Commission Decision (EU) 2020/1472 of 20 March 2020 on the State aid SA.39078 – 2019/C (ex 2014/N) which Denmark implemented for Femern A/S (notified under document C(2020) 1683) (Only the English text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2020/1472

of 20 March 2020

on the State aid SA.39078 – 2019/C (ex 2014/N) which Denmark implemented for Femern A/S

(notified under document C(2020) 1683)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited[(1)] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 13 July 2009, the Commission approved aid for the financing of the planning phase of the Fehmarn Belt Fixed Link project ('Planning decision')[(2)].

(2) Following a pre-notification phase, the Danish authorities notified, by letter dated 22 December 2014, to the Commission pursuant to Article 108(3) of the Treaty the financing model of the Fehmarn Belt Fixed Link project.

(3) On 5 June 2014, 5 September 2014, 26 November 2014, 19 January 2015, and 22 April 2015, the Commission received five complaints[(3)] alleging that Denmark had granted unlawful and incompatible State aid for the planning, construction and operation of the Fehmarn Belt Fixed Link project in favour of Femern A/S and A/S Femern Landanlæg[(4)].

(4) On 23 July 2015, the Commission decided not to raise objections to the measures granted by Denmark to A/S Femern Landanlæg and Femern A/S ('Construction decision')[(5)]. The operative part of that decision is divided into two parts. In the first part, the Commission concluded that the measures granted to A/S Femern

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Landanlæg for the planning, construction and operation of the road and rail hinterland connections in Denmark do not constitute State aid within the meaning of Article 107(1) of the Treaty. In the second part, the Commission concluded that, even if the measures granted to Femern A/S for the planning, construction and operation of the Fixed Link did constitute State aid within the meaning of Article 107(1) of the Treaty, they are compatible with the internal market pursuant to Article 107(3)(b) of the Treaty. On 16 September 2015, the Commission sent the Construction decision to the complainants.

(5) Following actions for annulment by two complainants[6], the General Court annulled the Construction decision with its judgments of 13 December 2018[7] in so far as the Commission decided not to raise any objections to the measures granted by Denmark to Femern A/S for the planning, construction and operation of the Fixed Link (the coast-to-coast infrastructure).

(6) The General Court dismissed the action as to the remainder. In particular, it rejected the arguments of the applicants concerning the Commission's conclusion that the measures granted to A/S Femern Landanlæg for the planning, construction and operation of the road and rail hinterland connections in Denmark do not constitute State aid within the meaning of Article 107(1) of the Treaty.

(7) The judgments of 13 December 2018 have been appealed by the two complainants[8].

(8) On 24 January and 22 May 2019, the Commission services had a meeting with the Danish authorities. The Commission services had telephone conferences with the Danish authorities on 12 April and 20 June 2019. The Commission services sent further information requests on 26 March, 18 April and 24 April 2019. The Danish authorities submitted additional information on 18 January, 4 February, 25 February, 28 March, 5 April, 7 May, 8 May, 16 May, 20 May, 28 May and 10 June 2019.

(9) On 18 and 25 March 2019, the Commission services had a meeting with Stena Line Scandinavia AB ('Stena Line') and with Scandlines Danmark ApS and Scandlines Deutschland GmbH ('Scandlines') respectively. On 4 April and 13 May 2019, the Commission services had a meeting with the Naturschutzbund Deutschland e.V. ('NABU') and the Association of Swedish Ship-owners (Föreningen för Svensk Sjöfart ('FSS') respectively. The Commission received further information from interested parties on 29 January, 14 February, 18 February, 26 March, 15 April, 16 April, 24 April, 24 May, 29 May, 6 June and 7 June 2019. The Commission received a letter from Scandlines on 29 January 2019 to which it replied on 8 February 2019. The Commission received a further letter from Scandlines on 20 February 2019 to which it replied on 13 March 2019. The Commission received a letter from Stena Line on 7 February 2019 to which it replied on 28 February 2019. The Commission received a letter from NABU on 18 February 2019 to which it replied on 18 March 2019. The Commission received a letter from FSS on 19 February 2019 to which it replied on 8 March 2019. The Commission received a letter from Verband Deutscher Reeder ('VDR') on 12 March 2019 to which it replied on 21 March 2019. The Commission received a letter from Grimaldi Group on 28 March 2019 to which it replied on 16 April

2019. The Commission received a letter from Trelleborg Port on 8 April 2019 to which it replied on 9 April 2019. The Commission received a letter from Trelleborg Port on 15 April 2019 to which it replied on 2 May 2019. The Commission received a letter from Aktionsbündnis gegen eine feste Fehmarnbeltquerung e.V. on 15 April 2019 to which it replied on 2 May 2019.

(10) By letter of 14 June 2019, the Commission informed the Danish authorities that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the public financing of the Fixed Link ('Opening decision').

(11) On 5 July 2019, the Opening decision was published in the *Official Journal of the European Union*[9]. In the Opening decision, the Commission invited interested parties to submit their comments within one month.

(12) On 12 July 2019, the Commission services forwarded earlier comments from Scandlines of 7 June 2019 to the Danish authorities. On 23 July 2019, the Commission services forwarded other previous comments and observations from Scandlines of 28 January 2019 and 29 May 2019 to the Danish authorities.

(13) Through successive requests, Scandlines asked for an extension of the deadline to submit comments to the Opening decision until end of August/beginning of September. On 22 July 2019, the Commission services agreed to a 10 working days extension of the deadline to 20 August 2019, which the Commission services subsequently granted also to other interested parties.

(14) On 17 August 2019, Scandlines brought an action for the annulment of the decision to extend the time-limit for submitting their comments to 20 August 2019, and not until the end of the month as they had requested. By separate application lodged on the same day, Scandlines requested the President of the General Court to order, by way of interim measure, the Commission to suspend the formal investigation and/or to prohibit the Commission from adopting a final decision, or grant any other form of appropriate interim relief.

(15) The President of the General Court dismissed the application for interim relief by order of 13 September 2019[10]. Subsequently, Scandlines withdrew the related action for annulment[11].

(16) Eleven interested parties submitted comments. The Danish Ferry Association submitted comments on 16 August 2019. The European Community Shipowners' Associations ('ECSA') submitted comments on 19 August 2019. FSS submitted comments on 20 August 2019. Scandlines, Aktionsbündnis gegen eine feste Fehmarnbeltquerung e.V., NABU, Rederi Aktiebolaget Nordö-Link, Stena Line, Trelleborg Hamn AB, Rostock Port GmbH and VDR all submitted comments on 21 August 2019. The interested parties are involved in the shipping industry (ferry operators, ports and associations) or non-profit organisations alleging an interest in the coast-to-coast infrastructure. By letter dated 3 September 2019, the Commission services forwarded a non-confidential version of the comments of the eleven interested parties to the Danish authorities, which were given the opportunity to react. The

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Danish authorities submitted their observations on those comments on 4 October 2019, complementing their comments on the Opening decision of 26 August 2019.

(17) On 27 June, on 2, 5 and 9 July, on 3 October, on 4, 12, 15, 19, 22 and 25 November 2019 and then on 7 and 14 January and on 6 February 2020 the Commission services had a telephone conference with the Danish authorities. On 18 December 2019, the Commission services had a meeting in Brussels with the Danish authorities. The Commission services sent further information requests on 8, 12 and 17 July, on 3 and 12 September, on 4, 17, 18 and 24 October, on 5, 13, 25 and 27 November 2019 then on 7 and 9 January and on 3, 4, 14, 18, 19 and 28 February 2020. In 2019, the Danish authorities submitted additional information on 27 June, on 1, 4, 5, 10, 12 and 15 July, on 21 and 27 August, on 13 and 26 September, on 1, 9, 11, 23, 27 and 29 October, on 6, 7, 11, 14, 18, 22 and 25 November, and on 10 and 20 December. In 2020, the Danish authorities submitted additional information on 3, 7, 13, 15, 21 January, on 4, 6, 11, 12, 14, 20 and 21 February and on 3 March 2020. With their communication of 5 March 2020, the Danish authorities revised the initial notification.

(18) Furthermore, the Commission received additional comments from Scandlines and Stena Line which in light of the Mytilinaios Anonymos Etairia – Omilos Epicheiriseon Judgment[12] the Commission is not required to take into account since those comments were submitted out of time. The Commission received such additional comments from Scandlines on 26 October 2019 and again on 20 February 2020, which were forwarded to the Danish authorities on 4 November 2019 and on 28 February 2020, respectively. The Danish authorities submitted their observations to those comments on 6 November 2019 and on 3 March 2020, respectively. Scandlines had a telephone conference with the Commission services on 25 February 2020 and submitted additional information on 5 March 2020. The Commission received additional comments from Stena Line on 13 December 2019, which were forwarded to the Danish authorities on 23 December 2019. The Danish authorities submitted their observations to those comments on 8 January 2020.

(19) The Commission received a letter from the Danish authorities on 9 September 2019 to which it replied on 30 September 2019.

(20) By letter of 4 March 2020, the Danish authorities agreed to have the present decision adopted and notified in the English language.

Clarification as to the scope of this decision

(21) On 2 August 2016, Scandlines sent a letter of formal notice to the Commission, asking it to take steps in respect of certain alleged aid measures in favour of Femern A/S, which, in their view, had not been addressed by the Commission in its Construction decision, even though those measures had been referred to in their complaint.

(22) By letter of 30 September 2016, the Commission services replied to that letter. It indicated that the Construction decision dealt with two alleged aid measures, namely non-commercial railway fees and the free use of State property during the construction phase of the project. As to the other alleged aid measures, the Commission considered,

pursuant to Article 24(2) of the Council Regulation (EU) 2015/1589 ('Procedural Regulation')[13], that the facts and points of law put forward by Scandlines did not provide sufficient grounds to show, on the basis of a *prima facie* investigation, the existence of unlawful aid. It therefore invited Scandlines to submit any comments it might have within a period of one month. The Commission received those comments on 30 October 2016.

(23) On 12 December 2016, Scandlines lodged an action of annulment of the letter of 30 September 2016[14]. On the same day, they also brought an action against the Commission for failure to act on their complaint[15].

(24) On 30 July 2018, Scandlines sent a second letter of formal notice[16], inviting the Commission to define its position on the other alleged aid measures following its comments of 30 September 2016. On 28 September 2018, the Commission adopted a decision ('2018 decision')[17] confirming that the State guarantees in favour of A/S Femern Landanlæg and the State loans in favour of Femern A/S and A/S Femern Landanlæg, as well as the alleged unlawful aid granted in excess of the Planning decision and in the form of tax advantages, did not constitute unlawful State aid. In the same decision, the Commission concluded that the alleged unlawful aid to Femern A/S in the form of capital injection is compatible with the internal market under Article 107(3)(b) of the Treaty, in so far as it constitutes State aid not covered by the Planning decision. On 4 January 2019, Scandlines brought an action for the annulment of this decision[18].

(25) By orders of 13 December 2018, the General Court declared both the action for the annulment of the Commission's letter of 30 September 2016 and the action for failure to act inadmissible[19]. Scandlines brought an appeal against the order dismissing its action for annulment[20].

(26) In the Opening decision, the Commission withdrew the 2018 decision in so far as it relates to measures granted to Femern A/S for the planning, construction and operation of the Fixed Link. Those measures are therefore part of the assessment in this decision.

(27) As noted in the Opening decision, this procedure also covers all measures relevant to the planning phase of the project that concern the Fixed Link.

(28) This decision does not concern the measures in favour of A/S Femern Landanlæg relevant to the financing of the hinterland connections, as also clarified in the Opening decision. In addition, it does not cover other possible measures than the ones as mentioned in Section 2.4 granted or allegedly granted by Denmark to Femern A/S, A/S Femern Landanlæg, Sund & Bælt Holding A/S or to any other related company.

(29) On 6 November 2017, Scandlines filed an additional complaint on alleged unlawful and incompatible aid measures used to finance Femern A/S' activities allegedly related to promotion and marketing of the Fixed Link ('promotional/marketing/information activities'). The measures referred to in that letter were included in the scope of the Opening decision and are therefore assessed in this decision.