



EUROPEAN COMMISSION

Brussels, 09.04.2002
C(2002)942fin

**Subject: Aids N 560/01 and NN 17/02 – United Kingdom
Brighton West Pier**

Sir,

The Commission wishes to inform the United Kingdom Authorities that, having examined the information supplied on the aids referred to above, it has decided not to raise objections.

I. PROCEDURE

(1) By letter dated on 1st August 2001, registered on 7th August 2001, the United Kingdom Authorities notified the Commission of the National Heritage Memorial Fund for Brighton West Pier.

(2) By letters dated on 18th September 2001 and 5th December 2001, the Commission requested additional information.

(3) Additional information was transmitted by the United Kingdom Authorities during a meeting held on 21st November 2001 and by letters dated on 19th October 2001 (registered on 22nd October 2001) and on 7th January 2002 (registered on 9th January 2002).

(4) On 3rd September 2001, on 1st October 2001 and on 14th February 2002, the Commission received observations of a third party complaining about the alleged aids.

II. DESCRIPTION OF THE MEASURES AT ISSUE

(5) The National Heritage Memorial Fund (hereafter NHMF) intends to finance the restoration of a pier with a cultural value (Brighton West Pier) belonging to a registered charity (Brighton West Pier Trust, hereafter BWPT). The application form for the obtention of the grant foresees the implication of a commercial operator in the project (St Modwen).

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(6) In order to select its private sector partner for the project, BWPT, the owner of the pier, charged an independent company, Deloitte & Touche Consulting Group ("Deloitte"), in early 1997 to organise a tendering procedure. Fifty major leisure firms were invited to tender. The private sector organisation chosen felt that the project was too risky and negotiations broke down in 1998. The new commercial partner chosen was wound up in early 2000 and BWPT had to put an end to the negotiations. During 2001, the scheme was again published in national and regional newspapers as well as specialised trade journals. By this stage, BWPT invited St Modwen to become its private sector partner.

(7) The total project costs for the pier restoration are estimated at around £ 22,800,000. The *grant contract between NHMF, BWPT and St Modwen* foresees that NHMF will provide the principal funding (£ 14,200,000) the rest being provided by the commercial partner (St Modwen) who will also finance the maintenance of the pier. In return St Modwen will receive a long lease for a nominal rent of the restored pier (about 125 years).

(8) *The Local Authority (Brighton and Hove City Council) will lease two parcels of land on either side of the Pier to BWPT who will sublease it to St Modwen.* The value of the land has been estimated to approximately £ 900,000 and the rent paid by BWPT (to the Local Authority and by St Modwen to BWPT) will be symbolic.

(9) *Some grants have already been made to BWPT:* in 1996 for emergency works (£ 950,000) and towards a feasibility study for the initial phase of works (£ 18,000), in 1997 for development work costs (£ 57,500) and in 1998 for further emergency works following storm damage and for BWPT's management expenses (£ 657,344). The funds granted since March 1998 (or to be granted) will come out of the total "in principle" sum of £ 14,200,000.

(10) In summary, two series of measures are at issue :

- the grants by NHMF to BWPT and St Modwen financing the restoration of the pier (£ 14,200,000 + £ 950,000 + £ 18,000 + £ 57,500 = 15,225,500) ;
- the lease of land on either side of the Pier by the Local Authority to BWPT and by BWPT to St Modwen on a symbolic rent (approximately £ 900,000).

(11) The total estimated amount of the aid is £ 16,125,500 (£ 15,225,500 + £ 900,000 = £ 16,125,500).

(12) Two expert reports have been provided to the Commission. The first report (62 pages) dated February 1997 (4 ½ years before the notification) was prepared by the independent company Deloitte & Touche Consulting Group ("Deloitte"), a Member of the Management Consultancies Association and authorised by the Institute of Chartered Accountants in England and Wales to carry on investment business. Deloitte was instructed by and delivered its report to the charity BWPT, not St Modwen, NHMF or Brighton and Hove City Council. BWPT is governed by the Charities Act 1993, which sets out detailed provisions relating to the establishment, operation and regulation of charitable trusts, including the liabilities of Trustees.

(13) The Deloitte report finds that, given the capital and maintenance costs, Brighton West Pier as it stands cannot be viable – its renovation and operation would require continuous public financial support. Three main reasons are given : the built space on the pier is limited and would have to remain so in order to preserve its heritage

perspectives; it is located about one mile from the current leisure visitor destination focus; and an entrance tariff would not produce sufficient revenue. The report proceeds on the basis that a sustainable development would necessitate other sources of revenue, from an exhibition and from leisure activities such as amusements, catering and retail in new buildings on land adjacent to the pier. It assesses likely revenues from such a scheme based on an analysis of the historical and projected number and type of visitor to Brighton (day, staying, conference) and to the pier (pier visitor, exhibition visitor, visitor to commercial development) and their likely spending patterns. These projected revenues are compared with projected operating and development costs. Information used in the report comes from a number of sources, including : Brighton Council Occupancy Survey; South East Tourist Board fact sheets; information published by, interviews with and visits to other pier operators; Deloitte database of visitor attractions; Brighton and Hove City Council Tourist Office; interviews with Brighton hoteliers; S & P leisure and retail architects; The Principles (exhibition designers); interviews with private sector operators who had put forward schemes for the pier; and the knowhow, experience and research of Deloitte. The report concludes that the aid envisaged could generate an internal rate of return sufficiently positive to appeal to developers and operators.

(14) The second report (47 pages), dated 17th May 2001 (2 ½ months before notification) was prepared by the independent company Graves Son & Pilcher, and signed by a partner, a Fellow of the Royal Institute of Chartered Surveyors. The report was also commissioned by BPWT. The purpose of the report was to ascertain whether or not the leasing by BPWT of the deck of the pier and land either side of the pier on a lease for a term of 125 years, on the terms envisaged, would comply with the Charities Act 1993, Section 36, which requires land disposals by charities to be given sufficient publicity, in order to ensure that an appropriate purchase price is paid. The report confirmed that, as it stands, the pier is worthless, but recommended additional advertising before proceeding with the proposed transaction. The United Kingdom has since confirmed that the operation has been appropriately advertised.

III. COMMENTS MADE BY THE UNITED KINGDOM AUTHORITIES

(15) The United Kingdom Authorities consider that the measures involved are no State aids, because

- BWPT is a charity, operating outside the commercial environment and undertaking a fundamentally non-economic exercise for the sake of the national heritage.
- St Modwen is benefiting of the minimum necessary advantages to persuade a private investor to invest into the project. This is evidenced by the difficulty of maintaining the interest of previous private sector partners in the restoration.
- There is no impact on intra-Community trade from the proposed investment. Whilst some diversion of trade from the Palace Pier (a concurrent pier) cannot be entirely excluded, there will be no diversion of trade from other towns on the South coast of England, let alone from other EU member States.

(16) However, in view of the doubt over the application of Article 87(1) EC, the United Kingdom Authorities have notified the project. If in the Commission's view state aid is involved, this aid should be considered compatible with the common market as an aid to promote culture and heritage conservation.

IV. COMMENTS MADE BY THIRD PARTIES

(17) On the 3rd September 2001, on the 1st October 2001 and on the 14th February 2002, the Commission received observations made by the Brighton Marine Palace and Pier Company (hereafter BMPPC) in relation to the proposed grants.

(18) The BMPPC runs the Palace Pier in Brighton and opposes to the project at issue because, once restored, the Brighton West Pier will act as a direct competitor to the complainant's business.

(19) The complainant considers that the relevant market is the market for general leisure spent on attractions in Brighton and, in particular, on the Brighton seafront. All leisure activities in Brighton compete for a share of visitors' attention, time and spending. The proposed operation would therefore directly impact on these or other leisure attractions in Brighton. A number of ancillary up and downstream markets would also be affected by the proposed grant of aid: the labour market, the works procurement market and the market for film locations.

(20) The complainant puts forward several elements in order to establish a distortion of competition and an effect on trade between Member States.

- The complainant stresses that *the amount of the aid is not negligible*, when one takes into account the funds generally required to restore and develop cultural attractions. In 1999, there were only four attractions listed in the United Kingdom on which at least £ 10,000,000 was being spent on improvements (National Maritime Museum, Greenwich; Manchester Museum; National Museum of Photography, Film and Television, Bradford; St Edmundsbury Cathedral, Bury St Edmunds) and only six in total which involved spending over £ 6,000,000 (Pleasureland, Southport; Shakespeare's Globe Exhibition, London)¹. In this case, in addition to the private funds (£ 6,000,000), the project receives an aid equivalent to approximately £ 16,000,000.
- The complainant observes that *the "attractions market" suffers from over-capacity*. An English Tourism Council study concerning trends in the attractions sector shows that there is a general decrease of the average number of visitors per attraction (-8% for Historic properties, -5% for Museums and Galleries, -21% for Wildlife sites), but that supply is increasing, indicating that supply may be outstripping demand². The study concludes that there is an increasing competition for consumer leisure and spent.
- The complainant considers that *the project financed is not of a local character*. The West Pier in Brighton is an historic pier, listed as Grade 1 for its cultural value as a heritage asset (it is the only Grade 1 Listed Pier in the country). The Grade 1 Listing recognises that the engineering, architecture and aesthetics of the West Pier are a crucial part of the National heritage. The Palace Pier (the competitor pier) is only a Grade 2 listed pier. However, there are at least 3,750,000 visitors per year to the Palace Pier, which makes it the fourth most visited attraction in the UK after Blackpool Pleasure Beach (7,200,000 visitors per year), the British Museum (5,460,537 visitors per year) and the National Gallery

¹ See the "Sightseeing in the UK" 1999 produced by the English Tourism Council, p. 41.

² Sea Changes, Creating World-class resorts in England- English Tourism Council, 2001.

(4,964,879 visitors per year)³. Therefore, there are good reasons to think that the Brighton West Pier will also be one of the United Kingdom major cultural attractions.

According to South East Tourist Board Figures, there are 17,559,000 visits to “Other Attractions” in the South East of England. “Other Attractions” would include the Palace Pier and of these visits 12% are made up of overseas visitors. Given that, according to the Office of National Statistics figures, around 60% of these visitors are from EU countries, then around 7.2% of visitors (1,264,000) to this category of attraction in the South East of England are from other Member States. It is, according to the complainant, reasonable to think that once restored, the Brighton West Pier which is a Grade 1 classified pier will attract a considerable number of visitors from other Member States. The BWPT detailed plans of proposed redevelopment also state that Brighton is one of the United Kingdom’s top ten destinations for overseas visitors. It also competes with other European locations as a conference destination.

(21) The complainant considers that Article 87(3)(d) EC according to which « aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest » does not apply in the present case, because :

- no element of compensatory justification is offered in this case towards the achievement of the Community objectives in particular since the result of the development is a largely commercial one, namely the creation of some 11,200 square metres of modern commercial leisure space of which 74% is entirely new ;
- the aid is not necessary to bring out the project. Only if the development of the West Pier were entirely publicly funded and were to lead to an entirely cultural site with no material commercial element, could the aid be justified as necessary ;
- the amount of aid is disproportionate given the entirely commercial nature of the project and in comparison to the levels of aid granted to other projects in this sector.

V. ASSESSMENT OF THE MEASURES AT ISSUE

(22) In accordance with Article 4(2) of the Council Regulation n° 659/1999 of 22 March 1999⁴, where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

(23) Furthermore, according to Article 4(3) of the Council Regulation n° 659/1999 of 22 March 1999, where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article 87(1) EC, it shall decide that the measure is compatible with the common market. This applies also to unlawful aids (Article 13(1) of the Regulation).

³ See the “Sightseeing in the UK” 1999 produced by the English Tourism Council, p. 53, Table 4.

⁴ OJ L 83, 27.03.1999, p. 1.

(24) The Commission considers, on the basis of the following considerations, that the measures at issue do not constitute State aid within the meaning of Article 87(1) EC.

*** Measures imputable to the State**

(25) NHMF is a public entity created by a Legislative Act. It is administered by Trustees which are appointed by the Prime Minister, it is financed by public resources and it is controlled by the State (submission of annual reports to the Secretary of State, mandatory Financial and Accounting Directions, not mandatory Policy directions, termination of the appointment of a Trustee by the Prime Minister in certain cases). Its behaviour can be attributed to the State.

(26) The Brighton and Hove City Council is a local authority. The fact that the entity granting the aid is a Local Authority does not stand in the way of the application of Article 87(1) EC⁵. This has been expressly confirmed by the European Court of Justice⁶.

*** Measures financed by State resources**

(27) Every year, the Secretary of State pays to NHMF a sum determined by him. Since NHMF has at its disposal public resources, aids granted by NHMF are financed through public resources.

(28) As for the lease of land on either side of the Pier on a symbolic rent, it suffices to note that the measure at issue was intended to reduce the rent burden by diminishing the resources of the Local Authority. Since a loss of revenue is equivalent to consumption of resources⁷, the condition concerning the financing of the measure through public resources is met.

*** Selective advantages for certain undertakings**

(29) The provision of £ 15.2 million by NHMF in order to finance the restoration and maintenance of a pier is an economic advantage because it relieves BWPT from bearing the costs which it otherwise would have to bear. The lease of land having an approximate value of £ 900,000 by the Brighton and Hove City Council to BWPT (which leases on to St Modwen) at a symbolic rent is in the same way an economic advantage.

(30) These advantages benefit selectively BWPT.

- BWPT is a registered charity with no other assets and whose principal function is “the management and profitable usage of the lettable space at the landward end of the pier in order to generate revenue to promote the principal objects of the trust”, i.e. the preservation and restoration of the pier. A part of the lettable space of the pier will serve as heritage centre which will be run by BWPT.

According to settled case-law, the legal form/status of an entity and the objectives pursued are irrelevant, when it comes to decide whether it constitutes an

⁵ See the Commission’s Decision of 18 July 1990 on aid granted by the city of Hamburg, OJ L 215/1, 2.8.1991, paragraph IV 2.

⁶ See the Case 248/84, Federal Republic of Germany v Commission, [1987] ECR 4013, paragraph 17.

⁷ See the Commission’s Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384/3, 10.12.1998.

undertaking. The management and profitable usage of lettable space is an economic activity. Also the operation of the heritage centre might be considered as involving economic activities. Thus, BWPT, as far as it carries out an economic activity, is an undertaking despite the fact that it is a charity, that its only objective is to restore and maintain the pier and that the only counterpart it gets from its activity is an advantage in nature (it leases the pier to St Modwen, who in return provides funds to complete the restoration and finances the maintenance of the pier). Therefore, to the extent BWPT has an economic activity, the grant of the public funds constitutes a selective advantage for that undertaking.

The grant of public funds allows BWPT to carry out the restoration project which it would otherwise not have been able to finance. However, the public financing is not sufficient. In order to complete the restoration works BWPT had to find a commercial partner interested in investing into the project and allowed in return to exploit commercially the space on the pier. The commercial partner chosen through transparent and non discriminatory procedures is St Modwen.

- St Modwen is a commercial property company specialised in developments to regenerate town centres, brownfield sites and former employment complexes. Once it has restored the pier, it will sub-let space for commercial use. St Modwen enters into a commercial relationship with BWPT; it renders a service to BWPT by carrying out and financing partly the restoration and the maintenance of the pier and its remuneration consists in the right to exploit commercially the pier for 125 years on the conditions agreed between BWPT and St Modwen. BWPT selected St Modwen after an open procedure and it was in its interest to choose the operator making the best offer. Therefore, the Commission considers that under the circumstances at hand it can be concluded that no aid element is transferred to St Modwen.

(31) On the other hand, and contrary to what the complainant implies (see paragraph 19 above), the project at issue involves no specific advantage for undertakings in the works procurement market. Under the terms of the development agreement with BWPT, the commercial partner will act as the party employing the contractors engaged to carry out the restoration work. These will be selected following competitive tendering in all cases and the long term commercial partner will not have preferential access to these building contracts. Therefore, the project involves no selective advantage to the companies engaged to carry out the restoration work.

*** Effect on competition and intracommunity trade**

(32) Despite the circumstances put forward by the complainant, it appears that the aids at issue will have no effect on competition and intracommunity trade for following reasons:

(33) BWPT will not exploit directly the pier but rent it to a private operator who in return will contribute to its restoration and ensure its maintenance. BWPT will only run a heritage centre on the pier. Any commercial aspects of such a heritage centre are certainly not capable of affecting intracommunity trade. The Commission therefore considers that the running of such a heritage centre will have no effect on intracommunity trade.

(34) For these reasons, the Commission is of the opinion that the measures at issue will have no effect on competition and on intra-community trade. In any event, it could be added that the restoration of existing monuments and landmarks of cultural

and historical value does not in itself affect trade between Member States. Therefore, Article 87(1) EC is not applicable.

(35) Even if it were considered, contrary to the opinion of the Commission, that the measures at issue risk to distort competition and to affect intracommunity trade and constitute State aids in the sense of the EC Treaty, they would be compatible to the common market under Article 87(3)(d) EC.

(36) According to Article 87(3)(d) EC, aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest, may be considered to be compatible with the common market. The Commission considers that the measures at issue qualify for exemption under Article 87(3)(d) EC, because:

- they pursue a genuine cultural objective and
- they do not affect trading conditions and competition to an extent that is contrary to the common interest.

*** The aids at issue pursue a genuine cultural objective**

(37) The West Pier in Brighton is an historic pier, listed as Grade 1 for its cultural value as a heritage asset (it is the only Grade 1 Listed Pier in the country). The Grade 1 Listing recognises that the engineering, architecture and aesthetics of the West Pier are a crucial part of the National heritage. The pier is in a state of near dereliction and in danger of falling victim to the action of the sea. The proposal is to restore the pier authentically to its 1920's appearance for the benefit of the public and the heritage of the country and to do so with confidence that the restored pier will be commercially viable in the longer term.

*** The aids at issue do not affect trading conditions and competition to an extent that is contrary to the common interest**

(38) The Commission has reviewed the information, sources and assumptions set out in the Deloitte report. The report concludes that the pier as it stands would not be viable by a very considerable margin, a conclusion confirmed in the Graves report. Having regard to all the facts, the Commission has no doubt that that conclusion is a sound one. The complainant itself appears to accept the need for public funding.

(39) The decision has been made by the competent authority to fund restoration of the pier by bringing into existence a development designed to be sustainable over a given period of time, capable of generating revenues sufficient to attract a private developer and operator. Whether or not such an approach may impact negatively or positively on local businesses, including competing attractions, the Commission, in the exercise of its wide margin of discretion under Article 87(3)(d) EC, has no doubt that such a decision in principle does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

(40) Given the risks of the project, the Commission has no doubt that no private investor would accept to finance it without some public support (as confirmed by the Deloitte & Touche viability study in 1997 and the Graves Son & Pilcher study in 2001, referred to above). This is evidenced by the fact that even with the perspective of a grant, BWPT had great difficulty to find a commercial partner. Thus, *the aid is necessary* to restore and ensure the maintenance of the pier.

(41) *The aid does not exceed what is necessary to achieve the cultural objective.* The only purpose of BWPT being the maintenance and the restoration of the pier, the entire benefit of the aid to BWPT is serving the cultural objective. The support passed on to St Modwen is limited to what is necessary to convince a private operator to invest into the project. This is evidenced by the fact that even with the perspective of a grant, BWPT had great difficulty in maintaining the interest of a commercial partner. A study carried out by an independent expert at BWPT's request, also states that the deal with St Modwen is a fair deal and that the support given does not exceed what is necessary to convince a private investor to come into the project.

(42) A clause in the Draft Contract between NHMF, BWPT and St Modwen foresees that "if the Grantee fulfils the Approved Purposes without spending the full amount of the Grant, such part of the Grant as remains unspent must be repaid to NHMF by the Grantee". The United Kingdom Authorities took the engagement to include this clause in the grant contract. Furthermore, the Deloitte report projects internal rates of return for developer and operator that are not considered excessive, and a clause relating to clawback of the grant in the event of St Modwen making a profit over and above an agreed limit will also be included. Such a clause will also be required by Brighton & Hove City Council. For that reason also, the Commission has no doubt that, in the exercise of its wide margin of discretion under Article 87(3)(d) EC, the aid does not adversely affect trading conditions to an extent contrary to the common interest.

(43) In conclusion, the notification is complete and the Commission has all the information it requires in order to assess the measure. The Commission has no doubts about the essential facts, the law or the assessment. The Commission is of the opinion that the measures will not affect intra-community trade and therefore do not constitute state aid within the meaning of Article 87(1) EC. In addition, even if it were considered that the measures risk to affect intra-community trade and constitute state aid in the sense of the Treaty the Commission, in the exercise of its wide margin of discretion under Article 87(3)(d) EC, has no doubt that the measures at issue are limited to the minimum necessary to serve a genuine cultural objective and do not affect trading conditions and competition to an extent that is contrary to the common interest. The facts are such that it may be stated with an overwhelming degree of confidence that prolonged examination of the measure would not alter that conclusion.

VI. DECISION

(44) The Commission has decided, on the basis of the foregoing assessment, not to raise any objections to the measures at issue, considering that they constitute no State aids in the sense of Article 87(1) EC and that possible State aid elements involved would be compatible with the common market under Article 87(3)(d) EC.

(45) If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/. Your request should be sent by registered letter or fax to:

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Yours faithfully,

For the Commission

Mario Monti

Member of the Commission