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Subject: **State aid – SA.45300 (2016/N) – Denmark**
Amendment to the Danish Tonnage Tax Scheme

Sir,

1. PROCEDURE

(1) By electronic notification of 4 May 2016, the Danish authorities notified the Commission, in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), of their intention to materially amend the existing Danish Tonnage Tax Scheme ('the existing scheme').

(2) The Commission regarded the notification as incomplete and therefore requested additional information by letters of 1 July 2016, 1 December 2016, 21 February 2017 and 12 April 2018. The Danish authorities replied by letters dated 21 September 2016, 21 December 2016 and 30 May 2017.

(3) On 31 August 2017, the Commission services and the Danish authorities had a conference call to discuss the scheme. By letters dated 12 December 2017 and 3 July 2018, the Danish authorities submitted additional information on the scheme. In addition, further exchanges of information have taken place between the notification and the adoption of the present decision.

(4) By letters dated 22 February 2017, 30 March 2017 and 31 July 2017, the Commission requested the agreement of the Danish authorities to an extension of the two-month period within which the Commission is required to adopt a decision on the case. The Danish authorities agreed to that request.

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2. DESCRIPTION OF THE EXISTING SCHEME

2.1. Objectives of the scheme and fundamentals of operation

(5) The Commission has approved the scheme initially on 12 March 2002[1] for an unlimited duration, with retroactive effect from 1 January 2001 ("the initial scheme"). By decision of 6 December 2004[2], the Commission approved an amendment of the scheme ("the existing scheme").

(6) By letter of 21 January 2005, the Danish authorities notified the Commission of proposed appropriate measures to adapt the legal basis of the scheme, the Tonnage Tax Act[3], to the new Community Guidelines on State aid to maritime transport published by the Commission in January 2004[4] ('*the Maritime Guidelines'*). By letter of 18 May 2005, the Directorate General for Transport informed the Danish authorities of its conclusion that the notified measures did not introduce any change other than those needed for the purpose of complying with the Maritime Guidelines of 2004.

(7) The object of the aid under the scheme is to ensure and further enhance the competitive position of the Danish maritime sector on the global market. Thus, the aim is to prevent a decrease of the Danish merchant fleet and to maintain both the Danish merchant fleet and its seafarer-knowhow in Denmark.

2.2. Eligible beneficiaries

(8) The tonnage tax scheme is open to companies that are fully liable to tax in Denmark as well as to companies established in other EU countries operating through permanent establishments in Denmark.

2.3. Eligible vessels and activities

(9) Eligible vessels are vessels with a net tonnage of at least 20 tons.

(10) Eligible for tonnage taxation is income from shipping activities involving the transport of passengers or goods between ports or between ports and off-shore installations, or income from certain operations in close connection therewith defined as ancillary activities. Ancillary activities carried out by a company that has no activities involving maritime transport are not eligible for the scheme and income from such activities is subject to standard taxation. To align its practice to the Commission's interpretation of the Maritime Guidelines and to the Commission's case practice Denmark has committed to a clear definition of eligible ancillary services as presented in recital (41) below.

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1 Commission decision of 12.3.2002 in State aid N 563/2001 – Denmark, *Act on taxation of shipping (Tonnage Tax Act)*, OJ C 146, 19.6.2002, p.9.

2 Commission decision of 6.12.2004 in State aid N 171/2004 – Denmark, *Adaptation of the Danish tonnage tax regime aiming at taking account of the renting out of commercial facilities on board eligible vessels*, OJ C 136, 3.6.2005, p.42.

3 Consolidated Act no. 834 of 29 August 2005.

4 OJ C 13, 17.1.2004, p. 3.

(11) Towage activities are eligible under condition that the vessel carries out towing and salvage operations at sea constituting maritime transport for at least 50 % of the time it is in operation during a financial year. It is a condition that the vessel be registered in a Member State of the European Union ("EU") or the European Economic Area ("EEA"). Waiting time shall be divided *pro rata* between the time spent on tug and salvage activities at sea and the time spent on other activities. Towing operations carried out in or around ports or consisting of assisting self-propelled vessels to berth in port are ineligible for tonnage tax aid under the scheme.

(12) Under the Danish regime revenues from the operation of time chartered vessels may be tonnage-taxed provided the chartered in gross tonnage does not exceed the beneficiary's own fleet by more than four times.

2.4. Social, safety and environment standards

(13) Sea-going ships sailing under Danish flag must meet all relevant international requirements with regard to safety and working conditions, including the International Convention for the Safety of Life at Sea (SOLAS), the Load Lines Convention, the International Convention for the Prevention of Pollution from Ships (MARPOL), the Maritime Labour Convention (MLC) and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).

(14) In addition, Denmark has a number of special national requirements regarding the working environment.

(15) Danish requirements do not apply to ships sailing under foreign flag. Such ships are subject to flag state control by the relevant country. However, when sailing in Danish waters or calling into Danish ports, ships under foreign flag are subject to Danish port state control in accordance with the Paris Memorandum of Understanding and the existing Directive 2009/16/EC of 23 April 2009 on port state control[5].

2.5. Flagging requirements (‘flag-link’)

(16) The Danish authorities introduced in the Danish Tonnage Tax Act provisions on the flagging of eligible vessels (‘flag-link rules’) by Act no. 409 of 1 June 2005. The Danish authorities declared that the purpose of this amendment was to bring the scheme in line with the Maritime Guidelines.

(17) Pursuant to these flag link rules, a shipping company applying the tonnage tax scheme must - seen as an average over the income year - maintain or increase the share of the gross tonnage, owned by the company and used for purposes that could be covered by the Tonnage Tax Act, which is registered in a state within the EU/EAA. In determining whether this condition is met, the assessment must be based on such share as of 12 January 2005 (the date on which the bill introducing the flag-link rules, later adopted as Act no. 409 of 1 June 2005, was submitted to the Parliament). However, for shipping companies covered by the scheme as of 17 January 2004 (the date when the Maritime Guidelines were published in the

[5] OJ L 131 of 28 May 2009, p. 57.

Official Journal of the EU), the assessment may instead be based on the share as of 17 January 2004. For shipping companies entering the tonnage tax scheme later than 12 January 2005, the assessment is based on the share at the date of entry.

(18) Should a shipping company (or group) fail to meet the flag link requirement, income related to the additional share of non-EU/EEA flagged tonnage, owned by the company and used for purposes that could be covered by the Tonnage Tax Act, is taxed according to the general rules. This condition however does not apply in the following situations:

- If, seen for all shipping companies subject to tonnage tax, the share of the gross tonnage, owned by the companies and used for purposes that could be covered by the Tonnage Tax Act, which is registered in a state within the EU/EAA does not fall on average during the preceding fiscal year;

- if at least 60 percent of the gross tonnage, owned by the company and used for purposes that could be covered by the Tonnage Tax Act, is registered in a state within the EU/EAA.

(19) Shipping companies must each year submit information on the extent to which their gross tonnage, owned by the companies during the year and used for purposes that could be covered by the Tonnage Tax Act, has been registered within the EU/EEA respectively outside the EU/EEA.

2.6. Legal basis, implementing provisions

(20) The initial scheme was introduced by Act no. 264 of 8 May 2002 ('Tonnage Tax Act'), with effect from 2001.

2.7. Duration of the scheme

(21) The existing scheme was approved for an unlimited duration.[6] The Danish authorities have agreed to limit the limitation of the present scheme including its amendments to a 10-year period, i.e. the scheme will enter into force with retroactive effect on 1 January 2017 and expire on 31 December 2026.

2.8. Ring-fencing

(22) The existing scheme provides for a number of ring-fencing provisions in order to prevent abuse:

- 'Arm's length principle' applicable to prices and terms of transactions between associated enterprises;

- Rules on financial income and expenditure;

- Rules to prevent over-capitalization of tonnage-taxed activities (so-called 'thick-capitalization rules');

[6] Point 2.8 of Commission decision of 12.3.2002 in State aid N 563/2001; confirmed in Point 2.6 of Commission decision of 6.12.2004 in State aid N 171/2004.

- Rules applicable to activities that are 'crossing the ring fence', i.e. only partially falling inside the scheme's scope, e.g. profits from the sale of a vessel which is partly subject to tonnage tax;

- Rules applicable to groups of companies.[7]

(23) The 'arm's length principle', the 'rules on financial income/expenditure', the 'rules on thick capitalisation', the rules concerning activities crossing the ring-fence and the rules governing transactions within a group of companies provide clear references as regards which activities can or cannot be considered to fall under the tonnage tax. Thus, these make clear reference to transparent accounting.[8]

(24) The existing scheme also provides for opting-in/-out rules:[9] Opting for or against tonnage taxation shall be binding on the shipping company for a period of 10 years from the beginning of the financial year in which tonnage taxation for the first time can be selected. At the end of that period tonnage taxation can again be chosen for a new 10 year term. After opting out of tonnage taxation, the scheme cannot be chosen again until after a period of 10 financial years subject to taxation under the general rules of tax legislation. If a beneficiary opts into the tonnage taxation scheme, it must bring all its vessels and other assets which satisfy the conditions for tonnage taxation under the scheme.

(25) Moreover, the existing scheme provides for rules on deferred taxes:[10] Deferred taxes arise when a taxable depreciation proceeds more rapidly than the actual reduction in financial value. This produces a deferred profit, which will be taxed when the vessel is sold. Under the existing scheme, deferred taxes will be due for payment only to the extent that shipping activities are reduced without new tonnage being acquired as replacement for the ships that have been disposed of. This also means that deferred taxes will be due for payment if the shipping company becomes a resident of another country for tax purposes while being taxed under the scheme. In practice, deferred taxes will be remitted if the shipping company uses the ships in question for their entire technical and economic lifetime. In general, no new deferred taxes are generated under the scheme as ships and other assets cannot be depreciated for tax purposes.

(26) In respect of deferred taxes, the Danish authorities provided the following additional information, in the context of the notification of the amendments to the scheme:

- Reversed depreciation is not subject to taxation until the vessel is actually sold. At that time, taxation takes place according to the general rules on corporate taxation, and thus reversed depreciations do not benefit from the favourable taxation under the scheme.

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7 Point 2.11 of Commission decision of 12.3.2002 in State aid N 563/2001; point 2.8 of Commission decision of 6.12.2004 in State aid N 171/2004.

8 Point 3.3.5 2nd subparagraph of Commission decision of 12.3.2002 in State aid N 563/2001.

9 Point 2.8 of Commission decision of 12.3.2002 in State aid N 563/2001; recital (6) of Commission decision of 6.12.2004 in State aid N 171/2004.

10 Point 2.6.2 of Commission decision of 12.3.2002 in State aid N 563/2001.

- The applicable legislation ensures that shipping companies do not first benefit from the depreciation rules under the general taxation system and then, afterwards, by the favourable tonnage taxation scheme. It ensures that reversed depreciation is taxed when the vessel is actually sold and the shipping activity is reduced.

(27) When the Danish authorities notified the Commission of the intended amendment to the existing scheme, they also provided additional explanations on compliance control measures as implemented under the existing scheme. That information can be summarised as follows:

- One of the main ring fencing measures is the verification – on the basis of the arm's length principle – of commercial transactions between companies under tonnage tax and their possible affiliates. The arm's length principle also applies to the allocation of income within a shipping company to, respectively, activities subject to tonnage tax and activities taxed under the general rules. Other measures include special rules on the tax treatment of financial income and financial expenditure and the 'all or nothing' option for maritime groups. Due to the latter, all eligible entities of a group shall opt for the tonnage tax where at least one of them does.

- It is a general rule under the scheme that no allowances of any kind can be made against income calculated on basis of operated tonnage. Thus, the tonnage tax must be paid irrespective of the shipping company's actual operating profit or loss. Further, operating losses from shipping activities under the tonnage tax scheme cannot be set off against profits from other activities. This also applies in the case of a group of companies being taxed under the rules for joint taxation.

- Both the annual tax return together with the annual reports of each beneficiary is subject to review. If a tax return is outstanding, the Danish tax administration requests the shipping company to hand in the material and the information needed. On this basis, the tax administration decides whether to open a further investigation of the company.

- In general, the tax administration defines its continuous monitoring activities on the basis of risk assessments. In this context, the tax administration annually publishes its plan for the monitoring activities of the year. The mentioned activities are constantly adapted to ensure that the monitoring targets the areas and subjects where the risk of the shipping companies making errors is the highest. Primarily, the tax administration focuses on the risk areas below:

  – The allocation of revenues and costs between eligible and ineligible activities;

  – Questions related to transition balances created in connection with tax-exempt business formations;

  – The condition regarding eligible maritime transport activities;

  – The taxation of income in cases where the condition regarding the 1:4 split between owned tonnage and chartered tonnage is not met;

– The taxation of income from cruise ships;

– The taxation of operator companies.

2.9. Tonnage tax base and tonnage tax calculation

(28) Under the existing tonnage tax scheme, the taxable income pertaining to all eligible operations is a lump sum corresponding to the sum of fixed amounts determined for each vessel by reference to its tonnage (therefore 'tonnage tax'), regardless of the real profit made by the shipping company. The income calculated in this manner is taxed at the ordinary rate of the corporation tax. For each vessel subject to tonnage tax, the taxable income is at a lump sum calculated by reference to its net tonnage as follows, per 100 net tons (NT) and per 24-hour period started, irrespective of whether the vessel is operational or not:

Net capacity of vessel	***Flat-rate revenue***
Up to 1000 NT	*DKK 8.97 (approx. EUR 1.21)*
From 1001 to 10 000 NT	*DKK 6.44 (approx. EUR 0.87)*
From 10 001 to 25 000 NT	*DKK 3.85 (approx. EUR 0.52)*
More than 25 000 NT	*DKK 2.53 (approx. EUR 0.34)*[11]

3. AMENDMENTS TO THE EXISTING SCHEME

3.1. Extension of the scope of eligible vessels covered by the scheme

3.1.1. Notified extension of the scope

(29) With the notified amendment, the Danish authorities intend to bring under the scheme a number of activities that are related to maritime transport. According to the Danish authorities, such activities are typically carried out by specialized vessels operating in the off-shore sector. The expansion comprises the activities of the following types of vessels:

- guard vessels;
- vessels servicing off-shore installations;
- vessels for raising, repairing and dismantling windmills and other off-shore installations, including oil installations;
- pipeline- and cable-laying vessels;
- ice management vessels;
- accommodation vessels.

[11] Updated rates, Danish Tonnage Tax Act – consolidated act no. 945 of 6 August 2015.

(30) In order for service activities for oil installations to be included in the tonnage tax scheme, it is a condition that these activities are conducted outside the Danish territorial waters or continental shelf. The purpose of this condition is to prevent abuse through income transformation where two or more companies belonging to the same group are engaged in oil and gas production (subject to high hydrocarbon taxation) respectively in the construction of oil installations (subject to tonnage taxation under the conditions of the amended tonnage tax scheme).

(31) As regards accommodation vessels, the Danish authorities declared that the proposed amendment would only cover activities involving accommodation for crew members and housing of spare parts or workshop facilities in connection with off-shore works where the vessels form part of such works. The Danish authorities undertook to exclude accommodation vessels anchored in a harbor or close to shore and competing with onshore accommodation.

(32) The Danish authorities stressed that the above-listed specialized vessels share a significant number of characteristics with vessels that carry out maritime transport, in particular:

- these vessels' activities require qualified seafarers with corresponding professional qualifications; the same labour law applies as for seafarers on vessels dedicated to maritime transport;

- these vessels are sea-going and subject to the same operational and safety requirements as vessels dedicated to maritime transport;

- there is an equal risk that these vessels will be re-flagged outside the EU or never even be flagged in the EU to begin with, as is the case for vessels used for maritime transport.

(33) As explained by the Danish authorities, there is no difference in the technical or educational requirements for off-shore activities respectively activities relating to maritime transport with regard to seafarer qualifications, sea-worthiness requirements, technical and safety control standards etc. The Danish authorities stressed that eligible off-shore service vessels were basically ocean-going ships that have to comply with the standards described above in point 2.4. They also explained that this does not exclude that coastal States may impose additional requirements for off-shore services vessels, e.g. in respect of firefighting or rescue equipment.

3.1.2. Rationale for the extension

(34) The Danish authorities declared that the amendment has the objective of creating improved competitive conditions for the Danish shipping sector in the global market.

(35) According to explanatory notes to the Danish Parliament, provided in the Bill for an Act amending the Tonnage Tax Act and the Taxation of Seafarers Act, the proposed amendments are an implementation of a 2012 government initiative, *Vækstplan for Det Blå Danmark* (*Growth Plan for the Blue Denmark*). According to these notes, the Growth Plan provides for a series of initiatives to sustain the growth and creation of employment in the maritime sector. In summary, the Growth Plan concludes that it is important for the framework conditions for

shipping to follow the developments in the maritime sector. In this connection the Growth Plan establishes that flexibility is required to enable the shipping companies to adapt their activities to new growth opportunities and cyclical changes more easily. The Growth Plan also concludes that there is an extensive growth potential for Danish maritime businesses and good opportunities for Danish jobs on e.g. specialised vessels.

(36) According to data provided by the Danish authorities (2015-data):

- Of the 1.123 off-shore service vessels under construction worldwide, only 90 were planned to be EU-flagged;

- Of the 82 new off-shore service vessels European ship-owners had on order, only 43 were registered under EU-flags and 39 under non-EU flags;

- There is a 'flagging-out' trend in the worldwide off-shore service fleet, as substantiated by an expert report[12] which concludes that European off-shore shipping is lacking competiveness compared to non-EU countries.

(37) The Danish authorities explained that the off-shore sector has significant growth potential. At the same time, global competition has increased, thus challenging the possibility to obtain a share of the future growth in the off-shore sector. If Denmark and Europe were to maintain a strong position in the global market and realize its full potential, there was a need for adjustments.

(38) The Danish authorities illustrated the changing conditions in the off-shore service sector with the example of ice management vessels. According to the Danish authorities, demand for such vessels is expected to increase in the coming years due to the expected increase in off-shore activities in arctic regions and the opening of new northerly shipping lanes.

(39) The Danish authorities concluded that the amendment was necessary, as under the existing scheme's rules, shipping companies cannot bring under tonnage taxation their off-shore service activities and are therefore liable to taxation according to the general rules.

3.2. Other amendments to the scheme

(40) In parallel to notifying the extension of the scope of vessels covered by the scheme, the Danish authorities agreed to align the provisions of the scheme to the Commission's case practice for tonnage tax schemes which has evolved over the past years to keep pace with developments in the maritime sector. [13]

[12] PricewaterhouseCoopers, Corporate taxation in the global off-shore shipping industry, http://www.pwc.com/gx/en/transportation-logistics/pdf/pwc-off-shore-shipping.pdf.

[13] See e.g. Commission decision of 19 December 2017 in case SA.33829 (2012/C), Maltese tonnage tax scheme, http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3 not yet published in OJ.

3.2.1. Ancillary services

(41) The Danish authorities commit to ensure that income from ancillary activities which may be tonnage-taxed, at the level of each beneficiary, represents less than 50 percent of the total tonnage-taxed income.

(42) The capped ancillary activities that may benefit from tonnage tax include:

(a) the carriage of passengers or cargo otherwise than on board a tonnage tax ship operated by the licensed shipping organisation, where

(i) there is a single contract with the customer for a journey which includes a voyage on the tonnage tax ship; and

(ii) the transport for the remainder of the journey is purchased or obtained by the licensed shipping organisation by provision which would have been made as between independent enterprises;

(b) sales and facilities which are normally provided to customers by seagoing passenger ships, including:

(i) the sale of alcoholic beverages, perfume and tobacco;

(ii) the exchange of amounts of different currencies for personal expenditure;

(iii) health and beauty and spa and wellness services;

(c) administrative and insurance services which are directly related to the carriage of passengers or cargo, including under a single journey contract which includes a voyage on the tonnage tax ship;

(d) the provision of holidays, sold to the customer under a single contract, where

(i) part of the holiday is a voyage on a tonnage tax ship operated by the licensed shipping organisation, and the remaining part is land-based ("the land-based part");

(ii) the land-based part is purchased or obtained by the licensed shipping organisation by arm's length provision;

(e) the loading and unloading of cargo carried on a tonnage tax ship operated by the licensed shipping organisation, and the provision by the licensed shipping organisation of facilities used exclusively for those purposes;

(f) the consolidation or breaking of cargo carried on a tonnage tax ship operated by the licensed shipping organisation, immediately before or after the voyage, where the activity is not haulage-related;

(g) the temporary placement of cargo carried on a tonnage tax ship operated by the licensed shipping organisation, on or at the dockside, where the activity is not part of a long-term storage operation;

(h) the rental or provision to customers of containers for goods to be carried on a tonnage tax ship operated by the licensed shipping organisation;

(i) the provision of excursions for passengers of a tonnage tax ship operated by the licensed shipping organisation, where any cabin for the passenger remains available for exclusive use.

(43) Ancillary activities carried out by a company that has no activities involving maritime transport are not eligible for the scheme and income from such activities is subject to standard taxation.

3.2.2. Bareboat chartering

(44) If a shipping company leases out or subleases its own or leased vessels without crew (bareboat charter), the income from such activities is, as a basis, not eligible for taxation according to the tonnage tax scheme. The purpose is to ensure that income from what de facto is to be considered lease arrangements, does not qualify for taxation according to the tonnage tax scheme.

(45) By way of exception, income from bareboat chartering may be eligible for taxation according to the scheme if certain conditions are met. It is a condition that the lessee uses the vessel for purposes that could be eligible for tonnage taxation if the vessel had been used for such purpose by the lessor itself. It is also a condition that the shipping company leases out the vessel as a result of temporary excess capacity for a period not exceeding three years. Finally, it is a condition that the possibility of having the lease income for the individual vessel taxed according to the tonnage tax scheme has not previously been used by the same shipping company or a group company of such shipping company. The purpose of the exceptional possibility of using the tonnage tax scheme for bareboat chartering is to provide the shipping companies with certain flexibility in situations where the shipping companies have excess capacity.

(46) The Danish authorities commit to ensure that the bareboat chartered-out capacity does not exceed 50% of the tonnage of the entire company's fleet covered by the tonnage tax.

3.2.3. Self-declaration of compliance

(47) The Danish authorities further commit to introduce a mandatory annual self–declaration on compliance with the controllable parameters for the tonnage tax scheme[14]. This mandatory self-declaration will accompany the annual tax returns. This is without prejudice to the necessity of regular/random checks by tax authorities as regards the controllable parameters.

3.2.4. Limited duration of the scheme

(48) The Danish authorities have taken note that in line with Commission case practice the duration of the scheme will be limited to a 10-year period. The Danish authorities commit to re-notify the scheme before its expiry should they wish to prolong the validity of the scheme.

(49) The amendments will enter into force with retroactive effect on 1 January 2017.

[14] See e.g. recent decision in Croatian tonnage tax case SA.37912.

4. ASSESSMENT OF THE AID

4.1. Existence of aid under Article 107(1) of the TFEU

(50) The Commission maintains the reasoning set out in its previous decision on the existing scheme, which concluded that the measure constitutes State aid within the meaning of Article 107 (1) of the TFEU.[15]

4.2. Compatibility of the aid

(51) The existing scheme was approved on the basis of the Maritime Guidelines. The objective of the scheme, as described in recitals 5 to 7 above and as approved by the Commission in the existing scheme, remains unchanged.

(52) The Maritime Guidelines are still in force. Hence, the compatibility of the extended scheme with the internal market has to be assessed on the basis of the Maritime Guidelines. The Commission will in particular assess whether the extended scope of the scheme remains within the objectives of the Maritime Guidelines.

(53) Furthermore, on the one hand, in respect of the scheme's provisions that continue to apply, in particular the activities constituting maritime transport activities in the strict sense[16] and the towage activities[17] the Commission's previous assessment of the compatibility of the scheme with the internal market remains unaltered.

(54) On the other hand, the Commission has in its recent case practice developed criteria that ensure that only activities that are in line with the objectives and eligibility conditions of the Maritime Guidelines are covered by tonnage tax schemes, thus ensuring a level-playing field amongst European shipping companies. In this respect the Commission positively notes the commitments of the Danish authorities ensuring the alignment of the scheme, the initial approval of which dates back to 2002, with an evolved case practice.

4.2.1. Objective in the common interest

(55) Section 2.2, 1st paragraph, of the Maritime Guidelines provides for specific objectives in the Community [EU-] maritime interest that may be supported with aid schemes:

- improving a safe, efficient, secure and environment friendly maritime transport,
- encouraging the flagging or re-flagging to Member States' registers,
- contributing to the consolidation of the maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets,

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15 Recital (35) of Commission decision of 6.12.2004 in State aid N 171/2004. With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical.

16 See recital 10.

17 See recital 11.

- maintaining and improving maritime know-how and protecting and promoting employment for European seafarers, and
- contributing to the promotion of new services in the field of short sea shipping following the White Paper on Community transport policy.

(56) The Commission finds that the scheme including the amended scope contributes to those objectives in the EU interest:

- Eligibility criteria described above in point 2.3 help contributing to the consolidation of the maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets.

- Eligibility criteria described above in point 2.4 help improving a safe, efficient, secure and environment-friendly maritime transport;

- Eligibility criteria described above in point 2.5 encourage the flagging or re-flagging to Member States' registers.

4.2.2. Scope of the aid – vessels and income eligible for tonnage tax

(57) Pursuant to Section 2 last subparagraph of the Maritime Guidelines, the Guidelines are applicable to "*maritime transport*" activities as defined in Regulation (EEC) No 4055/86[18] and in Regulation (EEC) No 3577/92[19], that is to say, to the "*transport of goods and persons by sea*" between ports or between ports and an off-shore installation.

(58) The Maritime Guidelines also allow that towage and dredging activities be tonnage-taxed under certain conditions. Pursuant to section 3.1 14th subparagraph of the Guidelines, towage is covered by the scope of the Guidelines provided more than 50 % of the towage activity effectively carried out by a tug during a given year constitutes maritime transport. Waiting time may be proportionally assimilated to that part of total activity effectively carried out by a tug which constitutes maritime transport. Towage activities which are carried out inter alia in ports, or which consist in assisting a self-propelled vessel to reach a port do not constitute 'maritime transport'.

(59) The Commission has also decided that certain activities, even if they do not fall, or only partially fall, within the definition of maritime transport, can, by analogy with maritime transport, be subject to the provisions of Section 3.1 of the Maritime Guidelines.

Existing scheme

(60) As was described in recitals 10 and 11, eligible vessels must be engaged in transport of passengers or freight (shipping activities) between various destinations by sea-going vessels and other activities directly related thereto.

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[18] Regulation (EEC) No 4055/86 of 22.12.1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 378 of 31.12.1986, p. 1.

[19] Regulation (EEC) No 3577/92 of 7.12.1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364 of 12.12.1992, p.7.

(61) The Commission considers that the eligibility of such revenue continues to comply with the concept of 'maritime transport' as specified in the Maritime Guidelines and as acknowledged in respect of the existing scheme.[20]

(62) The Commission further recalls that towage activities at sea are eligible under the scheme. The scheme's rules on eligible towage are fully in line with point 3.1 14th subparagraph of the Maritime Guidelines.

The extended scope covering off-shore service activities

(63) The Danish authorities provided detailed descriptions of the main activities of the off-shore service vessels that would be admitted to the scheme. On that basis, the Commission establishes the following:

- Guard vessels: In essence, such vessels keep guard at sea and by off-shore-sites; they provide security and rescue services, but they also engage in activities relating to environmental clean-up activities.

- Vessels servicing off-shore installations ('supply vessels'): Such vessels provide a wide range of activities which are typically related to off-shore-sites. Main activities consist of:

  – assistance and support services, e.g. the transport of supplies and bunker fuel,
  – security and salvage services,
  – handling very large anchors and towing rigs; vessels performing such activities have a size and construction that make them incompatible to regular (harbour) tugboats and their operations, and are therefore not in direct competition with the latter;
  – services involving environmental protection;
  – guard service at e.g. a drilling platform.

- Vessels for raising, repairing and dismantling windmills and other off-shore installations, including oil installations: The main activities consist of

  – transporting parts (wings, towers etc.) to windfarm construction sites; building, maintenance or dismantling of wind turbines;
  – activities involving construction, repairing and dismantling of other off-shore installations – e.g. wave-breaking installations and other coast protection measures.

- Pipeline- and cable-laying vessels: Main activities involve the laying, inspection or repairing of pipelines and cables on the seabed.

- Ice management vessels: Main activities comprise the escorting of vessels through icy waters, the protection of e.g. drilling units in arctic waters against floating icebergs and actual ice-breaking.

- Accommodation vessels: Main activities include the housing of personnel the storage of spare parts, equipment or instruments necessary for off-

[20] Recitals (52) and (59) of Commission decision of 6.12.2004 in State aid N 171/2004.

shore-sites. Such vessels and their services are a necessary part of comprehensive and long-term off-shore-constructions at sea (e.g. of wind energy facilities, repairs of drilling rigs), at a considerable distance from the shore. In such cases, stationing a ship in the vicinity of the construction site seems necessary in order to provide accommodation, storage space, workshop facilities etc.

(64) The Commission notes that only a part of the above-described main activities constitutes maritime transport in the strict sense.

(65) When assessing whether new vessel types can benefit from tonnage tax, the Commission considers whether there is a risk that the companies operating relevant vessels could relocate their onshore activities outside the EU for the purpose of finding more accommodating fiscal climates and subsequently re-flag those vessels under flags of third countries. The Commission may consider applying by analogy the Maritime Guidelines to companies operating vessels not involved in maritime transport in the strict sense if the following conditions are fulfilled: First, the companies must operate in a global market and face similar challenges, in terms of global competition and relocation of on-shore activities, to those of the EU maritime transport sector. Second, the activities of the relevant vessels must be subject to the same legal environment as EU maritime transport in the fields of labour protection, technical requirements and safety. The activities must require qualified and trained seafarers, with similar qualifications as those working on board traditional maritime transport vessels. Seafarers on board those types of vessels should be governed by the same labour law and social framework as other seafarers. Third, the vessels must be seagoing vessels and they must be obliged to undergo the same technical and safety controls as vessels dedicated to maritime transport. [21]

(66) In that respect, the Commission on the basis of the information provided by Denmark establishes that

- off-shore vessels concerned by the amendment require qualified seafarers, with qualifications comparable to those working on board traditional maritime transport vessels and are subject to the same labour and social standards;

- such vessels are sea-going vessels and they are obliged to undergo technical and safety controls comparable to those of vessels dedicated to maritime transport.

[21] Decisional practice in respect of the eligibility of certain non-maritime transport activities for tonnage taxation: Commission decision of 13 April 2015 in case SA.38085 (2013/N) concerning the prolongation of the Italian tonnage tax scheme (including its application to vessels providing rescue at sea and marine assistance on the high seas), recital 54, OJ C 406, 4.11.2016, p. 1; Commission decision of 13 January 2009 in case SA C 22/2007 as regards the extension to dredging and cable-laying activities of the regime exempting maritime transport companies from the payment of the income tax and social contributions of seafarers in Denmark, recitals 65-72, OJ L 119, 15.5.2009, p. 23; Commission decision of 27.04.2010 in case SA. N 714/2009, The Netherlands – Extension of the tonnage tax scheme to cable layers, pipeline layers, research vessels and crane vessels, recitals 37 to 46, OJ C 158, 18.6.2010, p. 2.

(67) Consequently, the Commission acknowledges that the activities at stake are subject to a legal environment in the labour, technical and safety fields comparable to that of maritime transport. Similarly, qualified and trained seafarers are necessary as is the case in maritime transport.

(68) Section 3.1, 1st paragraph, of the Maritime Guidelines suggests that the fiscal climate in many third countries is considerably milder than within Member States, which has resulted in there being an incentive for companies not only to flag out their vessels but also to consider corporate relocation. A report provided by the Danish authorities suggests that off-shore service activities are exposed to global competitive pressure, and that companies are facing a real risk of losing business to competitors located in more liberal jurisdictions.[22]

(69) The Commission therefore considers there is a risk that shipping companies carrying out off-shore service activities with those vessels relocate their on-shore activities outside the EU for the purpose of finding more accommodating fiscal climates and subsequently re-flag their vessels under flags of third countries. In this context, the Commission acknowledges that these companies operate in a global market (see point 3.1.2 above on market development and competition). The challenges that these activities face in terms of global competition and relocation of on-shore activities are therefore similar to those of EU maritime transport.

(70) Section 3.1, 5th paragraph, of the Maritime Guidelines provides that, *inter alia*, a system of replacing the normal corporate tax system by a tonnage tax is a fiscal incentive to stimulate the competitiveness of the EU shipping industry. Recent expertise confirms that this statement is still valid. In particular, a study on the Analysis and Evolution of International and EU Shipping, of 2015, found that tonnage taxation has been the main incentive that contributed to the re-flagging status into EU flags.[23]

(71) For the above reasons, the Commission has no doubts that the scheme will have an incentive effect on beneficiaries to pursue activities in the common interest.

(72) In view of the above, the Commission considers that the activities at stake may benefit from the same type of aid as maritime transport. Therefore, Section 3.1 of the Guidelines can be applied to these activities by analogy.

Ancillary revenues

(73) In the Cypriot tonnage tax case[24], the Commission considered that in relation to the carriage of passengers by sea, also *"all hotel, catering, entertainment and retailing* act*ivities on board of a qualifying ship"* are eligible, "*provided that these services are performed as ancillary* act*ivities to the activity of carriage of passengers by sea by that ship and are all consumed or used on board that ship"*.

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22 PricewaterhouseCoopers, Corporate taxation in the global off-shore shipping industry, p. 8 and 10, http://www.pwc.com/gx/en/transportation-logistics/pdf/pwc-off-shore-shipping.pdf.

23 University of Antwerp *et al.*, Study on the Analysis and Evolution of International and EU Shipping Final report, September 2015, p. iii, 44-48, http://ec.europa.eu/transport/modes/maritime/studies/doc/2015-sept-study-internat-eu-shipping-final.pdf.

24 Commission decision of 24.03.2010 in case SA. 30338, recital 26, OJ C 144 of 03.06.2010, p. 28.

In the UK tonnage tax case[25], the Commission considered as eligible also "*services or facilities offered, which are additional to the core activities, but which are part of the total package offered to customers, provided that these would be unlikely to yield a profit if the normal tax rules were applied.*" In the Belgian tonnage tax case[26] the Commission prohibited revenues from the sale of products not intended for consumption on board such as luxury goods[27] and from gambling and casinos, as well as revenue from land-based excursions[28] to benefit from tonnage taxation.

(74) The Commission also refers to its decision in the Finnish tonnage tax case[29] and the Lithuanian tonnage tax case[30] where it accepted port terminal operations such as passenger embarkation/disembarkation services and cargo loading/unloading services as well as administrative and insurance activities that are closely associated with the transport of passengers or goods can be covered by the tonnage taxation. Furthermore, in its decision in the Belgian tonnage tax case the Commission accepted that revenue from short-term investment of operating capital results from normal financial management and may therefore be subject to tonnage taxation if such revenue relates to the shipping organisation's normal working capital in connection with the pursuit of eligible activities[31].

(75) In view of the above mentioned decision practice and recognising that it would be counterproductive to establish a definite list of services which may be covered by tonnage taxation as ancillary services, the Commission considers that some limitations are necessary to ensure that beneficiaries of tonnage taxation remain genuine maritime transportation service providers. The principle is that revenues from eligible ships should mainly be constituted by the core shipping revenues.

(76) Core revenues are revenues from ticket sales or fees for cargo transportation and, in case of passenger transportation, letting of cabins in the context of maritime voyage and sale of food and drinks for immediate consumption on board. Ancillary revenues are other types of revenues which are frequently provided on board (especially in passenger transport) and which do not threaten to excessively distort competition with land-based providers, who are taxed according to the general rules of taxation. Examples of ancillary services would be the rental of advertising billboards on-board; the sale of goods and the provision of services customarily offered on passenger ships, including spa, hairdresser services, gambling and other entertainment services; the renting out of ship premises to shop and services' operators; the intermediation in provision of local excursions etc. The Commission considers that core revenues should always cover more than 50% of the vessel's total (core and ancillary) gross revenues.

(77) In the same vein, distortions of competition with land-based services should be limited. This inter alia requires that e.g. land-based services, such as local excursions or road part transportation included in the overall service package, should be bought-in either from unrelated companies or at arm's length price from the same group's entities, which are subject to usual income taxation.

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25 Commission decision of 12.07.2000 in case SA. 15810, OJ C 258 of 09.09.2000, p. 3.
26 Commission decision of 30.06.2004 in case C20/2003, recital 47, OJ L 150 of 10.06.2005, p. 1.
27 Except for alcohol, tobacco and perfumes.
28 Bought-in services.
29 Commission decision of 20.12.2011 in the Finnish tonnage tax case N448/2010, recitals 9 and 31.
30 Commission decision of 24.04.2017 in case SA. 45764, recital 9, OJ C 219 of 07.07.2017, p. 4.
31 Supra footnote 26, recitals 139 to 141.

(78) The Commission takes positive note of the commitment by Denmark to ensure that income from ancillary activities which may be tonnage-taxed, at the level of each beneficiary vessel, represents less than 50 percent of the total tonnage-taxed income of that vessel. The Commission also positively notes that Denmark accepts that the activities listed in recital 41 as ancillary services will come under the cap of 50%. That list does not include any activity that would be completely unrelated to maritime transport and thus not eligible, as such, for tonnage taxation (i.e. neither eligible as core activity nor as ancillary activity).

Revenues from bareboat chartering out

(79) In principle, bareboat chartering-out is not a maritime transport activity, but rather a leasing activity, as the main risk for the transport rests with the lessee and not the lessor. Unfair competition to the detriment of genuine leasing companies which do not benefit from tonnage tax but which come under the normal corporate tax has to be avoided. Therefore, bareboat chartering-out activities may only be allowed for tonnage tax to address a situation of temporary overcapacity.

(80) In order to be eligible for tonnage taxation, the Commission has considered in its decision practice[32] that:

- bareboat chartering-out contracts must be restricted to a maximum period of three years;

- temporary excess capacity must be related to the beneficiary's own shipping services, i.e. excess capacity specifically acquired (bought or chartered) for chartering-out purposes is ineligible for tonnage taxation; and

- at least 50% of the tonnage taxed fleet must still be operated by the tonnage tax beneficiary. EEA intra-group bareboat chartering-out transactions are eligible without any limitations.

(81) The Commission notes positively that Denmark applies those criteria as a condition for bareboat-chartering out activities to benefit from tonnage tax.

4.3. Ring-fencing

(82) The Commission assessed whether the amended scheme will continue to provide for sufficient safeguards against abuse.

(83) First of all, the Commission notes that the Danish authorities expressly confirmed that the ring-fencing measures (point 2.8), as approved for the existing scheme[33], remain unchanged.

(84) The Commission takes positive note of the additional explanations on compliance control (described in recital 26), which the Danish authorities provided as well as of the commitment to introduce an annual mandatory self-declaration on compliance with all controllable parameters (described in recital 46).

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[32] See *inter alia* Commission decision in the Finnish tonnage tax case, recital 32; the Irish tonnage tax case, recital 28; the Croatian tonnage tax case, recital 86 and footnote 23; the Maltese tonnage tax case SA. 33829 (2012/C), recital 264; the Portuguese tonnage tax case SA. 48929 (2017/N), recital 65.

[33] Point 3.3.5 of Commission decision of 12.3.2002 in State aid N 563/2001; recital (48) of Commission decision of 6.12.2004 in State aid N 171/2004.

(85) Moreover, the Danish authorities described a new anti-abuse rule, to be introduced regarding activities relating to the construction, repair and dismantling of oil installations at sea, which are part of the amendment. This new rule, described in recital 29, prevents the risk of income transformation, e.g. where two companies belonging to the same group are engaged in oil and gas recovery (subject to hydrocarbon taxation) respectively in construction of oil installations (subject to tonnage taxation).

(86) As established in recent Commission decisions[34], capital gains related to previously over-depreciated ships entering the tonnage tax system cannot be covered by the tonnage tax system and should be considered as a separate State aid measure.

(87) Therefore, whenever a ship is brought into the tonnage taxation, any related tax liability[35] (so-called 'hidden tax liability') should be established and any relief measures with respect to this tax liability must remain within the aid ceiling pursuant to Section 11 of the Maritime Guidelines.

(88) The Commission takes positive note of the additional explanations provided by the Danish authorities, described in recitals 24 and 25 and concludes that the rules in place ensure that the aid ceiling remains respected and hidden tax liabilities are addressed.

(89) The Commission recognizes the exemption from taxation of capital gains from the sale or transfer of eligible ships which have been acquired and sold whilst being lawfully under the tonnage tax scheme.

(90) For the above reasons, the Commission concludes that the scheme's ring-fencing measures as well as measures that ensure that the aid ceiling is not exceeded continue to be in line with the Maritime Guidelines.

4.4. Distortions of competition

(91) Pursuant to Section 2, 2nd paragraph, of the Maritime Guidelines, aid schemes should not be conducted at the expense of other Member States' economies and must be shown not to risk distortion of competition between Member States to an extent contrary to the common interest.

(92) In that respect, the Commission assessed whether the fixed-profit rates applicable under the scheme are more favourable than the rate levels currently in force in other Member States that also grant State aid through tonnage tax schemes.

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[34] Decision of 20.12.2011 in State aid SA.30515 – N 448/2010 – Finland, *Amendments to the tonnage taxation aid scheme*, OJ C 220 of 25.7.2012, p.1; decision of 29.6.2011 in State aid SA.21233 C/2011(ex NN/2011, ex CP137/2006) – Spain, OJ C 276 of 21.9.2011, p.5; decision of 13.4.2015 in State aid – SA.38085 (2013/N) – *Italy – Prolongation of the tonnage tax scheme*, OJ C 406 of 4.11.2016, p.1.

[35] Difference between the market value and the tax value as at the entry into the tonnage taxation

(93) Firstly, the Commission notes that the fixed-profit rates described in recital (28) above do not deviate significantly from the rates that the Commission has approved for other Member States' tonnage tax schemes.[36]

(94) Lastly, available information does not suggest that the scheme encourages either the flagging out or corporate relocation from other Member States to Denmark.

(95) In conclusion, the Commission finds that aid under the amended scheme does not threaten to distort competition contrary to the common interest.

4.5. Time charter

(96) The Commission positively notes that under the existing scheme revenues from time charter activities may only benefit from tonnage taxation insofar as the beneficiary has in its fleet also own vessels which constitute at least 20 % of the total tonnage taxed fleet.

4.6. Flag link

(97) The Commission notes that the scheme covers vessels of any flag operated by companies subject to taxation in Denmark. The Commission further notes that the flag link rules as set out by the Maritime Guidelines remain respected in particular as regards the mandatory maintenance respectively increase of EU/EEA-flagged vessels.

4.7. Aid ceiling/Aid cumulation

(98) The Commission furthermore takes note that the Danish system allows for a reduction of taxation of shipping activities fairly in line with schemes approved, as requested by section 3.1. penultimate paragraph of the Maritime Guidelines.

(99) In line with Chapter 11 of the Maritime Guidelines, the total aid for the benefit of shipping companies, independently of the form of the aid, should not provide a higher benefit than the full exemption from taxes and social contributions of shipping activities and seafarers.

(100) The Commission positively notes that appropriate measures are taken to ensure that the aid ceiling under section 11 of the Maritime Guidelines remains respected. The Danish authorities have confirmed that companies under the scheme do not qualify for any other tax benefits or incentives that are similar to those provided by the scheme and that they cannot obtain benefits exceeding the full exemption from taxes.

5. CONCLUSION

(101) Having regard to the analysis set out above, the Commission concludes that the scheme under examination is in line with the Maritime Guidelines.

[36] Decision of 18.8.2016 in State aid SA.43642 (2015/N) – Sweden – *Tonnage tax scheme*, OJ C 341, 16.9.2016, p.8; decision of 13.4.2015 in State aid – SA.38085 (2013/N) – Italy – Prolongation of the tonnage tax scheme, OJ C 406 of 4.11.2016, p.1.

6. DECISION

(102) The Commission has accordingly decided, on the basis of the foregoing assessment, not to raise objections to the notified aid scheme on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the TFEU.

If any parts of this letter are covered by the obligation of professional secrecy according to the Commission communication on professional secrecy and should not be published, please inform the Commission within fifteen working days of notification of this letter. If the Commission does not receive a reasoned request by that deadline, Denmark will be deemed to agree to the publication of the full text of this letter. If Denmark wishes certain information to be covered by the obligation of professional secrecy, please indicate the relevant parts and provide a justification in respect of each part for which non-disclosure is requested.

Your request should be sent electronically in accordance with Article 3(4) of Commission Regulation (EC) No 794/2004, to the following address:

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Yours faithfully,
For the Commission

Margrethe Vestager
Member of the Commission