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**Subject: State Aid SA.59747 (2020/N) - Denmark
COVID-19: Damage compensation to operators of rail passenger services that concluded net-cost public service contracts**

Excellency,

1. PROCEDURE

- (1) On 25 November 2020, Denmark pre-notified a scheme supporting operators of passenger transport by rail that concluded net-cost public service contracts¹ (“the scheme” or “the measure”)².
- (2) On 17 December 2020 Denmark notified the scheme based on Article 107(2)(b) of the Treaty on the Functioning of the European Union (“TFEU”).
- (3) Denmark exceptionally agreed to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958,³ and to have this Decision adopted and notified in English.

¹ Net-cost public service contracts are contracts whereby the operators carry both the production risk and the commercial risk.

² Denmark submitted additional information on 1, 8, 10, 11, 14, 15 and 16 December 2020. The Commission services and the Danish authorities held a telephone call on 2 December 2020.

³ Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

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2. DESCRIPTION OF THE MEASURE

2.1. The COVID-19 outbreak in Denmark and the containment measures taken by the Danish authorities

- (4) The measure provides compensation in relation to damage suffered during the period between 11 March 2020 and 31 August 2020. The context in which that damage occurred is set out in this section.
- (5) The infectious disease SARS-CoV-2 (COVID-19) was first confirmed to have spread to Denmark on 27 February 2020. As of 15 December 2020, the total number of confirmed cases in Denmark was 116 087.
- (6) As in other countries, in response to the COVID-19 outbreak, Denmark has taken sequential mitigation measures (“the containment measures”) to prevent the spread of COVID-19 in the country, as summarised below.
- (7) On 6 March 2020, the Ministry of Foreign Affairs changed the travel recommendations for all countries to be at least marked as “yellow” (as opposed to “green”) meaning that travellers should be extra cautious.
- (8) On 10 March 2020, the Danish government encouraged passengers to travel by public transport outside the rush hour and encouraged providers of public transport to ensure that passengers keep a safe distance from each other. On that same day, the main Danish passenger rail operator, DSB SOV (“DSB”), announced a number of measures in relation to its train services, such as the addition of long train sets (with more carriages) outside rush hours and the refund of tickets without any additional charges. DSB also began daily reporting to the Danish authorities on train capacity, availability and numbers of travellers.
- (9) On 11 March 2020, the Danish government announced the application of a number of containment measures as of 13 March 2020, in particular: the closure of all indoor cultural institutions, libraries and leisure facilities; an obligation for all civil servants not performing critical functions to telework; and a recommendation to comply with social distancing measures (the minimum safe distance being 2 metres), to telework in the private sector and to reduce the use of public transportation to a minimum. Further, as of 16 March 2020 all schools, educational institutions and day care services had to close. The Danish authorities emphasised that the Prime Minister presented the measures in a way that clearly suggested that all citizens were requested to follow the measures immediately (i.e. as of 11 March 2020) to the largest extent possible.
- (10) On 13 March 2020, DSB introduced mandatory seat reservation for travelling on its InterCity, InterCityLyn (express) and regional trains⁴, limiting the number of passengers travelling on each train. DSB also lifted the standard seat reservation fee of DKK 30, bearing the financial consequences thereof. Denmark explained that, due to the trains’ construction and layout, the seat reservation system was

⁴ The requirement did initially not apply on trains running on the coastal line between Elsinore and Copenhagen Airport, where it was introduced on 11 May 2020.

not an option on DSB's S-train (S-tog) network⁵ or on the trains of the second largest rail operator in Denmark, Arriva Tog A/S ("Arriva"). Nonetheless, the general applicability of social distancing requirements meant that maximum occupancy was also reduced on those other trains. Based on regular reports submitted by both DSB and Arriva as well as information gathered during periodic meetings and day-to-day contacts with the Ministry of Transport and Housing, Denmark considers that both companies have at all times complied with social distancing rules. Further, the Ministry has not received any complaints concerning non-compliance with such requirements. At the same time, DSB and Arriva have been required to ensure a basic offer of service throughout the duration of the containment measures. At times, DSB and Arriva have been permitted to reduce service levels, but not below the need for a basic offer necessary to preserve connectivity and mobility of the general population and workers performing critical functions (e.g. healthcare professionals).

- (11) On 14 March 2020, Denmark closed its borders to all foreign citizens, with few exceptions (e.g. for people living or working in Denmark or having been commissioned to provide goods or services in Denmark). The Danish government further urged all Danish citizens abroad to return to Denmark and reiterated the strong recommendation to reduce travelling in general.
- (12) On 17 March 2020, gatherings of more than 10 people were prohibited. The limit was raised to 50 people on 8 June 2020 and to 100 people on 8 July 2020. On 6 August 2020, the Danish government announced that it would not raise the ban for public gatherings from 100 people to 200 people as previously expected due to the increased number of COVID-19 infections. As a result of those bans, large events such as the annual Roskilde festival (taking place between late June and early July, with ca. 130 000 participants), where a large number of participants arrive by train, were cancelled.
- (13) On 17 March 2020, the Danish government ordered the closure of nightclubs, bars, pubs and restaurants (except for takeaway service). Other activities such as hairdressers, tattooists, massage therapists, cosmetologists and indoor shopping centres were also ordered to close (except for grocery stores and pharmacies).
- (14) On 19 March 2020, the Ministry of Transport and Housing, together with organisations for senior citizens, recommended senior citizens not to travel by public transport.
- (15) On 23 March 2020, all the containment measures were extended until 11 May 2020. However, day care facilities and schools reopened on 15 April 2020 to pupils until the 5th grade and third-year high school students. The Prime Minister also once again emphasised the recommendation to telework and avoid public transport that does not allow a distance of at least 2 metres between passengers and advised against travelling in general, in particular between different regions (a recommendation reiterated several times in the weeks that followed).

⁵ S-tog is the urban/suburban rail network in the Copenhagen area.

- (16) The second phase of the reopening was announced on 7 May 2020 allowing shopping centres and other retail outlets to reopen on 11 May 2020. Restaurants were allowed to reopen on 18 May 2020 subject to specific requirements. Churches also reopened. Furthermore, 6th to 10th grade pupils were allowed back to school from 18 May 2020. High schools reopened to all students on 27 May 2020, while universities remained closed until 1 August 2020.
- (17) On 18 May 2020, the Ministry of Transport and Housing announced new recommendations to Danish transport providers, including the recommendation to limit crowds and encourage distance in public transport and implement enhanced sanitation measures.
- (18) On 21 May 2020, the Danish government announced that civil servants in the North Denmark Region, Central Denmark Region and Region of Southern Denmark could return to their workplaces. Employees in the public sector in the Capital Region of Denmark and Region Zealand were only allowed to resume work on 15 June 2020, although a recommendation to continue teleworking remained in place thereafter.
- (19) On 29 May 2020, the Ministry of Foreign Affairs announced that the travel recommendations for Germany, Norway and Iceland⁶ would be changed from “orange” to “yellow” on 15 June 2020, meaning that non-essential travel would no longer be inadvisable. At the same time, the Ministry of Foreign Affairs continued to discourage non-essential travel to other countries until 31 August 2020 and advised in general against travels to cities with more than 750 000 inhabitants. On 15 June 2020, tourists from Germany, Norway and Iceland were again allowed to enter Denmark, subject to the requirement to book a minimum 6-day stay in Denmark. That 6-day rule, which applied to all tourists entering Denmark until it was revoked on 15 August 2020, reduced the number of tourists in Denmark during the summer and therefore the number of foreign passengers travelling by train.
- (20) On 5 August 2020, DSB withdrew the requirement for seat reservations on its trains. However, on 7 August 2020 the Ministry of Transport and Housing ordered DSB to reinstate the mandatory seat reservation system, which it did on 12 August 2020. The Danish authorities took the view that mandatory seat reservation on all trains in which the requirement was compatible with the vehicles’ construction and configuration had been a de facto requirement from 13 March 2020 onwards; had DSB not voluntarily put in place the mandatory reservation system, the authorities would have imposed it, as they promptly did when DSB announced its the abolishment of that system⁷.
- (21) From September onwards, certain containment measures have been again tightened up, e.g. as regards the maximum number of people allowed to gather, restrictions on the opening hours of restaurants, bar and cafes, as well as the

⁶ They were the first countries to be changed from “orange” to “yellow” since 14 March 2020.

⁷ For example, on 19 May 2020, the Ministry of Transport and Housing sent an e-mail to DSB with updated recommendations to the providers of public transport. Among these recommendations, the providers were strongly encouraged to limit the congestion in the trains and to support distance in public transport.

recommendation to telework, avoid public transport and observe social distancing (in relation to which, DSB's mandatory reservation system on its trains was still in place at the time of the notification). Further, even stricter measures were temporarily introduced in certain areas of Denmark.

2.2. The economic impact of the containment measures on public passenger transport by rail

- (22) The COVID-19 outbreak and the containment measures described in section 2.1 induced a sharp decline in passenger numbers and thereby the revenue streams of providers of public passenger transport by rail.
- (23) Passenger numbers fell dramatically in March (between -50% and -52% compared to 2019 levels) and even further in April (-72/73%). Numbers remained low in May (-53/59%) and during June-August (-25% on average for all operators).
- (24) Denmark also provided specific figures on the impact of the containment measures - notably the obligation for civil servants to telework and more generally the Danish authorities' recommendation for other workers to do the same - on commuter traffic. The daily figures submitted by Denmark show that, starting in week 11 in March, passenger numbers remained significantly below 2019 levels on a number of lines used by many commuters. For example, on 11, 12 and 13 March 2020, respectively, the passenger drop compared to the same weekday in the same week in 2019 was ca. -20%, -61% and -72% on the S-train; ca. -25%, -47% and -63% on the Nyborg-Korsør line; and ca. -30%, -58% and -73% on the Helsingør-København line. Commuter traffic on those lines has thereafter remained below 2019 numbers until at least early December 2020. Further, Denmark provided monthly data by type of subscription card and operator showing that, as a consequence of the telework measures and the closure of educational institutions, as of March 2020 the income from various commuter cards and student cards were significantly lower compared to 2019 levels. For instance, between March and August 2020 DSB's revenues were on average approx. 57%, 56% and 59% of 2019 revenues as regards the following three products, respectively: Commuter Card, Youth Commuter Card, Travelcard – Commuter (Rejsekort). Concerning Arriva's products, between March and August 2020 the income from commuter cards was on average approx. 55% of 2019 levels; and, during the same period, the income from student cards was also on average approx. 55% of 2019 income levels.
- (25) As a result of the above negative traffic numbers developments, the rail passenger operators suffered a significant drop in income accompanied by additional costs for infection prevention measures, only partly offset by avoided costs, cost savings and public service compensation payments (see section 2.10 for more details on the damage calculation).

2.3. Objective of the measure

- (26) The scheme aims at compensating public service providers of passenger transport by rail in Denmark for the damage suffered due to the COVID-19 outbreak and the containment measures introduced by the Danish authorities as a consequence thereof (see section 2.1).

2.4. The nature and form of the measure

- (27) The aid takes the form of direct grants to be provided by the Ministry of Transport and Housing.

2.5. National legal basis

- (28) The national legal basis of the scheme is a ministerial decree issued by the Ministry of Transport and Housing⁸. The decree contains a standstill clause providing that the decree will only enter into force upon approval of the scheme by the Commission.

2.6. Administration of the measure

- (29) The scheme is administered by the Ministry of Transport and Housing.

2.7. Budget and duration of the measure

- (30) Compensation under the scheme is financed by the State budget.
- (31) The estimated budget is approx. DKK 1 billion (approx. EUR 134 million).
- (32) The scheme provides compensation to the beneficiaries for damage suffered during the period between 11 March 2020 and 31 August 2020.

2.8. Beneficiaries

- (33) The beneficiaries of the scheme are providers of public passenger transport by rail operating in Denmark on the basis of net-cost public service contracts with the Ministry of Transport and Housing⁹. The beneficiaries must demonstrate that they suffered damages as a direct consequence of the COVID-19 outbreak and the resulting containment measures.

2.9. Sectoral and regional scope of the measure

- (34) The scheme is designed to support rail operators providing public passenger transport services across Denmark. Therefore, the geographic scope of the measure is Denmark.

2.10. Eligible costs and modalities for compensation

- (35) The eligible costs correspond to the damage caused to the beneficiaries by the COVID-19 outbreak.

⁸ The text is published at <https://www.ft.dk/samling/20201/aktstykke/aktstk.97/afgjort.htm>.

⁹ On the basis of the information submitted by the Danish authorities, the undertakings meeting the requirements for benefitting from the scheme are DSB and Arriva. Denmark submitted that, while there are other rail passenger transport providers operating in Denmark on the basis of public service contracts, those contracts are administrated by the five Danish regions and are operated as “gross-cost contracts” (i.e. the transport providers do not bear the commercial risk, which lies with the contracting authority). Therefore, according to Denmark, those local operators do not have COVID-19 related losses due to the reduced number of passengers.

- (36) The scheme compensates the beneficiaries for up to 100% of the damage incurred during the period 11 March 2020 to 31 August 2020 (“the damage compensation period”) as a direct consequence of the containment measures specified in section 2.1.
- (37) The damage eligible for compensation under the scheme is the revenue shortfall incurred by the beneficiaries in fulfilment of their public service obligations during the damage compensation period. The revenue shortfall is calculated based on a comparison between the actual revenues obtained during the damage compensation period and the revenues obtained in the same reference period in 2019 (i.e. 11 March to 31 August 2019). The damage amount also includes extra costs related to COVID-19 infection prevention measures (e.g. costs related to the purchase of protective gear for staff, monitoring of the passengers’ compliance with COVID-19 rules, enhanced cleaning and other hygiene costs). On the other hand, avoided costs, cost savings and compensation payments from other sources¹⁰ will be deducted from the eligible costs.
- (38) The beneficiaries’ damage calculations will need to be audited by an independent expert and submitted together with aid applications by 12 February 2021. Any payment exceeding the damage suffered as a direct consequence of the COVID-19 outbreak will be recovered, including interest.
- (39) Moreover, the Danish authorities confirmed that the following safeguards will be put in place to avoid overcompensation:
- Compensation under the scheme can only be granted to the extent that the public service contracts concluded by the beneficiaries do not already offset the damage eligible for aid under the scheme.
 - Payments to beneficiaries under the scheme will be net of any amount recovered by insurance, litigation, arbitration or other source for the same damage.
 - Payments under the scheme are excluded for any applicant who is responsible for the damage suffered and/or did not conduct its activities with due diligence or in compliance with applicable rules or did not take any measure to mitigate its damages.
 - Aid under the scheme cannot be cumulated with other aid for the same eligible costs.
 - Payments will be suspended until the recovery of any unlawful aid declared incompatible with the internal market by a Commission decision
- (40) Finally, the Danish authorities committed to submit a report to the Commission no later than one year after the present decision, specifying the amount of compensation granted and including a summary of all recoveries ordered under the measure.

¹⁰ For instance, salary compensation received under the Danish salary compensation scheme.

3. ASSESSMENT

3.1. Lawfulness of the measure

- (41) By notifying the scheme before putting it into effect, the Danish authorities have respected their obligations under Article 108(3) TFEU.

3.2. Existence of State aid

- (42) For a measure to be categorised as State aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.
- (43) The measure is imputable to the State, since it is based on a legal act from the Ministry of Transport and Housing (see recital (28)) Further, the Ministry is competent to administer and grant aid under the scheme (see recitals (27) and (29)). The measure is financed through State resources, since it is supported through public funds (see recital (30)).
- (44) The measure confers an advantage on its beneficiaries in the form of direct grants (see recital (27)). The advantage corresponds to the amount of compensation paid under the measure to each of the beneficiaries. The measure thus relieves those beneficiaries of costs that they would have to bear under normal market conditions.
- (45) The advantage granted by the measure is selective, since, as set out in recital (33), it is awarded only to providers of public passenger transport by rail operating in Denmark on the basis of net-cost public service contracts concluded with the Ministry of Transport and Housing.
- (46) The measure is liable to distort competition, since it strengthens the competitive position of its beneficiaries. It also affects trade between Member States, since those beneficiaries are active in a sector in which intra-Union trade exists.
- (47) In view of the above, the Commission concludes that the measure constitutes State aid within the meaning of Article 107(1) TFEU. The Danish authorities do not contest that conclusion.

3.3. Compatibility

- (48) Since the measure involves State aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether that measure is compatible with the internal market. Following the notification of the Danish authorities, the Commission has examined the notified measure pursuant to Article 107(2)(b) TFEU.
- (49) This assessment has led to the following observations.

3.3.1. *The notion of exceptional occurrences with the meaning of Article 107(2)(b) TFEU*

- (50) Article 107(2)(b) TFEU provides that aid to make good the damage caused by natural disasters or exceptional occurrences shall be compatible with the internal market. Neither the TFEU nor other Union legislation contains a precise definition of the notion of ‘exceptional occurrence’. The Commission, in line with the consolidated case-law of the Union courts¹¹, has consistently held that the notions of ‘natural disaster’ and ‘exceptional occurrence’ referred to in Article 107(2)(b) TFEU must be interpreted restrictively as they constitute exceptions to the general prohibition of State aid within the internal market laid down in Article 107(1) TFEU.
- (51) The characterisation of an event as being an exceptional occurrence is made by the Commission on a case-by-case basis, having regard to its previous practice in the field¹². In that regard, the following indicators relating to the event concerned must be cumulatively met: (i) unforeseeable or difficult to foresee¹³; (ii) significant scale/economic impact¹⁴; and (iii) extraordinary¹⁵.

¹¹ Judgment of the Court of Justice of 11 November 2004, *Spain v Commission*, C-73/03, EU:C:2004:711, paragraph 37 and judgment of the Court of Justice of 23 February 2006, *Atzeni and others*, Joined Cases C-346/03 and C-529/03, EU:C:2006:130, paragraph 79.

¹² Exceptional occurrences that have been accepted in the past by the Commission include war, internal disturbances and strikes, and, with certain reservations and depending on their extent, major industrial accidents which result in widespread economic loss, see *Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020*, paragraph 330 (OJ C 204, 1.07.2014, p. 53).

¹³ Commission Decision of 1 August 2008 in case SA.32163, *Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010, Slovenia*, recital 31, OJ C 135, 9.5.2012, p. 1.

¹⁴ Elements taken into account by the Commission to consider that the occurrence reached a significant scale include: (i) the fact that negative consequences cannot be contained (Commission Decision of 4 October 2000 in case NN 62/2000, *Régime temporaire d'aides aux entreprises victimes des intempéries et de la marée noire – France*, OJ C 380, 30.12.2000, p. 9); (ii) the significant number of dead or injured people (Commission Decision of 11 April 2012 in case SA.33487, *Agricultural and fisheries aid to compensate for damage due to exceptional occurrence (red mud "Aluminium accident")*, Hungary, recital 35, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_33487; Commission Decision of 2 May 2002 in case N241/2002, *Régime en faveur des entreprises victimes de la catastrophe industrielle de Toulouse, France*, recital 19, OJ C 170, 16.7.2002, p. 16); (iii) the occurrence of immense ecological and economic damage (Commission Decision of 11 April 2012 in case SA.33487, recital 36); (iv) the amount of material damage despite the local character of the industrial accident (Commission Decision of 2 May 2002 in case N 241/2002, recital 19).

¹⁵ In its Decision of 19 May 2004 in case C-59/2001, concerning the aid scheme that Italy plans to implement for poultry farms — AIMA programme for the poultry industry, OJ L 32, 6.2.2007, p. 14, the Commission considered that the alleged fall in sales of poultry meat in a Member State not directly affected by the dioxin contamination did not constitute in itself an exceptional occurrence. In fact, it was an unforeseeable event but formed part of the normal commercial risks to which an undertaking is exposed.

3.3.2. *COVID-19 as an exceptional occurrence*

- (52) Following the first reports of cases of acute respiratory syndrome (COVID-19) in the Chinese Wuhan municipality at the end of December 2019, the Chinese authorities identified a novel coronavirus (SARS-CoV-2) as the main causative agent, which had not been previously identified in humans. The outbreak rapidly evolved, affecting not only other parts of China but spreading to the majority of countries worldwide. Specific sectors and areas are particularly affected by the outbreak, be it because of national outbreak control measures, travel restrictions or supply chain disruptions.
- (53) The WHO declaration of a pandemic¹⁶, associated with the public health risk deriving from the absence of therapeutics or vaccines for the novel COVID-19 determine the exceptional nature of the circumstances. The rapidity of the spread of the virus can cause enormous consequences both in terms of fatal outcomes in risk groups and in terms of economic and societal disruption¹⁷. The necessity to adopt and encourage the respect of measures aimed at interrupting transmission chains stems from this acknowledgement. According to WHO reports and observations of the current situation, such measures can result in far-reaching disruption of various economic sectors. That disruption is thus clearly outside the normal functioning of the market. In order to avoid an exponential increase in the number of cases, accompanied by social alarm and severe economic consequences, containment measures needed to be adopted.
- (54) From March 2020, Member States adopted various measures that aim to limit the spread of the coronavirus, e.g. travel restrictions for non-essential travels, closure of borders, obligation for companies to organise working from home for every position where this is possible and various social distancing measures.
- (55) In view of the above, the Commission considers that this event qualifies as an exceptional occurrence as it was not foreseeable, as it is clearly distinguishable from ordinary events by its character and by its effects on the affected undertakings and the economy in general and therefore lies outside of the normal functioning of the market¹⁸.
- (56) In this context, the COVID-19 outbreak can be considered as an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

3.3.3. *Causal link between the COVID-19 outbreak and the damage compensated by the scheme*

- (57) As described in section 2.1, as of mid-March 2020, the Danish authorities adopted several sequential containment measures in response to the COVID-19

¹⁶ WHO Director-General's opening remarks at the media briefing on COVID-19 on 11 March 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

¹⁷ ECDC's Rapid Risk Assessment, Outbreak of novel Coronavirus disease 2019 (COVID-19): increase transmission globally – fifth update, 2 March 2020.

¹⁸ See for instance also Commission Decision of 12 March 2020, SA.56685 - Denmark - Compensation scheme for cancellation of events related to COVID-19, OJ C 125, 17.4.2020, p. 8.

outbreak. Following the first registered infection on 27 February 2020, various limitations and rules were gradually introduced across Denmark. In particular, the Danish authorities issued multiple recommendations to telework (which became mandatory for civil servants), ordered the mandatory closure of educational institutions and day care services as well as the suspension of several economic activities.

- (58) Furthermore, certain measures affected the public transport sector specifically, notably recommendations to limit the use of public transport (particularly during rush hours) and observe social distancing. To comply with such requirements, the operators of rail passenger services implemented a number of measures, including the limitation of capacity made available to passengers. In particular, the main rail passenger operator, DSB, introduced a mandatory seat reservation system on its trains (excluding S-trains), while at the same time waiving the standard reservation fee of DKK 30. The Commission observes that the reservation requirement implied the limitation of capacity on DSB's trains (see recital (10)), thus negatively affecting ticket revenues. The Commission also takes note of the argument put forward by the Danish authorities that the fact that, after in August 2020 DSB announced that it would abolish the mandatory reservation system, the Danish authorities immediately ordered DSB to reintroduce it shows that that requirement had not previously been formally introduced only because DSB had voluntarily already put in place the mandatory reservation system (see recital (20)). In the light of this argument, the Commission concludes that, for the purpose of the damage compensation, it can be considered that the requirement to have in place a mandatory reservation system in all cases in which the train's characteristics so allowed had de facto been in place since 13 March 2020. Further, as described in recital (10), Denmark explained that (i) even though due to the vehicles' constructional features it was not possible to implement mandatory reservation on Arriva's and DSB's S-trains, the general social distancing rules in place meant that maximum occupancy had to also be reduced on the latter trains; and (ii) the Ministry of Transport and Housing constantly monitored the implementation of social distancing rules on board trains and found no instance of non-compliance. Therefore, the Commission considers that, also on those trains in which it was not possible to have in place a mandatory reservation system, the social distancing requirements restricted the operators' ability to run at full capacity and thus negatively affected their ticket revenues.
- (59) The Commission notes that, as set out in section 2.2, the various containment measures led to a significant passenger decrease and thereby to substantial revenue loss. The passenger decrease compared to 2019 levels was larger than 50% throughout March, April and May 2020 (reaching its lowest point in April, when it exceeded -70%) and averaged -25% during the period from June to August 2020.
- (60) The Commission further points out that the closure of all the facilities referred to in section 2.1, including educational institutions and several economic activities, together with the call to telework (which was initially mandatory for all civil servants), had a significant impact on passenger numbers. As described in recital (24), the volume of commuter traffic, which represents a significant proportion of rail passenger traffic, declined significantly because of the closure of various workplaces and the extensive use of telework arrangements. The reduced use of rail services to commute to/from the workplace or to attend school/university is

reflected in the data submitted by the Danish authorities (see recital (24)), which show that traffic and income figures were significantly below 2019 figures during the entire damage compensation period (11 March to 31 August 2020).

- (61) In addition, the Commission notes that the Danish authorities' repeated recommendations to avoid the use of public transport as much as possible, the various restrictions of social life progressively put in place, the cancellation of events (see recital (12)) and the severe entry restrictions for tourists (see recitals (11) and (19)) reduced usage of public transport to a minimum.
- (62) At the same time, the Commission takes note that, despite the significant decrease in passenger numbers, in order to fulfil their public service obligations set out in their contracts, the operators of public passenger transport by rail had to maintain a basic service offer throughout the duration of the containment measures (see recital (10)). Those public service obligations aim at ensuring connectivity and mobility of individuals, including workers exercising critical functions, and prevented the transport operators from limiting their damage by reducing their offer and thus their variable costs.
- (63) The Commission notes that the sharp decrease in revenues together with additional costs to prevent COVID-19 infections have created serious and persisting liquidity shortages, which put at risk the very survival of the affected transport operators.
- (64) As regards the duration of the damage compensation period (11 March - 31 August 2020), the Commission considers that due account should be taken of the specific circumstances in which beneficiaries have been operating and are currently operating. First, the Commission observes that the start date (11 March 2020) coincides with the announcement of the first containment measures taken by the Danish authorities in reaction to the COVID-19 outbreak. As pointed out in recital (9), even though the first containment measures entered into force on 13 March 2020, a few days earlier the Prime Minister made clear that the population was strongly advised to follow the measures immediately (i.e. as of 11 March 2020) to the largest extent possible. Those measures had an immediate disincentive effect on the use of public transport, as shown in the traffic figures submitted by Denmark (see recital (24)). Indeed, the Commission observes that those figures show a sharp decrease in commuter traffic as of the middle of week 11, which is consistent with Denmark's argument that the announcement of the first containment measures on 11 March 2020 in combination with the recommendation of 10 March to avoid the use of public transport during the rush hour (see recital (8)) affected traffic numbers almost instantly.
- (65) As regards the end date of the scheme, the Commission notes that, while some of the initial containment measures were gradually lifted as of April/May 2020, certain containment measures remained in place over a longer period, notably: (i) the governmental recommendation to telework, which was in place throughout the entire damage compensation period (in addition to which, civil servants in the Capital Region of Denmark and Region Zealand were obliged to telework until 15 June 2020); (ii) the social distancing rules, including mandatory seat reservation on most trains - which became a formally binding requirement in August 2020 and was still applicable at the time of the notification; (iii) the closure of universities (until 1 August 2020); (iv) a travel warning against non-essential travel abroad, which remained valid for most

countries until at least 31 August 2020; and (v) the ban on gatherings beyond a certain number of people, which, due to the increased number of COVID-19 infections, on 6 August 2020 the Danish government decided to keep at 100 instead of raising it to 200 as previously expected.

- (66) The Commission acknowledges that the restrictions that remained in place continued to lead to a significant decrease in passenger traffic and had a significant impact on operators of public passenger transport by rail.
- (67) Moreover, the Commission notes that the undertakings eligible for aid under the scheme discharge public service obligations and therefore fulfil a critical socio-economic function by ensuring mobility of individuals as well as contributing to the green transition by ensuring sustainable environmental friendly mobility¹⁹. Indeed, throughout the duration of the COVID-19 containment measures the continued provision of rail public transport has been crucial to ensure connectivity for the general population and in particular for workers, including critical staff in the healthcare sector, thereby contributing to the proper functioning of the economy. At the same time, maintaining minimum service levels, despite significantly reduced passenger numbers throughout the period of application of the various containment measures, has helped ensure observance of the social distancing measures on public transport.
- (68) The Commission notes, for the reasons set out in recital (62), that due to the specific nature of the public services entrusted, the beneficiaries under the scheme have not had the possibility to react to a changed market environment and to reduced demand, as they were obliged by the contractual provisions to continue to provide a certain level of transport services independently of occupancy rates in order to ensure connectivity, in particular of critical staff. Unlike companies in other sectors, the beneficiaries have not had the choice to reduce frequency beyond a certain level to react to the reduced demand and thereby to reduce their fixed costs. As such, they have had to continue to continuously ensure a basic service offer despite the very low number of passengers, while at the same time reducing the maximum occupancy on board due to social distancing rules, which on most trains was ensured through a mandatory reservation system financed by the rail operators (see recital (58)).
- (69) The Commission therefore considers that the duration of the damage compensation period (11 March – 31 August 2020) is justified, as its start coincides with the announcement and the negative impact on passenger numbers of the first containment measures taken in Denmark in response to the COVID-19 outbreak and its end takes into account the various factors summarised above.
- (70) Therefore, the Commission considers that the direct causal link between the damage caused by the exceptional occurrence and the aid under the scheme is ensured.

¹⁹ An overview of the European Green Deal strategy, including through sustainable mobility, is available at https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

3.3.4. *Proportionality of the aid*

- (71) In order to be compatible with Article 107(2)(b) TFEU, the aid must be proportional to the damage caused by the exceptional occurrence. Aid must not result in overcompensation of damage and should only make good the damage caused by the exceptional occurrence.
- (72) Aid granted under the scheme is strictly limited to compensation for the damage directly caused by the COVID-19 outbreak during the period 11 March - 31 August 2020. As described in more detail in section 2.10, it covers up to 100% of the damage. The damage eligible for compensation under the scheme is calculated as the revenue shortfall resulting from a comparison between the actual revenues obtained during the damage compensation period and the revenues obtained in the same reference period in 2019 (i.e. 11 March to 31 August 2019). The extra costs for COVID-19 infection prevention measures are added to the damage amount, whereas avoided costs, cost savings and compensation payments from other sources are deducted. The Danish authorities will verify the beneficiaries' damage calculations (to be audited by an independent expert) and ensure the recovery, with interest, of any overcompensation.
- (73) As described in recital (39), the Danish authorities have put in place the following additional safeguards to ensure that compensation under the scheme does not exceed what is necessary to make good the actual damage suffered and thus meets the abovementioned criteria.
- i) Compensation under the scheme can only be granted to the extent that the public service contracts concluded by the beneficiaries do not already offset the damage eligible for aid under the scheme.
 - ii) Payments to beneficiaries under the scheme will be net of any amount recovered by insurance, litigation, arbitration or other source for the same damage.
 - iii) Payments under the scheme are excluded for any applicant who is responsible for the damage suffered and/or did not conduct its activities with due diligence or in compliance with applicable rules or did not take any measure to mitigate its damages.
 - iv) Aid under the scheme cannot be cumulated with other aid for the same eligible costs.
 - v) Payments will be suspended until the recovery of any unlawful aid declared incompatible with the internal market by a Commission decision.
- (74) Finally, the Danish authorities committed to submit a report to the Commission no later than one year after the present decision, specifying the amount of compensation granted and including a summary of all recoveries ordered under the measure.
- (75) The Commission positively notes the abovementioned safeguards and concludes that the mechanism put in place will ensure that the compensation under the scheme will not exceed the damage directly suffered by each beneficiary due to the deficit caused by the COVID-19 outbreak.

- (76) In view of the above, the Commission considers that the scheme is proportional and consequently compatible with the internal market in accordance with Article 107(2)(b) TFEU.

4. 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(2)(b) 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:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President



