



Brussels, 12.5.2020  
C(2020) 3006 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State Aid SA.52489(2018/FC) – Denmark  
State Aid SA.52658(2018/FC) – Sweden  
Alleged State aid to PostNord Logistics**

Excellency,

**1. PROCEDURE**

- (1) On 22 November 2018, *Brancheorganisationen for den danske vejgodstransport* ('ITD' or 'the complainant') submitted a complaint concerning alleged State aid granted to PostNord Logistics A/S ('PNL') by Denmark and Sweden.
- (2) On 10 December 2018, a meeting took place in Brussels between the Commission services and the complainant.
- (3) On 11 December 2018, the Commission services sent a request for information to Denmark and Sweden. Denmark replied to that request on 4 February 2019 (received on 5 February 2019), Sweden submitted an identical reply on 6 March 2019.
- (4) By letter dated 25 January 2019 and 6 March 2019, the Danish and the Swedish authorities granted a language waiver to the Commission, agreeing to have all correspondence in this case, including this decision, in English.

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- (5) On 20 February 2019, the non-confidential version of the submission of 4 February 2019 was forwarded to the complainant.
- (6) On 1 March 2019, the Commission services sent a request for information to Denmark. The same request for information was sent to Sweden on 20 March 2019. Replies were received on 29 March 2019 and 8 April 2019 respectively. Sweden in its reply simply referred to the submission of Denmark.
- (7) On 7 May 2019, the complainant reacted to the letter of 20 February 2019.
- (8) On 7 June 2019, the complainant submitted further observations.
- (9) On 17 June 2019<sup>1</sup> and 28 June 2019 the Commission services asked for clarifications from Denmark and Sweden following the complainant's submissions of 7 May 2019 and 7 June 2019.
- (10) Denmark and Sweden reacted by way of two separate, almost identical, submissions to the Commission services' requests for information of 17 June 2019 and 28 June 2019 on 26 August 2019.<sup>2</sup>
- (11) In the cover email of its submission of 7 June 2019, the complainant brought forward an additional claim relating to alleged cross-subsidization between the Danish postal company Post Danmark and PNL. By emails of 27 June 2019, it was agreed with the complainant to add the additional claims to the present case.
- (12) Denmark submitted information on 11 March 2020 to address the additional claim made by the complainant on 7 June 2019.
- (13) On 30 March 2020, the complainant sent to the Commission services a formal notice in accordance with Article 265 TFEU for failure to act with regard to the complaint it submitted. On the same day, the complainant also submitted additional information related to the cross-subsidization claim.
- (14) On 1 April 2020, the Commission services forwarded the complainant's submission of 30 March 2020 to Denmark and Sweden.
- (15) On 3 April 2020, the Commission services reacted to the complainant's formal notice of 30 March 2020.
- (16) On 8 April 2020, the Danish authorities submitted information to address the complainant's submission of 30 March 2020.

## **2. BACKGROUND**

### **2.1. Corporate structure of PostNord Logistics**

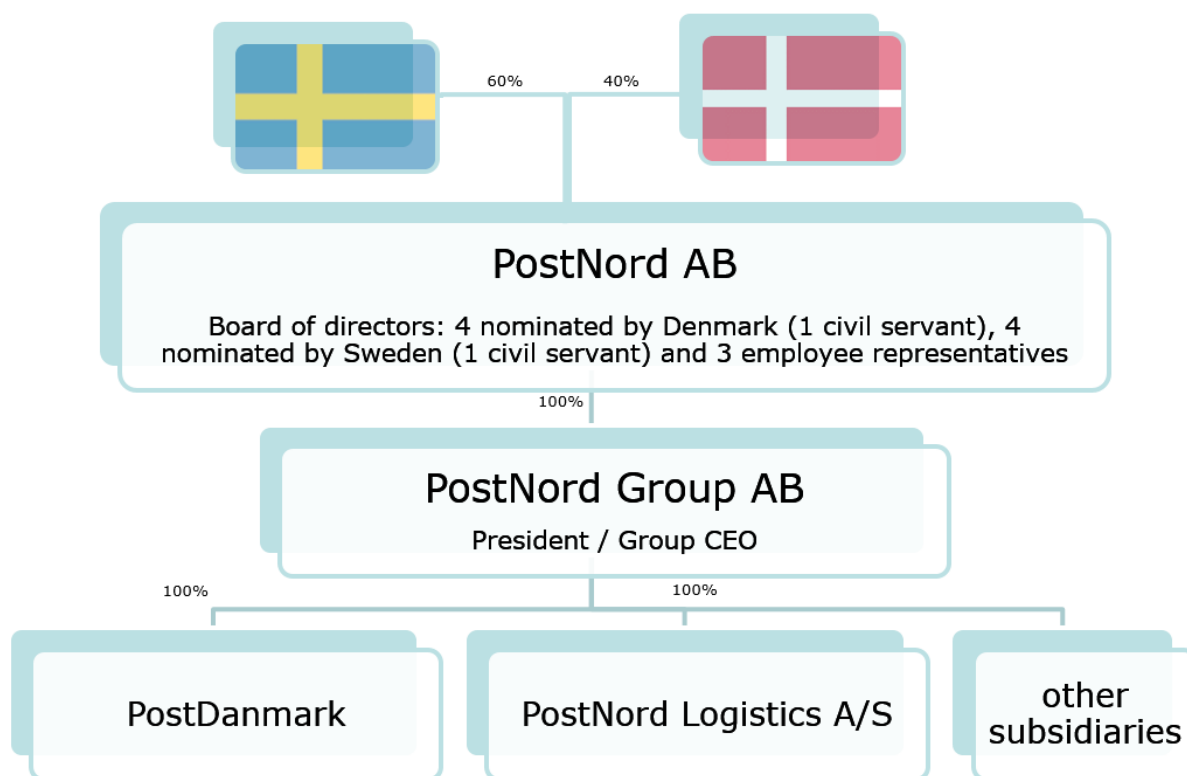
- (17) PNL is based in Denmark and is a 100% subsidiary of PostNord Group AB ('PNG'), which is based in Sweden. PNG is wholly owned by PostNord AB, also based in Sweden and jointly owned by Sweden (60%) and Denmark (40%). Both

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<sup>1</sup> The complainant's submission of 7 May 2019 was forwarded on 5 July 2019.

<sup>2</sup> Two separate, but almost identical submissions. The only difference is that Denmark in its submission made additional comments by which they essentially confirm their agreement with PostNord's views that are attached to its submission.

States have equal voting power (50/50). The ownership structure is visualized in figure 1 below.

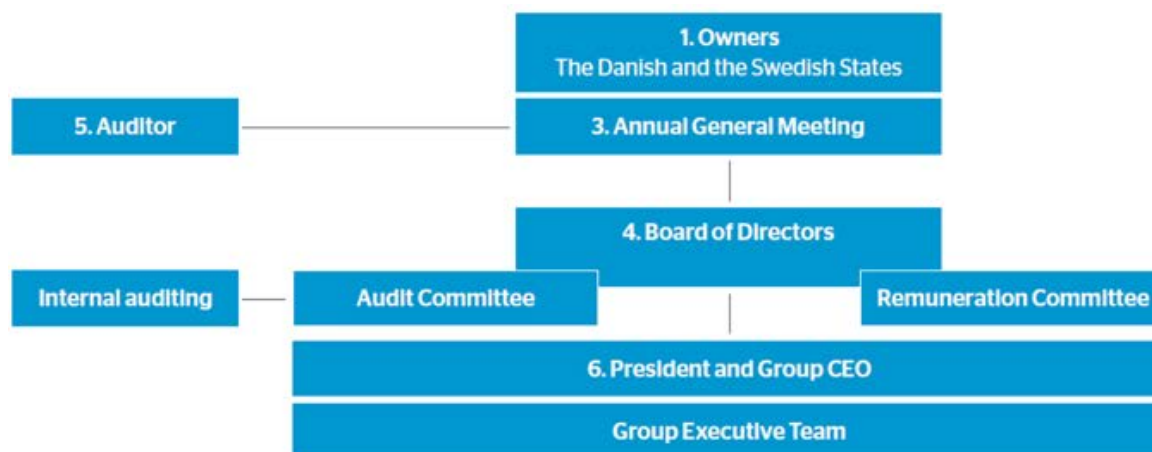


**Figure 1**

## 2.2. Decision making in the PostNord Group

- (18) Neither the Danish nor the Swedish State in its capacity as a public authority is formally represented in the management of PNG, nor are they directly involved in its appointment (including that of the President and Group CEO<sup>3</sup>). The Board of Directors of PostNord AB (PNG's parent company), on the other hand, is composed of eight persons, all nominated by Denmark and Sweden (and appointed by the Annual General Meeting where both States have 50% of the votes). Two out of eight directors are also employed as civil servants (one by Sweden and one by Denmark). The Swedish civil servant is Deputy Director at the department of State owned enterprises at the Ministry of Enterprise and Innovation. The Danish civil servant is Deputy Director-General at the Ministry of Finance. The corporate links between Denmark, Sweden, the Annual General Meeting, the Board of Directors of PostNord AB and the management of PNG are shown in figure 2.

<sup>3</sup> The President and Group CEO are the same person. From 2013 until 2018 this was Håkan Ericsson and as of 2019, this is Annemarie Gardshol.



**Figure 2**

- (19) The Board of Directors of PostNord AB is responsible for appointing and dismissing the President and Group CEO. The President and Group CEO is responsible for day-to-day administration of the company according to the board’s guidelines and directions. The relationship between the Board of Directors of PostNord AB and the CEO of PNG is governed by the board’s rules of procedure. The Group Executive Team assists the President and Group CEO in in her work.
- (20) As a rule, Denmark can nominate four directors (‘Red directors’) and Sweden can nominate four directors (‘Yellow directors’) onto the Board of Directors of PostNord AB. The Chairman needs to be agreed upon jointly by both States. The employees of Post Danmark and Posten, which is the Swedish postal operator and also a subsidiary of PNG, nominate three additional board members. This makes 11 board members that in principle decide by simple majority; exceptions apply and for some decisions at least one red and one yellow director should vote for a decision. None of the directors has a veto and the two civil servants have no special role or different voting power compared to other board members. Decisions on internal group capital injections exceeding SEK [...] (EUR [...] million<sup>4</sup>) need to have the approval of the Board of Directors of PostNord AB.<sup>5</sup>
- (21) At board meetings, half of the directors should be present, including at least one red and one yellow director.

### 2.3. The measures under assessment

#### 2.3.1. Measure 1 – statement in annual reports of 2017 and 2018

- (22) Measure 1 concerns two similar statements in PNL’s annual reports of 2017 and 2018.
- (23) In the 2017 annual report of PNL (published in June 2018), it is stated that due to the financial difficulties of PNL, the management of PNG has decided to provide “*the necessary capital injections on market conditions in order to ensure the necessary liquidity resources in the coming financial year*”.

<sup>4</sup> Rate based on the Inforeuro currency converter ([https://ec.europa.eu/info/funding-tenders/how-eu-funding-works/information-contractors-and-beneficiaries/exchange-rate-inforeuro\\_en](https://ec.europa.eu/info/funding-tenders/how-eu-funding-works/information-contractors-and-beneficiaries/exchange-rate-inforeuro_en)).

<sup>5</sup> This follows from the “internal governance policy” of PostNord.

- (24) In the 2018 annual report of PNL (published in June 2019), it is stated that “*in accordance with the transformation plan for the company, the parent company intends in the coming financial year to provide additional capital on market conditions, including ensuring the necessary liquidity resources*”. The statement in the 2018 annual report concerns the part of the capital injection that was referred to in the 2017 annual report, but not yet paid out (i.e. DKK 45 million, see recital (27)).

### 2.3.2. Measure 2 – Capital injection

- (25) The Board of PNL recommended a capital injection of DKK [...] million (EUR [...] million) to the management of PNG following an extraordinary general meeting on 30 November 2018. During fall 2018, PNG conducted an economic analysis of PNL’s business plan and the turnaround plan linked to the business plan. The turnaround plan aimed at addressing the negative financial results of the previous years. Based on this analysis PNG would decide whether a capital injection could be a rational and sound investment. This analysis was finalised on 3 December 2018 and resulted in a recommendation from the management of PNG to the Board of Directors of PostNord AB, dated 7 December 2018, to approve the capital injection into PNL by PNG.
- (26) On 11 December 2018, the Board of Directors of PostNord AB decided to proceed with the capital injection, to be paid out in several tranches in accordance with the recommendation from PNG’s management. The approval of the Board of Directors of PostNord AB was required because the investment exceeded SEK [...] million) (see recital (20)).
- (27) On 20 December 2018 the first tranche of DKK 70 million (EUR 9.37 million) was transferred to PNL. The remaining DKK 45 million (EUR 6.03 million) was paid out in two tranches of DKK [...] million (EUR [...] million) and DKK [...] million (EUR [...] million). Namely, DKK [...] million was paid out in May 2019 following an evaluation carried out by PNG of PNL’s performance in Q1 2019, and the remaining tranche of DKK [...] million was paid out in November 2019 following an evaluation of PNL’s performance from April to October 2019.

### 2.3.3. Measure 3 – Alleged cross-subsidization

- (28) Measure 3 concerns the allegation that PNL makes use of facilities (trucks, staff, cabotage warehouses) covered by the compensation that Post Danmark receives for its universal service obligation approved in the 2018 Universal Service Obligation (‘USO’) compensation decision<sup>6</sup>. Because of the alleged cross-subsidization, PNL allegedly has lower costs and could charge much lower prices, while Post Danmark artificially increases the costs of the public service obligation. Moreover, allegedly, Post Danmark pays certain bills for costs incurred by PNL.

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<sup>6</sup> Commission Decision SA47707(2018/N) of 28 May 2018, Compensation to PostNord for Universal Service Obligations imposed on Post Danmark – Denmark, available at: [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_47707](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47707) Decision has been appealed (T-561/18) and the appeal is still pending.

## 2.4. The complaint

- (29) ITD complains about the three measures described above and considers all of them to be State aid pursuant to Article 107(1) TFEU without compatibility ground.

### 2.4.1. Measure 1 – Statement in annual reports of 2017 and 2018

- (30) The complainant argues that the statements on their own constitute State aid without any compatibility ground: first, the statements are imputable to Denmark and Sweden (through PostNord AB); second, the capital injection (i.e. measure 2) is granted by way of the statement (comparable to the press release that was the subject of the *Bouygues* judgment<sup>7</sup>); and third, the capital injection is granted on terms that no private investor would accept.

### 2.4.2. Measure 2 – Capital injection

- (31) The complainant is of the view that the capital injection constitutes State aid pursuant to Article 107(1) TFEU, notably because it is granted from State resources and imputable to Denmark and Sweden and, in addition, because it has not been made on market terms.
- (32) In the complainant's view, the Decision from the management of PNG to proceed with the capital injection is influenced by Denmark and Sweden through the Annual General Meeting and/or the Board of Directors of PostNord AB. In this light, it refers to the conditions set by the Court in the *Stardust* judgment<sup>8</sup> and the *Commerz Nederland* judgment.<sup>9</sup>
- (33) In addition, the complainant argues that the capital injection is imputable to the States because PostNord AB (the ultimate parent company of PNL) is wholly owned by Denmark and Sweden; because the two States nominate their board members; and because there are two members on the board who are also employees of the States (see recital (18)). While these arguments refer to PostNord AB and not PNG, according to the complainant the fact that the decision to inject capital into PNL had to be taken by the Board of Directors of PostNord AB (because it exceeded SEK [...] million) confirms that Denmark and Sweden were involved.
- (34) The complainant emphasises that the 'granting date' of this measure is when the annual report was published (see measure 1), meaning the assessment on whether the measure would be market conform needs to have been carried out before June 2018. It alleges that this did not happen.

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<sup>7</sup> Judgment of the Court of 19 March 2013, *Bouygues SA and Bouygues Télécom SA v European Commission and Others and European Commission v French Republic and Others*, Joined cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175.

<sup>8</sup> Judgment of the Court of 16 May 2002, *French Republic v Commission of the European Communities (Stardust)*, Case C-482/99, ECLI:EU:C:2002:294, para 54-55.

<sup>9</sup> Judgment of the Court of 17 September 2014, *Commerz Nederland NV v Havenbedrijf Rotterdam NV*, Case C-242/13, ECLI:EU:C:2014:2224.

- (35) In addition, the complainant refers to articles in the Danish newspapers *Politiken* and *Berlingske*. The complainant claims that the article in *Politiken*<sup>10</sup> shows that the Danish and Swedish States are not “just” involved in PostNord’s management, but that they are integrated in PostNord’s management decisions to an extent that any important financial business decision with State aid implications by PostNord is directly imputable to Denmark and Sweden. The article in *Berlingske*<sup>11</sup> allegedly shows that the decision to inject capital was taken by the owners (i.e. Denmark and Sweden) and not by the Board of Directors of PostNord AB independently. The complainant has provided its own translation of part of the article in *Berlingske*, which reads as follows:

*“According to the draft Minutes from the meeting, Jens Moberg<sup>[12]</sup> said that it is the responsibility of the Board of Directors to put forward the facts of the case and inform the owners that “we have a problem”, but that it is not the Board of Directors which adopts the decision about the capital injections – it is a decision by the owners, i.e., the Swedish and Danish States”* (Emphasis added by the complainant).

- (36) In the same vein, the complainant alleges that Denmark, by having appointed Mr Peder Lundquist as board member, breaches a “*crucial principle of the Danish Ministry of Finance*”. Subsequently the complainant explains that according to the Danish Ministry of Finance this principle means that, “*the main rule is that State employees should not be elected as Board members in State owned companies*”<sup>13</sup>.
- (37) Finally, the complainant perceives the fact that the replies of Denmark and Sweden to the Commission’s requests for information are partly prepared by the PostNord management as an indicator for imputability.
- (38) As regards the market conformity of the capital injection, the complainant, based on PNL’s financial performance in the 2013-2017<sup>14</sup> period, deems it inconceivable that a capital injection into PNL would result in any positive return, and thus that a market economy investor would inject capital into PNL. Moreover, the complainant deems it impossible to argue that the prospects for PNL in the future are good. In this regard, it refers to the “*complete financial failure*” of one its major investment projects in 2016, namely the acquisition of GP Spedition ApS. As of 22 June 2018, GP Spedition ApS entered into bankruptcy proceedings.

#### 2.4.3. Measure 3 – Alleged cross-subsidization

- (39) The complainant did not submit any particular evidence to support its claims, allegedly because such evidence would reveal the identity of its sources, who fear potential retaliation from PNG.

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<sup>10</sup> Politiken, “Minister’s staff will be employed by the postal sector” [Ministers mand sættes ind i posten], 23 April 2017.

<sup>11</sup> Berlingske, “Did Ole Birk Olesen speak untrue? Here is what we know about the meeting on PostNord’s destiny” [Talte Ole Birk Olesen usandt? Her er hvad vi ved om centralt skæbnemøde om PostNord], 9 March 2017

<sup>12</sup> Chairman of the Board of Directors of PostNord.

<sup>13</sup> See footnote 10.

<sup>14</sup> Notably, the complainant refers to chronological financial losses in 2013, 2014 and 2016; a negative EBIT (earnings before interest and tax) as of 2013; negative equity in 2013 and again in 2017.

- (40) The complainant did however contest an investigation carried out by Deloitte at the request of the Danish authorities that looks into the alleged cross-subsidization. Such investigation concluded that there had been no cross-subsidization (see recital (54)).
- (41) The complainant argues notably that Deloitte relied on documentations provided by PNL and/or Post Danmark which would be likely to hide facts as they would be engaged in maladministration practices. The complainant also argues that Deloitte has checked existing invoices, which would by definition not cover gratuitous services offered by Post Danmark to PostNord Logistics since this is typically something that one would do outside the standard practice of preparing invoices.
- (42) Finally, the complainant argues that the fact that the Danish parliament requests an additional investigation (on top of the investigation from Deloitte) is a proof that not much value should be attached to the conclusions of Deloitte. The additional investigation referred to by the complainant corresponds to an initiative from the Danish parliament which, on 24 March 2020, requested the National Audit Agency [*Rigsrevisionen*] to carry out a new comprehensive investigation into Post Danmark for the 2010-2019 period. The complainant claims that this investigation includes a review of the provision of gratuitous services to subsidiaries, such as PNL.
- (43) While the investigation from the National Audit Agency has not been finalised, the complainant already considers it not to be sufficient to fully address its concerns because it does not question the allocation of common costs between USO and non-USO activities and the compliance of such allocation with the Postal Directive.

## **2.5. The position of Denmark and Sweden**

### *2.5.1. Measure 1 – Statement in annual reports of 2017 and 2018*

- (44) Denmark and Sweden believe that it is unexplained and incomprehensible how a non-binding announcement in an annual report that a parent company intends to provide capital injections “on market terms” is capable of constituting State aid. They explain that the non-binding nature of the announcement follows from a Decision of the Danish Supreme Court of 26 March 2009. Moreover, they argue that a mere intention to inject capital is not sufficiently firm and concrete to constitute the grant of an aid.<sup>15</sup> The Danish and Swedish authorities further consider that the comparison with the Bouygues judgment from 19 March 2013 does not hold since in the press release at issue in that case, the French State announced a binding decision to offer a shareholder loan; moreover, in that case, the investment amount was specified and the Commission was notified on the same day. Denmark, in addition, referred to the judgment of the General Court from 2 July 2015 in the Bouygues case to argue that the statements in PNL’s

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<sup>15</sup> See also Commission decision from 19 December 2012 in case SA.32015, State aid to Tirrenia companies and their acquirers, where it is stated that “Concerning the letters of comfort, on the basis of the information available at this stage it appears that they did not confer undue advantages to Saremar to the extent that they were not used to guarantee any loan or other financial obligations of the beneficiary.”



annual report do not involve concrete and firm commitments vis-a-vis PNL and therefore cannot be considered as the granting of aid.<sup>16</sup>

- (45) Denmark and Sweden also explain that including the statement in the annual report in no way binds PNG and that it only shows the willingness of PNG to support its subsidiary. The external accountant of PNL required the inclusion of the statement in PNL's annual report for accounting purposes.

#### 2.5.2. Measure 2 – Capital injection

- (46) Denmark and Sweden contest that any influence has been exercised by one of the two States on the decision-making process in the Board of Directors of PostNord AB.
- (47) They consider that the involvement of the highest corporate level within PostNord (i.e. PostNord AB) is a mere consequence of internal governance rules and in no way shows that the decision of the management of PNG to inject capital into PNL is imputable to Denmark, Sweden or both.
- (48) As regards the two newspaper articles (recital (34)), the States claim that the complainant misinterpreted these articles. First, they were written and published in the context of the compensation approved by the Commission in the 2018 USO compensation decision and, second, keeping in mind that they concern USO funding and not the capital injection at issue, the States explain that the article in *Berlingske* has been misquoted by the complainant.<sup>17</sup> The States claim that it reads: “*it is not the Board of Directors who decides on the funding – it is a decision for the owners, i.e. the Swedish and Danish States*” and not “*which adopts the decision about the capital injections*” as submitted by the complainant.
- (49) In addition to the absence of imputability, Denmark and Sweden submit that the capital injection from PNG into PNL does not confer an economic advantage on PNL since it is made on market terms. The States claim that the conclusion of the complainant that it would be inconceivable that the capital injections to PNL would result in any positive return, and thus that a market economy investor would inject capital in PNL, has no basis.
- (50) To substantiate this position, Denmark and Sweden provided the business plan underpinning the capital injection into PNL as well as other information that shows that injection is market conform in their view. In order to turn around the negative financial results to which the complainant also referred, the entire senior management of PNL was replaced and a turnaround plan was implemented.
- (51) As regards the acquisition of GP Sepdition ApS, Denmark and Sweden explain that not the full range of activities of GP Sepdition ApS were acquired, but only the freight forwarding activities. PNG does not hold any shares in GP Sepdition ApS and therefore the bankruptcy did not have any impact on PNG, nor PNL.

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<sup>16</sup> Judgment of the Court of 2 July 2015, *France and Orange v Commission*, T-425/04 RENV and T-444/04 RENV, ECLI:EU:T:2015:450, para 235, 237, 242-245. Upheld by: Judgment of the Court of 30 November 2016, *European Commission v French Republic and Orange*, C-486/15 P, ECLI:EU:C:2016:912.

<sup>17</sup> See recital (35).

### 2.5.3. Measure 3 – Alleged cross-subsidization

- (52) Denmark and Sweden note that the complainant did not provide any evidence to substantiate its claims and therefore makes these claims without any basis.
- (53) In addition, Denmark and Sweden explain that the USO compensation has been given for a specific use (financing of redundancies) and cannot be used for other purposes. In the decision in case SA.47707<sup>18</sup>, it is also explained that a consultant will oversee that this is complied with. To the extent that there are transactions between PNL and Post Danmark, they take place on market terms (this is also provided for in PNG's annual report 2018).
- (54) Denmark has also submitted to the Commission a study that the Danish government asked Deloitte to carry out. The study was undertaken following an anonymous whistle-blower that reached out to the Danish authorities. The whistle-blower made eight claims, most of them related to the absence of invoicing when Post Danmark provides services or equipment to PNL. After a detailed investigation of all eight claims, Deloitte informed the Danish authorities on 11 March 2020 that no irregularities were detected.
- (55) As regards the investigation from the National Audit Agency, the Danish authorities have explained that this agency reports to the Danish Public Accounts Committee [*Statsrevisorerne*]. This Committee consists of six members who are appointed by the Danish parliament for a four-year period. The role of the Public Accounts Committee is primarily to verify that the government accounts are correct, assess whether public funds are managed effectively and submit the audited government accounts to the parliament for approval. Additionally, the Public Accounts Committee can ask the National Audit Agency to carry out examinations of specific policy areas, as is the case here.
- (56) The Danish authorities explain that most of the areas to be reviewed pertains to the Danish State's supervision of Post Danmark's compliance with the terms of the provision of the USO, including cost accounting rules. Denmark is of the view that as such, this part of the investigation is irrelevant to the complaint regarding PNL. The Public Accounts Committee has also asked the National Audit Agency to investigate whether Post Danmark cross-subsidizes subsidiaries (for example the sister company PNL).
- (57) Denmark notes that the alleged cross-subsidization of PNL has never been documented by the complainant, and takes the view that Deloitte has already convincingly disproved all allegations in this regard. In the view of the Danish State, the critique of the credibility of Deloitte's independent investigation put forward by the complainant is wholly unfounded and plainly wrong.
- (58) In accordance with The Auditor General Act<sup>19</sup>, the ministry will cooperate and share all relevant information with Rigsrevisionen, and, as a part of this, will share Deloitte's report with the agency. The Rigsrevisionen investigation is expected to have a timeframe of up to a year.

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<sup>18</sup> See footnote 6.

<sup>19</sup> Available at: <https://uk.rigsrevisionen.dk/legislation/the-auditor-general-act/>.

### 3. ASSESSMENT OF THE MEASURES

- (59) 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". The criteria laid down in Article 107(1) TFEU are cumulative. In order to determine whether a measure constitutes State aid, the following conditions have to be fulfilled:
- (a) the measure is granted by the State and through State resources;
  - (b) the measure confers an advantage to an undertaking;
  - (c) the advantage is selective; and
  - (d) the measure distorts or threatens to distort competition and is liable to affect trade between the Member States.

#### 3.1. Measure 1 – Statement in the annual reports of 2017 and 2018

- (60) First, the Commission considers that due to the non-binding nature of such statements under Danish national law no capital can be deemed to be granted by way of the statement in the annual report of 2017, nor of 2018. The Danish Supreme Court confirmed the non-binding nature of such statements.<sup>20</sup>
- (61) Second, both annual reports refer to a capital injection that should be made "*on market conditions*" and therefore, if at all the statements could be considered as the granting of a capital injection in themselves, they should be considered as being made on market terms. Such a capital injection would therefore be considered to not involve an advantage. This means that the statements do not constitute State aid pursuant to Article 107(1) TFEU.
- (62) As regards the parallel drawn by the complainant with the Bouygues judgment (see recital (30)), the Commission notes, first that the complainant does not refer to the final judgment in the case. In the judgment from 2013 mentioned by the complainant, the Court refers the case back to the General Court, which rendered its judgment in 2015.<sup>21</sup> The 2015 judgment still stands.<sup>22</sup> Second, as also argued by Denmark and Sweden (see recital (44)), the parallel drawn does not hold.
- (63) First, the press release at issue in Bouygues did not constitute a binding commitment of the French State to offer a shareholder loan to *France Télécom*, even though it could be perceived by the market as such.<sup>23</sup> Second, in the case of Bouygues, this conclusion was not changed by the fact that the investment amount of EUR 9 billion was specified in the press release<sup>24</sup> and France notified

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<sup>20</sup> Danish Supreme Court's decision of 26 March 2009, published in UfR 2009.1512H.

<sup>21</sup> Judgment of the Court of 2 July 2015, *France and Orange v Commission*, T-425/04 RENV and T-444/04 RENV, ECLI:EU:T:2015:450.

<sup>22</sup> The Commission's appeal was dismissed by: Judgment of the Court of 30 November 2016, *European Commission v French Republic and Orange*, C-486/15 P, ECLI:EU:C:2016:912.

<sup>23</sup> See footnote 21, para 235.

<sup>24</sup> See footnote 7, para 13.

the Commission of the measure on the same day.<sup>25</sup> Those two elements are not even present in PNL's annual reports of 2017 and 2018, making it even less of a concrete and firm commitment, if at all.

- (64) Since the statements, if at all considered a granted capital injection, cannot constitute an advantage for PNL, one of the criteria of Article 107(1) TFEU is not fulfilled and they cannot constitute State aid. Since these criteria are cumulative, the Commission does not need to assess whether the other conditions are met.

## **3.2. Measure 2 – Capital injection**

### *3.2.1. Introduction*

- (65) The first condition of Article 107(1) TFEU to be considered is whether PNG's capital injection into PNL was granted by the State or through State resources (see recital (59)). According to the case-law of the Court of Justice in the Stardust case, this criterion is fulfilled if, on the one hand, it concerns State resources, and if, on the other hand, their granting is imputable to the State, that is to say Denmark and/or Sweden.

### *3.2.2. Aid granted through State resources*

- (66) State resources within the meaning of Article 107(1) TFEU are the resources of a Member State and of its public authorities as well as the resources of public undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence.
- (67) As pointed out by the Court of Justice, "*since the resources of public undertakings are subject to the control of the State and are therefore at its disposal, those resources fall within the scope of the concept of 'State resources', within the meaning of Article 107(1) TFEU*".<sup>26</sup>
- (68) PNG, via its parent PostNord AB, is 100% owned by the State. The Commission therefore concludes that PNG's financial support to PNL implied the use of State resources.

### *3.2.3. Imputability to the State*

- (69) As regards imputability, in Stardust Marine the Court stated that '*Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. [...] Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been*

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<sup>25</sup> See footnote 7, para 13-14.

<sup>26</sup> Judgment of the Court of 9 November 2017, European Commission v TV2/Danmark A/S, Case C-656/15, ECLI:EU:C:2017:836, point 47.

*involved, in one way or another, in the adoption of those measures.*<sup>27</sup> The Court repeated this in its SACE judgment.<sup>28</sup>

- (70) It is therefore clear from the case law of the Court of Justice that the criterion of imputability to the State must be examined by the Commission on a case-by-case basis. Imputability cannot be inferred exclusively from factors of an organic nature, which link the public undertaking to the State.
- (71) The Court of Justice indicated that “*the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken*”.<sup>29</sup>
- (72) In its case-law, the Court referred to indicators<sup>30</sup>, such as: the fact that the public undertaking which granted the aid could not take that decision without taking account of the requirements of the public authorities<sup>31</sup>, the fact that the undertaking was linked to the State not only by factors of an organic nature<sup>32</sup>, the fact that it had to take account of directives issued by governmental bodies such as an inter-ministerial committee<sup>33</sup>, the integration of the public undertaking into the structures of the public administration<sup>34</sup>, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators<sup>35</sup>, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law)<sup>36</sup>, the intensity of the supervision exercised by the public authorities over the management of the undertaking<sup>37</sup>, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being

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<sup>27</sup> See footnote 8, paragraph 52.

<sup>28</sup> Judgment of the Court of 23 November 2017, *Servizi assicurativi del commercio estero SpA (SACE) and Sace BT SpA v European Commission*, Case C-472/15 P, ECLI:EU:C:2017:885, para 34 and following.

<sup>29</sup> See footnote 8, paragraphs 55 and 56. See also the Opinion of Advocate General Jacobs of 13 December 2001, *France v Commission (Stardust)*, C-482/99, ECLI:EU:C:2001/685, paragraphs 65 to 68.

<sup>30</sup> These indicators are also reflected in the SACE judgment (see footnote 28) and recital 43 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (C/2016/2946), OJ C 262, 19.7.2016, p. 1–50. In the notice, the Commission wishes to provide further clarification on the key concepts relating to the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, with a view to contributing to an easier, more transparent and more consistent application of this notion across the Union.

<sup>31</sup> Judgment of the Court of 2 February 1988. *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities*, joined Cases 67/85, 68/85 and 70/85, ECLI:EU:C:1988:38, para 37.

<sup>32</sup> Judgment of the Court of 21 March 1991, *Italian Republic v Commission of the European Communities*, Case C-303/88 ECLI:EU:C:1991:136, paragraphs 11 and 12; Judgment of the Court of 21 March 1991, *Italian Republic v Commission of the European Communities*, Case C-305/89, ECLI:EU:C:1991:142, paragraphs 13 and 14.

<sup>33</sup> See footnote 9, paragraph 35.

<sup>34</sup> See footnote 8, paragraphs 56.

<sup>35</sup> For instance, when measures are taken by public development banks pursuing public policy objectives (Judgment of the General Court of 27 February 2013, *Nitrogenmuvék Vegyipari, Zrt. v Commission*, Case T-387/11, ECLI:EU:T:2013:98, paragraph 63) or when measures are taken by privatisation agencies or public pension funds (Judgment of the General Court of 28 January 2016, *Slovenia v Commission ('ELAN')*, Case T-507/12, ECLI:EU:T:2016:35, paragraph 86).

<sup>36</sup> See footnote 8, paragraphs 56.

<sup>37</sup> See footnote 8, paragraphs 56.

involved, having regard also to the compass of the measure, its content or the conditions which it contains<sup>38</sup>.

- (73) It follows from the above that it is for the Commission to prove that a measure is imputable to the State.
- (74) Based on the submissions and further clarifications provided by Denmark, Sweden and the complainant, the Commission investigated the circumstances of the granting of the measures and the various indicators of possible involvement of the Danish and/or Swedish authorities in the granting decisions.<sup>39</sup>
- (75) The purpose of this exercise is to verify whether the involvement of the Danish and/or Swedish authorities in the decision of PNG to grant the measures at issue constitutes the exercise of the actual influence or control by the State, based on the set of indicators established by the Court.

#### 3.2.3.1. Role of public authorities when decision was taken

- (76) The decision of PNG to inject capital into PNL happened following a request of PNL. PNL took the decision to request capital during an extraordinary general meeting of its board on 30 November 2018.
- (77) PostNord AB, in line with the internal governance policy of PostNord, was involved in the decision-making process since the intended capital injection exceeded SEK [...] million. While it is highly likely that Denmark and Sweden were aware of the intended capital injection (notably since two board members are also active as civil servants in Denmark and Sweden respectively), it does not appear at all that the States, nor the two civil servants that are board members, expressed any particular view regarding the capital injection for PNL. This is confirmed by the minutes of PostNord AB's board meetings of 7 December 2018 and 11 December 2018 that the Commission was able to check.
- (78) Moreover, as follows from the above, the decision to implement a capital injection was incited by the management of PNG and not by PostNord AB.

#### 3.2.3.2. Factors of an organic nature

- (79) Since Denmark and Sweden each appoint four members of the Board of Directors of PostNord AB, this could give, hypothetically, a certain weight to the position of Denmark and/or Sweden as both public authority and shareholder on decisions taken by this board. However, considering that the measure is imputable on this basis alone would contradict the spirit of the Stardust Marine and SACE judgments (see recital (69)). Moreover, the Commission notes that in the case of PostNord AB employee representatives nominate an additional three board members, making a total of 11 board members.
- (80) Besides possibly the two civil servants (one for Denmark and one for Sweden), all the other board members are independent and do not work for one of the two States. Even for the two civil servants, their position as board member does not

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<sup>38</sup> See footnote 8, paragraphs 56.

<sup>39</sup> See also Commission Decision SA.41727(2016/C) (ex 2016/NN) (ex 2015/CP) of 6 March 2020 on the measures in favour of Empresa de Manutenção de Equipamento Ferroviário, S.A. (EMEF), not yet published.

automatically mean that they cannot act independently in their capacity as board member. Moreover, the two civil servants do not have more voting power and they do not have a veto right. For this reason they cannot by themselves impose a decision on the rest of the Board of Directors of PostNord AB.<sup>40</sup>

- (81) The article in *Politiken* (see recital (35)) the complainant refers to does not alter this conclusion. Mr Peder Lundquist is the Danish civil servant also active as board member of PostNord AB and therefore the line of reasoning in recital (80) also applies to him specifically. For this reason, the appointment of Mr Peder Lundquist as board member cannot be considered as such a factor that would make the capital injection into PNL imputable to Denmark and/or Sweden.
- (82) Moreover, the newspaper articles referred to do not relate to the capital injection from PNG into PNL, but rather to the funding granted, and approved by the Commission, following the decision in case SA.47707.<sup>41</sup> Indeed, the funding approved in this case can necessarily only be decided by the State and is therefore imputable to Denmark.
- (83) As regards the complainant's claim that the appointment of Mr Peder Lundquist breaches a "*crucial principle of the Danish Ministry of Finance*", the Commission considers that this cannot be considered a State aid issue and national Courts are the relevant institutions to assess the relevance of that claim. Moreover, by no means, does a possible violation of this principle prove anything as regards the involvement of Denmark (nor Sweden) in the capital injection and therefore this would have no impact on the assessment whether the measure is imputable.

#### 3.2.3.3. Obligation to take into account directives issued by governmental bodies

- (84) In this respect, the complainant only refers to the Swedish government's State's ownership policy guidelines which would state that "*[t]he owner instructs the company's Board of directors through owner instructions. In State-owned enterprises, owner instructions are primarily applied when a company has specifically adopted public policy assignments, receives government subsidies, is in the process of restructuring or in the event of deregulations or other material changes.*"
- (85) First, the guidelines referred to by the complainant are of a general nature and only concern Sweden. Sweden, via the Board Members it has appointed, was not in a position to push through the decision to grant capital to PNL.

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<sup>40</sup> See in this regard also the Commission Decision of 24 April 2007 relating to the aid measure implemented by Belgium in support of Inter Ferry Boats (C 46/05 (ex NN 9/04 and ex N 55/05)), OJ L 225, 27.8.2009, p. 1–52, para 212 where the Commission assessed whether the presence of a "Government Commissioner" on the board of the national railway company (SNCB) could impute a Decision take by that board to the State. According to the facts at the Commission's disposal neither the examination of the dossier, nor the third party observations resulted in evidence suggesting that the Belgian Government sought to influence the decision by the Management Board of 19 July 2002. The SNCB, being an autonomous public undertaking, which has the status of a public limited company in law, enjoys management independence in relation to Belgium.

<sup>41</sup> See footnote 6.

- (86) Second, despite several exchanges with and requests for information and clarification addressed to Denmark, Sweden and the complainant (see Section 1), the Commission has no indications that any such particular instructions were actually given either to the Board of Directors of PostNord AB, or to the four board members nominated by Sweden or even to the board member which also works as a civil servant for Sweden when PostNord AB had to decide on the capital injection proposed by the management of PNG. The complainant has also not provided any element pointing in that direction. The Commission also considers that there are no effective means to get additional useful information on the issue at stake.
- (87) Finally, the Commission understands that the owner's instructions referred to in (84) most likely concern structural issues touching PNG itself rather than the interactions between PNG and each of its numerous subsidiaries.
- (88) For this reason, the Commission does not consider that the Board of Directors of PostNord AB was under any obligation to take into account particular directives issues by governmental bodies to the extent it concerns the capital injection proposed by the management of PNG and, moreover, the Commission also has no indication that such directives were actually given.

#### 3.2.3.4. The integration of PostNord AB or PNG into the structures of the public administration

- (89) PostNord AB and its subsidiaries are not integrated in the public administration of Sweden and/or Denmark.

#### 3.2.3.5. The nature of PostNord AB's or PNG's activities

- (90) PostNord AB's activities and those of its subsidiaries (i.e. PNG and PNL) are in general purely commercial, excluding certain of Post Danmark's activities (namely, the Universal Service Obligation entrusted to Post Danmark, see case SA.47707<sup>42</sup>).
- (91) It is important to note in this respect that there is no link between the commercial activities of PNL and the public service activities of Post Danmark as explained also below.

#### 3.2.3.6. The legal status of PNG

- (92) PNG, via PostNord AB, is 100% owned by Denmark and Sweden, as are almost all its subsidiaries, including PNL. Despite PNG being a publicly owned company, it is governed by private law.

#### 3.2.3.7. The degree of supervision from Denmark and/or Sweden over the management of PNG

- (93) PNG has a high level of autonomy in its operations; the supervision of its activities comes from PostNord AB and not directly from the States.

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<sup>42</sup> See footnote 6.



- (94) Regarding the degree of autonomy from the government, PNG operates generally, but also with regard to the capital injection at issue, independently and there is no evidence of direct supervision from Denmark and/or Sweden over the management of PNG, nor PNL. Only the Board of Directors of PostNord AB and not Denmark and/or Sweden can directly instruct the CEO.
- (95) It follows from the Shareholder's agreement between Denmark and Sweden that the Decision adopted by the Board of Directors of PostNord AB to agree with PNG's decision to inject capital in PNL on 11 December 2018 could be adopted by simple majority. The requirement for a simple majority makes it impossible for one of the two States to push through its will.

3.2.3.8. Any other indicator possibly showing the involvement of public authorities or the unlikelihood of them not being involved

- (96) The Commission has not found any evidence showing that Denmark, Sweden or both were actively involved in the adoption of the Decision by PNG to inject capital into PNL, nor the agreement of PostNord AB to the proposed injection. The Commission also considers that there are no effective means to get additional useful information on the issue at stake.
- (97) Moreover, there are no indications that PNL is important politically, socially or economically in Denmark, where it is based, nor in Sweden. PNL is a relatively small company, it has 160 employees and a turnover of approximately EUR 85 million (2017). In addition, PNL does not provide services to private citizens (i.e. is not active B-to-C), but only to companies (i.e. B-to-B).
- (98) The amount at stake also does not raise suspicions as regards the involvement of the States. While the amount is significant for PNL (approximately accounting for 12% of the total revenues of PNL), it is not at all for PNG (approximately accounting for 0.3% of its total revenues of SEK 39.7 billion (EUR 3.7 billion) in 2018).
- (99) It also does not appear that a hypothetical bankruptcy of PNL would have such a significant political and/or societal impact, that a political intervention to prevent such bankruptcy from happening would be likely. The complainant also did not provide any elements pointing in that direction.
- (100) Finally, the Commission also considers that the decision of PNG to support its logistics subsidiary is from a strategic viewpoint rational since the logistics market is a growing market. Such a decision is therefore neither particularly surprising nor indicative of a necessary involvement of Denmark and/or Sweden.

3.2.3.8.1. The newspaper articles referred to by the complainant

- (101) The complainant has referred to two newspaper articles. First, an article published in the Danish newspaper *Politiken* from 23 April 2017 and second an article published in *Berlingske* from 9 March 2017. The complainant uses the article in *Politiken* to show specifically the alleged Danish involvement in the approval of the capital injection. The article in *Berlingske* is used to show the alleged involvement of both Denmark and Sweden.

- (102) The Commission notes first that that both articles concern a very different type of measures, namely USO compensation for Post Danmark, and not the capital injection to PNL. Moreover, PNL can also not be compared to Post Danmark.
- (103) Indeed, Post Danmark is entrusted with the USO which is a regulated service of significant social importance and Post Danmark receives since 2018 significant subsidies from the Danish State to deliver this service (see also recital (82)). The Commission has never questioned the political involvement of in particular Denmark regarding the USO compensation.
- (104) For that reason, the newspaper articles cannot be considered as evidence showing that Denmark and/or Sweden as public authorities have exercised their powers to steer the decision whether to inject capital into PNL into a certain direction.

3.2.3.8.2. The fact that part of the submissions from Denmark and Sweden were prepared by PostNord.

- (105) The Commission considers it to be standard practice that Member States' authorities cooperate with companies accused of receiving unlawful State aid and therefore this type of cooperation can in no way be considered as a sign of imputability of PostNord decisions to the States.
- (106) On the contrary, the Commission believes that this is rather an additional indicator showing absence of imputability. If the Danish and/or Swedish authorities were involved in the adoption of the decision to inject capital, it would not have been necessary to turn to PostNord to explain the details and circumstances of the injection.

3.2.4. *Conclusion on imputability*

- (107) Considering the circumstances and context of the present case and based on the direct and indirect indicators set out above, the Commission considers that there is no evidence of any specific involvement of the Danish and Swedish authorities in the granting of the capital injection to PNL. Denmark nor Sweden initiated or approved the capital injection, nor were they informed differently from what one can usually expect in a relationship between a company and its shareholders. The Commission also considers that there are no effective means to get additional useful information on the issue at stake.
- (108) In light of the above and in the absence of sufficient indicators - beyond the mere automatic consequences of public ownership which are according to the case law insufficient to prove imputability - of the exercise of actual influence or control by Denmark and Sweden in the capital injection at hand, the Commission concludes that the capital injection cannot be considered imputable to Denmark and/or Sweden.

(109) Since the capital injection is not imputable to Denmark and/or Sweden, one of the criteria of Article 107(1) TFEU is not fulfilled. Since these criteria are cumulative, the Commission does not need to assess whether the other conditions are met.

### **3.3. Measure 3 – Alleged cross-subsidization**

(110) The Commission notes first that the complainant's allegation that Post Danmark cross-subsidizes its sister company PNL has not been substantiated by the complainant. The complainant has explicitly recognized not being able to provide any proof of its allegations, allegedly by fear of retaliation.

(111) Moreover, the Commission has in 2018 already formally approved USO compensation for Post Danmark<sup>43</sup> and this approval provides for an ex-post overcompensation test which excludes the possibility of cross-subsidization.

(112) Finally, the Commission has been informed by Denmark that an anonymous whistle-blower complaint had been addressed to the Danish government equally alleging the existence of cross-subsidization between Post Danmark and PNL in 2019 (see recital (54)).

(113) Following that complaint, the Danish government asked Deloitte to carry out an independent study into the (corporate) relationship between PNL and Post Danmark. Both PNL and Post Danmark accepted the study and cooperated with Deloitte.

(114) Deloitte conducted a detailed investigation and notably examined the following transactions for which allegedly no invoicing took place between Post Danmark and PNL:

- Vehicles financed under the universal service obligation (USO) are utilised for the operations of PNL.
- Executives from Post Danmark handle the overall management of PNL
- Leasing equipment such as trucks and similar were utilised for the operations of PNL and paid for by Post Danmark.
- PNL's customer service is handled by Post Danmark
- Expenses for IT equipment applied in PNL are paid by Post Danmark
- Post Danmark imposed upon PNL to utilise 70% of the vehicles from Post Danmark

(115) Deloitte disconfirmed all claims and established that proper invoicing has always taken place.

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<sup>43</sup> See footnote 6.

- (116) Considering, (i) the absence of any evidence provided by the complainant, (ii) the conclusion of the investigation carried out by Deloitte and (iii) the existence of an ex-post overcompensation test foreseen by the 2018 USO compensation decision that should exclude the possibility of cross-subsidization, the Commission concludes that the alleged cross-subsidization is unsubstantiated.
- (117) As regards the fact that the complainant considers that the Deloitte investigation cannot be trusted because it relies on information provided by PNL and/or Post Danmark, the Commission understands that Deloitte has verified whether the alleged gratuitous services offered by Post Danmark to PostNord Logistics mentioned by the anonymous whistleblower had been properly invoiced or not. The Commission sees no particular basis to put in question a factual verification of this nature, which necessarily relies on interactions with the concerned companies, all the more since the complainant has voluntarily and explicitly declined to provide any proof of its allegations.
- (118) As regards the investigation of the Danish National Audit Agency, the Commission notes that, while the complainant refers to it as a proof that the Deloitte report should not be taken into account, the complainant also puts into question in advance the methodology of that second investigation. Moreover, the complainant does not want to wait for the results of this investigation; on the contrary, the complainant explicitly requested the Commission to take a decision on the measure before the conclusion of that investigation takes place, which will take up to a year (see recital (58)), through a letter of formal notice.
- (119) For all the reasons above, the Commission considers that this part of the complaint is unsubstantiated and that there is no available evidence that the transactions between Post Danmark and PNL would involve State aid.

#### **4. CONCLUSION**

The Commission has accordingly decided:

- that the statements in PNL's annual reports of 2017 and 2018 do not constitute aid;
- that the capital injection of DKK 115 million injected by PNG into PNL does not constitute aid;
- and that the transactions between Post Danmark and PNL do not involve aid.

The Commission notes that Denmark and Sweden exceptionally accept the adoption and notification of the Decision in the English language.

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:

European Commission,  
Directorate-General Competition  
State Aid Greffe  
B-1049 Brussels  
[Stateaidgreffe@ec.europa.eu](mailto:Stateaidgreffe@ec.europa.eu)

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President

**CERTIFIED COPY**  
For the Secretary-General,

**Jordi AYET PUIGARNAU**  
Director of the Registry  
EUROPEAN COMMISSION