

State aid: Commission opens in-depth investigation into public financing of Øresund fixed rail-road link

Commissioner Margrethe **Vestager**, in charge of competition policy, said: *“The Øresund link has been instrumental in the cross-border integration of two dynamic regions and brought significant benefits to citizens and businesses on both shores and beyond. The Commission already approved State aid for the building and operating of the link in 2014 but the Court annulled this decision, finding that the Commission should have opened an in-depth investigation. Today’s opening of such an investigation is an invitation for all stakeholders to provide their input, which will allow the Commission to adopt a new, well-informed final decision”*.

The Commission has today opened an in-depth investigation under EU State aid rules into the aid measures granted by Denmark and Sweden to the consortium owning and operating the Øresund fixed rail-road link.

The Øresund fixed rail-road link consists in a toll-funded 16 kilometres long bridge, an artificial island and a tunnel for road and railway traffic from the Swedish coast to the Danish island of Amager. It is the longest combined road and rail bridge in Europe and connects Copenhagen to Malmö. The link was built between 1995 and 2000 and has been in operation since June 2000.

The Øresundsbro Konsortiet, a consortium formed by the Danish and Swedish states, owns and operates the Øresund fixed rail-road link on the basis of an intergovernmental agreement. Under this agreement, Denmark and Sweden guarantee the loans that the consortium secured in order to finance the link. Denmark also foresaw a special tax treatment for the consortium as regards depreciation of assets and fiscal loss carry forward.

In 2013, Scandlines Øresund I/S (“Scandlines”) filed a complaint with the Commission alleging that the State guarantees granted by Denmark and Sweden to the Øresundsbro consortium, as well as certain tax advantages granted by Denmark, were incompatible with EU State aid rules.

On [15 October 2014](#), the Commission concluded that the Danish and Swedish support measures were in line with EU State aid rules. In particular, the Commission found that the public guarantees on the consortium’s loans and the tax measures implemented by Denmark constituted State aid, as they gave a selective advantage to the consortium, which operates the link on a commercial basis. However, the Commission found that the measures were necessary and proportionate for this project of common European interest to be completed. Therefore, the Commission concluded that the measures were compatible with EU State aid rules.

On 19 September 2018, following an appeal of the Commission’s 2014 decision by Scandlines, the General Court partially annulled the Commission’s decision

on procedural grounds (Case [T-68/15](#)). While the General Court did not rule directly on the compatibility of the measures with EU State aid rules, it found that the Commission should have opened a formal investigation to assess the case in-depth before adopting its State aid decision.

The Commission investigation

To comply with the General Court's September 2018 judgment, the Commission has today opened an in-depth investigation under EU State aid rules into the guarantees on the consortium's loans by Denmark and Sweden and the tax support measures implemented by Denmark.

Although these types of measures can be considered as aiming to promote an important project of common European interest, the Commission will focus in particular on the following elements in its investigation, as required by the Court:

- (i) the nature of the measures and whether they constitute individual aid or aid schemes, existing or new aid;
- (ii) the compatibility of the measures with EU State aid rules; and
- (iii) the precise period during which the consortium, Sweden and Denmark could invoke legitimate expectations barring recovery, should the measures ultimately be found to constitute incompatible State aid.

The opening of the in-depth investigation gives all interested parties the opportunity to submit their comments. It does not prejudge the outcome of the investigation.

Background

Traditionally, public support for the construction and operation of infrastructure projects was considered not to involve State aid. However, there have been important market developments, which led to increasingly commercial use of such infrastructures. The EU Court of Justice confirmed that public funding of infrastructure investment projects is subject to EU State aid rules when the infrastructure is intended to be commercially exploited (Joined Cases [T-443/08 and T-455/08 Leipzig Halle](#)). Therefore, public funding for projects like the Øresund link must be assessed under EU State aid rules.

EU State aid rules allow Member States to grant support for such infrastructure investments to stimulate economic growth, subject to certain conditions – this includes in particular the need to avoid overcompensation and to ensure that there is a level playing field in the market.

The non-confidential version of the decision will be made available under the case numbers SA. [52162](#) and [52617](#) in the [State Aid Register](#) on the [competition](#) website once any confidentiality issues have been resolved. New publications of state aid decisions on the internet and in the Official

Journal are listed in the [State Aid Weekly e-News](#).

[ESMA TRV: Political uncertainty amid growth slowdown weighs on market sentiment](#)

Uncertainty related to Brexit, amid weakening growth prospects, global trade tensions, and reduced global monetary policy stimulus have contributed to market risk remaining very high.

The fourth quarter of 2018 saw increasing volatility on equity and sovereign bond markets, a decrease in equity prices, continued repricing on corporate and sovereign bond markets, and regional developments leading to localised sell-offs and increased short-selling activity.

Overall risk levels for the European Union's (EU) financial markets remained stable but at high levels for most risk categories, particularly liquidity, market contagion and credit risk. Securities markets experienced several episodes of short-term volatility, and equity markets suffered sharp declines from October onwards, erasing all the gains made in the first half of 2018.

Going forward, EU financial markets can be expected to become increasingly sensitive to mounting political and economic uncertainty, with concerns over a no-deal Brexit weighing on economic and market expectations.

Areas of focus

ESMA, in a series of articles in the Vulnerabilities section of the TRV, also looks in more detail at the following issues:

- **RegTech and SupTech:** We examine how technology can help supervised entities and supervisors to perform their duties. New automated tools in areas such as fraud detection, regulatory reporting and risk management are available for firms, while potential applications of new tools for regulators include greater surveillance capacity and improved data collection and management.
- **Retail Alternative Investment Funds – heterogeneity across the EU:** We provide an overview of the EU market for Alternative Investment Funds (AIFs) sold to retail investors. Overall, the size of AIFs sold to retail investors accounts for 18% of the AIF market in terms of NAV in 2017. The data do not suggest significant signs of liquidity mismatch for AIFs held exclusively by retail clients in 2017.
- **Double Volume Cap mechanism – impact on EU equity markets:** We analyse the impact of the DVC mechanism on market liquidity in lit markets. For equities banned by the DVC mechanism, trading in dark pools dropped from

7% to less than 1% in August before increasing again above 5% in September 2018, when the ban was lifted. The share of trading in periodic auctions increased over the same period from virtually 0% to 4% of the total before declining to 2%. Market liquidity in lit markets improved in terms of breadth and depth, while it worsened in terms of tightness, as measured by the spread between bid and ask

- **Money Market Funds in the EU – new stress-testing requirements:** This article provides an overview of potential financial stability risks posed by MMFs, and how the MMF Stress test guidelines aim at increasing the resiliency of the sector by addressing the issues identified, such as the “first-mover advantage”. The Regulation also introduces new stress-testing requirements, as part of fund risk management and regulatory disclosure. ESMA will design common parameters and scenarios to coherently capture the risks of the sector. Stress test results will be reported to ESMA and the National Competent Authorities (NCAs).

[Indicative programme – Transport, Telecommunications and Energy Council meeting \(Energy issues\) of 4 March 2019](#)

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Cyber Security and Cyber Risk: A universal Challenge

Cyber Security and Cyber Risk: A universal Challenge – Keynote speech by Gabriel Bernardino, Chairman, European Insurance and Occupational Pensions Authority (EIOPA) at the 3rd Annual FinTech and Regulation Conference on “Taking innovation to the next level” on 26 February 2019 in Brussels

Mergers: Commission approves RWE's acquisition of E.ON electricity generation assets

RWE and E.ON are both energy companies based in Germany and are active across the whole electricity supply chain, from generation and wholesale to distribution and retail of electricity. The two companies are engaged in a complex asset swap. Following this asset swap, RWE will be primarily active in upstream electricity generation and wholesale markets, whereas E.ON will focus on the distribution and retail of electricity and gas.

As part of the asset swap, RWE would acquire (i) the majority of E.ON's renewable and nuclear generation assets and (ii) a 16.67% minority interest in E.ON as part payment for the assets it is selling to E.ON in the context of the asset swap .

E.ON's acquisition of RWE's distribution and retail business is being assessed separately by the Commission and is still under review (case [M.8870](#)).

The Commission's investigation

The Commission assessed the impact of the transaction on the **generation and wholesale supply of electricity**. Its assessment focused on **Germany**, the main country where the activities of RWE and E.ON's electricity generation assets overlap.

During its investigation, the Commission received feedback from a large number of competitors and customers of RWE and E.ON, as well as regulators, municipalities, grid operators and energy exchanges.

The Commission's investigation found that the transaction is:

- **Unlikely to hinder effective competition in the generation and wholesale supply of electricity.** RWE has a market share slightly above 20% (and approximately 30% in conventional power generation only), but the increment created by the transaction is very small (less than 1% overall and also less than 1% based on conventional power generation only). In addition, part of the increment would only be temporary in nature since the nuclear capacity transferred to RWE will have to be decommissioned by end of 2022, at the latest.
- **Unlikely to affect RWE's ability and incentives to influence market prices** through withholding electricity supply, as the increment is too small to materially enhance RWE's incentives do so.

The Commission therefore concluded that the transaction would raise no competition concerns as RWE would continue facing effective competition after the transaction on the markets for generation and wholesale supply of electricity, and cleared the case unconditionally.

During its investigation, the Commission also cooperated closely with the Bundeskartellamt, the German competition authority, and the Competition and Markets Authority, the UK competition authority, as RWE's acquisition of the 16.67% minority stake in E.ON is notifiable to these authorities under national law.

Companies and products

RWE, based in Germany, is an energy company currently active across the whole electricity supply chain. Following the completion of the asset swap with E.ON, RWE will be primarily active in the generation and wholesale supply of electricity.

E.ON, based in Germany, is an energy company also currently active across the whole electricity supply chain. Following the completion of the asset swap with RWE, E.ON will focus on the distribution and retail of electricity and gas.

Merger control rules and procedures

The transaction was notified to the Commission on 22 January 2019.

The Commission has the duty to assess mergers and acquisitions involving companies with a turnover above certain thresholds (see Article 1 of the [Merger Regulation](#)) and to prevent concentrations that would significantly impede effective competition in the EEA or any substantial part of it.

The vast majority of notified mergers do not pose competition problems and are cleared after a routine review. From the moment a transaction is notified, the Commission generally has a total of 25 working days to decide whether to grant approval (Phase I) or to start an in-depth investigation (Phase II).

A non-confidential version of today's decision will be available on the

Commission's [competition](#) website, in the [public case register](#) under the case number [M.8871](#).