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Angående: KOMMISSIONENS AFGØRELSE (15.10.2014)

Generalsekretariatet sender Dem vedlagt afgørelsen om ovennævnete emne til videresendelse til udenrigsministeren.

For generalsekretæren

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Bilag : **C(2014) 7358 final**

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EUROPEAN COMMISSION

Brussels, 15.10.2014
C(2014) 7358 final

Subject: State aids SA.36558 (2014/NN) and SA.38371 (2014/NN) – Denmark
State aid SA.36662 (2014/NN) - Sweden
Aid granted to Øresundsbro Konsortiet

Madam, Sir,

1. PROCEDURE

1. By letter dated 1 August 1995, the Øresundsbro Konsortiet (the Consortium) informed the Commission of State guarantees granted by the Danish and Swedish States in favour of the Consortium for the financing of the Øresund Fixed Link and asked the Commission to confirm that the State guarantees did not constitute State aid. The Commission was thereby informed that obligations arising from the Consortium's loans and other financial instruments in connection with the financing of the project were jointly and severally guaranteed by Denmark and Sweden. The Commission was also informed that the guarantees were provided at no charge to the Consortium.

2. Following the information received from the Consortium, the Commission services confirmed, in letters of 27 October 1995 to the Danish and Swedish authorities, that the State guarantees in question did not constitute State aid within the meaning of Article 107(1) of the Treaty for the Functioning of the European Union (the Treaty) because they were attached to an infrastructure project of common interest. It is explicitly mentioned in the two letters that as a consequence of this assessment the Member States should not notify the measure to the Commission.

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3. The Danish and Swedish States have never formally notified to the Commission the financing model of the Øresund Fixed Link.

4. On 17 April 2013 the Commission received a complaint alleging that the State guarantees granted by the Danish and Swedish States in favour of the Consortium constitutes unlawful State aid and that this aid is incompatible with the internal market (this complaint was registered under the numbers SA.36558 for Denmark and SA.36662 for Sweden). The complainant argues that due to the "unlimited" character of the State guarantees, the Consortium received continuous advantages regarding lending terms in the financial markets and it has no obligation to behave like a private market economy operator. Consequently, the complainant alleged that the Consortium pricing policy was anti-competitive.

5. The Commission sent a formal request to Denmark and Sweden on the assessment of the facts on 13 May 2013. A joint reply by the Danish and Swedish States was registered on 28 June 2013. The Commission requested the Danish and Swedish authorities to provide additional information in an email of 15 October 2013. The requested information was received by letters of 9 December 2013 and 7 March 2014.

6. By letter of 8 January 2014, the complainant alleges that the Consortium, in addition to the guarantee, has also benefited from a favourable taxation regime in Denmark as regards depreciation and the loss carry forward (this complaint was registered under the number SA.38371). According to the complainant the favourable taxation regime confers a selective advantage to the Consortium and constitutes unlawful State aid. By letter of 2 April 2014, the complainant further clarified why this alleged favourable taxation regime for the Consortium does not meet the compatibility criteria under Article 107(3) (b) and (c) of the Treaty.

7. In its letter of 8 January 2014, the complainant also refers to the mandatory joint taxation regime applicable in Denmark for all companies that allows the Sund & Bælt Holding to optimise benefits resulting from the tax advantages granted to the companies of the group. According to the complainant, the Sund & Bælt Holding avoids the taxation of the more profitable companies of the group by creating new infrastructure companies, which initially incur substantial losses. The joint taxation regime would also allow the Sund & Bælt Holding A/S to offset the profits of some group companies with the substantial losses incurred by other group companies.

8. On 21 February 2014 the Commission services sent a request for information to the Danish authorities with regard to the alleged tax advantages. The Swedish authorities were also invited to submit their comments on the tax measures applicable to the Danish part of the Consortium. By letter of 11 March 2014 the Swedish authorities informed the Commission that Sweden did not have any comments with regard to the alleged tax advantages in favour of the Danish part of the Consortium. On 11 April 2014 the Danish authorities requested an extension of the deadline for submitting information which the Commission accepted. On 25 April 2014 the Danish authorities submitted their reply to the request for information of the Commission.

9. By letter of 15 May 2014 the Commission services asked the Danish authorities further questions regarding the alleged tax advantages and their compatibility with State aid rules. The Danish authorities replied by letter of 13 June 2014.

10. By letter of 20 May 2014 the complainant submitted additional information concerning the amortization period for the Consortium's loans guaranteed by the Danish and Swedish States and the financial model underlying the Fixed Link. On 4 June 2014 the Commission invited the Danish and the Swedish authorities to comment on the additional information submitted by the complainant. On 24 June 2014 the Danish and Swedish authorities submitted a joint reply.

11. On 17 June 2014 the complainant submitted supplementary information on the alleged aid granted to the parent companies of the Consortium. On 26 June the complainant submitted a non-confidential version of that information. The complainant alleged that the financing of the hinterland connections through State resources constitutes unlawful and incompatible State aid to SVEDAB AB and A/S Øresund and that those financing measures indirectly benefit the Consortium. On 27 June 2014 the Commission forwarded this information to the Danish and the Swedish authorities for comments. On 11 July 2014, the Danish and Swedish authorities requested an extension of the deadline for submitting comments, to which the Commission agreed. By letter of 1 September 2014 the Swedish and the Danish authorities submitted a joint reply.

12. On 9 September 2014 the complainant submitted additional information concerning the alleged aid granted to the parent companies of the Consortium for the hinterland connections and the alleged aid to the Sund & Bælt Holding.

13. On 15 September 2014 the Swedish and Danish authorities submitted a joint statement, in which the States clarified and committed the following regarding the scope of the economic advantages provided to the Consortium:

    1) The State guarantees are limited to cover the Consortium's actual accumulated debt at any point in time.

    2) The State guarantees and any other economic advantages, including tax advantages, which the Consortium might receive, are limited to the actual debt repayment period. Thus, the Consortium will not receive any such advantage after it has fully repaid its debt.

    3) If it is necessary for the Consortium to adopt new loans covered by State guarantees after the end of 2040, or if it is necessary for the States to grant any other economic advantages to the Consortium after that date, the States commit to notify this to the Commission pursuant to Article 108(3) of the Treaty.

    4) The States commit to inform the Commission on an annual basis of developments regarding the repayment of the Consortium's debt.

14. By letters of 6 October 2014 the Danish and Swedish authorities agreed exceptionally to waive its rights deriving from Article 342 of the Treaty in conjunction with Article 3 of the EC Regulation 1/1958[1] and to have this decision adopted and notified in English language.

15. In their submissions, the Danish and Swedish authorities take the view that the public financing model of the Øresund Fixed Link does not constitute State aid within the meaning of Article 107(1) of the Treaty. They submit that the assessment made by the Commission in 1995 remains valid, in particular, that having regard to the purpose and nature of the Øresund Fixed Link, its construction and operation cannot reasonably be considered an economic activity. According to the States, both the construction and the operation of the Fixed Link are classic examples of the exercise of public planning authority, which is not, and ought not to be, covered by Article 107(1) of the Treaty.

16. With regard to the hinterland connections on both sides of Øresund, the Danish and Swedish authorities take the view that the planning, construction and management of hinterland connections are clearly not economic activities within the meaning of Article 107(1) of the Treaty. The alleged aid measures do not constitute State aid in favour of the Consortium, since the Consortium is not an undertaking. Even if the Consortium were to be considered as carrying out economic activities, the public financing of SVEDAB AB and A/S Øresund do not confer any additional economic advantages on the Consortium. On the contrary, the relationship between the Consortium and its owners entails a significant economic burden on the Consortium as the hinterland connections established, owned and managed by SVEDAB AB and A/S Øresund shall be financed, via dividend payments, by the user fees collected by the Consortium.

17. Furthermore, the Danish authorities consider that the special regime on depreciation applicable to the Consortium does not constitute State aid, because the Fixed Link is not in a comparable situation to other Danish infrastructure projects as regards its size, construction cost and purpose. According to the Danish authorities the specific depreciation regime rather served the purpose of simplifying the depreciation rules applicable to the project. Furthermore the Danish authorities submitted data from which it appears that the benefit stemming from the depreciation regime applicable to the Consortium has been very limited, about DKK 304 000 (around EUR 41 000) in the period 1991-2013.

18. Regarding the special regime for the carry forward of losses the Danish authorities did not contest that that regime confers an advantage for the Consortium but they considered that this special regime is inextricably linked to the guarantee and in line with the logic of the Danish rules for the carry forward of losses and thus not selective within the meaning of Article 107(1) of the Treaty.

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[1] Council Regulation No 1 of 15 April 1958, article 1, 1958 O.J. (17) 401-402 (EEC/Euratom) (Determining the language to be used by the European Economic Community and the European Atomic Energy Community).

19. In case the special tax regimes for the Consortium are found to constitute State aid, the Danish authorities consider that they should be declared compatible with the internal market pursuant to Article 107(3)(b) of the Treaty, i.e. aid to promote the execution of an important project of common European interest. The Danish authorities referred in this regard to the arguments that they put forward with respect to the State guarantees.

2. DESCRIPTION OF THE MEASURES

2.1. THE ØRESUND FIXED LINK

20. The Øresund Fixed Link project is composed of a toll-funded 16km long bridge, the artificial island of Peberholm, a partially immersed tunnel for road and railway traffic between the Swedish coast and the Danish island of Amager. It is the longest combined road and rail bridge in Europe and provides a direct connection between Copenhagen to Malmö.

21. The Øresund Fixed Link was constructed between 1995 and 2000 and has been in operation since June 2000. The project was one of the trans-European networks in transport (TEN-T) priority projects approved by the European Council in 1994.

22. The legal and operational aspects of the construction, management and operation of the Fixed Link are governed by:

- The agreement of 23 March 1991 between the Danish and the Swedish governments (the Intergovernmental Agreement)[2].
- The agreement of 27 January 1992 (the Consortium Agreement).

23. The Fixed Link is owned and operated by the Consortium. The Consortium is a partnership of the Danish and Swedish states established on the basis of the Intergovernmental Agreement. The Consortium is founded and owned by two limited liability companies - A/S Øresund (50%) and Svensk-Danske Broförbindelsen SVEDAB AB (50%). A/S Øresund is wholly owned by Sund & Bælt Holding A/S, which, in turn, is wholly owned by the Danish State. SVEDAB AB is wholly owned by the Swedish State. According to Article 11 of the Intergovernmental Agreement, both the profits and losses derived from the activities of the Consortium shall be shared equally. In relation to any third-party, A/S Øresund and SVEDAB AB shall be jointly and severally liable for the Consortium's obligations holding equal liability in all mutual undertakings.

24. The Consortium was established to be the owner, constructor and operator of the Fixed Link directly on the basis of the Intergovernmental Agreement. The Consortium procured the construction works of the Fixed Link to third-party undertakings through an open

[2] On 23 March 1991 the Danish and the Swedish governments signed the Intergovernmental Agreement, which was ratified by Sweden on 8 August 1991 and by Denmark on 24 August 1991.

tender procedure. According to Article 10 of the Intergovernmental Agreement and Section 1 of the Consortium Agreement the Consortium's exclusive tasks are to own, plan, finance, construct, operate and maintain the 16 km fixed combined road and railway link between Sweden and Denmark. The Consortium cannot be engaged in any other activities.

25. In addition to the Øresund Fixed link, road and rail hinterland connections needed to be constructed in both Sweden and Denmark in order to make the Fixed link functional. These infrastructures connect the Fixed Link with other parts of the rail and road systems in Sweden and Denmark. According to Article 8 of the Intergovernmental Agreement the responsibility for constructing these connections on each side of the Fixed Link rests with the States for their respective territories. The States delegated this task to the Consortium's parent companies, i.e. A/S Øresund and SVEDAB AB, respectively (Section 2(5) of the Consortium Agreement).

26. The Swedish hinterland connections consist of a 10 km motorway between Lernacken and Yttre Ringvägen in Malmö, and a 20 km railway (Öresundsbanan and Kontinental-banan), which connects the Fixed Link to Malmö Central Station and to the Södra Stambanan (the Swedish south main railway line).

27. The Danish road hinterland connections consist primarily of a 9 km motorway (Øresundsmotorvejen) which links to the existing E20 motorway, and which leads across the island of Amager, via Tårnby, to Copenhagen Airport, where it connects to the Fixed Link. The Danish rail hinterland connections mainly consist of a 12 km railway for passenger traffic connecting Copenhagen Central Station to new stations at Tårnby and Copenhagen Airport[3], and a 4 km freight railway.

28. The Consortium is subject to a special tax regime under the Danish tax law. The special tax regime of the Consortium was originally introduced under Sections 11 to 13 of Act no. 590 of 19 August 1991 (the Øresund Act). This act was later incorporated in Act no. 588 of 24 June 2005 on Sund & Bælt Holding A/S (the Sund & Bælt Act). The special tax regime is laid down in Section 12 to 14 of the Sund & Bælt Act.

29. According to Article 14 of the Intergovernmental Agreement, the design, preparations, construction and operation of the Øresund Fixed Link should be fully financed by tolls levied on the users of the Fixed link. Article 15 empowers the Consortium to charge such toll on the users. In addition, Trafikverket (The Swedish Transport Administration) and Banedanmark (Rail Net Denmark) pay an annual fixed fee to use the railway under Article 15 of the Intergovernmental Agreement.

30. The revenue from toll and railway payment is intended to cover all of the interests and capital repayments of all loans taken out by the Consortium for the purpose of financing the planning, construction and operation of the Fixed Link.

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[3] These new stations form part of the hinterland facilities too.

31. Moreover, the revenue from toll and railway payment is also intended to cover interest and capital repayments of loans taken out by the parent companies (A/S Øresund and SVEDAB AB) in relation to the construction of the rail and road hinterland connections on each side of the Øresund.

2.2. THE STATE GUARANTEES TO THE PROJECT

32. Under Article 12 of the Intergovernmental Agreement the States have undertaken a legal obligation to guarantee all loans and other financial instruments used by the Consortium in connection with the financing of the Øresund Fixed Link. For these guarantees, the States do not receive a guarantee premium. The Consortium Agreement provides in Article 4 (3) that the Consortium shall fund its activities by taking out state guaranteed loans and other financial instruments on domestic and international financial markets.

33. The State guarantees are limited to the special tasks of the financing of the Fixed Link and may not be used by the Consortium to increase capacity or extend its activities on any market (Article 4 (5) of the Consortium Agreement).

34. The guarantee obligation deriving from the Intergovernmental Agreement was implemented in Swedish[4] and Danish[5] law. The Riksgäldskontoret (in Sweden) and the Nationalbanken (in Denmark) are responsible for the practical implementation of the two guarantees. In this context, they define the general framework for the Consortium's financing policy and activate the guarantee by giving their consent prior to the Consortium signing new loan agreements or using other financial instruments in connection with the financing of the Fixed Link.

2.3. THE PUBLIC FINANCING OF THE HINTERLAND CONNECTIONS

35. Article 8 of the Intergovernmental Agreement obliged the States to construct the necessary road and rail connections from the Fixed Link to the existing road and rail networks. Under Section 2(5) of the Consortium Agreement the States shall plan, finance, construct, operate and maintain necessary road and rail links from existing rail and road networks in each country to the Øresund Fixed Link. Denmark and Sweden delegated those tasks to A/S Øresund and SVEDAB AB respectively.

36. A/S Øresund was established by Sund & Bælt Holding A/S in 1991 in order to own 50% of the Consortium and to plan, construct, own and operate the Danish road hinterland

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4 In Sweden the State's guarantee obligation towards the Consortium was implemented in the Government's proposition no. 1990/91:158 of 25 March 1991 on an agreement between Sweden and Denmark on a Fixed Link across Øresund, which was adopted by the Swedish Parliament on 12 June 1991, cf. Riksdagsskrivelse 1990/91:379.

5 In Denmark the guarantee obligation towards the Consortium was implemented in 1991, cf. Act no. 590 of 19 August 1991 on the construction of a fixed link across the Øresund.

connections and to plan, construct and own the Danish rail hinterland connections[6]. For the planning, construction and operation of the hinterland connections, a number of public financing measures were made available to A/S Øresund, namely an initial capital injection, a State guarantee, State loans and tax measures.

37. A/S Øresund was formed in 1992 with a capital base of 5 million DKK (EUR 0.66 million) injected into the company by Sund and Bælt Holding A/S. Since then, no further capital has been injected into the company by Sund and Bælt Holding A/S.

38. The Danish State guarantees the payment of the instalments and interest on loans obtained by A/S Øresund for the planning and construction of the hinterland connections, for which A/S Øresund pays an annual premium to the State of 0,15% of the outstanding debt. In addition, A/S Øresund's other financial commitments are covered by a general State guarantee. The Danish Minister of Finance is also empowered to cover A/S Øresund's funding needs through State loans. Such loans may not be granted on terms more favourable than those obtainable by the State itself as borrower. Moreover, a loan margin of 0,15 % corresponding to the premium on the state guarantee is added to the interest payable on the loans. A/S Øresund also benefits from tax measures, as described in recitals 40 to 47 of the present decision.

39. SVEDAB AB was established with the purpose of owning 50% of the Consortium, and in order to plan and construct the Swedish road and rail hinterland connections. SVEDAB AB entered into an agreement in 1999 with Trafikverket (the Swedish Transport Administration) regarding the delegation of the management and operation of the Swedish road and rail hinterland connections. The costs of planning, constructing and operating the Swedish hinterland connections have been financed with State resources, namely an initial capital injection, State loans, a credit guarantee and a capital adequacy guarantee.

40. SVEDAB AB was formed in 1992 with a capital base of SEK 8 million (EUR 0.87 million) injected into the company by Banverket and Vägverket (now: Trafikverket). In order to finance the planning, construction and operation of the Swedish hinterland connections, SVEDAB AB obtained loans from the Swedish National Debt Office, for which it pays interest corresponding to the State's borrowing costs plus an administrative fee. SVEDAB AB's loans were initially covered by a guarantee granted by Banverket and Vägverket and then transferred to the National Debt Office. In addition, on 12 October 1995 Banverket and Vägverket issued the capital adequacy guarantee towards SVEDAB AB in order to guarantee that SVEDAB AB's registered share capital stays always the same.

[6] The operation and management of the railway hinterland connections was delegated in 1998 by A/S Øresund to the Danish national railway network manager Banedanmark.

2.4. THE SPECIAL DANISH TAX MEASURES APPLICABLE TO THE PROJECT

41. The Danish authorities have explained that the Consortium is a partnership which, as regards Danish tax rules, is transparent. As mentioned in recital 23, the Consortium is 50% owned by A/S Øresund, the Danish parent company of the Consortium. The Danish tax rules apply to that Danish parent company in respect of 50% of the income and costs incurred by the Consortium. Special tax rules apply to the:

(i) depreciation of assets and

(ii) carry forward of losses.

Moreover, the mandatory joint taxation regime applies to the Consortium through its inclusion in the Sund & Bælt Holding group.

2.4.1. Loss carry forward

42. For the period 1991 to 2001, under the Danish Depreciation Act[7], undertakings established in Denmark had the possibility to carry forward losses incurred during a specific tax year and deduct them from their tax base for the five subsequent years. The Consortium was however subject to special rules with respect to loss carry forward. The nature of these special rules was two-fold. First, the Consortium could carry forward its losses for a longer period in time, i.e. 15 years instead of five years. Second, the Consortium was allowed to include – in the total amount of losses which could be carried forward – losses resulting from the deduction of operating expenses incurred prior to the start of the operation of the Fixed Link. The Consortium was allowed to carry forward those losses for a maximum period of 30 years.[8]

43. In 2002, section 15 in the Tax Assessment Act[9] was amended and the limitation of loss carry forward to 5 years was abolished. For the period 2002-2012, companies subject to Danish corporate tax law could carry forward their losses without any limits in time or amount. Section 11 of the Øresund Act was also amended to remove the limitations it contained, but during that period the Consortium did not enjoy special tax treatment with respect to loss carry forward.

44. On 1 January 2013, a new limitation on the amounts of losses carried forward that can be deducted in a single year was introduced into the Danish tax law[10]. Under this provision, the amount of losses carried forward that can be deducted from the profits of subsequent years is limited, per year, to DKK 7 500 000 (approximately EUR 1 006 000) plus an

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7 See section 22 of the consolidated act no. 597 of 16 August 1991.

8 Between 1 January 2002 and 31 December 2012 all Danish undertakings including the Sund & Bælt Holding could carry forward losses for tax purposes without any limits in time or amount.

9 Danish Act no. 313 of 21 May 2002.

10 See section 12, subsection 2 of Act no. 591 of 18 June 2012 amending the Danish act on Corporation Tax.

amount corresponding to 60% of the positive taxable income in excess of DKK 7 500 000. However, this limitation does not apply to the Consortium[11].

2.4.2. Depreciation of assets

45. Pursuant to section 13 of the Øresund Act[12], the annual depreciation rate for the Consortium was set at 6% of the initial acquisition costs, which are defined as the total construction costs of the entire project. This means that a single general rule on depreciation is applied to all assets of the Consortium. The 6% depreciation rate for the Consortium applies until the income year in which the total depreciation costed exceeds 60% of the initial acquisition costs, as from which point the annual depreciation rate is reduced to 2%.

46. For the period 1991 to 1998, the depreciation rules established by section 13 of the Øresund Act correspond to the normal depreciation rules applicable to buildings and installations pursuant to the Danish Depreciation Act[13], which applies to all undertakings established in Denmark.

47. However, in 1999 the normal depreciation rate for buildings and installations set in the Danish Depreciation Act decreased to 5% and in 2007 it further decreased to 4%, while the depreciation rate for the Consortium remained 6% pursuant to Sections 12 and 13 of the Øresund Act[14]. This change in the normal depreciation rate created a difference between the rules applicable to the Consortium and those applicable to other undertakings established in Denmark.

2.4.3. Joint Taxation regime

48. The Consortium is included in mandatory joint taxation with Sund & Bælt Holding, in accordance with the general joint taxation regime applicable to all Danish undertakings within a group. According to article 31 of the Danish Act on Corporation Tax a "group", when all companies in the group are established in Denmark, is to be taxed in accordance with the provisions on mandatory group taxation. No specific rules apply to the Consortium in that respect.

3. SCOPE OF THE DECISION

49. This decision relates to the public financing of the Øresund Fixed Link infrastructure project and hinterland connections on both sides of the Øresund.

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11 See section 13 of Act no. 591 of 18 June 2012 amending the Danish act on Corporation Tax.
12 As replaced in 2005 by Section 14 of the Sund & Bælt Act.
13 See section 22 of the consolidated act no. 597 of 16 August 1991.
14 As replaced in 2005 by Sections 13 and 14 of the Sund & Bælt Act.

50. First, the examined measures consist of two State guarantees granted by Sweden and Denmark for loans that the Consortium had taken out in order to finance the construction and operation of the Øresund Fixed Link infrastructure project.

51. It follows from the wording of the Intergovernmental Agreement that the State guarantees are not limited in time but are intrinsically linked to the financing of the Fixed Link. As the Consortium was created for the sole purpose of the planning, construction and operation of the Øresund Fixed Link, the Consortium is precluded from engaging in any other activities and in any case the State guarantees do not cover loans to finance other activities than those related to the planning, construction and operation of the Øresund Fixed Link infrastructure project[15].

52. Thus the Commission considers that the two State guarantees were unconditionally granted on the day (27 January 1992) the Consortium was founded and achieved a legal right to obtain State guaranteed funding. Consequently, the Consortium has had a legally enforceable right to finance itself with the assistance of the two State guarantees, and third parties have recourse to this right when the Consortium acts within its competences. Moreover, the Consortium has a legally enforceable right to obtain those guarantees without paying a premium.

53. Although individual guarantees are confirmed or issued for every lender by the guarantors, this does not change the fact that the States definitively committed to guarantee the Consortium's obligations in relation to loans and other financial instruments for the financing of the Fixed Link.

54. Second, the tax measures granted by Denmark and subject to the present decision are

(a) the rules applicable to the Consortium with regards to the depreciation of assets;

(b) the rules applicable to the Consortium with regards to loss carry forward;

(c) the Danish joint taxation regime.

55. Third, the examined measures consist in public financing granted to the parent companies of the Consortium: A/S Øresund and SVEDAB AB for the planning, construction and operation of the hinterland connections.

56. This decision does not cover other possible measures granted by Denmark or Sweden to the Consortium, A/S Øresund, SVEDAB AB, the Sund & Bælt Holding A/S or to any other related company.

[15] See Article 4(5) of the Consortium Agreement.

4. STATE AID ASSESSMENT

4.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107 (1) OF THE TREATY

57. According to Article 107(1) of the Treaty, "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."

58. To qualify as State aid, a measure must meet the following cumulative conditions: 1) it must confer an economic advantage granted through State resources, 2) the advantage must be selective in that it favours certain undertakings and 3) the measure at stake must distort or threaten to distort competition and affect trade between the Member States.

59. As regards the first condition mentioned in recital 58, it must be recalled that the aim of Article 107(1) of the Treaty is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products[16]. It results from settled case law that the concept of aid is thus wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect[17].

60. In the case at hand, it must first be assessed whether i) the State guarantees granted to the Consortium for the financing of the Fixed Link, ii) the alleged tax advantages granted to the Consortium for the financing of the Fixed Link and ii) the measures granted to the Consortium's parent companies for the financing of the hinterland connections on both sides of the Øresund constitute State aid in the meaning of 107(1) of the Treaty, and in the affirmative, whether such aid is compatible with the internal market.

4.1.1. Concept of undertaking

General principles

61. It has to be recalled, on the one hand, that activities that normally fall under State responsibility in the exercise of its official powers as a public authority do not fall within the scope of State aid rules and, on the other hand, that the Court of Justice considers

16 See, for instance, Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 26.

17 See, for instance, Case C-200/97 *Ecotrade v Altiforni e Ferriere di Servola* [1998] ECR p. I-7907, paragraph 34.

"any activity consisting in offering goods and services on a given market is an economic activity"[18].

62. According to case law, the Commission must first establish whether the Consortium is an undertaking within the meaning of Article 107 (1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed[19] and that any activity consisting in offering goods and services on a given market is an economic activity[20].

63. The States submit that due to the purpose and nature of the Øresund Fixed Link, its construction and operation cannot be considered an economic activity. According to the States, the Consortium offers a public good (access to a particular road and rail infrastructure) and when it sets the price for this public good, it executes a public policy decision concerning the financing of the Fixed Link. This was also the position of the Commission at the time the State guarantees were granted to the Consortium in 1992[21].

64. However, in recent years there have been important developments in the jurisprudence and the Commission's approach as regards the notion of "economic activity" in relation to public financing of the construction and operation of infrastructure projects has evolved.

65. In its judgment "*Aéroports de Paris*"[22], the Court of First Instance held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity.

66. In its *"Leipzig-Halle airport"* judgement[23] the Court of Justice confirmed that where an infrastructure is operated for a commercial purpose, the construction of that infrastructure also constitutes an economic activity. In addition, for a certain activity to be classified as

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18 See, for instance, Case 118/85 *Commission v Italy* [1998] ECR p. 2599, paragraph 7.

19 Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; C-41/90 *Höfner and Elser* [1991] ECR I-1979, para 21; Case C-244/94 *Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 14; Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21.

20 Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case 35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36.

21 See, for instance, Commission's decisions in cases N 208/2000 – Netherlands - Subsidy Scheme for Public Inland Terminals (SOIT); N 356/2002 – United Kingdom - Network Rail (OJ C232/2002); N 649/2001 Freight Facilities Grant (OJ C 45 of 19.02.2002) point 45 and . See for the soft law, 1994 Guidelines on State aid in the aviation sector, point 12; 1998 Commission's White Paper on fair payment for infrastructure use: A phased approach to a common transport infrastructure charging in the framework in the EU (COM (1998) 466 final of 22 July 1998, paragraph 43; 2001 Communication on improving the quality of European ports (COM (2001) final of 13 February 2001, p. 11.

22 Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, confirmed by the ECJ, Case C-82/01P, ECR 2002 Page I-9297.

23 Joint Cases T-455/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v CommissionvCommission* and T-443/08 *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, (hereafter: "Leipzig-Halle airport case"), [2011] ECR II-01311, confirmed by the ECJ, Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, [2012], not yet published in the ECR, and Case T-196/04 *Ryanair v Commission* [2008], ECR II-3643.

an economic activity, it is irrelevant whether a private investor would have carried out the same activity[24]. Once an infrastructure operator engages in economic activities, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107 (1) of the Treaty, and the Treaty rules on State aid are capable of applying to advantages granted by the State or through State resources to that infrastructure operator[25].

Construction and operation of the Fixed Link

67. The Fixed Link is operated on a commercial basis by the Consortium.

68. The Consortium, as the owner and manager of the coast-to coast motorway and railway, provides a transport service against remuneration to citizens and undertakings using the Fixed Link, in the market for transport services to cross the Øresund strait. On that market the Consortium competes with operators of the other modes of transport, for example ferry services. The Consortium charges a price (toll) from passengers using the Fixed Link for crossing the Øresund[26]. In addition, the Swedish and Danish railways managers (Trafikverket and Banedanmark) pay an annual fixed fee for access to the railway on the Fixed Link. As noted in recital 30 above, the toll revenues from road and rail collected by the Consortium for its own profit finance in full the total cost of design, construction and operation of the Fixed Link.

69. In the operation of the Fixed Link the Consortium decides on its own commercial and pricing policy[27] on the basis of the principles fixed by the States in the Intergovernmental Agreement and the Consortium Agreement. According to Article 1 of the Consortium Agreement, the Consortium's activities shall be conducted in accordance with sound commercial principles. This entails that the Consortium should determine its prices based on the overall objective of maximising its long-term profit in order to repay the Consortium's and its parent companies' debts. In this respect, the Consortium pursues a commercial strategy based on increasing revenue from traffic.

70. The business activity of the Consortium is clearly mentioned in its 2013 annual report: "*Our most important task, therefore is to ensure a long term and commercially sound business based on increasing revenue from road traffic and supported by cost effective operations, maintenance and financing. Our vision is for the Oresund Region to become a powerhouse that is attractive to visit or to live and work in. Our business concept is for*

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24 Case C-309/99, *Wouters, Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, paragraph 48.

25 Joint Cases C-159/91 and C-160/91, *Poucet v AGV* and *Pistre v Cancave* [1993] ECR I-637.

26 Regarding the fact that providing access to roads against payment of a toll by the user is an economic activity see inter alia Case C-276/97 *Commission v France*, [2000] ECR I-06251, paragraphs 24 to 36. See also the Commission's decisions in case SA.34065 (2012/N) United Kingdom – Cable Car for London, recital 36 (OJ C 220 of 25.07.2012).

27 The Consortium's pricing policy entails differentiated prices to its users depending on the type of customer (e.g. private or business), type of vehicle, frequency of use (e.g. annual pass, 10-trip card or OresundBusiness), time of passage and payment method.

the Oresund Bridge to build new bridges every day- economically, culturally and mentally."

71. The Commission notes that the Consortium has developed a pricing strategy similar to any other commercial company. The web site of the Consortium notably mentions: "*Trips across the bridge are cheaper the more you and your employees cross the bridge in a year. ØresundBusiness is the flexible business contract for small as well as large companies in the Øresund Region*".

72. In view of the arguments above, the Commission considers the operation of the Fixed Link to be an economic activity. Furthermore, it would not have been possible to pursue this activity without having first constructed the Fixed link infrastructure. The construction of the Fixed Link infrastructure is therefore also an economic activity[28]. As a consequence the entity exploiting this infrastructure (i.e. the Consortium) constitutes an undertaking for the purposes of Article 107 (1) of the Treaty.

Construction and operation of hinterland connections

73. In Denmark and Sweden, road and rail infrastructure is provided and funded exclusively by the State as a matter of public policy. In neither of the States is the funding or operation of land transport infrastructure undertaken, wholly or partially, by private undertakings. On the contrary, land transport infrastructure is as a rule funded and managed exclusively by the States which have, in effect, not decided to open the market for the commercial operation of such infrastructure. In both countries, the provision of a nationwide land transport network remains, as a matter of public policy, within the essential tasks of the public authorities. As the Commission has explained in earlier decisions, State support will not constitute State aid when public powers carry out work to develop their land holdings, for instance, by funding infrastructure which will benefit the population as a whole. Moreover, the reason for which such infrastructure is set up is immaterial, provided that it is done in the overall general interest[29].

74. Through Article 8 of the Intergovernmental Agreement the States agreed to construct the necessary road and rail connections from the Fixed Link to the existing road and rail networks. According to Section 2(5) of the Consortium Agreement the States shall plan, finance, construct, operate and maintain necessary rail and road links from existing rail and road networks in each country to the Øresund Fixed Link. Denmark and Sweden delegated those tasks to A/S Øresund and SVEDAB AB respectively. These two special purpose companies were established with the purpose to own 50 % of the Consortium each and to plan, construct and manage the Danish and Swedish road and rail hinterland connections. A/S Øresund and SVEDAB AB delegated operation and management of rail hinterland connections to the respective national railway infrastructure managers (Banedanmark and Trafikverket). A/S Øresund and SVEDAB AB are not engaged in any other activities.

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28 See, for instance, Commission's decisions in case Cable Car for London (cited above), para 36.

29 See Commission decision 2003/227/EC of 2 August 2002, Terra Mitica SA, OJ L 91, 8.4.2003, p. 23.

75. In addition, as stipulated in Article 17 of the Intergovernmental Agreement, SVEDAB AB and A/S Øresund may not collect tolls for use by motor vehicles of the road access facilities in Sweden or Denmark. The road hinterland connections on both sides of Øresund can be used free of charge like any other motorway in Sweden and Denmark.

76. A/S Øresund and SVEDAB AB own the Danish and Swedish rail hinterland connections but Banedanmark and Trafikverket are the infrastructure managers. Banedanmark carries out all tasks related to infrastructure management of the railway, including provision of capacity, traffic regulation and safety measures and also covers the costs for this purpose, for example costs related to maintenance and reinvestments. Banedanmark compensate A/S Øresund for use of the railway network and the amount of compensation is fixed by the Minister for Transport.

77. Trafikverket is responsible for management and operation of the Swedish railways hinterland connections. SVEDAB AB receives annual compensation from Trafikverket from the traffic providers using the rail. Trafikverket is on the other hand compensated by SVEDAB AB for commitments and costs related to the operation and management of the rail hinterland connections, but not for costs related to new investments or reinvestments.

78. The hinterland connections on both sides of the Øresund are linked by several road interconnections and railway stations to the nearby agglomerations. They form an integral part of transport infrastructure in Denmark and Sweden.

79. The road hinterland connections are made available free of charge to all users and provide a benefit to the population as a whole. As they are not commercially exploited and as there is not market in Denmark and Sweden for the management and operation of the road hinterland connections, the Commission considers that SVEDAB AB and A/S Øresund are not engaged in economic activity and therefore do not constitute undertakings for the purposes of Article 107 (1) of the Treaty. For the same reasons, the financial funding made available to those companies for the construction of the road hinterland connections is not liable to distort competition and affect trade between member States.

80. With regard to the rail hinterland connections the Commission notes that the railway networks owned by SVEDAB AB and A/S Øresund form an integral part of transport infrastructure in Denmark and Sweden and are open to all potential railway operators on equal and non-discriminatory terms. Therefore, even supposing that the activities of SVEDAB AB and A/S Øresund constitute an economic activity, the Commission would consider that due to the nature of the national rail infrastructure network in both Member States, that there were no competition in the market for the operation and management of the national rail network. In addition, since the management and operation of the national network concerned is carried out in national, geographically closed and separated markets that are not subject to competition, public financial support made available to SVEDAB

AB and A/S Øresund is not liable to affect intra-community trade[30]. It follows from the above considerations that even if SVEDAB AB and A/S Øresund were considered as undertakings with respect to the planning, construction and management of rail hinterland connections, the measures they receive for the financing of those activities are not liable to distort competition or affect trade between Member States.

81. As a consequence of the above, the public funds granted to SVEDAB AB and A/S Øresund to finance the planning, construction and management[31] of the road and rail hinterland connections do not constitute State aid within the meaning of Article 107 (1) of the Treaty.

Conclusion

82. The Consortium constitutes an undertaking in the sense of Article 107(1) of the Treaty, at least with respect to the construction and operation of the Fixed Link. Thus, it is necessary to consider whether it received State aid. By contrast the advantages A/S Øresund and SVEDAB AB may have received cannot be considered as State aid.

4.1.2. State resources and imputability to the State

83. With regard to the state origin of the advantages resulting from the application of the measures, it should be recalled that the concept of aid is more general than that of subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect[32].

84. A measure by which the public authorities grant to certain undertakings exemption from a reduction in or a deferral of payment of the tax normally due, although not involving a transfer of state resources, places beneficiaries in a more favourable financial situation than other taxpayers and constitutes State aid within the meaning of Article 107(1) of the Treaty[33]. The same is true, for instance, when guarantees are granted by a Member State

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30 See Commission decision of 2 May 2013 in case SA.35948 (2012/N) – Czech Republic - Prolongation of the interoperability scheme in railway transport, OJ C 306, 22.10.2013, point 18 and following; Commission decision of 17 July 2002 in case N 356/2002 – United Kingdom - Network Rail; OJ C 232, 28.9.2002, p. 2.

31 As explained in recitals 76 to 77 the operation of the Danish and Swedish rail hinterland connections is done by the infrastructure managers, Banedanmark and Trafikverket respectively.

32 See *inter alia* the judgments of the Court of Justice in Cases C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90, and the case law cited therein; C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 77; and C-222/04 *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze*, cited above in footnote 28, paragraph 131, and the case law cited therein.

33 See, for example, the judgment of the Court of Justice in Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14.

without requiring the payment of a premium on market terms from the beneficiary of the guarantee. The State thereby foregoes State resources.

85. As a consequence, the guarantees granted for free by the Danish and Swedish States as well as the tax advantages granted to the Consortium by Denmark involve State resources and they are imputable to the States, as they result from legislative measures, i.e. the Intergovernmental Agreement and national laws.

4.1.3. Selective Advantage

86. According to settled case law, the application of Article 107(1) of the Treaty only requires it to be determined whether under a particular statutory scheme a state measure is such as to favour "certain undertakings or the production of certain goods" over others which are in a legal and factual situation that is comparable in the light of the objective pursued by that scheme[34].

87. Consequently, in order to identify what constitutes an advantage as contemplated in the case law on State aid, it is imperative to determine the reference point or the common system applicable, under a particular statutory scheme, against which that advantage is to be compared[35]. In this respect, the Court of Justice has ruled, moreover, that the determination of the reference framework is of particular importance in the case of tax measures since the very existence of an advantage may be established only when compared with 'normal' taxation, i.e. the conditions of taxation in force in the geographical area constituting the reference framework.

4.1.3.1. The guarantees

88. The guarantees reduce the costs that the Consortium would normally have to bear, through the payment of premium on market terms for the guarantees, or through the financing the Fixed Link without the guarantees. By giving the guarantees without requiring the payment of a premium on market terms, the States have not behaved as market economy investors would have behaved. Therefore, the States' guarantees confer an economic advantage on the Consortium. The Commission also notes that the advantage conferred by the guarantees is granted to the Consortium only. Thus, it is a selective measure within the meaning of Article 107 (1) of the Treaty.

4.1.3.2. The tax measures

89. Similarly, the special tax regime on depreciation and on loss carry forward reduce the tax liability of the Consortium compared to what it would have been in the absence of those measures and thereby confer an economic advantage to the Consortium.

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34 Judgment of the Court of First Instance in Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, paragraph 79, and the case law cited therein.

35 *Salzgitter* v *Commission*, cited above in footnote 29, paragraph 81. See also the Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3, paragraph 16).

90. As regards the alleged tax advantages, according to established case-law[36], the assessment of the material selectivity of a tax measure consists of three steps:

- first, it is necessary to identify the common or "normal" tax regime (the so-called "system of reference") applicable in the Member State concerned.
- second, it is necessary to determine whether the measure at stake derogates from the common or "normal" tax regime insofar as it differentiates between economic operators that are in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned. If this is the case, the measure would be *prima facie* selective.
- third, it is still necessary to determine whether the derogation results from the nature or general scheme of the taxation system of which it forms part. Thus, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State can show that the measure directly results from the basic or guiding principles of the tax system[37]. In this context, it is for the Member State to demonstrate that the differentiated tax treatment derives directly from the basic or guiding principles of that system.[38]

Loss carry forward

91. The system of reference is the normal Danish tax rules on loss carry forward that apply in principle to all undertakings in Denmark, as laid down in the Danish Act on Corporation Tax.

92. For the period 1991 to 2001, the loss carry forward regime applicable to the Consortium clearly derogated from the system of reference since the Consortium could carry forward losses for 15 years (and even 30 years for costs incurred before the operations of the Fixed Link started) instead of the normal 5-year loss carry forward regime applicable to all other Danish companies.

93. For the period 2001 to 2012, the general rule for loss carry forward was amended. The loss carry forward rules were the same for the Consortium as for other companies in Denmark and thus there was no derogation from the system of reference.

94. However, on 1 January 2013 the general loss carry forward regime was amended again. The rules applicable to the Consortium after that date derogated again from the system of reference since the Consortium was excluded from the limitation introduced on the

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36 See, *inter alia*, case C-88/03 *Portugal v. Commission* [2006] ECR I-7115, paragraph 56; joined cases C-78/08 to C-80/08 *Paint Graphos*, paragraph 49.

37 Case C-88/03 *Portugal v. Commission* [2006] ECR I-7115, paragraph 42.

38 See *inter alia*, case C-88/03 *Portugal v. Commission* [2006] ECR I-7115, paragraph 81; joined Cases C-78/08 to C-80/08 *Paint Graphos*, paragraph 65.

amounts of the yearly deduction (i.e. 60% of the amount in excess of DKK 7,5 million[39]) for all Danish companies.

95. The Commission therefore concludes that the special rules on the carry forward of losses that the Consortium enjoyed in the period 1991 to 2002 and since 2013 discriminate(d) between economic operators that were/are in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned. The rules applicable to the Consortium during those two periods were/are thus *prima facie* selective[40].

96. A measure which is *prima facie* selective may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the system of reference or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system[41]. On the contrary, external policy objectives which are not inherent to the system cannot be relied upon for that purpose[42]. It is up to the Member State concerned to demonstrate that a measure which is at first sight selective is justified by the nature or general scheme of its tax system.

97. The Danish authorities have argued that the special regime on loss carry forward can be regarded as justified by the logic of the system due to the extraordinary character of the project in terms of its size and purpose making it incomparable to any other infrastructure project that has been subject to Danish tax rules. Although the Commission accepts the principle that the extraordinary nature of infrastructure projects could justify a different tax treatment, it notes that the Danish tax law does not define or contain any specific rules for projects of an extraordinary character. The extraordinary character of the project is also not mentioned as a justification in the legislative texts that granted this advantage to the Consortium and is in any case not further substantiated. More generally, the Danish authorities did not sufficiently show why, and to what extent, the size and the purpose of a project would be sufficient to justify a differential tax treatment i.e. that such tax treatment would be consistent, necessary and proportionate in the light of the guiding principles of the Danish tax system. Hence, this differential tax treatment seems the result of an objective that is unrelated to the tax system of which it forms part. For this reason, the Commission concludes that the measure is selective.

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39 Act n°. 591 of 18 June 2012.

40 See, *inter alia*, Case C-88/03 *Portugal v. Commission* [2006] ECR I-7115, paragraph 56; joined Cases C-78/08 to C-80/08 *Paint Graphos*, paragraph 49.

41 See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraph 69.

42 See Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraphs 69 and 70; Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 81; Case C-279/08 P *Commission v Netherlands (NOx)* [2011] ECR I-7671; Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515.

Depreciation of assets

98. The system of reference is the Danish depreciation system applicable in principle to all companies in Denmark, as laid down in the Danish Depreciation Act.

99. With regard to rules on depreciation, the depreciation rate applicable to buildings and installations of all Danish companies is currently set at a rate of 4% (it was 6% until 1998, reduced to 5% for the period 1999 to 2007). As explained above, the Consortium has been subject to a 6% depreciation rate since 1991 and was excluded from any decrease of the depreciation rate under the Danish Depreciation Act. The current situation is that, pursuant to Sections 13 and 14 of the Sund & Bælt Act, the Consortium can depreciate at a maximum rate of 6% on the entirety of its assets (until the income year in which the total sum of the depreciation has surpassed 60%, from which point an annual depreciation rate of 2% applies).

100. The Commission observes that, since 1999, the depreciation rate applicable to the Consortium derogates from the common depreciation regime applicable to all other undertakings in Denmark that are in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned. The rules applicable to the Consortium are therefore *prima facie* selective.

101. The Danish authorities have argued that the deviation from the general regime on depreciation is justified by the logic of the system, because the Fixed Link is not comparable to other Danish infrastructure projects as regards its size, construction cost and purpose.

102. As mentioned above, the Commission agrees as a matter of principle that the extraordinary nature of infrastructure projects may justify a different tax treatment. However, it is up to the Member State to establish to what extent the extraordinary character of a project (in regard to its size or nature for example) makes it necessary and proportionate in light of the guiding principles of the national tax system to apply a different tax treatment. The Commission notes that the Danish tax law does not define projects of an extraordinary character and does not contain specific rules for such projects. The extraordinary character of the project is also not mentioned as a justification in the legislative texts that granted this advantage to the Consortium and is in any case not further substantiated. More generally, the Danish authorities did not sufficiently show why the size and/or the purpose of a project is sufficient to justify that a higher rate of depreciation for projects of a certain size or nature would be consistent, necessary and proportionate in the light of the guiding principles of the Danish tax system.

103. Hence, the Commission can neither conclude that the different depreciation rules applicable to the Consortium derive directly from the intrinsic basic or guiding principles of the tax system of which they form part, nor that they are necessary for the functioning and effectiveness of that system. Therefore, the Commission concludes that this measure is not justified by the nature and general scheme of the tax system and that it is selective.

Joint Taxation

104. The system of reference for the joint taxation regime is the provisions on mandatory group taxation in the Danish Company Tax Act. Since the joint taxation regime is mandatorily applicable to all Danish undertakings within a group and not specifically to the Consortium, no selective economic advantage is conferred to the Consortium.

4.1.4. Distortion of competition and effect on trade between the Member States

105. When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as affected by that aid. In accordance with settled case law[43], for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.

106. The Consortium is active on the market for the construction and operation of (cross border) bridges and on the market for transport services to cross the Øresund strait. On the latter the Consortium competes with operators of the other modes of transport, for example ferry services. As a consequence it cannot be excluded that the measure at stake distorts or threatens to distort competition on that market.

107. It follows that the State guarantees granted by the Danish and Swedish States to the Consortium for the financing of the Øresund Fixed Link as well as the special tax regime on depreciation of assets and on carry forward of losses that Denmark granted to the Consortium constitute State aid in the sense of 107(1) of the Treaty.

108. On the other hand, the joint taxation regime does not constitute State aid within the meaning of Article 107(1) of the Treaty.

4.1.5. New or existing aid

109. The guarantee granted by the Danish State and the the special tax regime on depreciation of assets and on carry forward of losses that Denmark granted to the Consortium must be considered as new aid in the sense of Article 1(c) of Regulation (EC) No 659/1999[44].

110. As regards the guarantee granted to the Consortium by the Swedish state, the Commission notes that the guarantee was granted prior to Sweden's accession to the EU and prior to the entry into force of the EEA Agreement on 1 January 1994. Accordingly, the guarantee provided by Sweden is existing aid in the sense of Article 1(b)(i) of Council Regulation No 659/1999 and Article 144 of the Act of Accession for Sweden.

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43 Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

44 Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 83, 27.3.1999, p. 1, as amended by Regulation (EU) No 734/2013, OJ L 204, 31.7.2013, p 15.

4.2. COMPATIBILITY OF STATE AID

111. According to Article 107(3)(b) of the Treaty, aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market.

112. Indeed, pursuant to Article 107 (3) (b) of the Treaty and with regard to important projects of common European interest, the Commission has established four criteria to be fulfilled cumulatively as a prerequisite for considering State aid to be compatible with the internal market[45]:

- the aid must "promote" a project, meaning to take action which contributes to implementation of the project;
- the project must be specific, precise and clearly defined;
- the project must be important both quantitatively and qualitatively, with an emphasis on the qualitative aspect;
- the project must be 'of common European interest' and as such be of benefit to the whole of the Union.

113. Moreover, with the adoption of the Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (IPCEI Communication) on 20 June 2014[46], the assessment of public financing of such projects has been updated and consolidated. Although the principles set out in that communication are only applicable to non-notified aid granted after that communication was published in the Official Journal of the European Union, the Commission considers it appropriate to apply the criteria of necessity and proportionality to the present case in the light of the IPCEI Communication.

4.2.1. The aid must promote the project

114. The State guarantees as well as the special regime on depreciation and on carry forward of losses provided to the Consortium undisputedly contribute to the accomplishment of the project and to its viability. The Øresund Fixed link can be considered a *sui generis* project, which establishes two cross border transport lines (road and rail) and, which has received EU funding under the TEN-T framework. It is highly unlikely that the market itself could provide transport infrastructure of this kind in particular due to the scale of the project, the significant investments costs needed and the uncertainties related to the profitability of such an investment.

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45 See, for example, Commission Decision N 157/2009 of 17 March 2009 in Financing of the planning phase of the Fehmarn Belt fixed link (OJ C 2002 of 27 August 2009, p. 1); Commission Decision of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ L 146 of 20 June 1996, p. 42), Commission Decision N 576/98 of 22 December 1998 – United Kingdom – Channel Tunnel Rail Link (OJ C 56 of 26 February 1999, p. 6) and Commission Decision N 420/08 of 13 May 2009 – United Kingdom – Restructuring of London & Continental Railways.

46 OJ C 188 of 20 June 2014, p. 4.

4.2.2. The project has to be specific, precise and well-defined

115. The Øresund Fixed Link is a specific, precise and clearly defined project. Article 2 of the Intergovernmental Agreement specifies that the Fixed Link shall be built as a combined road and rail link consisting of a twin-track railway and a four-lane motorway and that it shall extend from an artificial peninsula at Kastrup Airport and cross the Øresund via an immersed tunnel to an artificial island and from there proceed as a combined high- and low bridge to join Sweden to the south of Linhamn.

116. In addition, Annex 1 to the Intergovernmental Agreement provides a detailed description of the technical design of the Fixed Link. Thus, at the time when the measures were granted to the Consortium the project was, both in terms of geographical location and technical design, very specific and clearly defined.

4.2.3. The project has to be important quantitatively as well as qualitatively

117. The Fixed Link across Øresund is a major project of European transport infrastructure. The construction of the Fixed link cost approximately DKK 20 billion (EUR 2.7 billion) and including the costs of the construction of the connecting land infrastructures, the total costs of the project is approximately DKK 30 billion (EUR 4 billion) (NPV at 2000 prices).

118. The project was realised by a partnership between Sweden and Denmark and it was fully endorsed at Union level as the Fixed Link forms an integral part of the trans-European transport network (TEN-T priority project 11). The project significantly improves the mobility of people and provides a physical connection of people and businesses in the cross-border Øresund Region inhabited by more than 3.5 million people.

119. The Commission considers that the Øresund Fixed Link is quantitatively and qualitatively important, and to the benefit of the whole Union.

4.2.4. The project is of a common European interest

120. The Øresund Fixed Link was on the first list of TEN-T priority projects endorsed by the European Council in 1994 and has contributed to a better connection of the Nordic countries to Central Europe. The Øresund Fixed Link connects also the Nordic Triangle road and rail links (TEN-T priority project 12) via Denmark, to the Fehmarn Belt (priority project 20) between Germany and Central Europe.

121. The Fixed Link therefore plays an important role in common European transport policy. It is generally recognised that the TEN-T also contribute to attaining other overall Union objectives such as the smooth functioning of the internal market and the strengthening of economic and social cohesion.

4.2.5. Necessity and proportionality of aid

122. According to the IPCEI Communication the aid must not subsidise the costs of a project that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity. Without the aid the project's realisation should be impossible, or it should be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits. Moreover, aid will only be considered proportionate if the same result could not be achieved with less aid.

123. The State guarantees and fiscal measures granted to the Consortium were necessary and proportionate to the objective pursued under the circumstances that existed at the time for raising private financing for the project. The Commission notes that the measures were adopted at a time where it was generally agreed that the public financing of such infrastructure was not covered by EU State aid law.

124. The possibility of constructing a fixed link between Sweden and Denmark had been on the agenda for more than 35 years prior to the conclusion of the Inter-governmental Agreement. During this period there were no indications that such an extraordinary large-scale infrastructure project could be established without public support. The Fixed Link infrastructure project required substantial capital investments that could only be recovered in the very long term and numerous uncertainties existed in relation to the revenues of the Fixed Link. No rational private investor would have engaged in the financing of such a project under normal market conditions. Hence, without the aid the project would not have been realised. The States submit that all calculations of the project financing were based on the assumption that the loans obtained by the Consortium to finance the Fixed Link would be fully covered by State guarantees, as prescribed by the Intergovernmental agreement. Consequently, a comparison of the profitability of the project with an equivalent scenario without the State guarantees and tax advantages was not carried out.

125. In addition, the provision of Union funds under the TEN-T framework (EUR 127 million representing 6% of the total project costs) further demonstrates the necessity of public funding for the realisation of the Fixed Link project.

126. The initial budget estimated that the total costs of planning and constructing the Øresund Fixed link were DKK 11,7 billion (EUR 1,55 billion). The estimated cost of the hinterland connections was DKK 3,2 billion (EUR 0,43 billion) in Denmark and DKK 1,95 billion (EUR 0,26 billion) in Sweden. Hence, the total costs of the project were estimated at approximately DKK 16,9 billion (EUR 2,25 billion) (at 1990 prices).

127. Moreover, it is noted that the Consortium's actual accumulated interest-bearing net debt was DKK 19.4 billion at the end of 2000, the year the Fixed Link was opened. By end of 2003 the interest-bearing net debt had increased to DKK 20.1 billion, while by end of 2013 the interest-bearing net debt was DKK 16.6 billion. The Consortium expects that the actual accumulated interest-bearing net debt will not increase above the 2013 level.

128. While the repayment period for the investment undertaken by the Consortium was estimated at 30 years in 1991, in the period since 2000, this estimation of the repayment

period has fluctuated between 30 and 36 years. The estimated debt repayment period for the Consortium is calculated on an annual basis and published in the Consortium's annual reports. In the annual report from 2013 it is estimated that the Consortium will have repaid its debt by 2034. This calculation is based on a number of forecasts concerning, *inter alia*, development of traffic revenues, operational costs, reinvestment costs, financing costs, dividend payments to the parent companies etc. Of these, the most important is the forecast concerning (road) traffic revenues, which accounts for 75% of total revenues, and which has varied considerably over time. As a result of the uncertainties concerning future traffic developments, the Consortium has set out three possible scenarios for future traffic developments: a base case scenario with repayment period after 34 years[47], a growth scenario with repayment period of 30 years[48] and a stagnation scenario with a repayment period of 43 years[49].

129. Given the nature and the size of the Øresund Fixed Link project the aid contained in the chosen financial structure involving two State guarantees covering 100 % of the Consortium's liabilities and tax advantages should be considered proportionate and limited to the minimum necessary. Any other means of financing the Fixed Link would have resulted in the same project but entailed a significant risk of higher financing costs for the States. If, for examples, the States had provided capital injections or loans to the Consortium, there would have been a risk that the total burden on the States' budgets would have been higher and as a consequence the total costs of the project would have increased. The Commission also notes that, so far, there has been no need for any creditor to draw on the guarantees, and that there are no indications that the Consortium should not be able to meet its obligations in the future.

130. As explained above[50] the main purpose of the State guarantees is to ensure the financing of the construction of the Fixed Link and to make sure that the Consortium cannot obtain loans covered by the guarantees with a view to extend its activities beyond that objective.

131. It follows that the State guarantees are limited to the extent that the Consortium needs to (re)finance its debt, which has been accumulated in the context of the Consortium's tasks relating to the financing of the Fixed Link. Since the State guarantees can only be used for the tasks relating to financing of the Øresund Fixed Link and not for any other purposes, they are in effect limited to covering the total amount of the Consortium's accumulated debt at any point in time. Moreover, the guarantees are in effect limited in time, since the

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47 The base case scenario envisages moderate growth of 4% for the next few years after which growth will decrease gradually towards a long term trend of 1,8%.

48 The growth scenario assumes that the integration of the Øresund Region will result in strong traffic growth as was the case before the global recession. The Danish and Swedish economies are reviving, and annual traffic growth is assumed to increase by approximately 6%, arriving at 2,5% in the long run.

49 The stagnation scenario assumes negative growth for the next few years followed by moderate growth of approximately 2% over the medium term and a long-term trend of a little more than 1 per cent.

50 See recitals 31 to 33.

Consortium will not be able to benefit from the guarantees after the debt has been fully repaid[51].

132. With respect to the concrete effect of the tax measures, the Danish authorities have confirmed that the advantage of the special depreciation rules amounted to about DKK 304 000 (around EUR 41 000) for the period 1991 to 2013. With regard to loss carry forward rules, according to the Danish authorities in the absence of the special regime[52], losses amounting to approximately DKK 1 700 000 (approximately EUR 228 021) that could be carried forward would have been "lost" in the absence of special tax rules. This would have lengthened the repayment period of the project and would have had negative implications for its financial robustness.

133. The Commission observes that the tax treatment of the Consortium in respect of depreciation and loss carry forward was defined in the context of the different agreements establishing the legal and financial framework for the construction and operation of the Fixed Link, including the guarantees. It also appears that the special rules granted to the Consortium were expected to contribute to the viability of the project, by reducing the repayment period and lowering the risk associated with the reimbursement of the loans by the Consortium. It would appear that, as compensation to the advantage resulting from the tax measures, the risk associated with the two States guarantees – and the advantage resulting from the granting of those guarantees – was reduced; i.e. the advantage resulting from the guarantees and advantage resulting from the tax measures appear to be interdependent.

134. The State guarantees and any other economic advantages, including tax advantages, which the Consortium might receive, are limited to the actual debt repayment period. The States have committed that the Consortium will not receive any such advantage after it has fully repaid its debt.

135. In addition, the States committed that if it will be necessary for the Consortium to adopt new loans covered by State guarantees after the end of 2040, or if it will be necessary for the States to grant any other economic advantages to the Consortium after that date, the States will notify this to the Commission pursuant to Article 108(3) of the Treaty.

136. The States also committed to inform the Commission on an annual basis about progress in the repayment of the Consortium's debt.

137. For all those reasons, the Commission considers that, assessed jointly, the special tax measures and the guarantees were necessary and proportionate to the objective of general interest pursued.

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51 See recitals 128 to 129 of the present decision.

52 Which the Commission considers to be justified by the nature and general scheme of the Danish tax system, and therefore not State aid.

138. Therefore, the Commission considers that the measures under scrutiny are compatible with the internal market under Article 107(3)(b) of the Treaty. In any case, even supposing that the aid measures at stake were incompatible with the internal market, they would not be recovered by the Member States concerned, for the reasons set out in the next section.

139. The assessment above applies to both the Danish and Swedish guarantees. With regards to the conclusion in recital 137 the Commission considers that there is no need to propose appropriate measures to Sweden.

5. LEGITIMATE EXPECTATIONS

140. Pursuant to Article 14(1) of Regulation (EC) No 659/1999, any aid found to be incompatible with the internal market granted under the scheme at issue must be recovered.

141. Article 14(1) provides, however, that '[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. In this respect, it has been ruled that the Commission is required to take into consideration on its own initiative exceptional circumstances that provide justification, pursuant to Article 14(1), for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Union law[53].

142. The Court has consistently held that the right to rely on the principle of the protection of legitimate expectations extends to any person to whom an institution has given rise to justified hopes. In addition, the Court has accepted that legitimate expectations can arise only where the Commission itself has given precise assurances that the measure in question does not constitute State aid[54]. It is also right that, in principle, there is no legitimate expectation on the part of recipients of aid unlawfully implemented[55].

143. In the present case, in view of the combination of the highly specific circumstances described in recitals 144 to 153, the Commission is of the opinion that the Member States concerned and the beneficiary of the aid measures should benefit from the principle of the protection of legitimate expectations.

144. First, the Commission's position at that time when the State guarantees were granted to the Consortium in 1992 was to consider public financing of the construction and operation of infrastructure projects as public goods and not economic activity. The

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53 See Judgment of the Court of Justice in Case 223/85 *RSV* v *Commission* [1987] ECR 4617.

54 See Case C-182/03 and C-217/03, *Forum 187 ASBL* [2006] ECR I-5479, para 147; Case C-506/03 *Germany v Commission*, [2005] not yet published, paragraph. 58.

55 See Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava v Commission* [2004] ECR I-10609, paragraphs 44 and 45, and the case law cited therein.

position was clearly spelt out in various soft law instruments[56] as well as certain Commission decisions[57]. As noted in recitals 64 to 66, the Commission's position has evolved over time, and with the General Court's judgment in *Aéroports de Paris* it has been very clear that the construction and operation of infrastructure may be considered as an economic activity.

145. Second, in view of these developments, the Commission has adopted a general policy that financing measures for the construction and operation of infrastructure definitively adopted before the judgment in *Aéroports de Paris* can no longer be called into question on the basis of State aid rules. In this regard, the Commission has considered public authorities could legitimately consider that financing measures definitively adopted before the judgment in *Aéroports de Paris* did not constitute State aid and accordingly did not need to be notified to the Commission[58].

146. Third, in line with the Commission's policy at the time, the Commission services informed Denmark and Sweden in 1995 that the State guarantees in question did not constitute State aid within the meaning of Article 107(1) of the Treaty.

147. Indeed, while the Commission did not receive a formal notification pursuant to Article 108(3) of the Treaty by the two Member States concerned, the Consortium duly informed the Commission of the existence of the State guarantee by its letter of 1 August 1995 and asked for the position of the Commission as regards the qualification as State aid of the two State guarantees.

148. In that context, it is relevant to note that the letter was submitted to the Commission prior to the entry into force of Regulation No 659/99 and of Commission Regulation (EC) No 794/2004, which introduced new formalities for State aid notifications, including

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56 See, for instance, Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350 of 10.12.1994, point 12 of these guidelines refers explicitly to bridges: *The construction of enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid.*; The Commission's 1998 White Paper on fair payment for infrastructure use: A phased approach to a common transport infrastructure charging in the framework in the EU (COM (1998) 466 final of 22 July 1998, paragraph 43; Green Paper on Sea Ports and Maritime Infrastructure. COM (97) 678 final of 10 December 1997, paragraph 42; 2001 Communication on improving the quality of European ports (COM (2001) final of 13 February 2001, p. 11).

57 See, Commission's decisions in cases N 208/2000 – Netherlands - Subsidy Scheme for Public Inland Terminals (SOIT); N 356/2002 – United Kingdom - Network Rail (OJ C232/2002); N 649/2001 Freight Facilities Grant (OJ C 45 of 19.02.2002) point 45, N 284/2005 Irish Broadband, point 34, C 42/2001 Terra Mitica SA, point 64; N 355/2004 PPP Antwerp Airport, point 34; N 550/2001 Partenariat public privé pour la construction d'installations de chargement et de déchargement, point 24; N 649/2001; Ems Flood barrier at Gandersum, IP/98/539 of 17.7.1998; N 511/1995 Jaguar Cars Ltd. See also reply of the Commission to written question No 28 of Mr Dehousse of 10 April 1967, OJ No 118, 20. 6. 1967, p. 2311/67.

58 See, for instance Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, p. 3, paragraphs 28-29; Commission's Decision C 38/2008 of 3 October 2012 on Munich airport Terminal 2, OJ L 319, 29.11.2013, p. 8, paragraphs 74 to 81.

notification forms, and electronic submission through the SANI system with validation by Member State's Permanent Representations (see Article 2 of that regulation)[59].

149. In respond to the Consortium's letter of 1 August 1995, on 27 October 1995, the Commission services sent two letters to the two Member States concerned but not to the Consortium. In those letters, signed by the Director General for Transport, the Commission informed the two Member States concerned that the State guarantees in question did not constitute State aid within the meaning of Article 107(1) of the Treaty and that, as a consequence, the guarantee in question should not be notified to the Commission.

150. In that regard, it has to be noted that the conclusion in the Commission's letters of 27 October 1995 was fully consistent with the decision practice of the Commission at the time. As explained in recital 143, the construction and operation of infrastructure was not considered an economic activity by the Commission at the time the State guarantees were granted to the Consortium and therefore was not subject to State aid rules.

151. It has to be further noted that in addition to the Consortium's letter of 1 August 1995 the fact that the Øresund Fixed Link was approved as a TEN-T project and received Union funding, shows that the Commission was duly informed that the measure in the form of State guarantees would be implemented.

152. Fourth, even though the Commission was not informed of the tax measures by the Consortium's letter of 1 August 1995, the Commission considers that the conclusion that the State guarantee did not constitute State aid and did not need to be notified gave Denmark legitimate expectations that the specific tax measures applicable to the Consortium did not constitute State aid either, because they were attached to an infrastructure project that was considered not to constitute an economic activity.

153. Given the exceptional nature of the above mentioned circumstances and the information about the public financing of the Fixed Link at the possession of the Commission, the Commission considers that the States and the Consortium could have legitimate expectations that the Commission would not call into question the State guarantees and the tax measures on the basis of State aid rules. It is not necessary to determine whether these legitimate expectations extend beyond the date of the General Court's judgment in *Aéroports de Paris* to the present date or even to the moment in the future when the Consortium will have repaid all its debts, since the Commission considers that the State guarantees and the fiscal benefits are, in any event, compatible with the internal market.

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[59] The Commission would point out that, since the entry into force of Regulation No 659/99 and of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing it (OJ L 140, 30.4.2001, p. 1), such a state of affairs cannot happen again. Both Regulations remind Member States of their obligation to notify in advance any proposal to grant new aid. The practical arrangements for making such notifications, such as the use of standard forms, are set out clearly.

6. CONCLUSION

The Commission has decided, on the basis of the foregoing assessment, including in particular the commitments provided by Denmark and Sweden, not to raise objections to the Danish special tax measures for depreciation of assets and carry forward of losses and the guarantees granted by Denmark to the Consortium, on the grounds that those State aid measures are compatible with the internal market pursuant to Article 107(3)(b) of the Treaty.

The guarantee granted to the Consortium by Sweden is an existing aid measure. On the basis of the foregoing assessment, including in particular the commitments provided by Denmark and Sweden, the Commission considers that there is no reason to initiate the procedure regarding existing aid schemes.

The Commission considers that the Danish joint taxation regime and the measures granted to SVEDAB AB and A/S Øresund for the financing of the road and railway hinterland connections in Sweden and Denmark do not constitute State aid within the meaning of Article 107(1) of the Treaty.

The Danish and Swedish authorities agree exceptionally to waive its rights deriving from Article 342 of the Treaty in conjunction with Article 3 of the EC Regulation 1/1958 and to have this decision adopted and notified in 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 by registered letter or fax to:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Belgium
Fax: +32 2 296 12 42
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission

Joaquín ALMUNIA
Vice-president

CERTIFIED COPY
For the Secretary-General,
Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION