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**Subject: State Aid SA.54807 (2019/N) – Denmark  
Prolongation of the winding-up scheme for small banks**

Excellency,

## 1. PROCEDURE

- (1) On 2 August 2017, the Commission approved the reintroduction of a scheme for the winding-up of banks with assets below EUR 3 billion ("the scheme")<sup>1</sup> in Denmark. The scheme was built on previously approved schemes for the winding-up of small banks that were set up in 2010 and authorised by the Commission every six months, last time on 18 September 2015<sup>2</sup>. The schemes ceased to exist at the end of 2015 (prior to their reintroduction in 2017).
- (2) The current scheme<sup>3</sup> is a prolongation of a scheme that was reintroduced in 2017 and approved for a period of twelve months from the date of the Commission's approval Decision ("the original Decision"). The current scheme will expire on 31 August 2019.
- (3) On 28 June 2019, Denmark notified a request for the prolongation of the current scheme until 30 September 2020 and subsequently submitted further information.

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<sup>1</sup> Commission Decision C(2017) 5458 of 2.8.2017 in case SA.44031 – Denmark – Winding-up scheme for small banks, OJ C 336, 6.10.2017.

<sup>2</sup> Commission decision C(2015) 6452 of 18.9.2015 in case SA.42405 (2015/N) – Denmark – Prolongation of the winding-up scheme, compensation scheme, Model I and Model II – H2 2015, OJ C 46, 5.2.2016.

<sup>3</sup> Commission Decision C(2018) 5757 of 31.8.2018 in case SA.51200 – Denmark – Prolongation of the winding-up scheme for small banks, OJ C 379, 19.10.2018.

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- (4) By letter dated 5 July 2019, Denmark exceptionally agreed to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union ("TFEU") in conjunction with Article 3 of Regulation 1/1958<sup>4</sup> and to have the present decision adopted and notified in English.

## 2. DESCRIPTION OF THE MEASURE

- (5) At the end of 2018, the Danish banking sector comprised 71 credit institutions, amongst them 64 banks and 7 mortgage credit institutions. Out of those 71 credit institutions, 58 would be eligible under the scheme. Since 2008, more than 60 banks in Denmark have ceased to exist, including 15 by use of the approved wind-down schemes. Since the reintroduction of the scheme, a private solution was found for one small institution<sup>5</sup> and the scheme was used once in September 2018 in the process of the resolution of Københavns Andelskasse (today Københavns Andelskasse under kontrol).<sup>6</sup>

### 2.1.1. *The legal basis*

- (6) The notified scheme is designed to comply with State aid rules and rests on the Act on Restructuring and Resolution of Certain Financial Enterprises<sup>7</sup> (the "DARR") of 31 March 2015, which also forms part of Denmark's transposition of Directive 2014/59/EU<sup>8</sup> (the "BRRD").
- (7) Under the DARR, as of 1 January 2015 the Danish Financial Stability Company ("the FS") was appointed as resolution authority in Denmark together with the Danish Financial Supervisory Authority ("the DFSA"). The framework grants FS a number of new responsibilities and powers in addition to its existing resolution tasks. As resolution authority, FS's responsibilities include preparing resolution plans for all Danish banks, restructuring or winding up distressed businesses and management of the Resolution Fund.
- (8) Also on 31 March 2015, the Act on a Guarantee Fund for Depositors and Investors<sup>9</sup> was amended to the effect that, among other changes, the Deposit Guarantee Fund ("the DGF") ceased to be an independent entity but was integrated into FS. Previously, while FS was handling the administration of the DGF, the DGF was an independent entity with an independent board. With this amendment, FS has taken over all assets and obligations from the DGF and consequently, its risks and results will be included as a separate item in the financial results of FS going forward.

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<sup>4</sup> Council Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

<sup>5</sup> In February 2018, a private solution was found for Østjydsk Bank A/S. The failed bank went into liquidation with Sparekassen Vendsyssel buying most of its activities.

<sup>6</sup> In September 2018 Københavns Andelskasse entered a resolution scheme and the Danish Financial Stability Company took over the bank with the aim to deposit the bank's licence and convert it into a financing company.

<sup>7</sup> Lov nr. 333 af 31 marts 2015 om restrukturering og afvikling af visse finansielle virksomheder.

<sup>8</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, OJ L 173, 12.6.2014.

<sup>9</sup> Lov nr. 334 of 31 March 2015.

### 2.1.2. *The scheme*

- (9) The objective of the scheme is to facilitate the orderly market exit of small banks through a sale or wind-down process, whereby they cease to exist as a market competitor. To this end, the FS will provide State support for the recapitalisation of the institution under resolution with funds from the national Resolution Fund in case the capital requirements set by the supervisor are not restored by the bail-in.
- (10) The injection of State funds will only take place after the bail-in of shareholders, subordinated debt holders and other liabilities in accordance with the provisions of Article 44 of the BRRD as implemented by sections 24 to 28 of the DARR, and after the full bail-in of shareholders and subordinated debt holders in line with point 44 of the 2013 Banking Communication<sup>10</sup>.
- (11) In its capacity as resolution authority, the FS will provide State funds from the Resolution Fund in accordance with the requirements of Article 101 of the BRRD as implemented by the Sections 26 and 59 of the DARR, and after ensuring the conditions for resolution in Article 32 of the BRRD are fulfilled.
- (12) As to deposit protection, the FS, acting as the DGF, will contribute to the loss absorption with the amount by which covered deposits would have been written down in order to absorb the losses in accordance with Article 109 BRRD and Article 11 of Directive 2014/49/EU<sup>11</sup>.
- (13) A detailed description of the scheme is provided in the original Decision, in particular recital (11) describing the objective of the scheme and recitals (16) to (23) providing a general description of the winding-up process.
- (14) Larger banks, i.e. those with total assets above or equal to EUR 3 billion, will not be covered by the winding-up scheme and will therefore require individual prior notification for assessment and authorisation by the Commission before the support can be implemented.

### **3. POSITION OF DENMARK**

- (15) Denmark requests the approval of the notified prolongation of the scheme until 30 September 2020.
- (16) Denmark accepts that the measure constitutes State aid within the meaning of Article 107(1) TFEU but is of the view that the prolongation of the scheme is compatible with the internal market on the basis of Article 107(3)(b) TFEU as it is necessary in order to remedy a potential serious disturbance in the Danish economy.

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<sup>10</sup> Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, ("Banking Communication"), OJ C 216, 30.7.2013, p. 1.

<sup>11</sup> Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on the deposit guarantee schemes, OJ L 173, 12.6.2014, implemented by the Danish Act on a Depositor and Investor Guarantee Scheme by Law nr. 334 of 31 March 2015.

- (17) Denmark submits that the larger Danish banks are financially solid and resilient and, according to the latest stress test, would be able to withstand even a deep economic downturn.
- (18) However, the Danish authorities note that there still is a group of small and medium-sized banks which could encounter difficulties in the coming years. In that context, the Danish authorities consider that prolonging the winding-up scheme for small banks would enable them to implement the appropriate measures in case of an ailing bank and therefore take the view that the scheme is necessary for preserving financial stability in Denmark.
- (19) The opinion of the DFSA, which was attached to the notification, underpins the ongoing relevance of the scheme. According to the DFSA, the scheme "ensures an orderly resolution of small institutions with a balance below EUR 3 billion" and "entails a settlement for all simple creditors, with no other guarantee than the statutory depositors' guarantee protection". Two recent cases – a winding-up of one small institution with the sale of most of the activities to a competitor without any support from the scheme and supported placement into resolution of another small institution that has been unable to sell any of its business – have, moreover, demonstrated that small banks can still encounter difficulties and having a winding-up scheme in place is still necessary, and at the same time that it does not discourage private solutions.
- (20) Denmark confirms that the following commitments in respect of the scheme continue to apply:
- (a) Applying the bail-in tools as foreseen in the BRRD. In any case, before the use of State aid, in accordance with the provisions of the 2013 Banking Communication, the conversion/write-down of shareholders and subordinated debt holders will always be required.
  - (b) Ensuring that the scheme is only applicable to small banks with total assets of less than EUR 3 billion, which through a sale and integration with a purchaser will cease to exist as independent credit institution. The sale process of the institution under resolution or bridge bank will be initiated as soon as possible after the decision date and the sale agreement will be concluded within six months after this date.
  - (c) Ensuring that the sale process is open and competitive, and on market terms, with the aim of maximising the sale price, and at the same time, excluding State aid to the purchaser. Each sale agreement will be subject to approval from the DFSA following the positive assessment of the long term viability of the combined entity.
  - (d) Ensuring that if the institution under resolution or bridge bank are not sold in their entirety within the six-month period from the decision date, all remaining activities will be wound up and no later than two years after the resolution date become subject to ordinary insolvency proceedings and any remaining banking licence shall be revoked.

- (e) Ensuring that the institution under resolution refrains from advertising and/or employing aggressive commercial strategies which refer to State aid support.
- (f) Ensuring that the purchaser of an institution under resolution (or parts of it) will be independent from the bank and will not receive or be allowed to use the banking licence, name, brand name or logo initially held by the failing bank.
- (g) Report to the Commission semi-annually on the use of the scheme no later than 45 days after the end of the relevant half year starting from the date of the adoption of the decision.

#### **4. ASSESSMENT**

##### **4.1. Existence of State aid**

- (21) According to Article 107(1) TFEU, 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.
- (22) For the reasons referred to in recitals (36) to (52) of the original Decision, the Commission considers that the scheme constitutes State aid within the meaning of Article 107(1) TFEU: The scheme concerns the provision of State resources to a certain sector, i.e. the financial sector, which is open to intense international competition. Under the scheme, participating banks may obtain capital support under conditions which would not be available to them under market conditions, and so receive an advantage. Given the characteristics of the financial sector, which is a highly competitive market, any advantage from State resources to a bank affects intra-Union trade and threatens to distort competition. The notified prolongation of the scheme, does not affect that finding. The scheme, therefore, continues to constitute State aid within the meaning of Article 107(1) TFEU.

##### **4.2. Compatibility of the winding-up scheme**

###### *4.2.1. Legal basis*

- (23) Article 107(3)(b) TFEU empowers the Commission to find that an aid measure compatible with the internal market, if it is intended to "remedy a serious disturbance in the economy of a Member State".
- (24) According to Denmark, the confidence in the Danish financial sector is growing and larger banks are more financially solid and more resistant towards the continuing uncertainty in the financial market after the financial crisis. However, the scheme provides the necessary elements that enable the Danish authorities to implement appropriate measures with respect to small banks that could still encounter difficulties in the coming years. The Danish government therefore takes the view that the scheme is necessary for preserving financial stability in Denmark.

- (25) The Commission endorses the Danish authorities' assessment. Regarding the difficulties in the Danish banking system, the conditions that were established by the 2008 Banking Communication<sup>12</sup> and the Commission's subsequent decisional practice and Communications<sup>13</sup> (including the 2013 Banking Communication<sup>14</sup>) are still present.
- (26) Furthermore, the 2013 Banking Communication confirms that the Commission will continue to encourage the exit of non-viable players in an orderly manner, where such institutions cannot credibly return to long-term viability. The notified prolongation has to be assessed under section 6 of the 2013 Banking Communication.

#### 4.2.2. *Compatibility assessment*

- (27) Section 6 of the 2013 Banking Communication, notably point (84), provides that the Commission will continue to consider the approval of liquidation aid schemes for credit institutions of limited size. The measures envisaged to be prolonged by Denmark cover precisely this type of institutions and limit the application of the notified scheme to small banks with a total balance sheet below EUR 3 billion.
- (28) Points (71) to (78) of the 2013 Banking Communication set forth the compatibility conditions for aid measures in the context of orderly market exit. Point (70) states that the Commission will assess the compatibility of such aid measures aimed at resolving credit institutions on the same lines *mutatis mutandis* as set out in Sections 2, 3 and 4 of the Restructuring Communication. Finally, points (79) to (82) specify rules to be complied with in case a credit institution is sold during the winding-up procedure.
- (29) The Commission consequently considers that, in order for the notified aid measure to be compatible under Article 107(3)(b) TFEU, it must comply with the following criteria:
- (a) *Limitation of costs*: aid amounts should enable the failing bank to be wound up in an orderly fashion, while limiting the amount of aid to the minimum necessary;

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<sup>12</sup> Communication on the application of State Aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008.

<sup>13</sup> Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ("*Recapitalisation Communication*"), OJ C 10, 15.1.2009, p. 2; Communication from the Commission on the treatment of impaired assets in the Community financial sector ("*Impaired Assets Communication*"), OJ C 72, 26.3.2009, p. 1; Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ("*Restructuring Communication*"), OJ C 195, 19.8.2009, p. 9; Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ("*2010 Prolongation Communication*"), OJ C 329, 7.12.2010, p. 7 and Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ("*2011 Prolongation Communication*"), OJ C 356, 6.12.2011, p. 7.

<sup>14</sup> Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ C 216, 30.7.2013, p. 1.

- (b) *Limitation of distortions of competition*: aid should not result in longer-term damage to the level playing field and competitive markets and measures to limit distortions of competition due to State aid have to be taken as long as the beneficiary failing bank continues to operate;
  - (c) *Own contribution (burden-sharing)*: appropriate own contribution to the winding-up costs should be provided by the aid beneficiary, particularly by preventing additional aid from being provided to the benefit of the shareholders and subordinated debt holders. Therefore, the claims of shareholders and subordinated debt holders must not be transferred to any continuing economic activity; and
  - (d) *Restoring long-term viability*: the sale of a failing bank or a bridge bank to another financial institution can contribute to the restoration of long-term viability in the hands of another market participant, provided that the purchaser is viable and capable of absorbing the transfer of the failing bank or bridge bank, and may help to restore market confidence.
- (30) As to the duration of the scheme, the Commission notes that Denmark requests the prolongation of the scheme until 30 September 2020. The reference of point 85 of the 2013 Banking Communication to the conditions set out in section 3 of that Communication implies that the maximum six month period of sub-section 3.3 should in principle apply to the authorisation of liquidation aid schemes for credit institutions of limited size. However, the concrete circumstances of a case may justify that the Commission exceptionally deviates from that general rule.
- (31) As already explained in the original decision, there are several factors in the present case that justify a prolongation for more than six months. First, the scheme is not implemented for the first time. Secondly, the Commission notes that small and medium-sized banks could still encounter difficulties in the coming years<sup>15</sup> and that an orderly resolution will ensure the least possible adverse effect on the financial stability in Denmark, justifying the need to have a stable framework in place until 30 September 2020. Therefore, the Commission considers that it is appropriate to prolong the scheme until 30 September 2020.

*Limitation of costs*

- (32) The scheme facilitates the acquisition of the activities of a failing bank or a bridge bank by a viable purchaser, selected through a competitive sale process. The scheme aims at obtaining the highest possible price if the bank can be sold, thus reducing the final cost of the winding-up process.

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<sup>15</sup> There have been recent examples of small banks in difficulties, see recital (19).

- (33) The application of burden-sharing, in line with the requirements of the 2013 Banking Communication, and the application of the BRRD also contribute to limit the intervention from State resources, as the losses of the failing bank will be covered from private sources first.

*Limitation of distortions of competition*

- (34) As regards distortions of competition, the Commission notes that Denmark continues to be committed, in line with point 59(f) of the 2013 Banking Communication, to a ban on any aggressive commercial strategies (see recital 34(e) of the original Decision). Such safeguards help to ensure that the participating banks do not misuse the received State support to expand their activities.
- (35) Moreover, the activities of the failing bank or the bridge bank will be offered by the FS to competitors through an open and competitive sale process providing opportunity to any competitor to acquire the corresponding market share.
- (36) Ultimately, the failing bank will cease to exist as a stand-alone competitor. The acquired activities will be fully integrated into the purchaser and those assets and liabilities not part of a sale during the specified period will be wound-down, meaning that the business stops any market activity. Likewise, in case the sale fails within the committed time period, the banking licence of the bank will eventually be withdrawn within two years after the decision date. If the sale of the bank is not finalised in the committed time period, Denmark can notify individually the envisaged changes to the scheme for assessment and approval by the Commission.
- (37) The Commission also notes that, in line with the 2013 Banking Communication, measures under the scheme are only available to small banks with total assets of less than EUR 3 billion, which is in line with the threshold provided for in the 2013 Banking Communication. Consequently, any aid measures that would be granted for banks with more than EUR 3 billion must be notified individually.
- (38) Denmark will continue to report semi-annually on the operation of the scheme no later than 45 days after the end of the relevant half-year starting from the date of this decision.

*Own contribution (Burden Sharing)*

- (39) For aid to be declared compatible, section 3.1.2 of the 2013 Banking Communication, requires that shareholders and subordinate debt holders have to contribute as much as possible to the cost of the intervention.



- (40) In that respect Denmark continues to comply with the commitment that before the use of the DGF and/or the Resolution Fund, the conversion or a write-down of the shareholders and subordinated debt-holders will always be required, thus complying with the burden-sharing requirements of the 2013 Banking Communication. In addition, Denmark states that the application of the bail-in tool according to the BRRD is an integral part of the scheme.

*Restoring long term viability*

- (41) As the scheme provides for the sale of the failing bank or bridge bank, certain principles of the Restructuring Communication have to be respected. Accordingly, in order to be compatible with Article 107(3)(b) TFEU, the restructuring of a financial institution has to result in the restoration of the long-term viability of the transferred bank or parts of it. The sale of a failing bank or a bridge bank should in particular fulfil the conditions set out in point 17 of the Restructuring Communication, i.e. the purchaser should demonstrate that the integrated entity will be viable and the requirements regarding own contribution and limitations of competition distortions are respected. In this respect, Denmark continues to be committed to perform an assessment of the viability of the resulting institution to be assured that the resulting entity will be viable in the long term, as it committed to do in the past (see recital 34(c) of the original Decision).

*Conclusions on the overall compatibility of the aid measure*

- (42) In line with the considerations above, the Commission considers that the notified prolongation of the scheme meets all conditions and requirements of the 2013 Banking Communication, notably the provisions on the conditions laid down in section 6.2 and section 6.4.
- (43) The notified aid measure therefore is compatible with the internal market pursuant to Article 107(3)(b) TFEU.
- (44) Therefore, the scheme for small banks with total assets below EUR 3 billion can be extended until 30 September 2020. Any further prolongation will require the Commission's approval.

**5. COMPLIANCE OF THE WINDING-UP SCHEME WITH THE PROVISIONS OF DIRECTIVE 2014/59/EU ON BANK RECOVERY AND RESOLUTION**

- (45) The Commission notes that the aid measure does not appear to violate intrinsically linked provisions of the BRRD, which in this specific case relate to Article 44(5) and Article 59(3).
- (46) In addition, according to the BRRD, Member States must apply provisions adopted to comply with Section 5 of Chapter IV of Title IV, which includes Article 44(5). In the case of Denmark, the relevant legislation transposing the BRRD has been in force since March 2015.

(47) The Commission therefore concludes that the notified scheme does not appear to violate any intrinsically linked provisions of Directive 2014/59/EU.

## 6. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.

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Yours faithfully,

For the Commission

Margrethe VESTAGER  
Member of the Commission

