



EUROPEAN COMMISSION

Brussels, 28.11.2014
SG-Greffe (2014) D/17709
C(2014) 9236 final

Trajektna Luka Split d.d
Gat Sv. Duje 1, Split, 21000, Croatia

via:

CMS Hasche Sigle
Avenue des Nerviens 85
B-1040 Bruxelles, Belgique

Subject: Case AT.40199 Port of Split
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear [REDACTED]

- (1) I am writing to inform you that the European Commission ("the Commission") has decided to reject the complaint of Trajektna Luka Split d.d. ("Trajektna" or "the Complainant") against the Port Authority of Split ("the Port Authority"), pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.¹

1. THE COMPLAINT

- (2) By letter dated 22 August 2013, you requested the Commission to launch an investigation into the alleged infringements of competition law regarding the port of Split. You provided us with an updated version of the complaint on 26 September 2013

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

and with additional information on 8 November 2013 and 23 April 2014 (the "Complaint").

- (3) The port of Split is managed by the Port Authority. In accordance with the Croatian Maritime Domain and Seaports Act², port authorities are non-for-profit legal entities which manage, build and operate ports open to public traffic that are of particular economic importance to the Republic of Croatia. The Government of the Republic of Croatia exercises the rights of the Republic of Croatia as the founder of the port authorities.
- (4) The main activities of the Port Authority include the management, construction, maintenance, protection and improvement of the maritime domain constituted by a port area. The Port Authority sets port charges paid by port users, such as ferry operators, for using the quay, demurrage and berth.
- (5) The Complainant, Trajektna, is the private operator of the passenger terminal in the port of Split, providing services such as the mooring and unmooring of ships or the embarkation and disembarkation of passengers and vehicles. The provision of the port services by Trajektna is subject to port fees paid by the port users, such as ferry operators.
- (6) According to the complaint, after privatization in 2003 Trajektna was granted a concession for twelve years by decision of the Port Authority of Split. The legal basis, scope and terms of the concession are however still subject to legal disputes between Trajektna and the Port Authority before national courts.
- (7) In accordance with the Maritime Domain and Seaports Act, the Port Authority is authorized to set the maximum port fees for port services provided by concessionaires in the Port of Split. The concessionaire, Trajektna, is obliged to comply with those maximum port fees. When setting the maximum level of a port fee, the Port Authority must take into consideration the protection of the public interest of users of the port, but also the interests of the concessionaire, in such a manner that port services are accessible to all users and that it is profitable for the concessionaire to provide these services.
- (8) In the Complaint, you allege that the Port Authority infringes Article 102 TFEU and abuses its dominant position by setting port service tariffs for the passenger terminal at maximum levels which are prohibitively low. You claim that these maximum tariffs are lower than the ones set for the cargo terminal and lower than in other ports of Croatia. Trajektna, which provides these services against remuneration cannot manage its business profitably and could be forced to exit the market of concessions for port services in Split.
- (9) In addition, you allege that the Port Authority infringes Article 102 TFEU and abuses its dominant position by forcing Trajektna to charge tariffs for the provision of water to vessels in the port which are lower than the ones that the operator of the cargo terminal is allowed to charge, therefore applying dissimilar conditions to equivalent transactions and placing Trajektna at a competitive disadvantage.

² Narodne novine (NN; Official Gazette of the Republic of Croatia) Nos 158/2003, 100/2004, 141/2006, 38/2009 and 123/2011) - Zakon o pomorskom dobru i morskim lukama – Zakon.hr.

- (10) Lastly, you allege that the Republic of Croatia and the Port Authority infringe Articles 102 and 106 TFEU by forcing Trajektna to apply significantly lower port service tariffs to operators of domestic passenger transport services (which constitute approximately 80% of Trajektna's operations) than to operators of international passenger transport services, thereby discriminating the latter.
- (11) By letter of 23 July 2014, the Commission informed you of its intention to reject your complaint. In response, you made additional observations in your letter of 19 August 2014 in which you confirm the claims contained in the Complaint. In particular you clarify that an investigation by the Croatian National Competition Authority was based on national law and that EU law was not applied. You also claim a sufficient Community interest referring to the duration of the concession, national Courts' decisions, the size of the Split Port and obviousness of the infringement. You also confirm that discrimination of the international traffic is subject to a separate complaint.

2. THE PROCEDURE BEFORE THE CROATIAN NATIONAL COMPETITION AUTHORITY

- (12) On 22 March 2013, Trajektna submitted a complaint to the National Competition Authority ("NCA") of Croatia. The complaint was related to the same practices as the ones incriminated in Trajektna's complaint to the Commission, that is the passenger transport port service tariffs set allegedly at prohibitively low maximum levels (in particular for domestic traffic) and the lower water supply tariffs at the passenger terminal.
- (13) On 19 September 2013, the NCA decided to dismiss the complaint since there were no grounds for initiating the proceedings. In particular, the NCA concluded that:
 - (a) As regards the prohibitively low maximum tariffs, the Port Authority, by setting maximum tariffs based on the legal authorisations, prevents potential exploitation by Trajektna of the users of port services.
 - (b) As regards the different tariffs for water supply, the concessionaires of the passenger and cargo terminals are not in competition with other and the users of the port do not consider their services to be mutually interchangeable or substitutable.
- (14) In your letter of 19 August 2014, you claim that Article 13(2) of Council Regulation No. 1/2003³ does not apply in this case, since the NCA, which had run its investigation before Croatia joined the EU, only applied Croatian law and did not take into account EU competition law.
- (15) Considering that the NCA indeed only applied national competition law in this case, the Commission no longer refers to Article 13(2) of Regulation No. 1/2003 in the present decision.

³ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, pages 1-25.

3. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (16) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.⁴
- (17) When deciding which cases to pursue, the Commission takes various factors into account. The Commission may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. The Commission may also take into account whether a national court or national competition authority might be well-placed to examine the allegations made. Lastly, the Commission may also attach importance to the potential impact of the alleged infringement on the functioning of the internal market.

4. ASSESSMENT OF YOUR COMPLAINT

- (18) As mentioned in its letter of 23 July 2014, the Commission also assessed the interest of the European Union in conducting further investigation into the complaint and concluded that there is insufficient interest of the European Union for the continuation of the investigation. Since Article 13(2) of Regulation No. 1/2003 is not applicable in the present case for the reasons explained above, the Commission confirms that it does not intend to conduct an in-depth investigation into your claims for the reasons set out below, pursuant to Article 7(2) of Regulation No. 773/2004.

4.1. The likelihood of establishing the existence of an infringement

- (19) First, as already mentioned the NCA has already dealt with a case concerning the same alleged infringement than the one you have raised in the complaint brought to us, that is the passenger transport port service tariffs set allegedly at prohibitively low maximum levels (in particular for domestic traffic) and the lower water supply tariffs at the passenger terminal –see paragraphs (8) and (9). The NCA concluded that there were no grounds for initiating the proceedings.
- (20) In your letter of 19 August 2014, you claim that the NCA did not take into account EU competition law but only applied Croatian law while the relevant practice allegedly affects trade and competition between Member States. Moreover, you contest the reasoning behind the assessment of the NCA and allege that the infringement of European competition law is obvious.
- (21) After having examined the decision of the NCA –see section 2, the Commission preliminarily considers that the reasoning of the NCA appears to be applicable under EU competition law. Therefore, even if Article 13(2) of Regulation No. 1/2003 is not applicable in the present case, the Commission considers that the reasoned decision of the NCA provides a good indication that the likelihood of establishing the existence of an infringement of Article 102 TFEU appears limited in this case.

⁴ OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

- (22) Second, concerning the last part of your complaint, that is the allegation of discrimination of international ferry operators – see paragraph (10), the Commission considers that it does not seem *prima facie* an issue related to competition rules, as international and domestic ferry operators seem to operate in different markets. The issue is however subject to a separate complaint⁵ which is related to the implementation of Council Regulation (EEC) No 4055/86 of 22 December 1986 on the application of the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.⁶ The Commission has invited the Croatian authorities to comment on the issues above and may decide to initiate an infringement procedure under Article 258 of the Treaty for incorrect implementation of Regulation No 4055/86 in the absence of satisfactory reply.
- (23) In your letter of 19 August 2014, you admitted that the unequal treatment of international and domestic traffic is not subject to the complaint. This seems to corroborate the assessment of the Commission regarding to the last part of your complaint that is described in paragraph (10) above.

4.2. National courts and authorities appear to be well-placed to handle the matters raised

- (24) Trajektna disputed the Port Authority's decisions to impose lower tariffs before national courts on the basis of Croatian law. In March 2010, the court did not accept the request of Trajektna to annul the decisions of the Port Authority as unlawful. In particular, the court stated that the documentation and the court experts' statements referred to by Trajektna did not prove that the decisions of the Port Authority Split resulted in such transformation in business operations, i.e. illiquidity, or that the services provided were disproportionate compared to the price of the service according to the highest tariffs adopted by the Port Authority.
- (25) In your letter of 19 August 2014, you indicate that the judgement above has been annulled by decision of the High Commercial Court on 27 January 2014, following the appeal by Trajektna. The cases are therefore referred back to the Commercial Court for renewed procedure. Moreover, you indicate that the case at hand paints a clear picture on insufficient legal standards in the Republic of Croatia.
- (26) We understand from your submissions that Trajektna disputed the 2003 and 2005 tariff decisions by the Port Authority before the Commercial Court in Split. In both cases (V P-732/04 and V P-734/05) the court decided in favour of the Port Authority. Trajektna appealed these decisions before the High Commercial Court in Zagreb (cases no. Pž-7863/10 and Pž-7943/10). Subsequently the High Commercial court issued decisions by which both rulings of the Commercial Court in Split were annulled and the cases were referred back to the Commercial court in Split for renewed procedure. However, from the rulings submitted by you we understand that both rulings were annulled due to serious violations of the civil procedure and were not considered fully on the merits.

⁵ Complaint CHAP(2013)02579, transferred to the EU Pilot application under reference 5991/14/MOVE

⁶ Official Journal L 378 , 31/12/1986 P. 0001 - 0003

- (27) Without prejudice to the final outcome of this ongoing litigation, the Commission considers that the national courts appear to be well-placed to handle the matters raised, in particular the lawfulness of the decision of the Port Authority to set maximum tariffs and on the proper application of the criteria set out in the Maritime Domain and Seaports Act (competitiveness of the port and ability of claimant to adapt its business operations to the reduced tariff). According to the case law, the Commission can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts.⁷

4.3. The impact on the functioning of the internal market

- (28) First, the incriminated practices were initiated in the years 2003 to 2005, that is about ten years ago and long before the Croatia's accession to the EU on 1 July 2013. For the period prior to the date of accession, the European competition rules cannot be applied retroactively and the behaviour of the Port Authority must be assessed by reference only to the national competition law applicable at that time.⁸
- (29) The Commission though acknowledges that according to the complaint these practices continue after accession of Croatia in the European Union. Nevertheless, the concession granted to Trajektina, which is still subject to legal disputes with the Port Authority, should end by 2015, that is within the next year. Afterwards, new concession terms may modify the conditions of profitability of the concessionaire for the provision of port services and therefore the substance of the case itself.
- (30) In your letter of 19 August 2014, you indicate that in the context of the ongoing litigations against the Port Authority, Trajektina operates only as a de-facto concessionaire and thus the twelve years of the concession have not started yet. You also indicate that the decisions of the Port Authority will have anti-competitive effects even beyond any replacement of Trajektina by another party once the concession will be renewed.
- (31) Without prejudice with the ongoing litigation in front of the national courts, the Commission takes the preliminary view that the concession has started in 2003 and will end in 2015. Whether Trajektina or another party will be granted the new concession, the Commission emphasizes the fact that new concession terms may modify the substance of the case itself. As a result, the Commission may find itself in a situation where it investigates practices that have ceased.
- (32) Second, in your letter of 19 August 2014, you emphasize the fact that the ferry port of Split is the third largest passenger port in the Mediterranean. However, according to Eurostat, the port of Split had 3.7 million of passengers transported in 2012 and 3.8 million passengers in 2013. With these numbers the port of Split is not even within the

⁷ See Case T-24/90, *Automec v Commission*, [1992] ECR II-2223, paras 88ss.; Case T-5/93, *Roger Tremblay and Others v Commission*, [1995] ECR II-185, paras 65ss; Case T-575/93, *Casper Koelman v Commission*, [1996] ERC II-1, paras 75-80.

⁸ See Case C-17/10, *Toshiba Corporation and Others*, ECR [2012], paragraph 50

twelve largest ports of the Mediterranean Sea⁹. Moreover, taking into account that 92 % in 2012 and 95% in 2013 of the passenger traffic of the port of Split was domestic, the importance of the passenger port of Split for the internal market seems rather limited to justify further investigation by the Commission.

- (33) Therefore, taking into account all these considerations, the Commission considers that the impact on the functioning of the internal market appears to be limited.

5. CONCLUSION

- (34) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement(s) and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004.

6. PROCEDURE

6.1. Possibility to challenge this Decision

- (35) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

6.2. Confidentiality

- (36) The Commission reserves the right to send a copy of this Decision to the Port Authority. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.¹⁰ If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would [REDACTED]

[REDACTED] Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to the Port Authority.

⁹ [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/File:Top-20_passenger_ports_in_2012 -
on the basis of number of passengers embarked and disembarked %28in 1000%29.png](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/File:Top-20_passenger_ports_in_2012_-_on_the_basis_of_number_of_passengers_embarked_and_disembarked_%28in_1000%29.png)

¹⁰ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.

- (37) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission
Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION