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**Subject: State Aid SA.51981 (2018/FC) – Denmark – Complaint about
alleged unlawful aid to Femern A/S and Femern Landanlæg A/S**

Sir,

1. INTRODUCTION

- (1) This decision addresses allegations of unlawful State aid made by Scandlines Denmark A/S and Scandlines Deutschland GmbH ("Scandlines") in connection with the Fehmarn Belt Fixed Link project (see section 2.1).
- (2) This decision will first set out the main elements of the background and the procedure (Section 2). It will then explain the notion of unlawful aid (Section 3). Section 4 contains the specific assessment of the individual allegations made by Scandlines.

2. BACKGROUND AND PROCEDURE

2.1. The Fixed Link

- (3) The Fehmarn Belt Fixed Link ("the Fixed Link") is a project to build a coast-to-coast immersed rail-and-road tunnel connecting Rødby in Denmark and Puttgarden in Germany. The project also involves rail and road hinterland connections.
- (4) The Fixed Link project can, for the purposes of this decision, be divided into two parts: the "Planning Phase" involving planning, prospection and other preparatory

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works, and the "Construction Phase" covering the (eventual) building and operation of the Fixed Link.

- (5) The public funding of the Planning Phase was notified to the Commission pursuant to Article 108 TFEU on 17 March 2009 and authorized by the Commission on 13 July 2009 (State aid N 157/2009, "the Planning Decision").
- (6) On 22 December 2014 the Danish Authorities notified the financing measures for the Construction Phase. On 23 July 2015 the Commission adopted a decision declaring that the notified measures were partially not aid and, to the extent that they involved aid, were compatible with the internal market (SA.39078, "the Construction Decision").
- (7) The effects of the Planning and Construction Decisions are explained in more detail below

2.2. The Planning Decision

- (8) The Planning Decision concerns the model for the public financing of the Planning Phase, *i.e.* the preparation, investigation and planning of the Fixed Link. The purpose of the Planning Phase is to determine the most suitable solution for the Fixed Link. This includes a number of tasks as mentioned in recital 11 of the Planning Decision.
- (9) The notification of the Planning Phase was (in addition to the compulsory notification form) structured around a memorandum setting out the broad lines of the public financing model. More detailed information was provided in attachments to that memorandum. As is clear from recital 9 of the Planning Decision, the notification was based on the draft Planning Act (bill L 99 of 17 December 2008)¹ which was part of the notification, together with an Explanatory Memorandum from its *travaux préparatoires* ("Bemærkninger til lovforslaget"). The notification was supplemented by additional information in the course of the preliminary investigation.
- (10) In the Planning Decision the Commission found that Femern Bælt A/S would act as a public authority insofar as its involvement in the Planning phase was concerned, and that the public funding granted to it for those purposes does not constitute State aid within the meaning of Article 107 TFEU.²
- (11) However, at the time of the Planning Decision, there was no legal basis in Danish law for the subsequent construction and operation of the Fixed Link and no definitive plans for the Construction Phase which would depend on the outcome of the Planning Phase. The notification indicated that a new law authorizing the construction and operation of the Fixed Link would be put before the Danish Parliament when the technical design of the project had been determined, at which stage the decision would also be taken as regards the undertaking(s) that will be in charge of the construction and operation.³

¹ This draft was eventually passed into law on 15 April 2009 (law nr 285).

² See recital 30 of the Planning Decision.

³ See recital 17 of the Planning Decision.

- (12) In those circumstances, although the activity of Femern Bælt A/S was found to be non-economic, the Commission considered that it could not exclude that the public funding might in the future come to involve State aid to the operator that would, at a later stage, be appointed to build and operate the Fixed Link (by relieving that undertaking of costs which it would normally have had to bear). For this reason, the Commission considered it appropriate to assess whether the notified measures could be declared compatible with the internal market.
- (13) In this respect, it should be noted that the Commission's findings on the existence of aid and compatibility are not conditional on a maximum aid amount or aid intensity. As regards the sums involved in the Planning Phase, the Planning Decision only records, as a matter of fact, the estimated budget needs of DKK 1 445 million.⁴ The findings of the Planning Decision consequently apply without any limit on the amount of public funding, provided it is used for the purposes and on the terms approved in that decision.

2.3. The Construction Decision

- (14) As a result of the work done in the Planning Phase, draft legislation providing the legal basis for the Construction Phase was put before the Danish Parliament in November 2014. As part of this "Construction Act", Femern A/S (the new name of Femern Bælt A/S) would be appointed to carry out the construction, operation and financing of the Fixed Link, whilst Femern Landanlæg A/S would be entrusted with the financing of the construction and operation of the Danish rail and road hinterland connections to the Fixed Link.
- (15) Denmark notified the public funding structure for the Construction Phase to the Commission on 22 December 2014. The notification concerned the total costs for the planning and construction of the Fixed Link, including the costs linked to the measures covered by the Planning Decision.⁵ In this connection, the notification clearly set out the adjustments to the budget due to the fact that the actual costs of the Planning Phase had exceeded the estimates made at the time of the Planning Decision.
- (16) On 23 July 2015, the Commission adopted the Construction Decision in which it found that:
- (a) A/S Femern Landanlæg is not engaged in an economic activity when it plans, constructs and operates the road hinterland connections, and that therefore the public funding for those purposes does not constitute State aid;
 - (b) the public funding to A/S Femern Landanlæg for the planning, construction and operation of the rail hinterland connections does not constitute State aid as it is not liable to distort competition or affect trade between Member States; and

⁴ See recitals 12, 14, 37 and 41 of the Planning Decision.

⁵ See recital 14 of the Construction Decision.

- (c) the public funding to Femern A/S for the planning, construction and operation of the Fixed Link, should it constitute State aid, would in any event be compatible with the internal market.
- (17) It is clear from the wording of the Construction Decision that it covers not only costs linked to the construction and operation of the Fixed Link but also the costs linked the Planning Phase.⁶

2.4. The Complaint

- (18) On 5 June 2014 Scandlines submitted a complaint alleging, on several grounds, that the state-owned undertakings Femern A/S and A/S Femern Landanlæg had received unlawful and incompatible State aid granted in breach of the Planning Decision, and that the public funding notified for the Construction Phase would involve incompatible State aid. This complaint was registered as case SA.38915 ("the Complaint").
- (19) The Complaint was divided into several parts of which Part I concerned the Construction Phase and Part II concerned alleged breaches of the Planning Decision. The Commission submitted the Complaint to the Danish authorities for comments.
- (20) On 16 September 2015 the Commission forwarded a copy of the Construction Decision to Scandlines with a cover letter explaining that the decision concerned the measures covered by the Complaint. Scandlines has brought an action for the annulment of the Construction Decision before the General Court (case T-630/15). That action is pending.
- (21) By letter of 2 August 2016, registered with the Commission on the same day, Scandlines called upon the Commission "*to act under Articles 4(2), (3) or (4) of the Procedural Regulation*"⁷ in relation to a number of alleged instances of unlawful State aid. Scandlines argued that the Commission had failed to act on these allegations which would have been made in the Complaint. Scandlines further stated that the letter "*constitutes a step preliminary to proceedings against the Commission under Article 265 TFEU for failure to act*" and that Scandlines would bring such an action "*if, within two months of receipt of the formal notice, the Commission has not defined its position*".
- (22) The Commission replied to the letter of 2 August 2016 by letter of 30 September 2016.
- (23) In that letter, the Commission took the view that the Construction Decision dealt with the non-commercial railway fees and the use of State property during the construction phase of the project. As to the other alleged aid measures, the Commission considered that the facts and points of law put forward by Scandlines did not provide sufficient grounds to show, on the basis of a *prima facie* investigation, the existence of unlawful aid. The letter therefore invited Scandlines to submit any comments it might have within a period of one month of

⁶ See e.g. recitals 8, 14, 30, 36, 57, 81, 109 and the section "Conclusion" of the Construction Decision.

⁷ Council regulation (EU) 2015/1589 (OJ L 248, 24.9.2015, p. 9).

the receipt of the letter, in absence of which the complaint would be deemed to have been withdrawn.

- (24) On 30 October 2016 Scandlines sent another letter to the Commission maintaining some of the allegations of unlawful aid made in the letter of 2 August 2016.
- (25) On 10 January 2017 the Commission's services invited the Danish authorities to comment on the allegations in Scandlines' letters of 2 August and 30 October 2016. The Danish authorities replied by a letter registered by the Commission on 10 February 2017.
- (26) On 12 December 2016 Scandlines brought an action under Article 265 TFEU before the General Court for the Commission's alleged failure to act on the allegations of unlawful State aid specified in its letter of 2 August 2016 (T-891/16). At the same date, it also brought an action for the annulment of the decision allegedly contained in the Commission's letter of 30 September 2016. Both actions are pending.
- (27) By a letter dated 26 July 2018 and registered with the Commission on 30 July 2018, Scandlines again alleged that the Commission had failed to act in relation to certain allegations of unlawful aid and "*put the Commission on notice to act pursuant to Article 265 TFEU*" with respect to those allegations. This letter was registered by the Commission under case reference SA.51981.
- (28) By letter registered with the Commission on 10 September 2018, the Danish government agreed exceptionally to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of Regulation 1/1958 and to have the present decision adopted and notified pursuant to Article 297 TFEU in the English language.

3. THE NOTION OF UNLAWFUL AID

- (29) It is appropriate, before moving to the assessment of the specific allegations in the Complaint, to make some general points about the notion of unlawful State aid.
- (30) Unlawful aid is defined in Article 1(d) of the Procedural Regulation as "*new aid put into effect in contravention of Article 108(3) TFEU*".
- (31) New aid, in turn, is defined as any measure fulfilling all the criteria of Article 107(1) TFEU and which is not existing aid, including alterations to existing aid (Article 1(a) and (c) of the Procedural Regulation).
- (32) Existing aid includes authorised aid, that is to say, aid schemes and individual aid which has been authorised by the Commission or by the Council (Article 1 (b) (ii) of the Procedural Regulation).

4. ASSESSMENT OF THE COMPLAINT

- (33) In this section, the Commission will in turn assess the specific allegations of the Complaint mentioned in Scandlines' letter dated 26 July 2018. In particular, Scandlines alleges that the Commission failed to take a position on (i) alleged unlawful aid to A/S Femern Landanlæg in the form of State guarantees (ii)

alleged unlawful aid to Femern A/S in the form of a capital injection; (iii) alleged unlawful aid in the form of State loans to Femern A/S and A/S Femern Landanlæg; (iv) alleged unlawful aid granted in excess of the Planning Decision; and (v) alleged aid in the form of tax advantages.

4.1. Alleged unlawful aid to A/S Femern Landanlæg in the form of State guarantees

- (34) Scandlines claims, in substance, that public funding granted to A/S Femern Landanlæg (in the form of a State guarantee for a credit line) for the purposes of activities within the Planning Phase constitutes unlawful State aid insofar as the Planning Decision only makes explicit reference to public funding to A/S Femern Bælt and does not mention funding to A/S Femern Landanlæg.⁸
- (35) The Commission makes the following observations.
- (36) A/S Femern Landanlæg was established on 16 November 2009, *i.e.* after the adoption of the Planning Decision. It is wholly owned by the Danish State through Sund & Bælt Holding A/S and in turn owns 100 % of A/S Femern Bælt (which is now named A/S Femern). A/S Femern Landanlæg has no purpose or activity outside the scope of the Planning and Construction Phases.
- (37) The State guarantees to A/S Femern Landanlæg were, together with other measures, included in the notification of the Construction Phase.⁹ The Construction Decision explicitly provides 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*".¹⁰ It follows that the granting of State guarantees to A/S Femern Landanlæg for those purposes cannot constitute unlawful State aid.
- (38) The Commission has no indications that state guarantees to A/S Femern Landanlæg would have been used for other purposes than those related to the hinterland connections.
- (39) The Commission therefore finds, without it being necessary to take a view on whether these measures were covered by the Planning Decision, that the alleged unlawful aid to A/S Femern Landanlæg in the form of State guarantees does not constitute unlawful State aid.

4.2. Alleged unlawful aid to Femern A/S in the form of a capital injection

- (40) According to the Complaint, Denmark granted unlawful aid by providing capital to Femern A/S in excess of what the Planning Decision authorised. Specifically,

⁸ See in particular paragraphs 10, 29, 41 and 48 of Part II of the Complaint.

⁹ See recitals 35 to 40 of the Construction Decision.

¹⁰ See the section "Conclusion" of the Construction Decision, first indent.

Scandlines claim that the Danish authorities injected DKK 510 million of capital whereas the Planning Decision authorizes only DKK 500 million.¹¹

- (41) The Commission, without taking a view on whether this measure would be covered by the Planning Decision, finds as follows.
- (42) The Commission notes that the amount of alleged unlawful aid in this respect is very small (DKK 10 million) in comparison to the estimated costs of the Fixed Link (estimated, in the Construction Decision¹², at DKK 64.4 billion) and that the rules on compatibility under Article 107(3)(b) TFEU concerning important projects of common European interest allow that aid is given up to the full amount of the funding gap.¹³ The Commission finds therefore that an additional amount of DKK 10 million would not warrant a change to the assessment of compatibility with the internal market made in the Construction Decision.
- (43) The Commission therefore finds that the alleged unlawful aid mentioned in recital 45 above, in so far as it constitutes State aid not covered by the Planning Decision, is compatible with the internal market pursuant to Article 107(3)(b) TFEU for the reasons stated in the Construction Decision.

4.3. Alleged unlawful aid in the form of State loans to Femern A/S and A/S Femern Landanlæg

- (44) Scandlines argues that the Danish authorities have granted public funding in the form of State loans to Femern A/S and Femern Landanlæg A/S and that this funding would not be covered by the Planning Decision, which makes express reference only to capital injections and state guarantees, and therefore constitutes unlawful aid.¹⁴
- (45) As regards the State loans to A/S Femern Landanlæg the Commission points out that, as recalled in recital 37 above, it found in the Construction Decision that any public funding that firm may receive for the planning, construction and operation of the rail and road hinterland connections does not constitute State aid.
- (46) As regards State loans to Femern A/S, the Commission notes it has been notified to the Commission and, insofar as they constitute State aid, explicitly authorised by the Construction Decision.
- (47) The Commission consequently finds, without it being necessary to take a view on whether these measures are covered by the Planning Decision, that the State loans to Femern A/S and Femern Landanlæg A/S mentioned in recital 49 do not constitute unlawful State aid.

¹¹ See in particular paragraphs 6 to 9, 21 to 28, 44 and 48 of Part II of the Complaint.

¹² See recital 8 of the Construction Decision.

¹³ See recital 106 of the Construction Decision.

¹⁴ See in particular paragraphs 11 to 15, 30 to 32, 44 and 48 of Part II of the Complaint.

4.4. Alleged unlawful aid granted in excess of the Planning Decision

- (48) Scandlines alleges that Denmark granted public funding through the State loans and capital injections in excess of the budget in the Planning Decisions. Scandlines argues that these amounts, insofar as they exceed the budget mentioned in the Planning Decision, constitute unlawful aid to Femern A/S and A/S Femern Landanlæg.¹⁵
- (49) In this respect, the Commission notes that the public funding for the Fixed Link project has been authorised by the Commission in the Construction Decision. As explained above, this includes the funding for costs in the Planning Phase. The adjustments to the budget under the Planning Act between 2009 and 2013 were included in the amounts notified to the Commission and are consequently covered by the approval in the Construction Decision.
- (50) For those reasons, and without it being necessary to take a view on whether they are covered by the Planning Decision, the Commission considers that these measures do not constitute unlawful State aid.

4.5. Alleged aid in the form of tax advantages

- (51) According to the Complaint, Femern A/S and A/S Femern Landanlæg would have benefitted from unlawful aid in the form of the ability to reduce their taxable income thanks to an extended ability to carry forward losses from one fiscal year to another as compared to other firms in Denmark.
- (52) In this respect, the Commission has the following comments.
- (53) Section 9 of the Planning Act allowed Femern A/S and A/S Femern Landanlæg A/S to carry forward losses year on year without any restrictions. At the outset this was consistent with the rules that apply to undertakings generally in Denmark. However, the general rules were changed as of 1 January 2013 with the effect that undertakings can only deduct "historical"¹⁶ losses carried forward in order to reduce their taxable income by 60% annually above a standard allowance of DKK 7.5 million. However, by virtue of the special provisions of the Planning Act, this limitation did not apply to Femern A/S and A/S Femern Landanlæg, which retained the right to unlimited carry-forward of historical losses until 2015 included.
- (54) Although Femern A/S and Femern Landanlæg A/S may have benefitted from a specific legal regime in respect of loss carry-forward, this exception applied only in the years 2013 to 2015. It has since been abolished and is thus no longer in force.
- (55) As regards A/S Femern Landanlæg, the Commission finds in the Construction Decision (see recital 16 above) that it is not engaged in economic activities. Even in the event that A/S Femern Landanlæg had received an advantage, compared to other comparable tax payers, from the specific tax provisions, that would not

¹⁵ See in particular paragraphs 44 and 48 of Part II of the Complaint.

¹⁶ "Historical" losses refers to losses incurred in previous financial years.

constitute State aid within the meaning of Article 107(1) TFEU since it would not benefit an economic activity.

- (56) As regards Femern A/S the Commission is informed by the Danish authorities that the special carry-forward rules did not result in any actual advantage to Femern A/S as the firm did not carry forward any losses from previous years in the period 2013-2015 (it only used losses incurred in the same financial years to reduce taxable income, in the same way as any other firm could do under the general rules of the Danish tax system).
- (57) Given that the specific tax provisions of Section 9 of the Planning Act no longer apply and that, in the period when they did constitute an exception from the general tax system, they did not provide Femern A/S with a material benefit compared to what would be available to other undertakings, the Commission considers that this measure has not provided Femern A/S with an advantage within the meaning of Article 107(1) TFEU.
- (58) These measures consequently do not constitute unlawful aid.

5. CONCLUSION

For the reasons indicated above, the Commission finds that the following measures do not constitute unlawful State aid:

- the alleged unlawful aid to A/S Femern Landanlæg in the form of State guarantees;
- the alleged unlawful aid in the form of State loans to Femern A/S and A/S Femern Landanlæg;
- the alleged unlawful aid granted in excess of the Planning Decision; and
- the alleged unlawful aid in the form of tax advantages.

As regards the alleged unlawful aid to Femern A/S in the form of a capital injection, the Commission decides not to raise objections, because, in so far as it constitutes State aid not covered by the Planning Decision, the aid is compatible with the internal market under Article 107(3)(b) of the TFEU.

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 electronically to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

