COMMISSION DECISION

of 25 August 2011

on State aid C 39/09 (ex N 385/09) — Latvia — Public financing of port infrastructure in Ventspils Port

(notified under document C(2011) 6043)

(Only the Latvian text is authentic)

(Text with EEA relevance)

(2011/784/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

1. PROCEDURE

(1) By electronic notification of 26 June 2009, Latvia notified, according to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), a measure providing for public financing for the construction of port infrastructure in Ventspils Port.

(2) By letter dated 15 December 2009, the Commission informed Latvia that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the TFEU in respect of part of the measure.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [2] (hereinafter 'the opening decision'). The Commission called on interested parties to submit their comments.

(4) The Commission received no comments from interested parties. With letters dated 16 March 2010, 7 April 2010, 12 April 2010 and 14 April 2010 the Latvian authorities submitted their comments on the opening decision.

(5) The Commission requested additional information on the measure by letters dated 21 September 2010, 22 December 2010 and 18 March 2011. The Latvian authorities provided the information requested by letters dated 8 October 2010, 20 January 2011, 22 March 2011 and 31 March 2011.

(6) Additionally, several meetings took place between the Commission services and the Latvian authorities. These meetings were preceded and followed by the dispatch of additional information by the Latvian authorities.

2. DESCRIPTION

2.1. *THE PROJECT*

(7) 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. *SCOPE OF THE PRESENT DECISION*

(8) In its decision of 15 December 2009 [3], the Commission considered that it was not necessary to decide whether the public financing of the breakwater, the fortification of the coast of the channel and the renovation of the mooring jetties used by the ships of the port authority involved State aid within the meaning of Article 107(1) TFEU at the level of the port authority, since such aid would be compatible with the internal market.

[1] OJ C 62, 13.3.2010, p. 7.
[2] See footnote 1.
[3] See footnote 1.

(9) As regards the public financing of the dredging and the access railroads, the Commission considered that it involved State aid within the meaning of Article 107(1) TFEU and declared the aid at the level of the port authority as compatible with the internal market.

(10) As regards the public financing of the new terminal and the two berths, the Commission considered that it involved aid at the level of the port authority. The Commission concluded that the aid to the port authority was compatible with the internal market.

(11) The dry-bulk terminal and the two berths will be operated by private parties. To that end, the port authority will conclude concession contracts with port service providers for a period of 35 years. No tender will be carried out in order to grant the 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.

(12) In its decision of 15 December 2009, the Commission raised doubts as to whether the price of concession would not involve State aid. On the basis of the information available at that stage, the Commission could not conclude on the aid character of the public financing at the level of the three concession holders of the user-specific port infrastructure.

(13) The Commission also found that end-users will have access to the newly built infrastructure on non-discriminatory conditions.

(14) Consequently, only potential aid at the level of the concession holders has been subject to the formal investigation procedure.

2.3. *CONCESSION CONTRACTS*

2.3.1. THE DRY BULK TERMINAL

(15) The port authority intends 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 […].

(16) According to the Latvian authorities, […] intends to extend its operations and use the leased territory in its entirety for its own operations, and therefore plans to terminate the sublease agreement.

(17) The port authority decided to construct a new terminal and subsequently grant the concession to […], so that […] can continue to operate in the port.

2.3.2. BERTH No 35 FOR LIQUID CARGO

(18) According to the Latvian authorities, the restoration of the capacity of liquid cargoes in the port of Ventspils is linked to this particular location because of constraints related to the required depth for accommodation of liquid cargo vessels of appropriate tonnage.

(19) The entire adjacent territory is currently leased to […]. The intention of the Latvian authorities is to grant the concession contract for the operation of the new berth to the […] since it has handled liquid cargoes in the port and therefore already owns the required equipment for transhipment of liquid cargoes, including fire extinguishing equipment.

2.3.3. BERTH No 12 FOR GENERAL AND BULK CARGO

(20) 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 vessels.

(21) 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.

(22) According to the Latvian authorities, […] and […] are the only potential operators of berth No 12. The port authority initially intended to grant the concession to the […].

2.4. *GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE AS REGARDS THE AID CHARACTER OF THE MEASURE AT THE LEVEL OF THE CONCESSION HOLDERS*

2.4.1. EXISTENCE OF STATE AID

(23) In its opening decision, the Commission took the preliminarily view that the criteria required to conclude that the port authority behaved like a private investor when establishing the concession fees to be charged to the future concession holders were not fully complied with.

(*) Covered by the obligation of professional secrecy.

(24) The Commission expressed doubts both as to the methodology used to establish the concession fee itself, as well as to the independent character of the expert's valuation.

2.4.1.1. **Methodologies used by the port authority to establish the concession fees**

(25) The independent expert which valuated the concession fees has used two different methodologies, namely benchmarking and income. With regard to the liquid berth, the expert only used income.

(26) With regard to *benchmarking*, the Commission observed that it was mainly based on ongoing contracts in the same port. Therefore, the Commission raised doubts as to its reliability. The Commission noted that such benchmarking could not be conclusive insofar as there was no indication that a market oriented concession fee is paid pursuant to the contracts used as reference. In addition, the Commission noted that the analysis has been 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, despite the fact that those terminals appear to differ substantially in their nature.

(27) With regard to the *income approach* used in the evaluation, the Commission observed that it did not appear to reflect the entirety of the investment cost in the case of the dry bulk terminal and berth No 12.

2.4.1.2. **Independent character of the expert's valuation**

(28) The Commission noted that a decision taken by the port board already in March 2006 showed 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. Consequently, the Commission raised doubts as to the independent character of the evaluation as such.

2.4.1.3. **Conclusion**

(29) The Commission considered that the public financing of the construction of the terminal and the two berths appeared 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.

2.4.2. COMPATIBILITY OF THE AID

(30) The Commission took the preliminary view that any aid to the concession holders would constitute operating aid, relieving them from costs they would normally have to bear. According to the case law of the Court, such operating aid is in principle incompatible with the internal market ([4]).

([4]) Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 48. See in that sense also Judgment of 8 July 2010, T-396/08, *Freistaat Sachsen and Land Sachsen-Anhalt/Commission*, paragraphs 46-48; case C-156/98, *Germany* v *Commission*, [1998] ECR I-6857, paragraph 30.

3. **COMMENTS FROM LATVIA**

3.1.1. THE CONCESSION HOLDERS

(31) The Latvian authorities maintain that the three operators have been chosen by the port authority on objective grounds and represent the most viable alternative as operators of the newly built infrastructure.

3.1.1.1. **Dry cargo terminal**

(32) The port authority intends to grant the concession for the operation of the dry bulk terminal to […], dealing mainly with the transhipment of wood. The Latvian authorities explain that the presence of […] in the port is essential because of the particular significance of wood exports in the region.

(33) As explained above, […] is currently providing cargo handling services in the territory leased by the port authority to […] on the basis of a sublease agreement concluded with the […]. Given that […] intends to extend its operations and use the leased territory in its entirety, the port board adopted in October 2005 a resolution to construct a new terminal and subsequently grant the concession for its operation to […] (see Annex I).

(34) The Latvian authorities maintain that the decision to award the concession contract to this particular operator is based on purely objective commercial grounds. In this sense the Latvian authorities underline that […] represents the most feasible solution for the operation of the terminal since it already owns the equipment required for the handling of dry cargoes. In addition, no other potential concessionaire has expressed an interest to operate the dry bulk terminal. The Latvian authorities underline that it is in the interest of the port authority to initiate negotiations with all potentially interested parties, in particular since a significant portion of port land is still unused.

(35) […] has already transhipped in the port more than […] thousand m^3 per year and has thus already established a solid business network. The port authority considers that the company would be able to maintain such cargo turnover in the future and thus offer the required guarantees as regards the recovery of the investments carried out by the port authority.

3.1.1.2. **Berth No 35**

(36) The berth will replace jetty No 1 for the transhipment of liquid hazardous cargoes. The jetty is currently outdated and cannot therefore be used for cargo handling. As explained above, the restoration of the capacity of liquid cargoes in the port of Ventspils is linked to this

particular location because of safety requirements and constraints related to the required depth for liquid cargo vessels of appropriate tonnage.

(37) The Latvian authorities state that granting the concession for the operation of berth No 35 to a different company is not possible in practice precisely due to the specific location of the infrastructure at stake within the port. Currently the entirety of the adjacent port territory is leased to […] (see Annex II).

(38) Moreover, it is argued that, similarly to […], since […] has already handled liquid cargoes in Ventspils port, the operator owns all the equipment required for trans-hipment of liquid cargoes, which is essential to the operation of the berth.

3.1.1.3. **Berth No 12**

(39) The project aims to increase the discharge capacity of general cargo. The Latvian authorities explain that the decision to construct the berth is linked to the conclusion by the port authority of a long-term land lease agreement with a subsidiary of […]. The subsidiary of […] intends to establish a building modules factory on the territory of the port. The building modules may only be transported to export markets by ro-ro vessels.

(40) The Latvian authorities however underline that prior to the conclusion of the lease contract with […], the port authority participated to various tenders organised by freight forwarders and potential concessionaires of berth No 12, such as […], but was unsuccessful.

(41) According to the Latvian authorities, transport of the modules from the factory itself to the berth can only be carried out by rail and road, alongside 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.

(42) Furthermore, the Latvian authorities state that there are only two potential operators of the berth, i.e. […] and […]. By the comments submitted in the context of the formal investigation procedure, the Latvian authorities have clarified that the concession contract for the operation of the berth would be granted to […].

(43) Given that the only way to deliver the building modules from the factory to berth No 12 is through the territory leased to the […] (see Annex III), the port authority considers […] as the most realistic alternative.

(44) In addition, the Latvian authorities underline that the surface of the port plot adjacent to the berth does not allow storage of cargo. Therefore it is necessary to ensure the reliable connections with other areas of the port where storage is possible.

(45) 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.

3.1.2. THE EXPERT VALUATION

(46) Separate valuations have been carried out for each of the concession contracts for the user specific infrastructure. The Latvian authorities maintain that these valuations have been carried out in accordance with the Latvian Valuation Standards and International Valuation Standards.

(47) As regards the methodology used, the Latvian authorities underline that, given the location and characteristic of the Riga and Liepaja ports, the benchmarking exercise (the so-called 'comparison approach') is fully reliable. The concession fees paid by the service providers operating in these ports have been provided by the port authorities themselves and should therefore be considered as trustworthy.

(48) According to the Latvian authorities, the reviewed valuations, based on cash flow analysis, should also allay the Commission's doubts as regards their independent character.

(49) In what follows, the Commission will detail in turn the methodology used by the expert to establish the concession fees.

3.1.2.1. **Dry cargo terminal**

(50) The assessment is based on two methods, as follows:

Comparable transaction approach

(51) The benchmarking exercise is carried out in respect of three contracts considered as comparable in Ventspils port. The expert used correction quotients in order to establish an adequate concession fee. The following factors were taken into account: time and conditions of conclusion of the contract, location, description of the berths, rent area, technical conditions of terminals and access to utilities.

(52) The calculated concession fee equals EUR […] per sm per year. The valuer set the concession fee at EUR […] per sm per year.

Income approach

(53) The income approach is used to assess whether the discounted values of future income allow full coverage of the total investment costs (including the loading area, dredging and access railways costs) and provides for financial projections for a period of 25 years. Estimated income and costs are corrected by a discount rate of 7,5 %, which reflects the investment risk level.

(54) The independent appraisal takes into account income from port dues and fees and income resulting from the use of port land and infrastructure. Total investment costs are taken into account.

(55) Based on different levels of cargo turnover, the net present value (NPV), internal rate of return (IRR) and benefit costs ratio (BCR) are forecasted for concession fees ranging from EUR […] per sm to EUR […] per sm per year. The financial indicators justify a concession fee of at least EUR […] per sm per year at an average cargo turnover of […] tonnes per year and EUR […] per sm per year for an average cargo turnover of […] tonnes per year. If the average turnover exceeds […] tonnes per year, the concession fee can be minimal.

(56) Given that the forecasted average cargo turnover is […] tons per year, the independent valuer concludes that an annual concession fee between EUR […] and EUR […] per sm per year is justified.

(57) Taking into account both methods detailed above, the independent valuer set the concession fee at EUR […] per sm per year.

(58) The table below provides the values of the financial indicators of the project taking into account the resulted concession fee:

Cargo turnover […] tonnes, concession fee EUR […] per sm per year, discount rate 7,5 %, growth rate 2,28 %

Indicator	Without Cohesion Fund grant	With Cohesion Fund grant
IRR	[…] %	[…] %
NPV	[…]	[…]

(59) Thus the appraisal of the independent valuer confirmed the appropriateness of the concession fee calculated as detailed above, i.e. EUR […] per sm per year.

3.1.2.2. **Berth No 35**

(60) The *income approach* provides for financial projections for a period of 25 years. Estimated income and costs are corrected by the same discount rate of 7,5 %, which reflects the investment risk level.

(61) The independent appraisal takes into account income from port dues and fees and income resulting from the use of port land and infrastructure. Total investment costs are taken into account.

(62) Based on different levels of cargo turnover, the net present value (NPV), internal rate of return (IRR) and benefit costs ratio (BCR) are forecasted for concession fees ranging from EUR […] to EUR […] per year. The financial indicators justify an annual concession fee above EUR […] per year for an expected cargo turnover of […] tonnes per year and higher than EUR […] per year for an expected turnover of […] tonnes per year. For higher cargo turnover the concession fee may be minimal.

(63) Considering that the 30-year depreciation period of deep water berths, the independent valuer established the value of the concession fee at EUR […] per year, i.e. 1/30 of the berth investment costs, excluding dredging works.

(64) The table below indicates the financial results of the project for an annual cargo turnover of […] tonnes, taking into account a concession fee of EUR […] per year. Total investment costs, including dredging works, have been taken into account in the calculation.

Cargo turnover […] tonnes, concession fee EUR […] per year, discount rate 7,5 %, growth rate 2,28 %

Indicator	Without Cohesion Fund grant	With Cohesion Fund grant
IRR	[…] %	[…] %
NPV	[…]	[…]

(65) Thus the valuer set the concession fee at EUR […] per year (instead of EUR […] per year, as initially foreseen).

3.1.2.3. **Berth No 12**

(66) The valuation is based on two methods, i.e. the comparable transaction approach and the income approach.

Comparable transaction approach

(67) First, the concession contract is benchmarked against three contracts considered as comparable in Ventspils port. 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 following factors were taken into account: time and conditions of conclusion of the deal, location, description of the berths, rent area, technical conditions of the infrastructure, access to utilities.

(68) The calculated concession fee equals EUR […] per sm per year. The concession fee was set to EUR […] per sm per year.

Income approach

(69) The income approach, used to assess whether the discounted values of future income enable the coverage of the total investment costs (including dredging and access railways costs), provides for financial projections for a period of 25 years. Forecasted income and costs are corrected by a discount rate of 7,5 %, which reflects the investment risk level.

(70) The independent appraisal takes into account income from port dues and fees and income resulting from the use of port land and infrastructure. Total investment costs are taken into account, including the public financing.

(71) Based on different levels of cargo turnover, the net present value (NPV), internal rate of return (IRR) and benefit costs ratio (BCR) are forecasted for concession fees ranging from EUR […] per sm to EUR […] per sm per year. The independent valuer concluded that the financial indicators justify (the NPV is positive) a concession fee not lower than EUR […] per sm per year for an expected cargo turnover of […] tonnes per year and EUR […] per sm per year for an expected cargo turnover of […] tonnes per year.

(72) Given the forecasted volume of […] tonnes per year, the valuer concluded that a concession fee of at least […] EUR per sm per year is justified.

(73) Taking into account the results of the two methods detailed above, the independent valuer set the concession fee at EUR […] per sm per year.

(74) The table below provides the values of the financial indicators of the project taking into account the resulted concession fee:

Cargo turnover […] tonnes, concession fee EUR […] per sm per year, discount rate 7,5 %, growth rate 2,28 %

Indicator	Without Cohesion Fund grant	With Cohesion Fund grant
IRR	[…] %	[…] %
NPV	[…]	[…]

(75) Thus the appraisal of the independent valuers confirmed the appropriateness of the concession fee set as detailed above, i.e. EUR […] per sm per year.

3.1.3. THE CONCESSION FEE

(76) On the basis of the valuations carried out by the independent valuer, the Latvian authorities decided to set the concession fees as follows:

Concession holder	Infrastructure	Independent valuation (per year)	Concession fee (per year)
[…]	Dry cargo terminal	EUR […]	EUR […]
[…]	Berth No 35	EUR […]	EUR […]
[…]	Berth No 12	EUR […]	EUR […]

4. ASSESSMENT

4.1. *EXISTENCE OF AID*

(77) Pursuant to 107(1) of the 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 save as otherwise provided by the TFEU.

(78) 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 a Member 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.

4.1.1. ECONOMIC ADVANTAGE

(79) According to the case-law ([5]) of the Court, there is no advantage to the concession holders if a private investor, in similar circumstances, would have set the concession fee at the same level.

(80) From the outset, the Commission notes that in this case the concession fees have been established beforehand by means of separate valuations carried out by an external expert. The Latvian authorities have provided evidence to the effect that the expert has suitable degree and experience.

(81) As detailed above, the independent valuer benchmarked the calculated concession fees with those set for three contracts considered as comparable in Ventspils port. Taking into consideration the specific features and characteristics of the infrastructure subject to these contracts, the independent expert used correction quotients in order to establish an adequate concession fee.

([5]) Joined cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4053.

(82) Nevertheless, the Commission cannot ascertain, on the basis of the information available whether the contracts considered as reference have been tendered out, nor there is currently any indication that the concession fees paid on the basis of these contracts can be considered a market price.

(83) In the light of the above, the Commission maintains that the benchmarking exercise is not sufficiently reliable and thus cannot be sufficient to exclude that the concession holders will benefit of an advantage.

(84) According to the second method used by the independent valuer, the concession fees and other revenues of the port authority would ensure recovery of the infrastructure investment costs and a certain rate of return in 25 years. The port authority decided to set the concession fee for the dry cargo terminal (EUR […] per sm instead of EUR […] per sm per year) and for berth No 35 (EUR […] instead of EUR […] per year) substantially above the value recommended by the expert. Therefore, the actual return expected by the port authority is substantially higher than the value calculated by the expert.

(85) Therefore, the Commission concludes that the concession fee and the other revenues of the port authority enable it to recover the entire infrastructure investment costs, including dredging and access railways costs, and earn a return which is in line with the return a private investor would require.

(86) In addition, the Commission notes that there is no indication in this case that the port authority has set the concession fees at a level that would not maximise its revenues.

(87) Furthermore, the inclusion of review clause enables the concession fee to be reviewed periodically.

(88) In view of the above, the Commission is of the view that in the present case, it can be concluded that the concession fee established as detailed above does not grant undue advantages to the concession holders of the user-specific infrastructure.

(89) This decision in no way prejudges any possible further analysis by the Commission as far as the respect for the EU public procurement rules or other general principles of the TFEU are concerned.

4.1.2. CONCLUSION

(90) The Commission considers that the public financing of the user-specific infrastructure in Ventspils port does not result in an economic advantage at the level of the concession holders and the measure does not therefore have the effect of putting the chosen service providers in a more favourable competitive position than the undertakings competing with them.

(91) According to settled case-law, for a measure to be classified as State aid, all the conditions set out in Article 107(1) TFEU must be satisfied [6]. Since the measure to be put in place by the Latvian authorities does not entail an economic advantage for the future concession holders, it does not therefore cumulatively fulfil the conditions required to be considered State aid within the meaning of Article 107(1) TFEU.

5. **CONCLUSION**

(92) In light of the above, the Commission concludes that the public financing of the construction of user-specific infrastructure in Ventspils port does not involve aid at the level of the concession holders.

(93) This decision only concerns State aid aspects and is without prejudice to the application of other provisions of TFEU, particularly regarding service concessions,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Latvia is planning to implement in favour of Ventspils port authority in relation to the construction of the dry-bulk terminal, berth No 12 and berth No 35 does not involve State aid within the meaning of Article 107(1) TFEU at the level of the concession holders.

Implementation of the measure is accordingly authorised.

Article 2

This Decision is addressed to the Republic of Latvia.

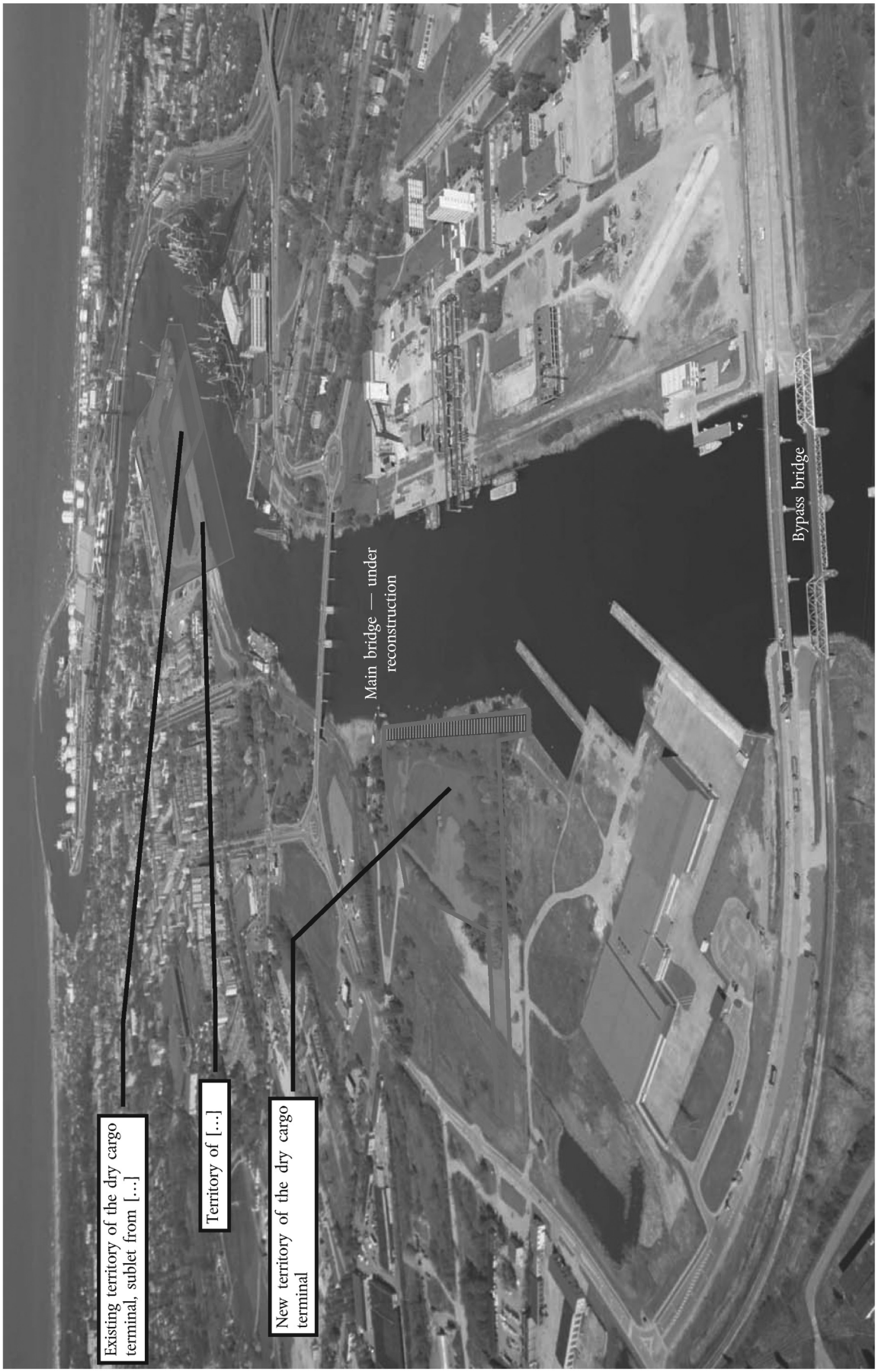
Done at Brussels, 25 August 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

[6] Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 20; Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68.

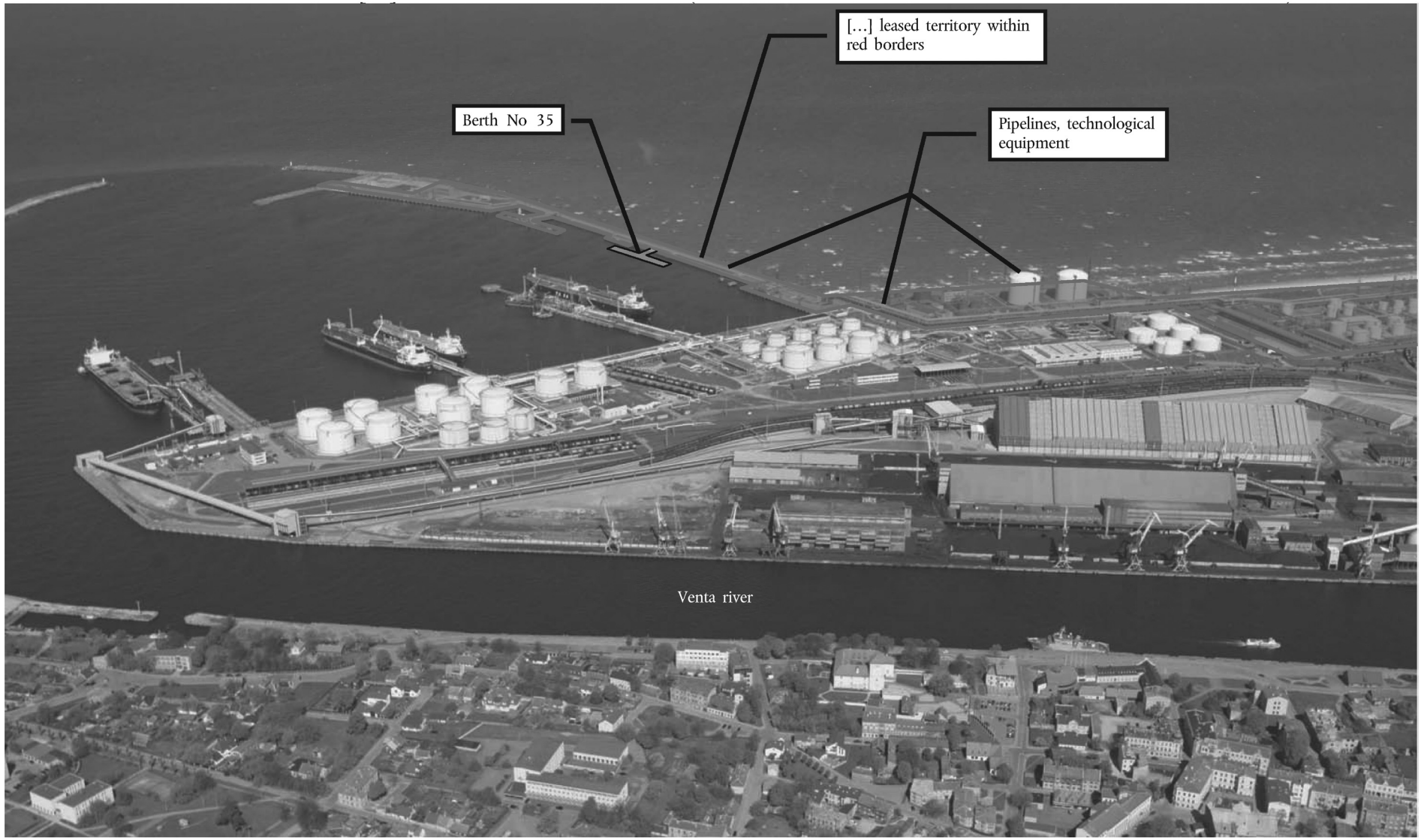
ANNEX I

EXISTING AND NEW TERRITORY OF THE DRY CARGO TERMINAL



ANNEX II

SCHEME OF […] LEASED TERRITORY (INCLUDING PLANNED BERTH No 35)



ANNEX III

TRANSPORTATION SCHEME OF CONSTRUCTION MODULES FROM […] LEASED TERRITORY TO BERTH No 12

