

- (36) According to the Latvian authorities, the restoration of the capacity of liquid cargoes in the port of Ventspils is indissolubly linked to this particular location because of constraints related to the required depth for accommodation of liquid cargo vessels of appropriate tonnage.
- (37) The entire adjacent territory is currently leased to [...]. The intention of the Latvian authorities is in fact to grant the concession contract for the operation of the new berth to the latter on the ground that the operator has handled liquid cargoes in the port of Ventspils and therefore already owns all the required equipment for transshipment of liquid cargoes, including fire extinguishing equipment.

2.9.3. Berth No. 12 for general and bulk cargo

- (38) One of the users of the berth will be a subsidiary of [...], which intends to establish a building modules factory on the territory of the port on the basis of a long term land lease agreement with the Port Authority. The building modules will be transported to export markets by ro-ro type vessels.
- (39) Transport of the modules from the factory itself to the berth will be carried out by rail and road, along the territory of Universal terminal No 2 operated by [...]. To this end, a trilateral agreement between [...], [...] and the Port Authority will be signed after the construction of the berth.
- (40) According to the Latvian authorities, [...] and [...] are the only potential operators of berth No 12. The port authority has decided to grant the concession to the latter.

2.10. Cumulation

- (41) The aid cannot be cumulated with State aid received from other sources to cover the same eligible costs.

3. POSITION OF THE LATVIAN AUTHORITIES

- (42) Notwithstanding the granting of the concession contracts without the carrying out of a tendering procedure, the Latvian authorities submit that no undue advantage will be granted to the concession holders insofar as the concession fee has been established on the basis of an independent evaluation and the price the concessionaires will actually pay does not deviate from the estimated values. As

for the direct award of the contracts, the Latvian authorities basically consider there is no real justification to tender out the granting of the contracts for the user-specific infrastructure insofar as potential offers could only come from those port operators already chosen by the port authority itself.

- (43) The Latvian authorities thus argue that the port infrastructure at stake is highly specialised to the effect that only those operators chosen by the port itself could presumably submit offers tailored to the specific needs of the port. In addition, the Latvian authorities are of the view that in order to ensure a sufficient return on its own investments, the port has to consider the service providers currently operating in the port, which have clearly demonstrated their willingness to invest in the port.
- (44) In particular, [...] deals mainly with the transshipment of wood. The Latvian authorities explain that the presence of [...] in the port is very important because of the particular significance of wood exports in the region. In addition, the Latvian authorities maintain that granting the concession to this particular operator constitutes the most realistic and viable solution for the operation of the *terminal* since it already owns the equipment required for the handling of dry cargoes.
- (45) Similarly, the Latvian authorities assert that granting the concession for the operation of *berth No 35* to a different company is not possible in practice. This is because liquid cargoes are regarded as highly dangerous and, as explained above, the chosen operator owns the necessary equipment.
- (46) As regards *berth No 12*, the Latvian authorities underline the overall benefits in terms of employment and regional development that will result by the establishment of the building modules factory on the territory of the port. In particular, the Latvian authorities argue that up to 1,000 persons will be employed in the factory. It is also claimed that, considering both the location of the berth as well as its technical parameters, the berth will serve freight forwarders located in an area up to 12 ha, irrespective of the type of cargo handled. According to the Latvian authorities, there are only two potential operators of the berth, i.e. [...] and [...]. The port authority has decided to grant the concession to the latter.
- (47) In conclusion, the Latvian authorities maintain that the three operators have been chosen by the port authority on objective grounds and in fact represent the most viable alternative as concession holders.
- (48) As regards the independent valuation, the Latvian authorities claim that the chosen expert has carried out the evaluation independently, without any intervention or influence from the port authority.

4. ASSESSMENT OF THE NOTIFIED MEASURES

- (49) The Commission has decided to open the formal investigation procedure foreseen by Article 108(2) TFEU in relation to potential support measures in favour of the three concession holders of the user-specific port infrastructure.

4.1. Existence of aid

- (50) 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 internal market".
- (51) The criteria laid down in Article 107(1) 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.
- (52) In the present case, State aid has to be considered at the level of the port authority, at the level of the concession-holders, as well as at the level of the port users.

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

4.1.1.1. Notion of undertaking

- (53) 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 law³.
- (54) As 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 utilised exclusively for the management of the port and for the performance of the functions attributed to it by the law. However, 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 economic character of the activities pursued by it. Even if a non-profit activity is carried on, there may be participation on the market capable of undermining the objectives of competition law⁴.
- (55) In this case, as detailed under paragraph (11) above, the port authority is 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. The

³ 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.

⁴ Judgement of the Court in Case C-205/03 P Case C-205/03 P FENIN v Commission, [2006] ECR I-6295.

Commission however takes the view that, irrespective to the pursuit of certain activities which may be regarded as an exercise of the official powers conferred to it by the law, the port authority also engages in activities that can be equated with participation in the market and cannot therefore be sheltered from the application of State aid rules. This finding is supported by several considerations.

- (56) Firstly, the port authority pursues a commercial policy in accordance with its own economic criteria. More precisely, the port authority sets the tariff ceilings for the port services. In addition, the port authority does provide a range of technical nautical services to ship-owners, i.e. pilotage and mooring. The charges imposed for these services are undoubtedly commercial in nature.
- (57) In its “*Aéroport de Paris*” judgement,⁵ the Court of First Instance considered that the management and operation (provision of facilities) of an airport constitute an economic activity. In this sense, the Commission considers that making available the port land and certain infrastructure to the port service providers against a fee may be regarded as participation on the market insofar as the abovementioned fees have been freely fixed by the port authority, without regulatory intervention by the State.
- (58) In the light of the above, and consistent with the Commission's decisional practice⁶, the Commission concludes that the port authority is engaged in economic activities and should be regarded as an undertaking for the purposes of competition law as far as the economic activities are concerned.

4.1.1.2. State resources

- (59) The resources of the Cohesion Fund which are transferred to the national budget before being paid to the port authority are considered to be at the disposal of the Latvian authorities and therefore amount to State resources.
- (60) As regards the imputability to the State of the financing, the Commission notes that the Latvian authorities enjoy a high degree of decision-making powers in the selection of subsidised projects under the Operational Programme and that the notified measures are directly chosen by – and thus imputable to – the Latvian State.

4.1.1.3. Selectivity

- (61) Since the measure is granted only to the Ventspils port authority, it is selective.

4.1.1.4. Economic advantage

- (62) Public financing in sea ports infrastructure 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 effect⁷. In these circumstances, the public financing

⁵ Judgement of 24 October 2002, case C-82/01P *Aéroport de Paris*, ECR 2002, I -9297.

⁶ Commission decision of 13.07.2009, State aid - Greece – Public financing of infrastructure and equipment at the Port of Piraeus, not yet published.

⁷ Judgement of 14 February 1990, case C-301/87 *France/Commission* [1990] ECR I-307, point 41.

may raise State aid issues. The essential question in this respect is whether the infrastructure in question can be exploited economically.

- (63) In the case at hand, the Commission notes that part of the notified project regards the renovation of the Northern breakwater and the fortification of the coast of the channel. As regards the breakwater, the Commission notes that in addition to its primary function, i.e. protection of the port itself, this infrastructure also ensures the overall protection of not only the port services providers operating in the port, but also all the undertakings located in the free economic zone (see Section 2.2 above) and thus ensures the carrying out of their activities in safety conditions. The Commission has already acknowledged that access and sea-defence infrastructure works are extremely risky from a financial perspective. Such works are generally highly capital intensive. The same applies as regards the fortification of the coast of the channel, whose function is to protect the fishing boat pier from wind and rough sea. Therefore, the Commission notes that these considerations may speak in favour of considering these investments do not confer an economic advantage.
- (64) As underlined in paragraph (26) above, the renovation of the mooring jetties will benefit exclusively the port authority that will use this infrastructure itself in relation to its public tasks. The Commission notes that in this case the infrastructure at stake is not commercially exploitable by the port authority. The renovation of the jetties will ensure the safe mooring of the ships of the port authority performing certain activities aiming to ensure compliance with safety requirements (oil-collecting vessels, divers vessels, vessels measuring depth). In particular, the oil collecting vessels of Ventspils Free Port Authority ensure collection of oil and oil products polluting the port basin. The Court has already ruled⁸ that such 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 in maritime areas. Divers vessels and vessels measuring depth are themselves used to ensure navigation and people's safety.
- (65) In addition, the port authority has confirmed that the functions of the jetties will not be altered following the renovation works in the sense that on the long-term, they would still serve for mooring of the same vessels of the port authority. The Commission thus considers that the public financing in question does not, in principle, confer an advantage to the port authority.
- (66) Nevertheless, all these investments are necessary in order to render the commercial operation of the port possible. Due to this link they may therefore be considered as commercial as well.
- (67) The Commission notes that it is not necessary to definitely decide in the present case as regards the public financing of the breakwater, the renovation of the coast of the channel and the mooring jetties used by ships of the port authority performing certain public tasks. Even if an aid element was present in this public financing, such aid would be compatible with the internal market as detailed below.

⁸ Judgement of 18 March 1997, case C-343/95, *Diego Cali&Figli*, ECR – 1547.

- (68) As regards dredging, the Commission notes that such works can be undertaken to meet a number of different objectives. In this case, the Commission considers that insofar as the investments are directly related to the development of the infrastructure detailed under paragraphs (17)-(20) above, i.e. the dry bulk terminal and the two berths, which is commercially exploitable, the carrying out of such works cannot be considered as clearly falling within the public policy remit. Consequently, the Commission cannot *a priori* exclude that the public financing in question may confer an advantage to the port authority.
- (69) The project also involves the construction of access railroads, both in connection to the dry bulk terminal and berth No. 12. As regards the latter, the project foresees the reconstruction of the railways and mainly aims to ensure the connection to the national rail network. As regards the dry-bulk terminal, the access routes will partially serve the terminal itself. This part can be considered as directly linked to the commercial exploitation of the port since it is basically linked to the development of the dry-bulk terminal. With respect to the remaining part this link is less obvious. The Commission notes that a clear-cut separation between the different parts of infrastructure is difficult in the case at stake. Consequently, the Commission cannot exclude the existence of an advantage to the port authority.
- (70) In the light of the above, the Commission considers that the public financing of the dredging and the access railroads confers an economic advantage to the port authority.
- (71) Finally, the public financing partially covers investments in a new dry cargo terminal and two berths. Such infrastructure is commercially exploited by the port authority, who rents it against fees to stevedoring and warehousing undertakings. Public funding of such infrastructure, may thus, under certain conditions, imply a selective advantage for the port authority.
- (72) 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 market economy investor test is applicable in this case. The Court has clarified that it should be determined "whether in similar circumstances a private shareholder, having 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".⁹
- (73) In this case, the Commission has to assess whether the investment of the State in the user-specific port infrastructure is likely to be financially profitable for the State, in which case the public financing in question would not constitute State aid.
- (74) In order to determine whether the decision to finance the infrastructure was driven by the prospect of profitability on the long term, the Commission has to consider the financial assessment of the project because, from the perspective of a private investor, the maximisation of profits over a pre-defined time horizon and the financial viability of the project are the main objectives.

⁹ 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.

- (75) In this respect, the *Guide to cost-benefit analysis of investment projects* (hereinafter the Guide)¹⁰, 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 analysis shows a negative value of the FNPV. This means that the generated revenues do not cover the investment costs of the projects at the end of the 25 years time horizon.
- (76) Since a private investor would exclusively focus on financial analysis of the project, it seems unlikely that such investment would be typical for a prudent investor. The Commission thus preliminarily 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.

4.1.1.5. Distortion of competition and impact on trade

- (77) 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 aid¹¹.
- (78) As regards cargo turnover, Ventspils Port is currently one of the leading ports on the Baltic Sea. The terminals handling crude oil, oil products and liquid chemical products operating in the Ventspils port are amongst the largest in the Baltic Sea region. Other major port terminals in the Eastern Baltic's are those of the ports of Tallinn, Klaipeda, Riga and Liepaja. They handle to a large extent the transit flows from Russia, thus exercising a competitive pressure on each other. They profit from their favourable geographical position, in ice-free ports that are well connected through rail, for the Russian hinterland.
- (79) The Commission thus considers that the aid in question may affect intra-Union trade.

4.1.1.6. Conclusion

- (80) For the reasons set out above, the Commission concludes that:
- (a) it is not necessary to definitely decide in the present case whether the public financing of the breakwater, the coast of the channel and the mooring jetties used by the ships of the port authority performing public tasks involves State aid within the meaning of Article 107(1) TFEU since any aid would be compatible with the internal market;
 - (b) the public financing of the dredging and the access railroads involves State aid within the meaning of Article 107(1) TFEU;

¹⁰ Guide to cost-benefit analysis of investment projects, Structural Funds, Cohesion Fund and Instrument for Pre-Accession, Final Report, 16/06/2008.

¹¹ 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.

- (c) the public financing of the new terminal and the two berths constitutes State aid within the meaning of Article 107(1) TFEU.

4.1.2. *Existence of the aid at the level of the concession-holders*

- (81) The Commission has already had occasion to spell out the conditions under which operations such as the sale of land or buildings¹² or the privatisation of an undertaking¹³ does not, in its opinion, involve the possibility of State aid. This is generally the case if these operations are made at market prices, in particular where the price is the outcome of a sufficiently well-publicised, open, unconditional and non-discriminatory bidding procedure which ensures that potential applicants are treated equally. Without prejudice to the obligations deriving from the rules and principles applicable to public procurement and concessions, when these are applicable, the same kind of reasoning applies in principle, *mutatis mutandis*, to the sale or provision of infrastructure by public authorities.¹⁴
- (82) However, as the Commission has also stressed,¹⁵ it is not possible to rule out the possibility that particular cases may contain elements of aid. For example, there might be aid if the infrastructure in question were allotted to a predetermined manager which gained undue advantage therefrom, or if an unjustifiable difference between the sale price and a recent construction price were to give the purchaser an undue advantage.
- (83) As regards the length of the concession, the Commission notes that in this case the port authority will conclude 35-year concession contracts in order to grant the right of operation of the newly-built port infrastructure to private undertakings. In accordance with its established practice, the Commission considers that such duration is acceptable in this sector.¹⁶
- (84) As mentioned in paragraph (81) above, the Commission's Communication on State aid elements in sales of land and buildings by public authorities¹⁷ (hereinafter *the Communication*) lays down the criteria for assessment of the presence of State aid elements in sales of land and buildings by public authorities. The Commission considers that no State aid at the level of the purchaser can be ascertained if the sale is either carried out following a sufficiently well-publicized, open and unconditional tender procedure, or when the sale price is at least equal to the value established ex-ante by one or more

¹² Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ C 209, 10 July 1997, p 3-5.

¹³ European Commission report on competition policy, 1993, paragraphs 402 and 403.

¹⁴ Community Guidelines on financing airports and start-up aid to airlines departing from regional airports, OJ C 312, 9.12.2005, p. 1, para. 58.

¹⁵ Community Guidelines on financing airports and start-up aid to airlines departing from regional airports, OJ C 312, 9.12.2005, p. 1, para. 59.

¹⁶ See for instance Commission Decision of 10.12.2008 on State aid N 110/2008- Germany - Public financing of the JadeWeserPort Project, OJ C137, 17.06.2009; Commission decision of 13.07.2009 on State aid N 169/2008, N 105/2008 and N 168/2008 – Greece – Public financing of infrastructure and equipment at the port of Piraeus, not yet published.

¹⁷ See footnote 12.

independent asset valuers on the basis of generally accepted market indicators and valuation standards.

- (85) Applying by analogy the same principles, the Commission assumes that the granting of a concession contract by a port authority does not confer undue advantages to the concessionaire if the latter does not acquire the right to occupy and operate a specific port premise on terms that would not have been available under normal market conditions. In other words, no advantage accrues to the concession holder if the price is not lower than the market value.
- (86) The Communication provides the requisite elements of an adequate independent valuation. It has to be carried out beforehand on the basis of generally accepted market indicators and standards by an asset valuer independent in the carrying out of his tasks.
- (87) 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.
- (88) However, the fact that the concession fee has been established by an ex-ante evaluation is not in itself conclusive on the existence of State aid at the level of the operator of the port infrastructure. Unlike in the case of a tender procedure, it cannot be inferred from this alone that the market price is paid by the concession holders. The Commission has to carry out a material analysis which goes beyond the mere observance of the procedural requirements laid down by the Communication. As pursuant to the Communication, such analysis has to take into account the use of generally accepted market indicators and standards to be used when establishing the concession fee.
- (89) Given the specificity of the different types of infrastructure, the Commission considers that the granting of the three concession contracts for the user-specific infrastructure described in Section 2.8. above should be assessed individually in order to determine the observance of the conditions detailed above and consequently, whether each of the measures therein involve aid elements at the level of the concession holders. In what follows, the Commission shall examine in turn each of the three measures.
- (90) At the outset, the Commission notes that separate valuations have been carried out for each of the concession contracts for the user specific infrastructure related to them.
- (91) As regards the dry bulk terminal and berth No. 12, the assessment is based on two methods, i.e. comparison approach and income approach. The first method is based on comparison of different concession contracts. Thus, the appraised property is benchmarked against three contracts considered as comparable:
- (a) A concession contract signed by the port authority with [...] granting the operation of a terminal for general cargo;
 - (b) A sublease agreement signed between [...] and [...] for the handling of timber;

- (c) A concession contract signed by the port authority with [...] for the operation of a bulk cargo terminal.
- (92) Taking into consideration the specific features and characteristics of the infrastructure subject to these three contracts, the valuer used correction quotients in order to establish an adequate concession fee. The resulting value was EUR [...] per square metre per year.
- (93) The second method, based on income approach takes into account the investment costs of the infrastructure, as well as the income generated by the infrastructure to the port authority, in order to calculate the period of recovery of the investments.
- (94) As regards the liquid berth, the report sets out the assumption that the period of recovery of the investments should be 30 years. It is further underlined that the methodology used to establish the concession fee falls within the acceptable methods used for similar contracts in neighbouring ports. The comparison approach is not further substantiated with calculations.
- (95) Based on this, the Commission is of the view that in the present case, *prima facie* several of the criteria required to conclude that the fee established as detailed above represents the market price are not fully complied with.
- (96) Firstly, the independent valuer's assessment is mainly based on comparative analysis and relies very substantially less on actual calculations on the basis of financial standard indicators. Furthermore, the Commission notes that the comparison approach appears to be less accurate than other methods based on standard indicators, as the characteristics and the expected use of the property are to a lesser extent taken into account. In addition, the Commission takes into account the fact that the concession fees paid in relation to the contracts used as reference do not necessarily represent the market price in the case of ports. Consequently, the Commission *a priori* considers that this method cannot on a stand alone basis guarantee that a market-oriented price is paid for the concession in this case.
- (97) Secondly, the Commission has doubts as to the reliability of such comparison approach in the case at stake, insofar as the analysis is carried out in respect to the same three concession agreements for both the dry bulk terminal and berth No. 12 for general and bulk cargo. The Commission finds this approach to be somewhat in contradiction with the emphasis put by the Latvian authorities on the highly specialised character of the infrastructure at hand. As regards the liquid berth, the assessment merely establishes the period for recovery of the investments and divides the total investment costs into 30 equal shares. No further arguments are brought in order to substantiate the use of standard indicators.
- (98) No effective calculations based on cash flow analysis, taking into account future revenues of the port authority have been provided. Moreover, the so-called income approach used in the evaluation does not reflect the entirety of the investment cost in case of the dry bulk terminal and berth No.12.
- (99) In addition, it is not entirely clear why the methodology of assessment is different as regards the liquid berth.

- (100) Finally, the Commission notes that a decision taken by the port board in March 2006 shows the commitment of the port to grant the concession for the operation of berth No. 35 to [...] after completion of the construction works. The methodology of calculation of the concession fee, based on the same principles as the independent evaluation, is detailed therein. Moreover, the Latvian authorities have repeatedly argued that the method used is common for all concession contracts concluded by the port authority in order to grant the right of operation of liquid berths. Consequently, the Commission raises doubts as to the independent character of the evaluation as such.
- (101) The Latvian authorities have detailed the rationale behind the lack of tendering procedures in this case. The underlying assumption would be that no other viable offers could realistically have arisen if the contracts were to be tendered out. The Commission finds however that such assertion is not sufficient at this stage as to justify the granting of the contracts lacking extensive and reasonable considerations to that effect. In particular, as regards berth No. 12, the only justification provided by the Latvian authorities seems related to the appropriateness of the port authority's decision to lease a plot of port land for the construction of the building modules factory and of the decision to subsequently construct the berth, and not to the granting of the concession for its operation.
- (102) To conclude, the Commission has doubts as to whether the price of concession does not involve State aid. On the basis of the information available at this stage, the Commission cannot conclude on the aid character of the notified project at the level of the concession holders. The measures described above appear a priori to provide a selective economic advantage to the operators of the infrastructure in question and thus to constitute aid in the meaning of Article 107(1) TFEU.

4.1.3. Existence of State aid at the level of the port end users

- (103) With respect to potential advantages in favour of the end-users, the Commission has maintained the view that, in general, no State aid within the meaning of Article 107(1) TFEU is present at the level of ship-owners insofar as the infrastructure in question is open to all potential users on equal and non-discriminatory terms.
- (104) In the case under scrutiny, a provision to that effect will be included in the concession contract to be signed with the port infrastructure operators. All potential freight forwarders and ship-owners will have equal access to the port infrastructure. Consequently, the Commission concludes that the concession entails no advantage to the users of the port terminals.

4.2. Compatibility of the aid

- (105) The Commission must establish if the State aid to the Port authority as identified above can be found compatible with the internal market. Additionally, the compatibility of any potential State aid to the concession holders must also be assessed.

4.2.1. Compatibility of aid at the level of the port authority

- (106) In so far as the measures in favour of the port authority constitute State aid, their compatibility must be assessed in the light of the exceptions laid down in Articles 107(2) and 107(3) TFEU.
- (107) In the lack of a more specific provision, 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 Union's interest" may be considered to be compatible with the internal market.
- (108) Therefore, the Commission has to examine whether the notified measures fall within the general objectives of the EU transport policy. Consequently, the aid in question must meet a clearly defined objective of EU interest, has to be necessary and proportional to this objective and must not affect trade to an extent contrary to the EU's interest.

The construction or upgrading and the operation of the facility meets a clearly defined objective of EU interest and aid is necessary and proportional to the objective which has been set

- (109) 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.¹⁸
- (110) Commission's Communication *Strategic goals and recommendations for the EU's maritime transport policy until 2018*¹⁹ 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.
- (111) Accordingly, the Commission considers that State intervention in respect of both projects contributes to a more rational and sustainable traffic flow and is thus coherent with the EU transport policy objectives.
- (112) The Commission acknowledges that port infrastructure projects require substantial capital investments that can only be recovered in the very long term 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 approximately 50% to the investments in the dry-bulk terminal and the berths and 15% to the remaining. Accordingly, the Commission considers that the level of public financing proposed is appropriate.

¹⁸ COM(2009) 279/4, paragraph 46 therein.

¹⁹ 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.

The development of trade is not affected to an extent contrary to the EU's interest

- (113) The port is competing with the other port operators in the region, such as Tallinn, Klaipeda, Riga and Liepaja ports. As mentioned above, these ports handle to a large extent the transit flows from Russia.
- (114) However, the Commission notes that co-financing by the Cohesion Fund is available to all EU ports in Eastern Baltic's. Furthermore, cargoes handled via the newly built infrastructure are partially of Latvian origin and to a large extent have already been transhipped at the port. It is unlikely that the public financing in question have a significant impact on trade between the Member States. The Commission considers that the potential impact that the aid may have on distorting the competition is outweighed by the wider benefits that the aid will provide in supporting a more sustainable transport system (see paragraphs (109)-(111) above). Therefore, the Commission considers that the State financing of such port infrastructure will not affect trade between Member States to an extent which is contrary to the EU's interest.

Conclusion

- (115) On the basis of the foregoing, the Commission considers that the measure in favour of the port authority is necessary to pursue an EU objective and the advantage conferred by the aid is not disproportionate so as to have an impact on competition and on Union trade contrary to the EU's interest. On these grounds the Commission concludes that the aid to the port authority is compatible with the TFEU.

4.2.2. Compatibility of potential aid at the level of the concession-holders

- (116) The Commission considers that any aid to the concession-holders would constitute operating aid, relieving them from costs they would normally have to bear, and would therefore be forbidden under the Treaty rules on State aid.

4.3. Conclusion

- (117) Any aid to the port authority is compatible with the internal market under Article 107(3)(c) TFEU.
- (118) As regards potential aid at the level of the concession holders, the Commission concludes that the Latvian authorities have not submitted overriding reasons to prove that solely those concession holders that have initially been chosen by the port were in a position to conclude the contracts at issue. In addition, it must be noted that the Latvian authorities are of the view that the measures do not represent aid to the concession holders insofar as the latter pay a market-oriented price for the port infrastructure subject to the concession contracts. Consequently, no arguments have been brought forward in support of their compatibility.
- (119) The Commission is well aware of the significance of the investments required in port infrastructure as well as the highly specialised character of such infrastructure. However, the Commission considers that general transport policy objectives cannot justify the granting of the contracts below the market price,

nor would it be sufficient to preclude further assessment of the measures in favour of the concession holders.

- (120) The Commission finds that, insofar as the granting of the contracts has not been preceded by a public tender and no negotiations whatsoever appear to have taken place with different operators in order to award the contracts in question, the concession price necessarily has to be supported by reliable indicators. With the information available at this stage, the Commission has doubts that the price of the concession does not involve State aid.
- (121) On these grounds, the Commission requests the Latvian authorities to provide further information and comments on the observance of the conditions laid down by the Communication as regards the independent character of the valuation and the use of generally accepted market indicators and valuation standards.

5. DECISION

- (122) The Commission has accordingly decided to raise no objection with regard to the public financing of port infrastructure at the level of the port authority on the ground that any aid is compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- (123) With regard to the potential aid at the level of the concession holders, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests the Latvian Republic to submit its comments and provide all such information as may help to assess the measures, within one month of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.
- (124) The Commission wishes to remind the Latvian Republic that Article 108(3) TFEU has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
- (125) The Commission warns the Latvian Republic that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories of the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

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 publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
B-1049 Brussels
Fax (32-2) 296 12 42
Stateaidgreffe@ec.europa.eu

For the Commission

Antonio TAJANI

Vice President of the Commission