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Subject: State aid SA.39078 (2014/N) - Denmark

Financing of the Fehmarn Belt Fixed Link project

Sir,

1. PROCEDURE

- (1) By letter dated 22 December 2014, the Danish authorities notified to the Commission pursuant to Article 108(3) of the Treaty the financing model of the Fehmarn Belt fixed link project. On 13 February 2015 the Commission services sent a request for information to the Danish authorities, which replied on 24 and 27 February 2015. Denmark submitted additional information on 19 and 27 May 2015 and 8 July 2015.
- (2) On 5 June 2014, 5 September 2014, 26 November 2014, 19 January 2015, and 22 April 2015, the Commission received five complaints alleging that the Danish State had granted unlawful State aid for the planning, construction and operation of the Fehmarn Belt fixed link project in favour of A/S Femern and A/S Femern Landanlæg and that this aid is incompatible with the internal market (the complaints were registered under the numbers SA.39015 and

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SA.41640). Non-confidential versions of the complaints were received on 23 July 2014, 22 December 2014, 18 February 2015 and 30 April 2015 respectively. The Commission sent requests for information to Denmark on 25 July 2014, 19 September 2014, 8 January 2015, 10 April 2015 and 8 May 2015. The requested information was provided by letters of 3 September 2014, 16 October 2014, 20 February 2015, 11 March 2005, 16 March 2015, 8 April, 21 April and 20 May 2015.

- (3) The Danish authorities submit that the financing of the Fehmarn Belt fixed link project does not involve State aid and explain the notification was submitted for reasons of legal certainty only.

2. DESCRIPTION OF THE MEASURES

2.1. THE FEHMARN BELT FIXED LINK PROJECT

- (4) The Fehmarn Belt fixed link project (hereinafter "the Project") consists of a coast-to-coast infrastructure and rail and road hinterland connections. The coast-to-coast infrastructure (hereinafter "the Fixed Link") will be constructed as an immersed tunnel between Rødby on the island of Lolland in Denmark and Puttgarden in Germany. The Fixed Link will be approximately 19 kilometres long and will consist of an electrified, double-track railway and a four-lane motorway with emergency lanes.
- (5) The Danish hinterland connections to the Fixed Link will include the existing railway connection between Ringsted and Rødby of approximately 120 kilometres, which is owned by Rail Net Denmark, the State rail infrastructure manager. The Project entails the extension of the existing single track railway section between Vordingborg and Rødby to a double-track section. The railway section from Ringsted to Rødby will be electrified and equipped with new signalling systems according to ERTMS (European Rail Traffic Management System) level 2.
- (6) The objective of the Project is to improve the conditions for transport of passengers and goods between the Nordic countries and central Europe in an environmentally sound way. The Project will lead to a number of other positive impacts in terms of employment, regional development, improvement of trading conditions and a general strengthening of the transport sector. In combination with the Øresund fixed link between Denmark and Sweden, which has been in operation since July 2000, the Fixed Link will thus bring about a considerable improvement of one of the most important land based transport corridors connecting Scandinavia with Central Europe. The Project was also recognised by the Commission as a priority project within the TEN-T framework.

- (7) According to Article 1 of the treaty between the Kingdom of Denmark and the Federal Republic of Germany regarding the Fehmarn Belt fixed link (hereinafter "the International Agreement")¹, Denmark will be the sole owner of the Fixed Link, and Denmark has the sole responsibility and bears the full risk for the financing of the Fixed Link, as well as for the upgrading of the Danish hinterland connections. Germany is responsible for the financing and upgrading of the German hinterland connections.
- (8) The Danish authorities estimate that the total costs for the planning and construction of the Fixed Link are DKK 54.9 billion DKK (approximately EUR 7.4 billion) and that the costs related to the planning and construction of the upgrading of the Danish hinterland connections are DKK 9.5 billion (approximately EUR 1.3 billion); i.e. DKK 64.4 billion DKK (approximately EUR 8.7 billion) in fixed 2014 prices for the entire project (planning activities, construction costs, reserves and other works of both the Fixed Link and the hinterland connections), as presented in Table 1.

Table 1: Construction costs², February 2015

	DKK billion	EUR billion
Fixed Link		
Construction costs	49.4	6.6
Reserve for contractor risk	1.8	0.2
Extra reserves (16.4 per cent)	3.7	0.5
Total construction costs	54.9	7.4
Hinterland connections		
Construction costs	7.3	1
Reserves (30 per cent)	2.2	0.3
Total construction costs	9.5	1.3
TOTAL	64.4	8.7

- (9) The Commission has awarded total co-funding grants of EUR 205 million from 2007 to 2015 to the planning activities of the Project. The Danish authorities submitted also an application for EU funding for the construction phase under the TEN-T budget period for 2016-2020.

¹ The International Agreement was signed on 3 September 2008 and ratified by the Denmark and Germany in 2009.

² The project costs based on the priced offers received from bidders of the four principal civil works contracts on 22 December 2014 increased by reserve budget.

- (10) Pursuant to Article 6 of the International Agreement, Denmark shall establish a company responsible for the construction and operation of the Fixed Link. Accordingly, in September 2005, the state-owned company Sund & Bælt Holding A/S established the company Femern A/S as a wholly owned subsidiary. Femern A/S subsequently became a subsidiary of A/S Femern Landanlæg³, which is a subsidiary of Sund & Bælt Holding A/S.
- (11) On the basis of the Planning Act⁴, the Danish Minister for Transport appointed Femern A/S and A/S Femern Landanlæg to be responsible for the planning of the Project. Consequently, Femern A/S has carried out various studies and preparations for the construction of the Fixed Link, in particular analysis and evaluations regarding environmental, technical and safety aspects and preparations for the tender process. Femern A/S also carried out the necessary investigations and preparatory activities regarding the establishment of the future construction site in Rødbyhavn.
- (12) The financing of the planning phase of the Fixed Link was notified to the Commission pursuant to Article 108(3) of the Treaty on 16 March 2009 for reasons of legal certainty. On 13 July 2009 the Commission decided not to raise objections to the financing of the planning phase⁵, concluding that in the planning phase Femern A/S acted as a public authority and that any support therefore fell outside the scope of Article 107(1) of the Treaty. The Commission, however, also assessed the compatibility of notified measures as it could not exclude the possibility that the public financing of the planning phase could potentially benefit the future operator of the Fixed Link.
- (13) The Planning Act does not allow Femern A/S and A/S Femern Landanlæg to engage in other activities than those related to the planning of the Fixed Link and the related hinterland infrastructure in Denmark. On 28 April 2015 the Danish Parliament passed the bill on the construction of the Fixed Link and the hinterland connections in Denmark (hereinafter "Construction Act"). The Construction Act entered into force on 5 May 2015. The Danish authorities confirmed on 19 May 2015 that the standstill obligation in Article 108(3) of the Treaty is observed and none of the measures in the Construction Act have been definitively granted to Femern A/S and A/S Femern Landanlæg.

³ A/S Femern Landanlæg was established on 16 November 2009.

⁴ The Danish bill on the planning of a fixed link across the Fehmarn Belt and the Danish hinterland connections (Act no. 285 of 15 April 2009).

⁵ See Commission decision of 13 July 2009 in case N157/2009 *Financing of the planning phase of the Fehmarn Belt fixed link*, OJ C 202, 27.8.2009, p. 2.

- (14) The current notification concerns the total construction costs of the entire Project (i.e. planning included) and thus overlaps with the measures notified in case N159/2009.

2.2. THE FIXED LINK (THE COAST-TO-COAST INFRASTRUCTURE)

- (15) According to the Construction Act (Section 1), Femern A/S is appointed to carry out the construction, operation and financing of the Fixed Link. This is the sole purpose of Femern A/S. The Construction Act allows Femern A/S to obtain loans and to use other financial instruments only for purposes related to the construction and operation of the Fixed Link. (Section 4).
- (16) The tasks related to the construction of the Fixed Link are open to all potential undertakings on equal and non-discriminatory terms since all construction contracts are subject to public procurement procedures in accordance with public procurement law.
- (17) Femern A/S will finance the Fixed Link with loans obtained on the international financial market. The Danish Government will provide a State guarantee for these loans. Alternatively, the Femern A/S will use government re-lending from the central bank of Denmark.
- (18) Femern A/S is entitled to collect user fees for using the Fixed Link road infrastructure in order to be able to repay its debt. The user fees will be set by the Minister of Transport (Section 42 of the Construction Act). It follows from the notification that the repayment period of the Fixed Link and the Danish hinterland connections is estimated to be 55 years from the opening of the Fixed Link⁶.

2.3. THE ROAD AND RAIL HINTERLAND CONNECTIONS

- (19) The Construction Act entails that A/S Femern Landanlæg is appointed to carry out the financing of the construction and operation of the Danish hinterland connections (Section 2).
- (20) Pursuant to Article 5 of the International Agreement, Denmark carries out the construction and electrification of a dual track rail link between the cities of Ringsted and Rødby and equips it with new signalling systems according to

⁶ The repayment period depends on a number of factors, such as the final costs of planning and constructing the Fixed Link and the Danish hinterland connections, the realised operating and maintenance costs of the Fixed Link and the hinterland connections, the size of the EU grants received for the project, the actual real interest rate, the traffic volume and the traffic increase in respect of the road section of the link in particular.

ERTMS level 2. The existing single track railway section between Vordingborg and Rødby is to be extended to a double tracked railway.

- (21) The existing double tracked railway from Ringsted to Vordingborg and the existing single-track railway from Vordingborg to Rødby, including the new signalling system installed on this section, are owned by Rail Net Denmark. A/S Femern Landanlæg will own the new track section from Vordingborg to Rødby, including the new signalling system installed on the new track, and the installations for electrification of the whole section from Ringsted to Rødby.
- (22) A shared ownership of the installations of the railway section is envisaged in the Construction Act (Section 39) and therefore an exchange of property, based on the value of Rail Net Denmark's assets and A/S Femern Landanlæg's assets, will take place when the construction of the Fixed Link and the hinterland connections is completed⁷.
- (23) It follows from the notification that construction and maintenance of the railway hinterland connections will be undertaken, on behalf of A/S Femern Landanlæg, by Rail Net Denmark. Rail Net Denmark, as the Danish state's railway infrastructure manager, is responsible for all costs related to the operation of the Danish railway infrastructure, including the Fixed Link hinterland rail connections. However, costs related to the maintenance of the hinterland rail connections will be borne by A/S Femern Landanlæg and Rail Net Denmark in accordance with their ownership share of the hinterland rail connections. Thus 80% of these costs will be financed by A/S Femern Landanlæg and 20% by Rail Net Denmark.
- (24) The Danish hinterland connections also comprise the necessary environmental improvements and upgrading of the existing motorway infrastructure on Lolland, i.e. the existing E47 motorway between Rødbyhavn and Sakskøbing. Construction of the necessary upgrading of the road hinterland connection will be undertaken by the Danish Road Directorate on behalf of the Danish state, and financed by A/S Femern Landanlæg. The ownership of the hinterland road infrastructure, however, remains entirely with the Danish state. The operation and maintenance of the hinterland road connection will therefore be part of the general Danish road infrastructure which is financed by the Danish Road Directorate.

⁷ The Danish authorities submit that the current value of Rail Net Denmark's assets is estimated to approximately 20 % of the total assets of the section, while the assets of A/S Femern Landanlæg are estimated to approximately 80 %. Following the exchange of property this will lead to an ownership share according to which Rail Net Denmark will own 20 % of the railway section and A/S Femern Landanlæg 80 %. Accordingly, Rail Net Denmark will be owner of the approximately 23 km from Ringsted, including installations for electrification and signalling system and A/S Femern Landanlæg will own 96 km of the railway section to Rødby, including installations for electrification and signalling system (excluding the Storstrøms Bridge).

- (25) A/S Femern Landanlæg will finance the hinterland connections with loans obtained on the international financial market. The Danish Government will provide a State guarantee for these loans. Alternatively, A/S Femern Landanlæg will use government relending from the central bank of Denmark.
- (26) Femern A/S will pay dividends to A/S Femern Landanlæg. With these dividends A/S Femern Landanlæg will repay its debt related to the loans necessary to fund the costs of the construction, maintenance and reinvestments related to the hinterland rail connections and the costs related to the construction of the hinterland road connection.
- (27) In accordance with the general nationwide railway charges for using the Danish railways, A/S Femern Landanlæg will receive revenues from the railway operators' use of the Danish hinterland connections. Rail Net Denmark will charge the user fees to the railway operators. Due to the divided ownership of the hinterland rail connections between Rail Net Denmark and A/S Femern Landanlæg, Rail Net Denmark will transfer to A/S Femern Landanlæg 80% of the user charges collected from the railway operators.
- (28) In accordance with general principles in Denmark, there will be no user fees for the use of the Danish road hinterland connection.

2.4. THE NOTIFIED MEASURES

2.4.1. Notified measures to Femern A/S

2.4.1.1. Capital injection

- (29) The Danish Government injected – via a state-owned company, Sund & Bælt Holding A/S – in 2005 and 2009 in total DKK 500 million into Femern A/S as share capital. It is expected that A/S Femern Landanlæg will receive dividend payments and start repayment of debt related to the financing of the construction of the upgrading of the Danish hinterland rail and road connections after the opening of the Fixed Link.

2.4.1.2. The State guarantee and State loans

- (30) The financing of the Fixed Link is based on the State guarantee model where the planning, construction and operation of the Fixed Link is financed through State guaranteed loans raised by Femern A/S on the international financial markets, or through State loans via the Danish Central Bank. Femern A/S in line with other public undertakings that obtain loans covered by a State guarantee will be required to pay a guarantee premium to the Danish State of 0.15 % per annum of the outstanding debt covered by the guarantee.

- (31) The State guarantee covers the obligations of Femern A/S in relation to loans and other financial instruments used to finance and refinance the planning, construction, operation and other necessary arrangements for the purpose of construction and operation of the Fixed Link. The State also guarantees other financial contracts of Femern A/S used in connection with the project financing (such as swaps)⁸. Finally, the guarantee covers (non-financial) obligations assumed by Femern A/S in the construction phase⁹.
- (32) The State guarantee will be granted in favour of Femern A/S. The guarantee ensures that lenders receive payment of all interest and instalments which arise from Femern A/S' obligations.
- (33) The State guarantee can only be used to cover loans that Femern A/S obtains in order to finance the Fixed Link. Femern A/S cannot obtain loans for or engage in any other activity than the financing, planning, construction and operation of the Fixed Link.
- (34) As an alternative way of raising funds Femern A/S will be entitled to obtain State loans (re-lending). A margin of 0.15 % will be added to the interest rate on the State loans. The costs of State loans and State guaranteed loans will be comparable¹⁰.

2.4.2. Notified measures to A/S Femern Landanlæg

2.4.2.1. Capital injection

- (35) The Danish Government injected – via the state-owned company, Sund & Bælt Holding A/S – in 2005 and 2009 DKK 500 million into Femern A/S as share capital. When A/S Femern Landanlæg was established on 16 November 2009, Femern A/S became a subsidiary of A/S Femern Landanlæg.

2.4.2.2. The State guarantee and State loans

- (36) The State guarantees A/S Femern Landanlæg's obligations in relation to loans and other financial instruments used to finance and refinance the planning, construction, operation of the hinterland connections. The State also guarantees A/S Femern Landanlæg's other financial contracts used in connection with the financial management¹¹. Finally, the guarantee covers

⁸ Section 4(2) of the Construction Act.

⁹ Section 4(4) of the Construction Act.

¹⁰ Section 4 (3) of the Construction Act

¹¹ Section 4(2) of the Construction Act.

(non-financial) obligations assumed by A/S Femern Landanlæg in the construction phase¹².

- (37) A/S Femern Landanlæg will be required to pay a guarantee premium to the State of 0.15 % per annum of the outstanding debt covered by the guarantee.
- (38) The State guarantee ensures that lenders receive payment of all interest and instalments etc., which arise from A/S Femern Landanlæg's obligations.
- (39) The State guarantee can only be used to cover loans that A/S Femern Landanlæg obtains in order to finance the hinterland connections. A/S Femern Landanlæg cannot obtain loans for or engage in any other activity than the financing, planning, construction and operation of the hinterland connections.
- (40) As an alternative way of raising funds A/S Femern Landanlæg will be entitled to obtain State loans. A margin of 0.15% will be added to the interest rate on the State loans. The costs of the State loans and State guaranteed loans will be comparable.

3. STATE AID ASSESSMENT

3.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107 (1) OF THE TREATY

- (41) According to Article 107(1) of the Treaty, “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.”
- (42) To qualify as State aid, a measure must meet the following cumulative conditions: 1) it must confer an economic advantage granted through State resources, 2) the advantage must be selective in that it favours certain undertakings and 3) the measure at stake must distort or threaten to distort competition and affect trade between the Member States.
- (43) As regards the first condition mentioned in recital (42), it must be recalled that the aim of Article 107(1) of the Treaty is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products¹³. It results from settled

¹² Section 4(4) of the Construction Act.

¹³ See, for instance, Case 173/73 *Italy v Commission* ECLI:EU:C:1974:71, paragraph 26.

case law that the concept of aid is thus wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect¹⁴.

- (44) In the case at hand, it must first be assessed whether the capital injections, the State guarantees, and the State loans granted to Femern A/S and A/S Femern Landanlæg for the financing of the Project constitute State aid in the meaning of 107(1) of the Treaty.

3.1.1. Concept of undertaking

General principles

- (45) It has to be recalled, on the one hand, that activities that normally fall under State responsibility in the exercise of its official powers as a public authority do not fall within the scope of State aid rules and, on the other hand, that the Court of Justice considers “any activity consisting in offering goods and services on a given market is an economic activity”¹⁵.
- (46) According to case law, the Commission must first establish whether Femern A/S and A/S Femern Landanlæg are undertakings within the meaning of Article 107 (1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed¹⁶.
- (47) In recent years there have been important developments in the jurisprudence and the Commission's approach as regards the notion of "economic activity" in relation to public financing of the construction and operation of infrastructure projects has evolved.
- (48) In its judgment in *Aéroports de Paris*¹⁷ (2000) the Court of First Instance held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers constitutes an economic activity.

¹⁴ See, for instance, Case C-200/97 *Ecotrade v Altiforni e Ferriere di Servola SpA*, ECLI:EU:C:1998:579, paragraph 34.

¹⁵ See, for instance, case C-118/85, *Commission v Italy*, ECLI:EU:C:1987:283, paragraph 7.

¹⁶ Case C-35/96 *Commission v Italy*, ECLI:EU:C:1998:303, paragraph 36; C-41/90 *Höfner and Elser* ECLI:EU:C:1991:161, para 21; Case C-244/94 *Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche*, ECLI:EU:C:1995:392, paragraph 14; Case C-55/96 *Job Centre*, ECLI:EU:C:1997:603, paragraph 21.

¹⁷ Case T-128/98 *Aéroports de Paris v Commission*, ECLI:EU:T:2000:290, confirmed by the ECJ, Case C-82/01P, ECLI:EU:C:2002:617.

- (49) In its "*Leipzig-Halle airport*" judgment the Court of Justice confirmed that where an infrastructure is operated for a commercial purpose, the construction of that infrastructure also constitutes an economic activity¹⁸. In addition, for a certain activity to be classified as an economic activity, it is irrelevant whether a private investor would have carried out the same activity¹⁹. Once an infrastructure operator engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107 (1) of the Treaty, and the Treaty rules on State aid are capable of applying to advantages granted by the State or through State resources to that infrastructure operator²⁰.

A/S Femern Landanlæg: the road and rail hinterland connections

- (50) Under the Construction Act, A/S Femern Landanlæg is appointed to carry out the financing of the construction and operation of the Danish road and rail hinterland connections. A/S Femern Landanlæg has no other purpose and is not allowed to engage in other activities.
- (51) The necessary upgrading of the road hinterland connections, including the necessary environmental improvements and upgrading of the existing motorway infrastructure on Lolland, i.e. the existing E47 motorway connecting the agglomerations of Rødbyhavn and Sakskøbing, will be undertaken by the Danish Road Directorate, which is part of the Danish state. The works will be financed by A/S Femern Landanlæg. The ownership of the hinterland road infrastructure, however, remains with the Danish state. The operation and maintenance of the hinterland road connection will therefore be part of the general Danish road infrastructure which is financed by the Danish Road Directorate.
- (52) The road hinterland connection is made available free of charge to all users and provides a benefit to the population as whole. As they are not commercially exploited and as there is not a market in Denmark for the operation of public roads, the Commission considers that A/S Femern Landanlæg is not engaged in economic activity when it plans, construct and operates the road hinterland connections and therefore does not constitute an undertaking for the purposes of Article 107 (1) of the Treaty.²¹ For the same

¹⁸ Joined Cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v Commission* and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, (hereafter: "*Leipzig-Halle airport case*"), ECLI:EU:T:2011:117, confirmed by the ECJ, Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, ECLI:EU:C:2012:821, and Case T-196/04 *Ryanair v Commission*, ECLI:EU:T:2008:585.

¹⁹ Case C-309/99, *Wouters, Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, ECLI:EU:C:2002:98, para 48.

²⁰ Joined Cases C-159/91 and C-160/91, *Poucet & Pistre*, ECLI:EU:C:1993:63.

²¹ Cf the Commission decision of 15 October 2014 in cases SA.36558, SA.36662, SA.38371, Aid granted to Øresundsbro Konsortiet, (OJ C 29.11.2014, p. 1), recital 79.

reasons, the funding made available to A/S Femern Landanlæg for the planning, construction and operation of the road hinterland connections is not liable to distort competition and affect trade between Member States.

- (53) With regard to the railway hinterland connections, the Commission notes that they will be upgraded and operated by Rail Net Denmark ("Banedanmark" in Danish), the Danish State's railway infrastructure manager. A/S Femern Landanlæg will finance the costs of the upgrades²². Rail Net Denmark is the infrastructure manager of the state-owned railway sections in Denmark, including the existing railway section between Ringsted and Rødby. As infrastructure manager Rail Net Denmark will be in charge of the operation of the rail hinterland connections (i.e. the section between Ringsted and Rødby). This includes the management of capacity, the assignment of slots on the railway and collection of railway charges from the railway operators using the tracks. The railway charges for using the section between Ringsted and Rødby will be the nation-wide charges.
- (54) Rail Net Denmark is responsible for all costs related to the operation of the Danish railway infrastructure, and it will also cover those costs for the rail hinterland connections. However, costs related to the maintenance of the rail hinterland connections will be borne by A/S Femern Landanlæg and Rail Net Denmark in accordance with their ownership share of the hinterland rail connections (see recital 23). A/S Femern Landanlæg will finance the costs of the construction and maintenance related to the hinterland rail connection with loans. Femern A/S will pay dividends to A/S Femern Landanlæg. With these dividends A/S Femern Landanlæg will repay its debt related to the loans necessary to fund those costs.
- (55) Due to the nature of the national rail infrastructure network in Denmark there is no competition on or for the market for the operation and management of the national rail network. As explained in recital 53, the rail hinterland connections owned by A/S Femern Landanlæg will be operated by Rail Net Denmark, the national railway infrastructure manager, on the same conditions as other parts of the Danish railway system. In addition, since the management and operation of the national network concerned is carried out in a national, geographically closed and separated market that is not subject to competition, public financial support made available to A/S Femern Landanlæg for the rail hinterland connections is not liable to affect trade between Member States²³.

²² With the exception of the costs for the new signalling system on the existing railway section between Ringsted and Rødby currently owned by Rail Net Denmark, which will be paid by Rail Net Denmark as part of the Signalling Programme that is currently being implemented on the state-owned railway system in Denmark.

²³ See Commission decision of 2 May 2013 in case SA.35948 (2012/N) – Czech Republic - Prolongation of the interoperability scheme in railway transport, OJ C 306, 22.10.2013, point 18 and following;

- (56) It follows from the above considerations that the planning, construction, and operation of rail hinterland connections, the measures in favour of A/S Femern Landanlæg it receives for the financing of the planning, construction, and operation of rail hinterland connections would not be liable to distort competition or affect trade between Member States.
- (57) As a consequence of the above, the public funds granted to A/S Femern Landanlæg to finance the planning, construction and management²⁴ of the road and rail hinterland connections do not constitute State aid within the meaning of Article 107 (1) of the Treaty.

Femern A/S: the Fixed Link

- (58) According to the Construction Act (Section 1), Femern A/S is appointed to carry out the construction, operation and financing of the Fixed Link. The sole purpose of Femern A/S will be to carry out the construction and operation of the Fixed Link. Femern A/S will be entitled to collect fees for the use of the Fixed Link in order to be able to repay its debt. Femern A/S will consequently charge the road users, as well as the railway operators, for using the railways connection of the Fixed Link.
- (59) The fees will be determined by the Danish Minister for Transport (Article 42 of the Construction Act) and published on Femern A/S's website.
- (60) The total costs of planning, construction and operation of the Fixed Link will be recovered by the toll revenues collected by Femern A/S over an expected period of 55 years. Furthermore, it would not be possible for Femern A/S to operate the Fixed Link without having first constructed the infrastructure²⁵.
- (61) In the view of the Danish authorities, Femern A/S does not carry out economic activities. Denmark considers that Femern A/S has been assigned to plan, construct, own, operate and maintain the Fixed Link, and that when carrying out these tasks, it acts as a public authority and not an undertaking. In support of this view, Denmark has invoked the following main arguments.
- (62) First, the Project exclusively pursues public policy objectives relating in particular to furthering regional and economic development and cooperation between Germany and Denmark and in the region in general. Femern A/S has been established with the sole purpose of executing those public policy objectives, which are described in the International Agreement.

Commission decision of 17 July 2002 in case N 356/2002 – United Kingdom - Network Rail; OJ C 232, 28.9.2002, p. 2.

²⁴ As explained in recital 23 the operation of the Danish rail hinterland connections will be done by the national rail infrastructure manager, Rail Net Denmark.

²⁵ See recitals 50-51 above.

- (63) Second, the existence of the Project presupposes the consent of two sovereign Member States to establish such a link on and between their territories, which is an act of public authority that could never be undertaken by private entities.
- (64) Third, Femern A/S' activities relate to public duties, which are a direct consequence of public planning measures. These activities have the sole aim of achieving the planning policy objectives, and not to open up for competition between transport service providers or infrastructure managers.
- (65) Fourth, Femern A/S performs its public duties in a ring-fenced economic circuit, and thus there is no risk that its financing activities in respect of the Fixed Link could be used to cross-subsidise other activities not relating to its public tasks.
- (66) Lastly, Denmark considers that the mechanisms to set the user fees charged by Femern A/S demonstrate the basic public policy nature of its activities. Although the fees constitute remuneration for the use of the Fixed Link, Femern A/S only implements the financing model laid down in the International Agreement and the Construction Act and thus acts as a public authority and not as an undertaking. Femern A/S - as opposed to the Consortium in the *Øresund* decision, which is free to define its commercial policies and to determine the fees charged on the road users²⁶ - cannot set the fees or pursue its own commercial strategy and has no influence on its revenues, as the fees are set by the Minister for Transport (see recital 18). Femern A/S's activities and financing model are thus comparable to those of public authorities who charge a cost-based fee for providing specific public goods or services to their users rather than undertakings which pursue commercial objectives without any interference by public authorities in its pricing policy.
- (67) In relation to Denmark's arguments, the Commission makes the following assessment.
- (68) As set out in recital 47, any activity consisting in offering goods and services on a given market is an economic activity. Femern A/S offers access to the Fixed Link to private persons and undertakings against consideration (the user fees), which *prima facie* suggests that it is engaged in an economic activity and should be considered as an undertaking within the meaning of Article 107(1) of the Treaty.
- (69) Most of the arguments put forward by the Danish government are not sufficient to alter this *prima facie* conclusion.

²⁶ Commission decision of 15 October 2014 in cases SA.36558, SA.36662, SA.38371, Aid granted to Øresundsbro Konsortiet, OJ C 29.11.2014, p. 1, recitals 68 – 69.

- (70) First, the fact that the project seeks to achieve public policy objectives does not exclude that Femern A/S can be considered as an undertaking. The provision of, for instance, gas, electricity, public transport, and mail services can also seek to achieve public policy objectives, yet the entities providing such goods or services can undoubtedly be undertakings in sense of Article 107(1) of the Treaty. Only activities which fall within the exercise of public powers are not of an economic nature.
- (71) Second, it is inherent in the nature of cross-border transport that the consent of at least two sovereign states is required. International air transport, for instance, can only be carried out with the permission of the states concerned. The same applies to the construction of cross-border transport infrastructure. While the grant of permission to provide international transport services or to construct infrastructure to provide such services is an exercise of public powers, it does not make the transport services themselves or the construction of the necessary infrastructure an exercise of public powers.
- (72) Third, the fact that an activity has been planned by a State does not in itself make it non-economic. It is also immaterial that Denmark has directly charged A/S Femern with the planning, construction, and operation of the Fixed Link, without tendering out a concession contract. According to settled case-law, the decisive question is whether Femern A/S provides goods or services on a market.
- (73) Fourth, while the fact that Femern A/S cannot enter other markets may be relevant in determining whether public support it receives is liable to affect trade between Member States or distorts competition, it is not relevant for determining whether it carries out an economic activity.
- (74) The above arguments are consequently not sufficient to conclude that Femern A/S would not be an undertaking within the meaning of Article 107(1) TFEU.
- (75) However, the Commission notes the specific arrangements under the Construction Act, according to which the fees for the use of the Fixed Link are not set by Femern A/S but directly by the State through the Minister of Transport.
- (76) This is a specific feature of the Project which normally does not apply to undertakings operating on a market. Indeed, whilst regulated price structures may and do exist for certain products or services, the situation may be different where the State by law solely and directly determines the exact consideration to be paid for the use of a particular infrastructure (see, by contrast, the *Øresund* decision where the Commission noted that the Consortium was free to set its prices and determine its commercial policy).

- (77) The EU Courts have in the past held that a public entity (which also fulfils supervisory duties of a public nature) performs an economic activity when it provides services against a fee at a rate which it is free to set, and where the entity itself determines the conditions on which the services are provided.²⁷ Conversely, the EU Courts have found that the fact that a service provided by a public entity and connected to the exercise by it of public powers is provided in return for remuneration laid down by law and not determined, directly or indirectly, by that entity, is not alone sufficient for the activity carried out to be classified as an economic activity.²⁸
- (78) This case law suggests that where an entity provides goods or services against remuneration and this activity is connected to the exercise of public powers, its ability to freely set the level of this consideration (and thus compete, based on price, with rivaling providers) may be material in determining whether it is acting as an undertaking within the meaning of Article 107(1) of the Treaty.
- (79) While it is not apparent that Femern A/S exercises an activity connected to the exercise of public powers, it follows from the case-law that, were this to be the case, the mere fact that it charges a fee for the provision of goods or services does not necessarily suffice to conclude that this provision is an economic activity in situations where the level of the consideration is set directly by public authorities.
- (80) On the other hand, the services provided by Femern A/S compete with services provided by private operators, in particular ferry operators, and the financial analysis assume that tolls are set by reference to the ferry prices (see footnote 35). This seems to indicate that Femern A/S commercially exploits the Fixed Link by providing services on a market, and could hence be engaged in an economic activity.
- (81) However, the Commission considers that it is not necessary, for the purposes of this decision, to decide whether the planning, construction, and operation of the Fixed Link constitutes an economic activity within the meaning of Article 107(1) TFEU since, for the reasons indicated below (see section 3.2), the public financing of Femern A/S, if it were to constitute State aid, would in any even be compatible with the internal market.
- (82) For the same reasons, the Commission does not consider it necessary to assess whether the other conditions of the definition of State aid under Article 107(1) TFEU are met in this case.

²⁷ Case T-192/08, *Aéroports de Paris v Commission*, ECLI:EU:T:2000:290, paragraphs 120-121. Confirmed by judgment in C-82/91 P, ECLI:EU:C:2002:617, paragraph 78.

²⁸ Case C-138/11 *Compass-Datenbank GmbH v Republik Österreich* ECLI:EU:C:2012:449, paragraph 38, with further references.

3.2. COMPATIBILITY OF POSSIBLE STATE AID

- (83) Should the measures granted by Denmark to Femern A/S for the financing of the Fixed Link constitute State aid in the sense of 107(1) of the Treaty, the Commission considers that such aid would in any event be compatible with the internal market under Article 107(3)(b) of the EC Treaty.
- (84) According to Article 107(3)(b) of the Treaty, aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market.
- (85) With the adoption of the Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (IPCEI Communication) on 20 June 2014²⁹, the assessment of public financing of such projects has been updated and consolidated. The principles set out in that communication are applicable to this case.

3.2.1. General eligibility criteria

Definition of a project

- (86) According to point 3.1 of the IPCEI Communication, the aid proposal must concern a single project which is clearly defined in respect of its objectives as well as the terms of its implementation, including its participants and its funding.
- (87) The construction of the Fixed Link (and hinterland connections) is a specific, precise and clearly defined project. The International Agreement provides a clear description of the project, its implementation and funding. In addition, the Construction Act and its annexes provide a detailed technical description of the project, including geographical location, design, construction, financing and operation.

Common European interest

- (88) According to point 3.2 of the IPCEI Communication the project must contribute in a concrete, clear and identifiable manner to one or more Union objectives and must have a significant impact on competitiveness of the Union, sustainable growth, addressing societal challenges or value creation across the Union.

²⁹ OJ C 188 of 20 June 2014, p. 4.

- (89) The Commission notes that the common European interest of the Fixed Link has already been recognised in the decision regarding the planning phase³⁰.
- (90) The Fixed Link will contribute to the development of the trans-European transport network (TEN-T) and is, as such, considered a priority TEN-T project (no. 20). Accordingly, the Fixed Link will contribute to an improvement of the connection between the Nordic countries and central Europe as well as greater flexibility and time savings for road and railway traffic. In addition, the Fixed Link is a key element in the completion of the main north-south route connection between Central Europa and the Nordic countries.
- (91) The Project involves two Member States, i.e. Denmark and Germany, and the benefits go beyond those two Member States. The benefits of the Project were clearly defined and quantified in a cost benefit study prepared for the Danish Ministry of Transport³¹. The cost benefit analysis shows that the Project will have wide benefits for Europe. Despite significant investment costs, the Fixed Link will return a net benefit and produce an economic return of 4.7 per cent.
- (92) In addition, the Project received EU funding of EUR 205 million from 2007 to 2015 to the planning activities. The Danish authorities submitted an application for EU funding for the construction phase under the TEN-T budget period for 2016-2020.
- (93) The Fixed Link therefore represents an important and concrete contribution to the achievement of the Union's transport policy objectives and broader Union objectives, such as the smooth functioning of the internal market and the strengthening of economic and social cohesion.

Importance of the project

- (94) The important character of the Fixed Link has already been recognised by the Commission in the decision regarding the planning phase³².
- (95) The Danish authorities estimate that the total costs for planning and construction costs of the Fixed Link are DKK 54.9 billion (EUR 7.4 billion EUR) and that the costs related to the planning and construction of the upgrading of the Danish hinterland connections are DKK 9.5 billion (EUR 1.3 billion), i.e. DKK 64.4 billion (EUR 8.7 billion) in fixed 2014 prices for the entire project. In addition to this, the Project also involves significant

³⁰ See Commission decision of 13 July 2009 in case N159/2009 *Financing of the planning phase of the Fehmarn Belt fixed link*, OJ C 202, 27.8.2007, p. 2, recital 40.

³¹ A study prepared for the Danish Ministry of Transport by Incentive, 5 January 2015.

³² See Commission decision of 13 July 2009 in case N159/2009 *Financing of the planning phase of the Fehmarn Belt fixed link*, OJ C 202, 27.8.2007, p. 2, recital 42.

costs related to the construction of the German hinterland connections that are the responsibility of German authorities.

- (96) Moreover, the Project is realised in cooperation between Germany and Denmark and it has already been endorsed at Union level as the Fixed Link forms an integral part of the trans-European transport network. Once the Fixed Link is completed it will significantly improve the conditions for passenger and freight traffic between central Europe and Scandinavia, helping to relieve congestion on the Great Belt route across Denmark, in particular on the rail network.
- (97) The Commission therefore considers that the Fixed Link is quantitatively and qualitatively important, and to the benefit of the whole Union.

3.2.2. Necessity and proportionality of aid

- (98) According to point 28 of the IPCEI Communication the aid must not subsidise the costs of a project that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity. Without the aid the project's realisation should be impossible, or it should be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits. Moreover, aid will only be considered proportionate if the same result could not be achieved with less aid.

Necessity of the aid

- (99) According to point 29 in the Commission's IPCEI-Communication, the Member State should provide the Commission with adequate information concerning the aided project as well as a comprehensive description of the counterfactual scenario which corresponds to the situation where no aid is awarded by any Member State. In this respect, the Danish authorities submit that there is no counterfactual or an alternative project. The Danish Parliament has sole decision-making authority as regards the project's scope and its means of financing. Hence, Femern A/S and A/S Femern Landanlæg have no power to decide to carry out an alternative project of a different scale. Consequently, no realistic description of an alternative project could be provided by Denmark.
- (100) However, the Danish authorities provided information regarding a scenario where no public support is granted to Femern A/S. The analysis conducted in the preliminary phases show that the Fehmarn Belt fixed link project can only be realised with substantial public support either in form of State guarantees or direct grants.
- (101) The Enquiry of Commercial Interest was launched in 2001 with the aim of investigating the private sector's willingness and ability to design, plan,

construct, finance and operate a fixed link across the Fehmarn Belt, the financial and associated technical solutions for the project, the organisational framework for private investors' involvement in the project; and the distribution of risks involved in the project between the private sector and the Member States³³. The call aroused substantial interest: approximately 100 individual companies responded of which 31³⁴ responded to a questionnaire and 20 were invited for interviews. The enquiry concluded that the private sector is interested in participating in the design, financing, construction and operation of the Fixed Link provided the governments are willing to give some kind of subsidies, well in excess of the envisaged TEN-support and/or State guarantees. Private investors will require a high internal rate of return to compensate the substantial risks connected to such a project as the Fixed Link. Likewise, lenders will require a high interest rate and a high debt coverage ratio in order to overcome the perceived risks. Together, these requirements from the investors and the lenders lead to such high costs of capital that the project would not be feasible without public support.

- (102) According to point 30 of the IPCEI Communication, in the absence of an alternative project, the Commission will verify that the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable, e.g. by making it possible to achieve an internal rate of return (IRR) corresponding to the sector or firm specific benchmark or hurdle rate.
- (103) Consequently, aid must be considered as necessary if, for example, it can be demonstrated that the project's IRR is below the normal rate of return required by investors engaging in similar investment projects or if the IRR is insufficient to cover the cost of capital required by the market, *i.e.* the WACC.
- (104) The Danish authorities submitted in this respect calculations showing that the project's IRR on a debt-free basis is 4.2 per cent over the expected repayment period of 55 years³⁵ (*i.e.* where the net present value of the investment is zero

³³ The results from the Enquiry of Commercial Interest were published in the report: "Fehmarnbelt, An infrastructure Investment, Finance and Organisation, June 2002".

³⁴ The participants included consortia consisting of contractors, operators and banks on the one hand and individual companies, mainly banks, engineering companies and insurers, on the other hand.

³⁵ The calculation of repayment period of 55 years results from the following assumptions i) the project planning and construction costs of EUR 7.4 billion (2014 prices) based on the priced offers received from bidders of the four principal civil works contracts on 22 December 2014 plus reserve account of EUR 0.5 billion and average annual costs of operation, maintenance and reinvestment for the Fixed Link of EUR 72.5 million (2014 prices); ii) a continued hourly scheduled ferry service on the Rødby-Puttgarden route; iii).risk-free market interest of 3.0 per cent (in real terms) and projected inflation 2.0 per cent; iv) TEN subsidies for the Fixed Link amounting to 50% of the planning costs and 18% of the construction costs; v) traffic development following the opening of the Fixed Link based on the 'FTC forecast' drawn up by INTRAPLAN Consult GmbH and BVU Beratergruppe Verkehr und Umwelt GmbH in November 2014; vi) assumed road tolls based on average Scandlines' list prices for the

after 55 years), while the WACC is estimated to 11.0 per cent. Hence, the WACC expected to be required by a private investor significantly exceeds the project's IRR.

- (105) Hence, the lack of interest in undertaking and financing the project without public support as well as the calculations demonstrate that the WACC expected to be required by a private investor significantly exceeds the project's internal rate of return. Consequently, on the basis of the replies to the Enquiry of Commercial Interest and as demonstrated by the above calculations the Commission considers that no private investor would carry out the project without public support. Aid is therefore necessary.

The aid is proportional

- (106) According to point 31 of the IPCEI Communication the maximum aid level should be determined with regard to the identified funding gap in relation to the eligible costs.
- (107) The funding gap, calculated as the discounted difference between the positive and negative cash flows over the lifetime of the investment (including the net financial burden imposed on Femern A/S related to the financing of the hinterland connections and including net operating costs for the 55-year operating period and the expected TEN subsidies), amounts to DKK 23.1 billion (EUR 3.1 billion). The net present value of the eligible investment costs amounts to DKK 42.1 billion (EUR 5.6 billion)³⁶. The project's funding gap ratio is therefore 54.9 %.
- (108) The aid element granted to Femern A/S is the form of guarantee or State loans as well as the capital injection will amount to DKK 21.3 billion (EUR 2.8 billion) which leads to aid intensity of 50.8 %; i.e. below the project's funding gap ratio.
- (109) In addition, the State guarantees and State loans are limited in scope and time. The guarantee only covers debt related to the planning, construction and operation of the Fixed Link until the debt is fully repaid and thus there is no risk that the guarantee can be used to subsidise other non-eligible costs and activities.

Rødby-Puttgarden ferry; e.g EUR 65 for passenger cars and EUR 276 for lorries and a rail infrastructure payment of EUR 52.9 million per year.

³⁶ The eligible costs amount to DKK 58.8 billion in current prices, which at net present value corresponds to DKK 42.1 billion. The cost of the projecting and construction of the Fixed Link amounts to DKK 54.9 billion in fixed 2014 prices (based on priced offers received from the bidders of the four principal civil works contracts on 22 December 2014 including a reserve of DKK 3.7 billion and calculated without TEN subsidy).

- (110) Moreover, The Danish authorities committed to limit the guarantee and State loans to loans obtained in order to finance eligible costs no later than 55 years after the opening of the Fixed Link, to re-notify any public financing measures granted after that period and deemed necessary to ensure the sustainability of the Project, and to report annually on the developments in the repayment of Femern A/S' debt.. The guarantee will terminate earlier if the project debt is repaid before the end of this period.
- (111) On this basis, and taking account the commitment by the Danish authorities, it can be concluded that the aid is proportional.

3.2.3. Prevention of undue distortions of competition and balancing test

- (112) According to point 40 of the IPCEI Communication the Member State should provide evidence that the proposed aid measure constitutes the appropriate policy instrument to address the objective of the project.
- (113) The Danish authorities submit that since the underlying problem for the project is lack of access to finance aid in the form of liquidity support, such as loans or guarantees constitutes the appropriate policy instrument. The Danish financing model based on a State guarantee is an effective instrument to implement the project and ensure that Femern A/S is not overcompensated as the measures (State guarantee, State loans and the capital injection) merely enable Femern A/S to keep its capital costs at an appropriate level in order to make the project feasible by covering the funding gap. Also as the guarantee/loans only cover debt related to the planning, construction and operation of the Fixed Link until the debt is fully repaid - there is no risk that the guarantee/loans can be used to subsidise other non-eligible costs and activities. Therefore, the Commission considers that chosen aid instrument is appropriate.
- (114) According to point 41 of the IPCEI Communication aid can be declared compatible if the negative effects of the aid in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of the common European interest.
- (115) As explained in recitals 88-93 the Fixed Link is part of a wider plan to promote mobility, further integration and cultural exchange of people living on both sides of the Fixed Link, and to improve the connection between the Nordic countries and central Europe for passengers as well as road and railway freight. These expected benefits have been recognised at a European level by including the Fixed Link in the list of TEN-T priority projects. In this context the Fixed Link will generate positive effects on a number of economic sectors in the region, such as gas stations, retail, restaurants, hotels, amusement parks and rail and bus and transport.

- (116) The opening of the Fixed Link will however have a negative impact on the ferry operators, both serving Rødby and Puttgarden route as well as other ferry routes in the region. Decreased ferry operations may also have a negative impact on the ports used by those ferries in terms of traffic volumes and revenues. These effects are inherent in the project, which seeks to offer a quicker and more convenient alternative to the ferry services.
- (117) The Fehmarn Belt fixed link will be open to all users on equal and non-discriminatory basis. The Danish Minister for Transport will determine the tolls and railway charges to be collected from the users of the road and the rail connection of the Fixed Link. The pricing structure will be non-discriminatory and transparent and, as regards heavy goods vehicles, in line with the applicable rules of the Eurovignette Directive³⁷. It is expected that the user tolls on the road link will correspond to the price charged by the ferry operator.
- (118) Moreover, the cost benefit analysis of the Fehmarn Belt Fixed Link project clearly shows that the expected socio economic outcome of the Fehmarn Belt fixed link in the long run is positive, regardless of the fact whether the ferry service continues or is terminated³⁸. The study tallies to the extent possible all possible gains and costs of the Fehmarn Belt fixed link in comparison with a situation involving continued ferry operation. Despite significant investment costs in the Fixed Link and related hinterland connections, the project will return a net benefit and produce an economic return of 4.7 per cent for Europe³⁹. The net benefit reflects mainly time savings and greater flexibility in departure times for the various travellers using the Fixed Link.
- (119) Therefore the notified measures will only have limited negative effect on competition and trade, which cannot outweigh the obvious positive effects for the Union as a whole.

3.2.4. Reporting obligation

- (120) According to point 49 of the EPCEI Communication the execution of the project must be subject to regular reporting. In this respect Denmark has committed to submit annual reports regarding the developments of repayment of Femern A/S' debt.

³⁷ Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 as modified by Directive 2006/38/EC and by Directive 2011/76/EU.

³⁸ A cost-benefit analysis of the Fehmarn Belt Fixed Link, a study prepared for the Ministry of Transport by Incentive, 5 January 2015.

³⁹ Taking into account all benefits and costs for Denmark alone, the Fixed Link and the associated hinterland connections in Denmark will generate a net social benefit of DKK 28 billion over 50 years. This equates to an economic return of 5.3 per cent.

3.2.5. Mobilisation of State guarantees

- (121) According to point 5(3) of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ("the Guarantee Notice")⁴⁰ the Commission will accept guarantees only if their mobilisation is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure.
- (122) According to Section 4(2) of the Construction Act the Minister for Finance is authorized to provide State guarantees that cover Femern A/S' and A/S Femern Landanlæg's obligations in relation to loans and other financial instruments which the companies have obtained in order to finance and refinance the planning, construction and operation of the Fixed Link. The conditions for the mobilisation of that guarantee are not regulated in the Construction Act itself. The Danish authorities submit that those conditions will be determined by the Minister for Finance before Femern A/S and A/S Femern Landanlæg can obtain loans and other financial instruments for the financing of the construction and operation of the Fixed Link. Hence, the conditions for mobilising the State guarantee issued towards Femern A/S and A/S Femern Landanlæg will form part of the loan agreements which the companies will enter into with financial institutions.
- (123) With regard to State guarantee covering non-financial obligations entailed in Section 4(4) of the Construction Act the Danish authorities submit the conditions for mobilising the State guarantee will be based on an interpretation of the guarantee in light of general principles of Danish law of obligations. This entails that Femern A/S and A/S Femern Landanlæg respectively must be declared bankrupt before the guarantee can be mobilised.
- (124) The Commission considers that the mobilisation of State guarantees comply with Section 5.3 of the Guarantee Notice.

Conclusion

The Commission has decided, on the basis of the foregoing assessment not to raise objections to the measures granted by Denmark to A/S Femern Landanlæg and Femern A/S on the grounds that:

- The measures granted to A/S Femern Landanlæg for the planning, construction and operation of the road and railway hinterland connections in Denmark do not constitute State aid within the meaning of Article 107(1) of the Treaty.

⁴⁰ OJ C 155, 20.6.2008, p. 10–22.

- The measures granted to Femern A/S for the planning, construction and operation of the Fixed Link, should they constitute State aid within the meaning of Article 107(1) of the Treaty, would in any case be compatible with the internal market pursuant to Article 107(3)(b) of the Treaty.

The Commission also takes note of the Danish authorities' commitment to limit the State guarantees granted in favour of Femern A/S and Femern A/S' right to obtain State loans to 55 years after the opening of the Fixed Link. The guarantee and State loans will terminate earlier if the project debt is repaid before the end of this period. Denmark will inform the Commission on an annual basis about the developments in the repayment of the debt of Femern A/S.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

Margrethe VESTAGER

<p>CERTIFIED COPY For the Secretary-General,</p> <p>Jordi AYET PUIGARNAU Director of the Registry EUROPEAN COMMISSION</p>
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