

COMMISSION DECISION (EU) 2022/459**of 10 September 2021****on the State aid SA.49668 (2019/C) (ex 2017/FC) and SA.53403 (2019/C) (ex 2017/FC) implemented by Denmark and Sweden for PostNord AB and Post Danmark A/S***(notified under document C(2021) 6568)***(Only the Danish and Swedish versions are authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having given notice to the parties concerned to submit their comments pursuant to those provisions ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 27 November 2017, *Brancheorganisation for den danske vejgodstransport* ('ITD') submitted a complaint to the Commission on several measures that were granted or were planned to be granted by Denmark and Sweden to Post Danmark A/S ('Post Danmark'). The Commission has assessed several of those measures in its Decision SA.47707 of 28 May 2018 ('the 2018 Decision') ⁽²⁾. In the 2018 Decision, the Commission announced that it would adopt a separate decision on the remaining measures, which are the subject of the present Decision:
 - (a) a capital injection from PostNord Group AB ('PostNord Group') into Post Danmark;
 - (b) a capital injection from Denmark into PostNord AB; and
 - (c) a capital injection from Sweden into PostNord AB.
- (2) By letters dated 20 December 2017, 12, 13 and 28 March 2018, 3, 6 and 26 April, 15, 26, 28 and 30 May, 1 and 13 June 2018, 9 October 2018, 10 December 2018, 6 and 13 March 2019 the Danish and Swedish authorities either jointly or individually provided the Commission with further information ⁽³⁾.
- (3) By letter dated 14 June 2019, the Commission informed Denmark and Sweden that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU') in respect of the aid ⁽⁴⁾ ('the opening decision'). The Commission requested Denmark and Sweden to submit their comments and to provide all such information as may help to assess the remaining measures, and also invited all interested parties to submit their comments on the remaining measures.

⁽¹⁾ OJ C 268, 9.8.2019, p. 4.

⁽²⁾ Commission Decision SA.47707(2018/N) of 28 May 2018 – State compensations granted to PostNord for the provision of the universal postal service – Denmark.

⁽³⁾ See State aid – Denmark and Sweden – State aid SA.49668 (2017/FC) and SA.53403(2017/FC) – Alleged State aid to Post Danmark – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 268, 9.8.2019, p. 4), recitals (3) to (11).

⁽⁴⁾ State aid – Denmark and Sweden – State aid SA.49668 (2017/FC) and SA.53403(2017/FC) – Alleged State aid to Post Danmark – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 268, 9.8.2019, p. 4).

- (4) The Commission received the first comments from Sweden and Denmark on the opening decision by letters dated 12 and 16 July 2019 respectively.
- (5) The Commission received comments from seven third parties, including ITD, on the opening decision by letters dated 17 September 2019.
- (6) The Commission forwarded the comments from all third parties to Sweden and Denmark on 3 and 14 October 2019.
- (7) The Swedish and Danish authorities provided their comments on the comments from third parties by joint letter and separate letters on 13 December 2019.
- (8) In the course of the proceedings, the Commission received additional comments from Sweden and Denmark on 24 March 2020 and 19 May 2020 following requests for information of 14 February 2020 and 22 April 2020.
- (9) The Commission received additional comments from ITD on 15 May 2020 and 5 February 2021. The latter was forwarded to Sweden and Denmark on 9 February 2021. Denmark and Sweden reacted by email on 7 April 2021.

2. DETAILED DESCRIPTION OF THE AID

2.1. Beneficiaries

2.1.1. *Post Danmark and PostNord AB*

- (10) The provision of postal services as an integrated part of the Danish government dates back to 1711. The nationwide circulation of postal items was introduced in 1865. Until 1995, the postal services in Denmark were conducted under the responsibility of the Ministry of Public Works.
- (11) By Act No 88 of 8 February 1995 ⁽⁵⁾, Denmark transferred all of the activities of the postal service to Post Danmark, which was established as an independent public enterprise. Pursuant to the Postal Services Act ⁽⁶⁾, Post Danmark had a legal monopoly on domestic and cross-border letters.
- (12) The Danish Minister of Transport has established Post Danmark as a State-owned limited liability company under Act No 409 of 6 June 2002 ⁽⁷⁾. Pursuant to §4 of that act, the State could sell up to 25 % of Post Danmark's shares. In 2005, Post Invest S.A. (administered by CVC Capital Partners) acquired 22 % of the shares in Post Danmark and 3 % of the shares were offered to the employees. In 2009, Post Invest S.A. sold its stake in the company back ⁽⁸⁾ to Denmark, right before the company merged ⁽⁹⁾ with the Swedish postal operator Posten AB ⁽¹⁰⁾. Following the merger, PostNord AB was created.

⁽⁵⁾ Lov om Post Danmark, Nr 88 of 8 February 1995, <https://www.retsinformation.dk/eli/lta/1995/88>

⁽⁶⁾ Lov om postvirksomhed, Nr 89 of 8 February 1995, <https://www.retsinformation.dk/eli/lta/1995/89>

⁽⁷⁾ Lov om Post Danmark A/S, Nr 409 of 6 June 2002, <https://www.retsinformation.dk/eli/lta/2002/409>

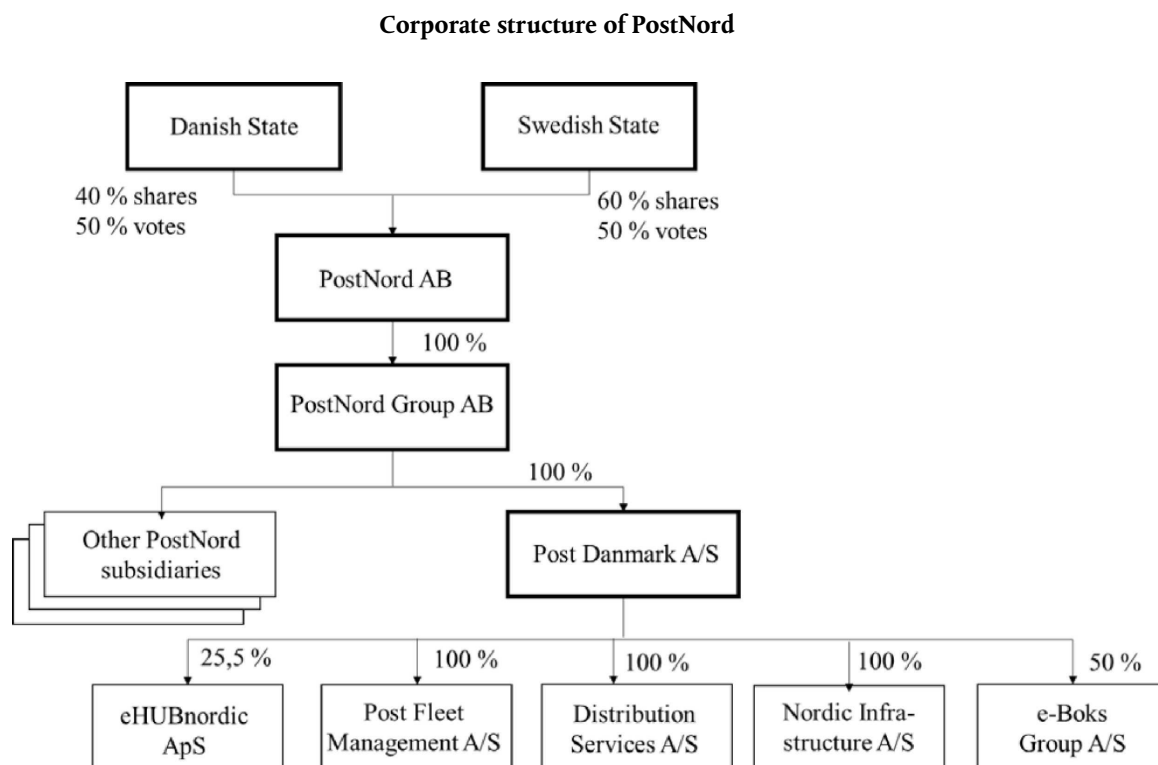
⁽⁸⁾ See: <https://www.cvc.com/media/press-releases/2009/02-02-2009-123603833>

⁽⁹⁾ The legal basis for the merger in Denmark was provided by: Lov om ændring af lov om Post Danmark A/S, LOV nr 542 of 17 June 2008, available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=120348>

⁽¹⁰⁾ Commission Decision of 21 April 2009, Case No COMP/M.5152 – Posten AB/Post Danmark A/S. Notification of 26/02/2009 pursuant to Article 4 of Council Regulation (EC) No 139/2004, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5152

- (13) The intention behind the merger was to establish a more robust undertaking and to meet increasing pressure on the undertaking's core product, namely the distribution of letters. PostNord AB is co-owned by Denmark (40 %) and Sweden (60 %) while voting rights are shared 50-50, and is the 100 % owner of PostNord Group. The structure of the undertaking is shown in **Figure 1**. The whole undertaking including all its subsidiaries is referred to as 'PostNord'.

Figure 1



- (14) Post Danmark is a wholly owned subsidiary of PostNord Group, and has been operating in full competition with other postal operators since the liberalisation of the Danish postal market in 2011, as a result of Directive 97/67/EC of the European Parliament and of the Council ⁽¹¹⁾. Denmark has entrusted Post Danmark with the universal service obligation ('USO') under the Danish postal act ⁽¹²⁾, involving in particular the delivery and distribution of letters across the territory of Denmark. Post Danmark faces competition especially in the parcel market and the market for the distribution of newspapers and magazine mail.

2.1.2. The markets on which PostNord and Post Danmark operate

- (15) PostNord is mainly active on the Swedish, Danish, Norwegian and Finnish markets for postal services, and provides courier, cargo and logistics solutions in the Nordic region and in the rest of Europe.
- (16) Post Danmark is active on the Danish postal services markets and offers a variety of postal services (delivery of letters, parcels, express deliveries, courier services, electronic mailbox services, cargo services, operation of a network of post offices).

⁽¹¹⁾ Directive 97/67/EC of the European Parliament and the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14).

⁽¹²⁾ See Postloven, LOV nr 1536 of 21 December 2010, available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=135208>. The law has been amended several times.

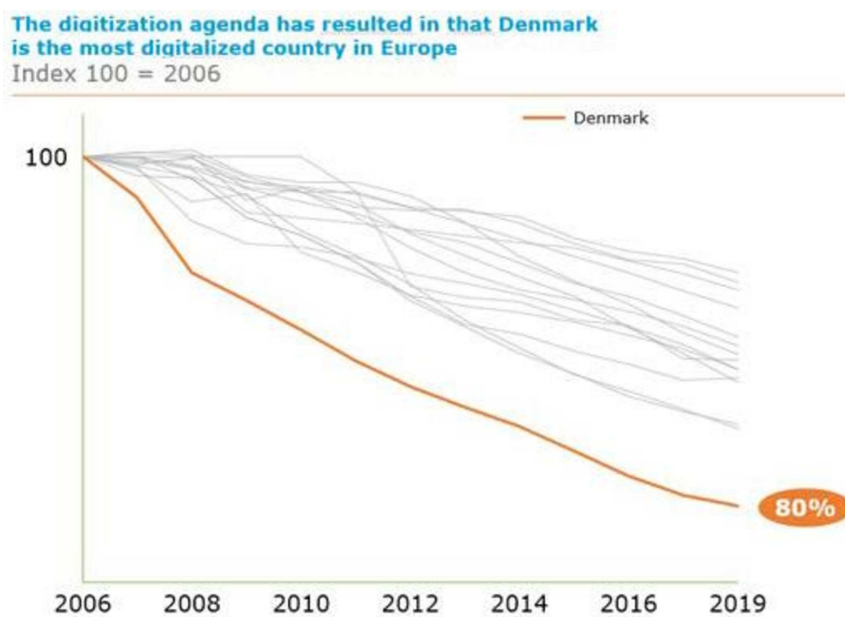
2.2. Background of the measures under assessment

2.2.1. Impact of digitisation on Post Danmark

- (17) General digitisation trends and specific circumstances in Denmark ⁽¹³⁾ have led to a rapid decline in the number of letters handled by Post Danmark, for instance, letter volume has declined drastically since the early 2000s, at a higher rate than that of other comparable countries. In Denmark, the letter volume fell by more than 80 % in the period 2006 to 2019. The development in letter volumes handled by Post Danmark compared to other European postal service operators is illustrated in **Figure 2**.

Figure 2

Development in mail volumes in European postal service operators



Other lines represent Germany (-27 %), Austria (-29 %), Switzerland (-31 %), Belgium (-35 %), France (-43 %), United Kingdom (-50 %), Spain (-52 %), Italy (-63 %), Netherlands (-64 %), Sweden (-50 %), Finland (-47 %), Norway (-53 %, since 2008), Ireland (-48 %, since 2010), Portugal (-44 %). Source: The postal operators' websites and annual reports

- (18) The consequence of that accelerated digitisation has been a fall in revenues. In the period 2009 to 2019, Post Danmark's revenue decreased by 55 %, in large part due to lower revenues from the letter market, and from 2012 onwards the company generated annual deficits, see **Table 1**:

Table 1

Post Danmark's revenue and Earnings Before Interest and Tax ('EBIT') in 2009 to 2019:

MDKK	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Revenue	10 828	10 107	9 250	8 811	8 171	7 964	7 641	6 728	5 836	6 214	4 913
EBIT	81	348	305	- 207	- 204	- 301	- 289	- 1 178	- 790	- 1 063	- 221

⁽¹³⁾ For example, from 2013 onwards, public authorities in Denmark were obliged to use electronic communication in exchanges with citizens and undertakings, according to Lov om Offentlig Digital Post, LOV nr 528 of 11 June 2012, available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=142234>

- (19) Post Danmark took measures to improve its financial situation and between 2009 and 2016, 8 000 FTE employees left the company. Those measures were however insufficient and Post Danmark could only avoid bankruptcy thanks to a capital injection from PostNord Group of DKK 1 billion on 23 February 2017 (addressed in the 2018 Decision ⁽¹⁴⁾).
- (20) In order to make Post Danmark economically viable again, the Board of Directors of PostNord AB developed a new production model. The production model is part of a broader transformation plan ⁽¹⁵⁾ that also includes the reorganisation of the administration (namely reductions in overhead costs, IT costs and real estate costs). The new production model aims to increase efficiency in mainly the following three ways:
- (a) the delivery of quick letters and other day-to-day mail items is to be based on the logistics delivery network (that is, delivered together with parcels) to save costs by avoiding parallel distribution networks;
 - (b) postal items are to be distributed directly from a hub or postal service outlet without the need for separate facilities except letter sorting centres;
 - (c) ordinary letters and magazine mail are to be delivered in a so-called flower model, replacing the current distribution method and entailing a significant reduction in the number of daily routes.
- (21) That plan entails high costs, in particular related to the dismissal of more than 4 000 employees, including an estimated 1 500 out of 3 200 former civil servants.

2.2.2. October Agreement

- (22) Against this background, Sweden and Denmark signed a bilateral agreement on 20 October 2017 ('The October Agreement') that describes several measures in favour of PostNord AB and Post Danmark. The October Agreement states: 'In order to meet the challenges of digitalization in Denmark, the Company [(PostNord AB)] has developed a new production model with an estimated cost of approximately SEK 5,0 bn' ⁽¹⁶⁾. PostNord AB estimated at the time that the external funding needed for the implementation of the transformation plan would be SEK 3 billion (approximately EUR 297 million) ⁽¹⁷⁾. According to the October Agreement, that amount is to be financed by a capital injection of SEK 400 million (approximately EUR 39,6 million) from Sweden and a capital injection of SEK 267 million (approximately EUR 26,4 million) from Denmark. Those two capital injections are to be made as a contribution of capital to PostNord AB ⁽¹⁸⁾. In addition, PostNord Group would make an internal contribution to Post Danmark of approximately SEK 2,3 billion (approximately EUR 228 million). Sweden and Denmark have paid out their respective capital injections, while PostNord Group has since injected capital for an amount of **DKK 2,339 billion** (approximately EUR 314,6 million) ⁽¹⁹⁾. The capital injection from PostNord Group is referred to in paragraph 4 of the October Agreement without explicitly mentioning an amount:

'The Company has estimated the need for capital to be SEK 3,0 bn whereof the Swedish Shareholder agrees to invest SEK 400 m and the Danish Shareholder agrees to invest SEK 267 m to support the implementation of the new production model and the Company will provide the additional funding. These investments are to be made as a contribution of capital to the Company on market terms without issuing new shares.' (emphasis added).

- (23) In addition, the October Agreement states that the Danish State is to provide SEK 1,533 billion (approximately EUR 151,6 million) to Post Danmark to finance certain legacy costs. Denmark eventually notified this amount as USO compensation and it was approved as compatible aid in the 2018 Decision.

⁽¹⁴⁾ The General Court has partly annulled the 2018 Decision, considering that the Commission should have opened the formal investigation procedure as regards certain measures, including the capital injection of 23 February 2017, see recitals (39) and (40).

⁽¹⁵⁾ McKinsey verified the viability of the transformation model in a report.

⁽¹⁶⁾ Paragraph 1 of the October Agreement.

⁽¹⁷⁾ Exchange rate: SEK 1 = EUR 0,09889, taken on 11 May 2021 from https://ec.europa.eu/info/funding-tenders/procedures-guidelines-tenders/information-contractors-and-beneficiaries/exchange-rate-infoeuro_en

⁽¹⁸⁾ Paragraph 4 of the October Agreement.

⁽¹⁹⁾ Exchange rate: DKK 1 = EUR 0,13448, taken on 11 May 2021 from https://ec.europa.eu/info/funding-tenders/procedures-guidelines-tenders/information-contractors-and-beneficiaries/exchange-rate-infoeuro_en

- (24) The October Agreement stresses that the agreement between Denmark and Sweden is subject to 'the consent of the Danish Government, the Danish Parliament, the Swedish Government, the Swedish Parliament and, as regards the State aid elements, approval from the European Commission' ⁽²⁰⁾.

2.2.3. The Agreement on the implementation of the USO compensation

- (25) On 11 June 2018, PostNord AB and Denmark concluded an agreement on the principles for implementing the USO compensation ⁽²¹⁾. That agreement also contains a clause which obliged the Board of Directors of PostNord AB to transfer the PostNord Group capital injection to Post Danmark. The Board of Directors decided to do so on the same day.

2.3. Description of the measures under assessment

2.3.1. The measures under assessment

- (26) The scope of this Decision concerns the three capital injections listed in recital (1) as described more in detail in Sections 2.3.2, 2.3.3 and 2.3.4.

2.3.2. Capital injection from PostNord Group into Post Danmark

2.3.2.1. Objective

- (27) The objective of the capital injection from PostNord Group into Post Danmark, as declared by the Danish and Swedish authorities, is to support the implementation of the transformation plan by Post Danmark.

2.3.2.2. Amount and origin

- (28) The capital injection from PostNord Group into Post Danmark amounts to DKK 2,339 billion.

2.3.2.3. Timing

- (29) PostNord Group has paid out the capital injection into Post Danmark in three tranches. Firstly, on 4 April 2018, a tranche in the amount of DKK 150 million was paid. Secondly, on 18 June 2018, a tranche in the amount of DKK 1 450 million was paid. Finally, on 4 February 2019, a tranche in the amount of DKK 739 million was paid.

2.3.3. Capital injection from Denmark into PostNord AB

2.3.3.1. Objective

- (30) The capital injection from Denmark into PostNord AB also forms part of the October Agreement, but has a different objective. Denmark has explained that the objective of the capital injection from Denmark relates to the preservation of the investment grade rating of PostNord AB ⁽²²⁾.

2.3.3.2. Amount and origin

- (31) The capital injection from Denmark into PostNord AB amounts to SEK 267 million.

2.3.3.3. Timing

⁽²⁰⁾ Preamble of the October Agreement.

⁽²¹⁾ This is the same agreement that arranges the principles for monitoring and reporting, including an *ex post* control mechanism for the purpose of verifying that Post Danmark has not been overcompensated (see recital 128(iii) of Commission Decision SA.47707(2018/N) of 28 May 2018 – State compensations granted to PostNord for the provision of the universal postal service – Denmark).

⁽²²⁾ The Decree referred to in recital (101)(a) states that the capital injection shall ensure that PostNord AB continues the objective of maintaining an investment grade status and can thus enter into agreements on commercially sound terms with banks and creditors [...].

- (32) Denmark paid out its capital injection into PostNord AB on 10 December 2018.

2.3.4. *Capital injection from Sweden into PostNord AB*

2.3.4.1. Objective

- (33) Sweden, like Denmark, has also explained that the objective of the Swedish capital injection is the preservation of the investment grade rating of PostNord AB ⁽²³⁾.

2.3.4.2. Amount and origin

- (34) The capital injection from Sweden into PostNord AB amounts to SEK 400 million.

2.3.4.3. Timing

- (35) Sweden paid out its capital injection into PostNord AB on 10 December 2018.

2.4. **ITD complaint**

- (36) On 27 November 2017, the Commission received a complaint from ITD, an association with over 810 members active in the road transport and logistics sector in Denmark (see recital (1)). The Commission has assessed part of the complaint in the 2018 Decision. The complaint concerned the following measures:

- (a) a State guarantee granted in 2002 by Denmark to former civil servants for liabilities regarding redundancy payments in case of Post Danmark's bankruptcy;
- (b) a VAT exemption related to e-commerce companies, in effect from 1990 to 1 January 2017;
- (c) the alleged incorrect separation of Post Danmark's accounts and the alleged cross-subsidisation of commercial services by USO activities between 2006 and 2013; and
- (d) an internal transfer from PostNord Group to Post Danmark of DKK 1 billion on 23 February 2017;
- (e) USO compensation for the period 2017 to 2019; and
- (f) three capital injections referred to in the October Agreement (see recital (22) to (24)), which are the subject of this Decision.

2.5. **The 2018 Decision**

- (37) On 28 May 2018, the Commission adopted the 2018 Decision in which it concluded that four measures raised in the ITD's complaint constituted either no aid or existing aid and that the USO compensation of SEK 1,683 billion was compatible aid under the Services of General Economic Interest (SGEI) Framework ⁽²⁴⁾ (an amount of only SEK 1,533 billion was finally paid).
- (38) In the 2018 Decision, the Commission announced that the three capital injections complained about by ITD, would be assessed separately.

⁽²³⁾ The Decision of the Swedish parliament referred to in recital (101)(b) states that to maintain confidence in the company of customers, suppliers and financiers and thereby to safeguard the business of the group *as a whole*, funds need to be provided to the company as soon as possible [För att möjliggöra en nödvändig omställning av verksamheten i Postnord, samt för att upprätthålla förtroendet för bolaget hos kunder, leverantörer och finansörer, och därigenom trygga verksamheten inom hela koncernen, behöver medel tillföras bolaget så snart som möjligt].

⁽²⁴⁾ Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11.1.2012, p. 15).

- (39) On 20 September 2018, ITD and Danske Fragtmænd A/S, a company active on the Danish market for road transport of goods and parcel distribution services, appealed the 2018 Decision on procedural grounds. In support of their action, the applicants raised a single plea in law, alleging that the Commission failed to initiate the formal investigation procedure provided for in Article 108(2) TFEU, despite the serious difficulties raised by the assessment of the compensation at issue and of the other measures challenged in ITD's complaint. The General Court registered the case under T-561/18 ⁽²⁵⁾.
- (40) On 5 May 2021, the General Court upheld the Commission's conclusion that the USO compensation for 2017 to 2019 constitutes compatible aid under the SGEI Framework. In addition, it upheld the Commission's conclusion on two out of the other four measures raised in the complaint, namely the State guarantee granted in 2002 by Denmark to former civil servants for liabilities regarding redundancy payments in case of Post Danmark's bankruptcy and the way in which Post Danmark allocated its costs in the period 2006 to 2013. The General Court partially annulled the 2018 Decision, however, considering that the Commission should have initiated the formal investigation procedure as regards the capital injection of DKK 1 billion granted by PostNord Group to Post Danmark on 23 February 2017 and the VAT exemption for e-commerce companies when they purchased transport services from Post Danmark.

2.6. Grounds for initiating the formal investigation procedure

- (41) On 14 June 2019, the Commission opened the formal investigation procedure regarding the measures described in Section 2.3 due to its doubts as to the market conformity of the three capital injections.

2.6.1. Capital injection from PostNord Group into Post Danmark

- (42) In the opening decision, the Commission considered that the discounted cash flow ('DCF') model presented by the Danish and Swedish authorities was in line, from a methodological viewpoint, with acceptable practice for assessing the market conformity of an investment. The net present value ('NPV') of the future cash flows of a company (adjusted for debt) is a commonly used way to evaluate equity investment decisions. The model considered two cash flows, namely one resulting from the bankruptcy of Post Danmark (negative cash flows), which would be avoided, and the other from Post Danmark's future operational profits (positive cash flows).
- (43) As regards the calculation of Post Danmark's future operational profits, the Commission however had doubts regarding the growth rates assumed for the letter and logistics market, in view of the fact that Post Danmark's net sales decreased by nearly 10 % in 2017. As regards the calculation of the adverse effects of Post Danmark's bankruptcy, the Commission considered that Denmark and Sweden had insufficiently substantiated the quantification of the adverse effects.
- (44) The Commission also noted that the DCF model was relatively sensitive to the assumptions applied. The investment would in particular no longer pass the Market Economy Operator Principle ('MEOP') test if, for example, the Weighted Average Capital Cost ('WACC') was [...] % and annual total projected sales growth was [...] %. Against this background, the Commission considered that more certainty was necessary on the parameters to be used in the calculations.
- (45) Considering the information set out in recitals (42) to (44), the Commission expressed certain doubts as to the market conformity of PostNord Group's capital injection ⁽²⁶⁾.

2.6.2. Capital injection from Denmark into PostNord AB

- (46) The Commission noted that the Danish authorities considered neither the probability of PostNord AB losing its shadow investment grade in the absence of the capital injections by Denmark and Sweden, nor the probability of PostNord AB losing such shadow investment grade anyway, even if the capital injections from Denmark and Sweden were granted.

⁽²⁵⁾ Case T-561/18, *ITD and Danske Fragtmænd v Commission*, ECLI:EU:T:2021:240.

⁽²⁶⁾ Recital (90) to (94) of the opening decision.

- (47) Furthermore, the Commission noted that the Danish authorities considered neither the maturity of the loans to be re-financed nor the period during which it was assumed that PostNord AB's shadow investment grade would be maintained because of the capital injections from Denmark and Sweden. Both elements would however have to be considered to properly estimate the savings in financing costs attributable to the capital injections, assuming that such savings would exist.
- (48) In light of recitals (46) and (47), the Commission expressed its doubts regarding the market conformity of the Danish authorities' capital injection ⁽²⁷⁾.

2.6.3. Capital injection from Sweden into PostNord AB

- (49) The Commission considered that the argumentation presented in recitals (46) to (48) applied equally to the assessment presented by the Swedish authorities about the Swedish capital injection into PostNord AB. Furthermore, the Commission considered that the Swedish authorities had not demonstrated that the annual savings on borrowing costs of SEK [...] estimated by the Swedish authorities as attributable to the capital injections from Denmark and Sweden would provide the Swedish authorities a return in conformity with the market from their capital injection.
- (50) The Commission noted that the Swedish authorities had also acknowledged that there were several uncertainties included in the credit rating analysis. Those uncertainties are in particular the fact that PostNord AB does not have a real public credit rating and the underlying assumption that all current debt is re-financed and that PostNord AB will be able to acquire SEK [...] additionally in debt from the market. Such unquantified uncertainties seemed difficult to reconcile with a proper private investor approach.
- (51) In light of recitals (49) and (50), the Commission expressed its doubts regarding the market conformity of the Swedish authorities' capital injection ⁽²⁸⁾.

3. COMMENTS FROM INTERESTED PARTIES

- (52) On 17 September 2019, the Commission received comments from seven interested parties: ITD, Dansk Distribution A/S, Dansk Scanning A/S, Danske Fragtmænd A/S, Jørgen Jensen Distribution A/S ('JJJD'), UPS Europe SPRL/BVBA and one interested party that requested to remain anonymous. All interested parties have submitted their comments separately.

3.1. ITD (the complainant)

- (53) ITD has its head offices in Padborg (Denmark) and has offices in Copenhagen and Brussels. ITD is a Danish trade association and its more than 810 members include Danish professional companies active on the national and/or international markets for road transport of goods and logistics services ⁽²⁹⁾. The objectives it pursues include ensuring a sound political and legal framework for the competitiveness of the Danish road transport and logistics companies and maintaining a high level of professionalism in the road transport sector by providing guidance, tools and services to road haulage companies. ITD claims that approximately half of its members transport general cargo and parcels and are therefore direct competitors of Post Danmark. The other half are potential future competitors in various market segments.

3.1.1. The three capital injections constitute one single measure

- (54) ITD takes the view that the three capital injections (see Section 2.3) constitute one single measure and not, as stated by the Commission in its opening decision in recital (69), three separate measures.

⁽²⁷⁾ Recitals (110) to (112) of the opening decision.

⁽²⁸⁾ Recitals (120) to (122) of the opening decision.

⁽²⁹⁾ Examples of large members are DSV Road, Frode Laursen and Danske Fragtmænd.

- (55) According to ITD, the judgment *Greece and Others v Commission* ⁽³⁰⁾ demonstrates that in order to determine whether aid in the form of different payments constitute several measures or one single measure, one should look at ‘their chronology, their purpose and the circumstances of the undertaking’ ⁽³¹⁾. In ITD’s view, applying those criteria to the present case can only lead to the conclusion that the three capital injections constitute one single measure:
- (a) Chronology – ITD argues that all three capital injections were granted on 20 October 2017 when the October Agreement was signed by Denmark and Sweden (see Section 3.1.2);
 - (b) Purpose – ITD argues that all three capital injections have the same purpose, namely to implement the transformation plan of Post Danmark and that the capital injections from Denmark and Sweden do not have the purpose to preserve the investment grade rating of PostNord, which is according to ITD merely a side effect of the capital injection. In this regard, ITD explains that the wording used in the October Agreement shows that also the capital injections from Denmark and Sweden aim at supporting the implementation of the transformation plan of Post Danmark and that the opening decision would support that view in recitals (59) to (61), (66) and (67);
- ITD also argues that it follows from the ‘obvious funding gap’ (namely the October Agreement estimates the costs of the transformation plan of which the new production model forms part at SEK 5 billion (see recital (22)), but the PostNord injection is ‘only’ DKK 2,339 billion) that the capital injections from Denmark and Sweden are needed, even if they would not be sufficient for carrying out the new production model.
- (c) Circumstances of the undertaking – ITD claims that the circumstances that Post Danmark found itself in at the moment of the three capital injections were the same.
- (56) ITD argues that the Commission wrongly used a different set of criteria than the criteria recognised in *Greece and others v Commission*, namely that the capital injections:
- (a) are injected by different type of investors (Denmark, Sweden and PostNord ⁽³²⁾) that find themselves in different financial situations and have different financing costs that require different rates of return (see recital (69) to (74) of the opening decision);
 - (b) do not have the same purpose;
 - (c) are not granted to the same beneficiaries; and
 - (d) require further implementing measures.
- (57) With reference to recital (71) of the opening decision, ITD rejects the Commission’s argument that the *BP Chemicals* case is not relevant for the case at hand because in *BP Chemicals* the same investor injected capital in several instances. ITD considers that *BP Chemicals* is relevant for the present case for two reasons. Firstly, ITD argues that, *BP Chemicals* is another case evidencing that the Commission should have looked at the chronology, purpose and circumstances (see recital (55)). In addition, ITD argues that there is no statement in the *BP Chemicals* judgment (or any other judgment) to support the view that it matters whether one or several investors inject capital. In this regard, ITD notes that the costs of different investments will naturally vary (irrespective of whether they are made by one or several investors).
- (58) ITD is also of the opinion that the Commission should have focussed on the investments and the target undertaking rather than the investor. In this regard, with reference to the wording in the October Agreement, ITD considers that the capital injections all had the same beneficiary, namely Post Danmark, contrary to what the Commission has argued. In this respect, in its comments of 17 September 2019, ITD has stated the following in relation to the October Agreement:

‘It appears from point 1 of the October 2017 Agreement that “a new production model with an estimated costs of approximately **SEK 5,0 bn**” has been developed and that “in the implementation of the new production model, the **Company [PostNord] will transfer [that] capital to Post Danmark**”. It appears from point 4 that “the need for

⁽³⁰⁾ Joined cases T-415/05, T-416/05 and T-423/05, *Greece and Others v Commission*, EU:T:2010:386.

⁽³¹⁾ ITD refers to joined cases T-415/05, T-416/05 and T-423/05, *Greece and Others v Commission*, EU:T:2010:386, paragraph 177; case T-11/95, *BP Chemicals v Commission*, EU:T:1998:199, paragraphs 176 and Case T-11/95, *BP Chemicals v Commission*, EU:T:1998:199, paragraphs 170-171.

⁽³²⁾ In this regard, ITD notes that in fact there are only two investors (Denmark and Sweden) since PostNord’s actions were considered to be imputable to Denmark and Sweden, meaning that PostNord is not the investor, but the States.

capital [is estimated] to be SEK 3,0 bn whereof the **Swedish shareholder** agree to invest SEK 400 m and the **Danish shareholder** agree to invest SEK 267 m to support **the implementation of [Post Danmark's] new production model**" (emphasis added by ITD ⁽³³⁾).

- (59) As regards the requirement for further implementing measures, which would affect the moment of granting of the different capital injections, ITD explains that it follows from the case law that in order for implementing measures to be present, either the requirement that capital injections may only be granted following those implementing measures should have been laid down in a prior existing agreement or prior existing legislative act ⁽³⁴⁾ or it should be impossible to grant the capital injections without taking those implementing measures ⁽³⁵⁾. According to ITD, both of those conditions have not been fulfilled ⁽³⁶⁾.
- (60) Moreover, ITD points at the payment of the first instalment of the PostNord capital injection on 4 April 2018 for which apparently no implementing measures were required and that took place before the date on which the Commission considers the PostNord capital injection to have been granted. ITD also refers to the capital injection of DKK 1 billion, which was subject of the 2018 Decision, which could take place without any implementing measure.
- (61) In addition, ITD considers that if the Commission would deviate from its line of reasoning in the opening decision (see recitals (69) to (76) of the opening decision) that the capital injections are three separate measures (and therefore would conclude that there is only one measure), a new opening decision is required.

3.1.2. *The three capital injections were granted on the same date*

- (62) ITD takes the view that even if the Commission maintains that the three capital injections are three separate measures, they are still granted on the same date, namely on 20 October 2017, with the conclusion of the October Agreement.
- (63) Alternatively, if the Commission considers that the capital injections were conditional upon the approval of the USO compensation, the three capital injections should be considered granted on 28 May 2018 when the Commission approved the USO compensation.
- (64) In this regard, ITD firstly explains that the October Agreement is binding upon both Denmark and Sweden ⁽³⁷⁾, similar to the Intergovernmental Agreement concluded between Denmark and Sweden on the establishment of a consortium that deals with the construction, management and operations of the so-called Øresund Fixed Link ⁽³⁸⁾.

⁽³³⁾ The parts in brackets are also part of ITD's comments and have not been added by the Commission.

⁽³⁴⁾ Case C-385/18, *Arriva Italia Srl and Others v Ministero delle Infrastrutture e dei Trasporti*, ECLI:EU:C:2019:1121. To be noted that this judgment was not yet adopted when ITD submitted its comments.

⁽³⁵⁾ The cases ITD likely refers to are Case T-131/16, *Kingdom of Belgium and Magnetrol International v European Commission*, ECLI:EU:T:2019:91; Case T-479/11 and T-157/12, *France v Commission*, EU:T:2016:320. In their comments, the references were limited to 'Kingdom of Belgium and Magnetrol International v European Commission' and 'European Commission v French Republic and IFP Energies nouvelles [from the General Court]'.

⁽³⁶⁾ ITD provides as an example Case T-818/14, *Brussels South Charleroi Airport (BSCA) v European Commission*, EU:T:2018:33, paragraph 72 and following. In this case there is a framework agreement which did not identify the recipient and was incapable of triggering the grant of the aid as it was limited to instructing the relevant Minister to submit implementing measures for granting the aid. Contrary to this case, ITD submits that in the present case, both the aid amount and the aid beneficiary are identified in the October Agreement.

⁽³⁷⁾ Case T-818/14, *Brussels South Charleroi Airport (BSCA) v European Commission*, EU:T:2018:33, paragraph 72 and the case law cited: 'the criterion for determining the time of granting aid is that of the legally binding act by which the competent authority undertakes to grant the aid to its recipient [...] by an unconditional and legally binding promise [...]. That criterion necessarily implies that, on the date of the granting of the aid, the recipient can be identified'.

⁽³⁸⁾ ITD refers to Commission Decision SA.36558 (2014/NN) and SA.38371 (2014/NN) – Denmark and SA.36662 (2014/NN) – Sweden of 15 October 2014 – Aid granted to Øresundsbro Konsortiet, without specifying the relevant paragraphs.

- (65) Secondly, ITD explains that no implementing measures are required for the October Agreement to become effective. The implementing measures referred to by the Commission in the context of the capital injection from PostNord to Post Danmark and the capital injection from Denmark to PostNord were not required according to ITD, either under the October Agreement, or under any other legislative act ⁽³⁹⁾, nor was it impossible to grant the capital injections without implementing measures ⁽⁴⁰⁾. Therefore, ITD considers that the granting date of 11 June 2018 for both the capital injection from PostNord to Post Danmark and from Denmark to PostNord is incorrect.
- (66) ITD also refers to the publication on 15 January 2021 of a report prepared by the Danish State auditor ('Rigsrevisionen'). That report presents the conclusions of the Rigsrevisionen of the adequacy of the supervision of Post Danmark's accounting practices. A graph included in that report, as well as the text of the report, shows, according to ITD, that all three capital injections constitute one single measure and were granted on the same date, namely 20 October 2017, the day of the October Agreement.

3.1.3. *The capital injections constitute aid*

3.1.3.1. State resources, imputability, selectivity, distortion of competition and affection of trade

- (67) As regards the aid assessment carried out by the Commission in the opening decision, ITD welcomes that the Commission considered that the three capital injections involve state resources and are imputable to Denmark, Sweden or both, are selective and distort competition and affect trade between Member States.

3.1.3.2. Advantage of the capital injection from PostNord into Post Danmark

- (68) As regards the DCF analysis prepared by PostNord establishing that the gains for PostNord as a result of the capital injection from PostNord to Post Danmark exceed the losses of liquidating Post Danmark, ITD claims that that analysis is not reliable due to the following reasons:
- (a) the DCF analysis has been conducted by PostNord itself and not by an independent expert;
 - (b) the cost of capital in the DCF analysis would be undervalued, since it includes only one capital injection (that is, the capital injection stemming from PostNord to Post Danmark), while all capital injections are in ITD's view linked and should thus be considered as a single intervention to be taken into account in the DCF analysis;
 - (c) the DCF analysis would include ineligible costs, since it factors in:
 - (1) Post Danmark's real estate mortgage debt and loans that Post Danmark would not be able to repay in case of liquidation; while, according to Danish law, costs related only to the value of shares of PostNord, considering the liquidation value of Post Danmark assets, should have been taken into account;
 - (2) costs linked to the responsibilities of the public authorities, such as the cost of the guarantor (namely PostNord) to pay Post Danmark's mortgage debt and other loans, that is, a form of State aid, which no private investor would undertake to pay, in view of the catastrophic financial situation of Post Danmark over the last number of years;
 - (3) the indirect bankruptcy costs, namely the alleged higher borrowing costs of PostNord and PostNord's loss 'of not being able to offer comprehensive Nordic logistics solutions' ⁽⁴¹⁾ as well as the 'loss of synergies and scale to its Nordic operations' ⁽⁴²⁾, which no private investor would be prepared to pay, and, therefore, they should be excluded as they involve the granting of State aid;
 - (d) according to ITD, the DCF analysis includes ineligible cash flows, such as the USO compensation, which is State aid and therefore should also be excluded.

⁽³⁹⁾ Case C-385/18, *Arriva Italia Srl and Others v Ministero delle Infrastrutture e dei Trasporti*, ECLI:EU:C:2019:1121.

⁽⁴⁰⁾ Case T-131/16, *Kingdom of Belgium and Magnetrol International v European Commission*, ECLI:EU:T:2019:91.

⁽⁴¹⁾ Recital (49) of the opening decision.

⁽⁴²⁾ Footnote 17 of the opening decision.

(69) In addition, ITD claims that:

- (a) even if it were to be accepted that Post Danmark's shareholders would have to bear the direct and indirect costs of bankruptcy, the DCF should not include the full amount of avoided costs of Post Danmark's bankruptcy, since its bankruptcy would not necessarily be avoided through the grant of PostNord's capital injection;
- (b) the revenues in the DCF are too high and do not account for the risk that the USO license might not be extended beyond 2019. ITD suggested that such a risk could be factored in by using a higher discount rate (namely WACC) for the years 2020 onward;
- (c) in view of the 10 % decrease in Post Danmark's net sales in 2017, the estimates in the DCF of the growth rates in the letter and logistics market are too optimistic and thus questionable;
- (d) the WACC in the DCF is too low, since it takes into account PostNord's peers, rather than Post Danmark's peers. Moreover, the WACC does not consider the risk for bankruptcy as a consequence of the transformation plan and the WACC does not factor in the arbitrary assumptions regarding future market conditions;
- (e) a potential loss of investment grade would be due to the fact that PostNord's capital injection would be financially unsound which, in turn, would prove that PostNord's capital injection does not meet the private market investor test.

3.1.3.3. Advantage of the capital injections from Denmark and Sweden into PostNord

(70) ITD considers that there are more elements casting doubts on the capital injections from Denmark and Sweden than those mentioned by the Commission in the opening decision:

- (a) based on the October Agreement, it is clear that the capital injections from Denmark and Sweden into PostNord are to be passed on to Post Danmark and that no private market investor would inject capital into Post Danmark;
- (b) all three capital injections are not in line with market terms because Denmark granted another DKK 112 million (approximately EUR 15 million) in December 2019 for the extension of the USO license of Post Danmark for 1 January 2020 to 30 June 2020, in order to enable Post Danmark A/S to survive;
- (c) the NPV calculation carried out for the Danish and Swedish capital injections in order to show their market conformity in the context of maintaining the credit rating of PostNord, does not indicate what the return is (if any);
- (d) no comparison has been made between the value of the capital injections and the counterfactual scenario where PostNord would be liquidated and, therefore, no private market investor would make those capital injections.

3.2. Dansk Distribution

(71) Dansk distribution A/S has its head offices in Karlslunde (Denmark) and ships parcels, pallets and general cargo. Dansk Distribution claims that it competes with Post Danmark in the parcel and more generally the distribution sector. It has an interest to submit comments because Dansk Distribution and Post Danmark participate in the same tenders for logistics contracts where Post Danmark would allegedly offer prices below the market price.

(72) Dansk Distribution has submitted the same comments as ITD.

3.3. Dansk Scanning

(73) Dansk Scanning A/S has its head office in Esbjerg (Denmark) and creates digital archives for its clients. It offers a range of digitalisation services. Dansk Scanning claims that it competes with Post Danmark in the digitalised postal sector and in particular in the market for scanning services.

- (74) Dansk Scanning has submitted the same comments as ITD.

3.4. **Danske Fragtmænd A/S**

- (75) Danske Fragtmænd A/S is based in Aarhus (Denmark) and is a subsidiary of Fragtmænd Holding A/S. It provides logistics services for corporate clients in Denmark. It receives orders and subsequently stores, picks, packs and distributes semi-manufactured and manufactured products, spare parts, convenience goods, consumer durables. It can deliver on a day-to-day basis and provides door-to-door delivery. In addition, Danske Fragtmænd is active on the market for warehousing and information technology services.
- (76) Danske Fragtmænd A/S has submitted the same comments as ITD.

3.5. **Jørgen Jensen Distribution A/S**

- (77) JJD has its head office in Ikast (Denmark) and provides cargo transport services. It provides a range of transport services, including the distribution of parcels, cargo, palletised cargo, long-haul deliveries, encompassing temperature-sensitive goods (like food) and non-temperature-sensitive goods. In addition, JJD is active on the markets for haulage services with pickup and delivery on very short notice as well as courier services. JJD claims to compete with Post Danmark in the transport and distribution sector. It considers that the capital injections, which are subject of this Decision, directly affect its operations since they would give Post Danmark the capability to offer lower prices than the market price (15 % to 30 % lower). JJD explains that it has experienced this in the context of tenders and competitions based on customer invitations ⁽⁴³⁾.
- (78) JJD has submitted the same comments as ITD.

3.6. **UPS**

- (79) UPS is a global provider of specialised postal and shipping services. After the United States of America, UPS' biggest market is Europe where it serves 56 countries and territories. Since 1988, UPS is active on the Danish market where it offers domestic, international postal, and logistics services, including express and standard delivery for parcels as well as a range of air, ocean and road freight transport services. UPS claims to compete directly with Post Danmark in the non-universal parcels and postal service and logistics sector.
- (80) UPS' comments overlap largely with those submitted by ITD and other third parties, but there are specific comments related to the MEOP assessment.

3.6.1. *Capital injection from PostNord into Post Danmark*

- (81) Firstly, UPS claims that the assumed growth rate in the DCF calculations may be validated by comparing it properly to that of the postal and logistics sector as reported in a number of research papers and other sources ⁽⁴⁴⁾.
- (82) UPS also suggests that PostNord's ability to accurately forecast the expected results on specific targets such as the revenue growth rate and EBIT of the company should be questioned. The latter could be assessed by 'back-testing' the historical plan to actual results for those targets.

⁽⁴³⁾ JJD has provided an example from the beginning of 2018 where it was invited by one of its existing customers to submit an offer for the provision of transport services related to the distribution of international palletised cargo. Post Danmark was also invited to submit an offer and the price of this offer turned out to be 18 % lower. According to JJD, the price offered by Post Danmark would not even be sufficient for Post Danmark to recuperate its costs for fuel, staff and administration.

⁽⁴⁴⁾ I.e. the International Post Corporation, <https://www.ipc.be/sector-data/postal-sector/market-watch> and PostNL, <https://www.postnl.nl/en/about-postnl/about-us/market-and-regulation/research-on-the-european-postal-market/>; Transport Intelligence, <http://www.gscintell.com/Dashboard>; Apex Insight, <https://apex-insight.com/express-logistics-service/>

- (83) In addition, UPS claims that additional borrowing costs, as a result of a downgrading, should be included in the DCF, not only in the bankruptcy scenario in absence of PostNord's capital injection, but also in the scenario where PostNord's capital injection takes place. UPS considers that this would be in line with the Danish authorities statement that PostNord's credit rating could also deteriorate as a consequence of the capital injection in Post Danmark.

3.6.2. *Capital injections from Denmark and Sweden into PostNord*

- (84) UPS claims that in order to determine whether Denmark and Sweden's capital injections would be made by a private investor, a more detailed assessment of the alleged additional borrowing costs resulting from PostNord's credit downgrade should have been conducted. That assessment should then have taken into account expected future funding needs in the form of a forecasted cash flow analysis and an overview of existing debt.

3.7. **Anonymous**

- (85) The anonymous third party claims to compete with Post Danmark in the parcel and freight distribution sector.
- (86) The anonymous third party has submitted the same comments as ITD.

4. **COMMENTS FROM DENMARK AND SWEDEN**

4.1. **Joint comments from Denmark and Sweden on the opening decision**

- (87) In their joint comments, Sweden and Denmark indicate that they, as separate and independent owners of PostNord AB, made their own assessments of the economic rationale of their respective capital injections. For this reason, their comments on the capital injections from Denmark and Sweden are presented separately in Sections 4.2 and 4.3.
- (88) Sweden and Denmark, in an annex to their joint comments, have submitted the comments from PostNord AB on the opening decision. According to PostNord AB 'the Danish and Swedish governments have requested PostNord AB to comment on the parts of the opening decision and the third-party submissions concerning the intragroup transfers.' As Sweden and Denmark have submitted PostNord AB's comments, the Commission treats those comments as comments from both Denmark and Sweden.

4.1.1. *The capital injections constitute three separate measures*

- (89) Firstly, Sweden and Denmark note that not only would the three capital injections be separate measures, but also the USO compensation for Post Danmark over 2017 to 2019 would be a distinct measure. They claim that this follows from the October Agreement whereby Denmark's payment of the USO compensation was a condition for the Danish capital injection of SEK 267 million and the Swedish capital injection of SEK 400 million. Similarly, the USO compensation was indispensable for PostNord Group's assessment that its capital injection would be on market terms. Making a capital injection (in line with market conditions) subject to the payment of compatible State aid in favour of the same undertaking is, according to Denmark and Sweden, widely accepted in the Commission's case practice ⁽⁴⁵⁾.
- (90) Secondly, Denmark and Sweden agree with the Commission that the three capital injections constitute three separate measures. In this regard, they submit that the Commission's considerations (namely the fact that the measures are granted by different investors with different financing costs, different requirements of return and decisional process, that the measures have different beneficiaries and different purposes) would be appropriate and supported by *Greece v Commission* ⁽⁴⁶⁾. In that case, the General Court ruled that the Commission should have relied on all relevant elements of fact and law and not only on their context and the chronological succession of measures.

⁽⁴⁵⁾ E.g. Commission Decision State aid No C 20/2009 (ex N 763/2002) of 13 July 2009, Belgium – La Poste, recitals (204) and (205).

⁽⁴⁶⁾ Joined cases T-415/05, T-416/05 and T-423/05, *Greece v Commission*, EU:T:2010:386, paragraph 178, ECLI:EU:T:2010:386.

- (91) Moreover, Denmark and Sweden stress that Sweden had no obligations flowing from Directive 97/67/EC on the Danish territory and thus would have had no other incentives than to make economically rationale investment decisions relating to PostNord Group's financing of the transformation plan of Post Danmark. It follows that Sweden's interest in Post Danmark is purely commercial.
- (92) In addition, Denmark and Sweden explain that the case law recognises that several public bodies of the same Member State should be viewed as individual market economic operators⁽⁴⁷⁾. For this reason, they consider it indisputable that two different States should be viewed as two separate and individual market operators.
- (93) In the view of Denmark and Sweden, not only are they distinct investors, but they and PostNord Group are also different investors. This would follow notably from the profitability (or loss-mitigation) analysis made by PostNord Group prior to its investment in Post Danmark, which is different from the analysis of Denmark and Sweden.
- (94) As regards the capital injections having different beneficiaries, Denmark and Sweden consider that the references of the interested parties to the October Agreement, which allegedly identifies Post Danmark as the only beneficiary are not substantiated since the October Agreement was not intended to identify the real beneficiaries for State aid purposes. Rather, the October Agreement was an agreement in principle and this is clear from the wording of it. Denmark and Sweden have explained that their respective capital injections do not flow to Post Danmark and therefore would primarily benefit PostNord AB.
- (95) Denmark and Sweden explain that any possible indirect benefit that Post Danmark may obtain because of their capital injections is too indirect to constitute an advantage in the sense of Article 107(1) TFEU. Moreover, other subsidiaries of the PostNord Group would receive a similar indirect advantage.
- (96) As regards the measures having different purposes, Denmark and Sweden firstly explain that PostNord Group made the capital injection to Post Danmark with the aim of facilitating implementation of the transformation plan and increasing shareholder value (or reducing potential losses). Secondly, with their respective capital injections, Denmark and Sweden aimed at reducing the risk for the entire PostNord Group being regarded as not having investment grade quality and thereby preserve or increase the shareholder value.

4.1.2. *The three capital injections were granted on different dates*

- (97) Denmark and Sweden consider it important to clarify their national decision-making procedures applicable to their respective capital injections and to correct the opening decision as regards when their respective capital injections were actually granted.
- (98) In Denmark, all costs or expenditures that are not contained in the State budget as described in the annual Finance Act require a separate legal basis to be legally valid. The Parliament's Finance committee can provide such a legal basis in the form of a Ministerial Decree (Akstykke) following a request made by the competent Ministry (*in casu* the Ministry of Transport, Building and Housing). Once adopted, the State reserves the funds for the objective described in the Ministerial Decree and the Ministry may subsequently dispose of the funds through its treasury account, subject to the conditions of the Ministerial Decree. The adoption of the Ministerial Decree does not result in an obligation for the Ministry to dispose of the funds; it only establishes the legal basis for doing so. If the Ministry does not use the funds (for example, because a transaction cannot be finalised, certain projects are delayed or cancelled) the funds are returned to the Treasury. The Ministerial Decree for the Danish capital injection is the Ministerial Decree of 17 May 2018.
- (99) In Sweden, the government needs a mandate from the Parliament to make changes to its company portfolio, including capital injections. Such a mandate from the Parliament enables the government to act; however, as a rule, it does not oblige the government to act upon at a certain time or in a certain way. There can be a significant time between the Parliament's approval enabling the government to act and the moment when the government actually acts, if it acts at all. At the end of 2019, the Swedish government had several mandates to act, which it has not decided to act upon partly or in full⁽⁴⁸⁾. The Swedish capital injection for PostNord AB requires a government decision and thus a mandate from the Parliament.

⁽⁴⁷⁾ T-152/99, *HAMSA v Commission*, EU:T:2002:188; T-284/15, *AlzChem v Commission*, EU:T:2018:950.

⁽⁴⁸⁾ For example, the bill enabling the Government to divest its ownership of Bilprovningen AB (a company that carries out inspections and registration of motor vehicles and trailers in Sweden) was adopted by Parliament as far back as 17 December 2009 (prop. 2009/10:54, bet. 2009/10:NU10, rskr 2009/10:162).

- (100) In light of recitals (97) to (99), Denmark and Sweden make a distinction between the date on which the investment decisions were made (in other words, any market conformity assessment should have been done before this date), the date on which the capital injections were granted and the date on which they were made available or paid out to the beneficiary. Those three moments in time are presented in the Figure 3 submitted by Denmark and Sweden:

Figure 3

Timeline of the granting of the three capital injections:



- (101) Denmark and Sweden explain that it follows from Figure 3 that:

- (a) the Danish owner's investment decision of 17 May 2018 referred to is the Ministerial Decree referred to in recital (98);
- (b) the Swedish owner's investment decision of 29 November 2018 ⁽⁴⁹⁾ was taken following the decision of the Parliament of 12 December 2017 ⁽⁵⁰⁾ which enabled the government to do so;
- (c) PostNord's investment decision of 11 June 2018 was taken following the conclusion of the implementing agreement (see recital (25)) and the subsequent decision of the Board of Directors on the same day that the capital injection would be economically rational;
- (d) Denmark granted its capital injection only on 10 December 2018 when it was paid out. Before that date, Denmark considers that there was no legal entitlement for PostNord AB to receive the capital. Denmark considers that the Ministerial Decree of 17 May 2018 is not an obligation for Denmark to grant the aid (see recital (98));
- (e) Sweden granted its capital injection on 29 November 2018, the same date as when the investment decision was taken;
- (f) PostNord granted its capital injection on 11 June 2018, the same date as when the investment decision was taken. This is in line with the Commission's conclusion in recital (82) of the opening decision;
- (g) Denmark paid its capital injection on 10 December 2018, the same date as the granting date;

⁽⁴⁹⁾ Utbetalning av kapitaltillskott till PostNord AB (rskr 2017/18:114).

⁽⁵⁰⁾ Bill adopted by the Swedish Parliament on 12 December 2017, prop. 2017/18:39, bet 2017/18:FiU28, rskr. 2017/18:114.

- (h) Sweden paid its capital injection on 10 December 2018;
- (i) PostNord Group paid its capital injection (minus DKK 150 million already paid on 4 April 2018) on 18 June 2018, the same date as on which the USO compensation, approved in case SA.47707, was also paid.

4.1.3. *The capital injection from PostNord Group into Post Danmark does not involve State aid*

4.1.3.1. Joint comments by Denmark and Sweden on imputability, State resources and distortion of competition

- (102) The Danish and Swedish authorities submit that the capital injection from PostNord Group to Post Danmark merely constituted a transfer within the same undertaking (that is, the PostNord Group) and would not change the conditions of competition on the market ⁽⁵¹⁾, since Post Danmark was already present and operated on the market.
- (103) In this regard, Denmark and Sweden explain that it follows from the Court's judgment in ENEA that 'the resources of public undertakings may be regarded as State resources where the State is capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order to finance advantages to the benefit of other undertakings' (emphasis added by the Danish and Swedish authorities) ⁽⁵²⁾.
- (104) However, in the present case the Danish and Swedish authorities consider that neither Denmark nor Sweden was capable of directing the use of PostNord Group's resources into Post Danmark, but more importantly a transfer of funds between the different entities in PostNord (such as the Group capital injection) would not amount to an advantage 'to the benefit of other undertakings' ⁽⁵³⁾, but would merely be a transfer within the same undertaking (PostNord).
- (105) In addition, the Danish and Swedish authorities explain, by again referring to ENEA ⁽⁵⁴⁾, that the conduct of PostNord AB was not 'dictated by instructions from public authorities' and thus was not imputable to Denmark or Sweden.
- (106) In this context, Denmark and Sweden also submit that it follows from Union case law in *Stardust Marine* that where decisions are taken by public undertakings, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking to be imputable to the State. In fact, it must be demonstrated that the public authorities can be regarded as having been involved in the adoption of the measure, and this imputability to the State may be inferred from a set of indicators ⁽⁵⁵⁾.
- (107) The Danish and Swedish authorities explain that the transfer of DKK 150 million made on 4 April 2018 was made in order to ensure that Post Danmark was able to continue operating while awaiting the Commission's expected approval of the USO compensation and the PostNord Group's subsequent execution of the transformation plan, including the PostNord Group capital injection. Furthermore, there is no evidence that Denmark and Sweden were involved, in one way or another, in the decision to make the transfer of DKK 150 million.
- (108) As regards the transfers made in June 2018 and February 2019, these contributions were part of PostNord AB's decision of 11 June 2018 to proceed with the transformation plan (the date of the implementing agreement, see recital (25)). Moreover, regarding those two transfers, Denmark and Sweden submit that there is no evidence that either were involved in PostNord AB's decision to proceed with the transformation plan (including the execution of the internal transfers of 18 June 2018 and 4 February 2019) other than in their capacity as shareholders of PostNord AB. Therefore, Denmark and Sweden consider that the Commission is wrong when it stated in recital (87)

⁽⁵¹⁾ Joined cases C-341/06 P and C-342/06 P, *Chronopost and La Poste v UFEX and Others (Ufex II)*, EU:C:2008:375, paragraphs 129-131.

⁽⁵²⁾ Case C-329/15, *ENEA S.A. v Prezes Urzędu Regulacji Energetyki*, ECLI:EU:C:2017:671, paragraph 31.

⁽⁵³⁾ Case C-329/15, *ENEA S.A. v Prezes Urzędu Regulacji Energetyki*, ECLI:EU:C:2017:671, paragraph 31.

⁽⁵⁴⁾ *Ibid*, paragraph 34.

⁽⁵⁵⁾ Case C-482/99, *French Republic v Commission of the European Communities (Stardust Marine)*, ECLI:EU:C:2002:294, paragraph 52 and 55. See also Opinion of Advocate General Saumandsgaard Øe, Case C-329/15, *ENEA S.A. w Poznaniu v Prezes Urzędu Regulacji*, ECLI:EU:C:2017:233, points 99 and 100.

of the opening decision that the internal capital transfer is imputable to Denmark and Sweden, because it was part of the October Agreement. In this regard, Denmark and Sweden submit that the October Agreement only engages the two owners (Denmark and Sweden) and not PostNord Group.

- (109) In addition, Denmark and Sweden submit that the mentioning, in paragraphs 1 and 4 of the October Agreement, of PostNord AB's intention to implement the new production model and the linked capital injection from PostNord Group to Post Danmark is simply setting out the factual context of the October Agreement. It does not mean that PostNord AB's decision to execute the transformation plan was imputable to Denmark and Sweden. This would be supported by the fact that:
- (a) at the initiative of PostNord AB, the transformation plan was already drawn up in autumn 2016;
 - (b) that an internal capital transfer to Post Danmark was already made in February 2017; and
 - (c) that the underlying analyses and assessments of Post Danmark's situation and business plan were carried out by PostNord AB and not by Denmark and Sweden.
- (110) According to Denmark and Sweden, the fact that Denmark's provision of USO compensation was conditional on the implementation of the transformation plan (paragraph 9 of the October Agreement) only further underlines that the decision to implement that transformation plan rested with PostNord AB, since the condition would have been redundant if PostNord AB were already obligated to do so.

4.1.3.2. Joint comments by Denmark and Sweden on the non-existence of an advantage

- (111) Denmark and Sweden argue that PostNord Group implemented its capital injection into Post Danmark in compliance with the MEOP. PostNord's decision to make the internal capital transfers was based on methods which are in line with the market practice such as the DCF analysis, the Capital Asset Pricing Model and WACC.
- (112) In particular, both Denmark and Sweden argue that Post Danmark's growth rates for the letter market ([...] % annually), logistics market ([...] %) and overall (combined) growth (that is, expecting to reach [...] % in 2026 and [...] % after 2026) assumed in the DCF model were conservative. This is based on expectations that the logistics business will grow at a minimum rate of the underlying GDP growth, and that the decline in the letter business is expected to slow down by 2022 and stabilise in 2026. The projected growth rates were based on their trends over the past few years and took into account the projected inflation and population growth. The assumed slow-down in the decline of the letter services by 2022 was based on the fact that large parts of the Danish mail volumes were already digitalised (approx. 80 % of the volumes compared to 2001), and an assumption that the remaining part of the mail volumes would decrease at a much slower rate than the first, very large part ⁽⁵⁶⁾.
- (113) In addition, Denmark and Sweden argue that in a scenario where Post Danmark would go bankrupt, the market would doubt PostNord Group's ability and willingness to support the remaining subsidiaries. In such a scenario, PostNord AB's shadow credit rating would be significantly downgraded from the equivalent of a weak investment grade in the [...] area to a speculative grade in the [...] area. This would correspond to a spread between a [...] bond and a [...] bond of [...] basis points (BPS), or the equivalent of [...] % in yield. In that respect, Denmark and Sweden regard an assumption of a [...] % increase in borrowing costs in a bankruptcy scenario as conservative. At the same time, the increased borrowing costs were calculated based on SEK [...] in gross debt, which is considered the average interest-bearing liabilities balance needed between 2018 to 2026 to finance the PostNord Group in a scenario of a Post Danmark bankruptcy.
- (114) Denmark and Sweden claim that if Post Danmark were to go bankrupt, PostNord would lose the competitive advantage of a complete Nordic network along with the combined synergies in the current production model. This would result in a revenue loss of [...] % of PostNord's own Nordic operations until 2026 (index with inflation and parcel growth), amounting to SEK [...] million, while the corresponding Earnings Before Interest, Taxes, Depreciation and Amortisation ('EBITDA') impact would be [...] %.

⁽⁵⁶⁾ The assumptions were based on information from the Denmark Ecommerce Country 2017 report issued from the Ecommerce Foundation and the e-commerce 2017 report issued from Danish Chamber of Commerce.

- (117) According to Denmark and Sweden, it follows from Table 2 that, in case of Post Danmark's liquidation scenario, the losses that PostNord Group (being the sole shareholder) would suffer (namely equity losses, 'G') amounting to MDKK [...] would be higher than the cost that PostNord Group actually suffered by injecting a capital ('H') of MDKK 2 339 in order to support Post Danmark.
- (118) The second quantitative analysis (presented in **Table 3**) focusses directly on the equity value and consists of an application of the DCF method, which is based on the profits accruing only to the owner of Post Danmark, that is, PostNord Group. The DCF to equity method takes as a starting point the same free cash flows to firm used in the first analysis and then subtracts the interest rate costs on the debt, the reimbursement of loans and the cash inflows from new loans at the level of Post Danmark leading to the free cash flows to equity. This free cash flow is discounted by the cost of equity of the owner (PostNord Group). Similar to the first analysis, the calculation of equity value provided by Denmark takes into account the negative effects on PostNord Group in the counterfactual scenario.

Table 3

Post Danmark A/S – DCF Evaluation model for PostNord Group's capital injection – Equity value

(amounts in million DKK)

	2018	2019	2020	2021	2022	2023	2024	2025	2026	Assumptions for Terminal Equity value
FCFF (incl. USO) (Free Cash Flow to Firm)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
USO equity capital injection	- 1 161									
Free Cash Flow to Firm (excl. USO)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Change in net debt	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Interest costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Difference in tax between FCF to Firm and FCF to Equity	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
USO equity capital injection	1 161									
FCFE (incl. USO) (Free Cash Flow to Equity)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Cost of equity	[...] %									
Terminal growth rate of FCFE	[...] %									
Terminal Equity value	[...]									
PV of FCFE	(A)	[...]								
PV of Terminal Equity value	(B)	[...]								
Equity value	(E)=(A)+(B)	[...]								
PV of Effects of bankruptcy	(F)	[...]								
PostNord Group's equity losses in Post Danmark's liquidation scenario	(G)=(F)-(E)	[...]								
PostNord Group's capital injection	(H)	- 2 339								

- (119) According to Denmark and Sweden, it follows from Table 3 that in case of Post Danmark's liquidation scenario, the losses that Post Nord Group (being the sole shareholder) would suffer (namely equity losses, 'G') amounting to MDKK [...] would be higher than the cost that PostNord Group actually suffered by injecting a capital ('H') of MDKK 2 339 in order to support Post Danmark.
- (120) According to Denmark and Sweden, both analyses presented in recitals (116) and (118) demonstrate the market conformity of the PostNord Group equity injection because the present value of the losses avoided due to the equity injection are higher than the cost of that injection.
- (121) The same analyses also shows (presented in **Table 4**) that the internal rate of return ('IRR') of [...] % of PostNord Group's capital injection to Post Danmark would exceed the minimum return required by a market economy operator, that is, the cost of equity of [...] % as explained below in recital (148).

Table 4

Post Danmark A/S – IRR Evaluation model for PostNord Group's capital injection*Balance sheet end of period*

Date of cash flow	31-Dec-17	30-Jun-18	30-Jun-19	29-Jun-20	29-Jun-21	30-Jun-22	30-Jun-23	29-Jun-24	29-Jun-25	30-Jun-26	Equity Terminal value
Net working capital	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Tangible fixed assets	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Operating capital to finance	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Free cash flow to equity (incl. USO)		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Excess cash	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Financial fixed assets	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Provisions	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Loans to credit institutions	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Net financial assets and liabilities	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
Equity	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	
<i>Investor capital injections (-)/dividends (+)</i>		- 2 339	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Equity IRR	[...] %
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Cost of Equity	[...] %
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- (122) Denmark and Sweden claim that the applied assumptions in the DCF models were prudent and conservative since, as evidenced by the sample of postal peer WACC rates, the WACC of [...] % used in the DCF model is [...] percentage points [...] than for comparable entities. Furthermore, the profitability forecasts are reasonable and justified by market studies ⁽⁵⁷⁾, while the assumptions on the growth rates of revenues and the profitability of Post Danmark were benchmarked against a sample of Post Danmark's peers ⁽⁵⁸⁾.

⁽⁵⁷⁾ Danish Chamber of Commerce report on e-commerce in 2017, Denmark Ecommerce Country 2017 report from Ecommerce Foundation, Pitney Bowes Parcel Shipping Index, <https://www.pitneybowes.com/us/shipping-index.html>, eCom survey 'eBarometern 2018', <https://dhandel.se/kunskapsbanken/e-barometern-arsrapport-2018/>, IPC, Global Postal Industry Report, November 2019.

⁽⁵⁸⁾ Post Danmark's peers taken into account: CTT-Correios De Portugal, S.A.; Deutsche Post AG; Bpost SA/NV; Österreichische Post AG; PostNL N.V.; Royal Mail plc; DX (Group) plc; FedEx Corporation; Kuehne + Nagel International AG; United Parcel Service, Inc; DSV Panalpina A/S; XPO Logistics, Inc.

4.1.4. *The capital injections from Denmark and Sweden into PostNord AB do not involve State aid*

- (123) With respect to whether Denmark and Sweden, as owners of and investors in PostNord AB, should have measured the probability of PostNord AB losing investment grade in the absence of the capital injections, they claim that such a requirement is very speculative. Moreover, they consider that comparable owners who consider whether to invest in their own company (as Denmark and Sweden claim they did) have detailed knowledge of their own undertakings, but they may not necessarily have described, calculated and documented all those effects explicitly and in detail before making a specific investment. Requiring such documentation would significantly exceed the documentation that normal market operators would produce prior to such investments. Private undertakings in similar situations would be normally guided by the so-called business judgment rule, in other words, the standard by which management of an undertaking can be liable for its decisions. The crucial question according to this rule is whether the basis for the decision was reasonable, and whether the decision is made in the interest of the undertaking.
- (124) Sweden and Denmark argue that the basis for deciding to inject capital into PostNord AB was reasonable, sufficient and similar to what a comparable private investor would have required for the following reasons:
- (a) prior to making their investment decisions, Denmark and Sweden consulted external financial advisers who carried out market conformity economic evaluations and recommended to carry out the capital injections;
 - (b) Denmark and Sweden have demonstrated that the capital injections were sound investments by quantifying the envisaged costs of not providing the capital, and by making more qualitative assessments of the positive and negative effects of the capital injections; and
 - (c) Denmark and Sweden have demonstrated that they did not have any other incentives for making an investment in PostNord AB other than to make economically rational investment decisions relating to PostNord's financing of the implementation of the transformation plan of Post Danmark.
- (125) In Denmark and Sweden's view, the DCF analysis demonstrates that their investments have a positive return in the form of value creation, since in case PostNord AB would lose investment grade, it would suffer enterprise value losses of SEK 1 071 million. This would exceed the actual total cost Denmark and Sweden suffered amounting to SEK 667 million, namely the total capital injected by them. They relied on the effects of their investments on the enterprise value of PostNord AB and their objective to protect their value as shareholders (that is, equity value of SEK [...]), and, in their view, the MEOP does not require that the owners should carry out economic assessments based on a counterfactual scenario where PostNord AB would be liquidated.
- (126) In addition, Denmark and Sweden claim that, even if it was not explicitly mentioned in the owners' economic analyses, they had in-depth knowledge of the refinancing needs of PostNord. Moreover, Denmark and Sweden have engaged financial advisers (SEB and Rothschild) who have carried out in-depth analyses of PostNord's financial situation. In those analyses, the maturity of the loans to be refinanced has been considered. Therefore, the assumption that PostNord needed significant refinancing and for that reason had a specific need to remain in investment grade territory, to enable access to the credit market and be flexible in choosing the most suitable and lowest cost sources of financing, has been properly justified in Denmark's and Sweden's view.
- (127) Finally, Denmark and Sweden claim that, although not required in an MEOP assessment, *ex-post* evidence, such as the yield of the bonds issued by PostNord and other peers, in 2018 and 2019, demonstrates that the capital injections were indeed in conformity with the market and that absent the capital injections the interest costs could increase by [...] basis points.

4.2. Denmark's comments on the opening decision

- (128) Denmark's individual comments concern only the capital injections from itself and Sweden. Denmark claims that the estimate of the probability of PostNord AB losing investment grade status with and without their own and Sweden's capital injection was not explicit, but implicit in the Danish authorities' assessment made prior to their investment decision. According to the assessment, it was likely (that is, [...] % to [...] % certain) that PostNord AB would lose investment grade in the absence of capital injections from Denmark and Sweden.
- (129) Denmark and Sweden's capital injection of SEK 667 million would ensure that the net debt to EBITDA ratio would remain below [...] in the coming years, a level usually required by the financial market to enter investment grade territory. Moreover, the owners' capital injection would strengthen in itself the creditworthiness of the company by signalling to the financial markets that the owners had assessed and believed in PostNord AB's future financial performance.
- (130) Denmark claims that it would not be standard market practice to proceed with an exact financial calculation of the counterfactual and factual scenarios of whether PostNord AB's credit rating would be maintained strictly because of the capital injections from Denmark and Sweden, as in view of Post Danmark's operational transformation, it could be expected that PostNord AB's creditworthiness would gradually improve in any event.
- (131) However, Denmark also considers that Rothschild's analysis provided an illustrative but realistic example of potential losses of PostNord AB being in non-investment grade, based on the total liabilities existing in 2017 (that is, SEK [...]) and assuming a maturity of [...] years. That analysis shows that PostNord AB had to be in investment grade territory to ensure low interest for the refinancing of liabilities maturing in the near future. The analysis therefore shows that the realistic risk of PostNord AB losing enterprise value due to increased investment costs would have prompted any private owner investor in similar circumstances to make the capital injection without the level of detail of the assessment required by the Commission.
- (132) Denmark also argues that the period where PostNord AB's investment grade would be maintained due of Denmark and Sweden's capital injections would be uncertain. However, since the majority of PostNord AB's liabilities had to be refinanced in 2018 to 2019, it was crucial for PostNord AB to maintain the investment grade in that period. Furthermore, PostNord AB is operating in a market undergoing significant change, which would imply that the financial markets are likely to apply stricter criteria to distinguish between investment and non-investment grade, and to show less flexibility to the net debt to EBITDA ratio. Under those circumstances, PostNord AB's investment grade rating would remain important for several years, even after the completion of the transformation of Post Danmark.
- (133) Denmark claims that net debt to EBITDA ratio would be one of the leading financial metrics used by credit rating agencies to determine an issuer's default risk, therefore, maintaining that specific ratio below a certain threshold would be crucial for PostNord AB to keep the investment grade rating. At the same time, the financial markets can only base credit assessments on expected future results, for example, the likelihood of the successful transformation of Post Danmark. In this context, the capital injections from Denmark and Sweden to PostNord AB would have affected the risk assessment of the market positively.

4.3. Sweden's comments on the opening decision

- (134) Sweden's individual comments concern only the capital injections from itself and Denmark. Sweden claims that if PostNord Group were to transfer capital to Post Danmark without the USO compensation from Denmark or capital injections into PostNord AB by the shareholders, the implementation of the transformation plan of Post Danmark would consume the financial resources of the PostNord Group to an extent where the whole group would be at risk.
- (135) Sweden estimates that the impact of a bankruptcy of Post Danmark on the equity value of the Swedish holding of shares in PostNord AB in total was uncertain but estimated to be negative.

- (136) Sweden claims that with no capital injections and no USO compensation for Post Danmark, the PostNord Group would be regarded as non-investment grade with a significant financial risk, increased borrowing costs and limited financial flexibility. A lower rating could involve adverse impact on customer and supplier relationships, difficulties in retaining talented employees as well as other signalling effects from no (capital) support from the owner. Therefore, Sweden considered that it was crucial to ensure a financial risk level corresponding to a credit rating of, or close to, investment grade quality [...], which is comparable to peers.
- (137) Sweden, on the basis of a DCF analysis, concludes that, including the Danish aid of SEK 1 533 million related to the USO compensation for 2017 to 2019, the NPV of the Danish business increases from SEK [...] to SEK [...], which subsequently increases in the value of the shareholders' equity. The increase in the Swedish shareholder's equity value of SEK [...] clearly surpasses its investment of SEK 400 million, which would show that the decision of Sweden to inject capital into PostNord AB was in line with the MEOP.

4.4. Comments from Denmark and Sweden on third parties comments

4.4.1. *The three capital injections constitute three separate measures and not one single measure*

- (138) For the reasons explained in Section 4.1.1, Denmark and Sweden disagree with ITD and other third parties that the three capital injections should be considered as a single measure. Denmark and Sweden also note, with reference to recital (75) of the opening decision, that the USO compensation for 2017 to 2019 is a distinct measure.
- (139) Denmark and Sweden notably consider that ITD's claim that in order to answer the question of whether several measures should be analysed separately, that one should look at the 'circumstances of the beneficiary, not the circumstances of the investors' cannot be accepted. Denmark and Sweden consider that compliance with the MEOP should depend on the economic rationality seen from the perspective of each investor ⁽⁵⁹⁾.
- (140) Regarding the purpose of the three capital injections and the argument from ITD that the alleged funding gap between the estimated costs of the new production model (namely SEK 5 billion according to the October Agreement) and the PostNord Group injection of DKK 2,339 billion would indicate that the capital injections from Sweden and Denmark are in fact also meant for the transformation plan ⁽⁶⁰⁾, Denmark and Sweden note that the estimated costs of the new production model, as referred to in the October Agreement, do not equal the need for the capital, since the estimated costs include predicted operating losses incurred by Post Danmark itself, making the need for capital less.
- (141) On ITD's claim that the final beneficiary of all three capital injections is Post Danmark (see recital (58)), Denmark and Sweden note that the October Agreement is not intended to identify the real beneficiary for State aid purposes. It is rather an agreement on principles, which was implemented with legally binding commitments *vis-à-vis* PostNord AB subsequently.

4.4.2. *The three capital injections were not granted on the date of the October Agreement*

- (142) For the reasons explained in Section 4.1.2, Denmark and Sweden also disagree with the position of ITD that the three capital injections were granted on the date of the October Agreement. Denmark and Sweden refer to the conditions listed in the *Magdeburger Mühlenwerke* and *BSCA* ⁽⁶¹⁾ judgments when explaining that a measure can only be considered granted by a legally binding act by which the competent national authority undertakes to grant the measure to the recipient, by an unconditional and legally binding promise, or when any conditions for obtaining the aid have been met and when the recipient of the aid can be identified.

⁽⁵⁹⁾ Denmark and Sweden refer in this respect to for example: Case T-152/99, *HAMSA v Commission*, EU:T:2002:188 and Commission Decision 2018/261/EU of 22 January 2014 on the measures SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) implemented by the Region of Sardinia in favour of Saremar (OJ L 49, 22.2.2018, p. 22), recital 243.

⁽⁶⁰⁾ See recital (55)(b).

⁽⁶¹⁾ C-129/12, *Magdeburger Mühlenwerke GmbH v Finanzamt Magdeburg*, EU:C:2013:200, paragraphs 40 and 41; T-818/14, *Brussels South Charleroi Airport (BSCA) v European Commission*, EU:T:2018:33, paragraph 72, and references therein).

(143) In Denmark's and Sweden's view, the October Agreement does not satisfy any of these three conditions for the following reasons:

- (a) the October Agreement is not legally binding and Denmark and Sweden did not undertake to grant the capital injections by that agreement. Notably, the October Agreement is an agreement in principle ⁽⁶²⁾ between two States and not an expression of a legally binding commitment towards PostNord AB;
- (b) the October Agreement was conditional since it requires several implementing measures. Denmark and Sweden in this regard refer to the need to obtain consent from their respective governments and parliaments. Without their consent, Denmark and Sweden could abandon the agreement at any point in time without legal consequences. Even the approval of the respective parliaments would not be sufficient, since they do not oblige the respective governments to dispose of the capital (see recitals (98) and (99)). In addition, the State aid elements of the October Agreement had to be notified to and approved by the Commission. Moreover, in order to condition the payment of the USO compensation on its use for terminating the contracts of former civil servants an implementing agreement ⁽⁶³⁾ between Denmark and PostNord AB was required. The same agreement contains provisions that bound PostNord to implement its own capital injection for Post Danmark (recital (25)). The States also consider that the wording of the October Agreement supports the need for implementing measures, for example, 'these investments are to be made as a contribution of capital to the Company on market terms without issuing new shares'. It would follow in the view of Denmark and Sweden that the capital injections are conditioned upon being on market terms, which requires further analysis of whether this would be possible ⁽⁶⁴⁾;
- (c) the October Agreement does not identify the beneficiaries since the actual beneficiary of the State capital injections is not the same as described in the October Agreement.

(144) Moreover, the States consider ITD's claim that implementing measures, in order to be characterised as such for State aid purposes, should be laid down *ex-ante* and that it would be impossible to grant the aid without undertaking the implementing measures (see recital (59)) as irrelevant. In this respect, the States have doubts on the relevance of the case law referred to by ITD. Firstly, the judgment in *Arriva Italia and Others* was not yet delivered at the moment when ITD submitted its comments. In any event, according to the States, the *Arriva Italia and Others* case would not concern whether implementing measures could be imposed, or when those measures could be imposed, but rather whether the national law that granted the right to receive the aid contained implementing measures and whether those were fulfilled ⁽⁶⁵⁾. Secondly, the other judgments referred to by ITD (see footnote 35) concern whether national measures constituted aid schemes and whether the conversion of a company into a particular legal form constituted an aid scheme or individual aid. According to the States, that case law is clearly not relevant for ITD's claim.

(145) In the view of Denmark and Sweden, ITD's subsidiary line of reasoning that all three capital injections were granted on 28 May 2018 is not substantiated, as explained in recitals (100) and (101).

(146) Regarding ITD's reference to the Rigsrevisionen's report (recital (66)), Denmark and Sweden note the following:

- (a) when the Rigsrevisionen in its report states that Post Danmark received capital injections from the owners (that is, Denmark and Sweden), this is incorrect, as shown directly from the subsequent sentence where the capital injections are listed:

'Det fremgår af figur 3, at Post Danmarks regnskabsreglement er blevet ændret 2 gange siden postdirektivet fra 2008. Det fremgår desuden, at Post Danmark de seneste år flere gange har fået tilført kapital fra ejerne og koncernen. Det drejer sig om 3 tilførsler i 2017, der henholdsvis medførte 2.340 mio. danske kroner fra PostNord til Post

⁽⁶²⁾ Before the operative part in the October Agreement, it is stated 'IT IS HEREBY IN PRINCIPLE AGREED AS FOLLOWS':

⁽⁶³⁾ Agreement on the principles for implementing the compensation amount of SEK 1,533 bn mentioned in the Agreement of 20 October 2017 between the Swedish and Danish State between the Kingdom of Denmark and PostNord AB, signed 11 June 2018.

⁽⁶⁴⁾ T-425/04 RENV and T-444/04 RENV, *France and Orange v Commission*, EU:T:2015:450, paragraph. 237, as upheld by C-486/15 P, *Commission v France and Orange*, EU:C:2016:912.

⁽⁶⁵⁾ Opinion of Advocate General Tanchev, Case C-385/18, *Arriva Italia and Others v Ministero delle Infrastrutture e dei Trasporti*, ECLI:EU:C:2019:647, paragraph 36-44.

Danmark, 267 mio. svenske kroner fra **den danske stat til PostNord** og 400 mio. svenske kroner fra **den svenske stat til PostNord**. I tillæg hertil forpligtede den danske stat sig i 2017 til delvist at kompensere PostNord med 1.533 mio. svenske kroner for udgifter i forbindelse med afskedi-gelser af tidligere tjenestemænd.' (emphasis added)

Figure 3 shows that the Accounting Regulation for Post Danmark has been amended twice since the Postal Directive [Directive 97/67/EC] from 2008. **Furthermore, it shows that Post Danmark several times has received capital from the owners and the group.** It concerns 3 capital transfers in 2017: DKK 2 340 m from **PostNord to Post Danmark**, SEK 267 m from the **Danish State to PostNord** and SEK 400 m from the **Swedish State to PostNord**. In addition, in 2017, the Danish State committed to partially compensate PostNord with SEK 1 533 m for costs related to the termination of former civil servants.' (emphasis added)

The Rigsrevisionen therefore refers to capital injections from Denmark and Sweden to PostNord AB and not to Post Danmark;

- (b) the Rigsrevisionen has not gone through Post Danmark's accounts as claimed by ITD. As clearly stated in the report, the report specifically concerns the supervision by the Danish Ministry of Transport, Building and Housing and the Transport Authority of Post Danmark.
- (c) the Rigsrevisionen wrongly states in the graph included in the report (referred to in recital (66)) that the different capital injections were transferred in 2017. According to the States, as shown by Post Danmark's annual report from 2019 ⁽⁶⁶⁾, the amounts were transferred from PostNord Group in 2018 and 2019, and PostNord AB's annual report from 2018 also mentions the amount received from the States ⁽⁶⁷⁾. In any event, the Rigsrevisionen is not a State aid authority and did not make any assessment regarding a granting date relevant for State aid purposes.

4.4.3. The DCF calculations for PostNord Group capital injection into Post Danmark are sound

- (147) Denmark and Sweden dispute ITD's claim that the WACC used for the capital injection from PostNord Group to Post Danmark should have been higher in order to reflect the likelihood that the USO would not be entrusted to Post Danmark. They explain that the USO entrustment has always lied with Post Danmark, and PostNord Group would have had no reason to expect that the Danish State had any intentions to change this situation, especially since the universal service is a cost-intensive obligation and a loss-making activity.
- (148) Denmark and Sweden also dispute ITD's claim that the WACC should have been higher than the WACC of PostNord Group's peers to reflect the risks related to the realisation of the transformation plan, because the relevant business risk was captured in the underlying business plan, and additional company risk premiums were applied (for digitalisation and size), as shown in **Table 5**:

Table 5

Post Danmark A/S – WACC calculation

Capital Asset Pricing Model	[...] %
Risk premium – Size	[...] %
Risk premium – digitalisation	[...] %
Cost of equity	[...] %
Cost of debt	[...] %
Equity ratio	[...] %
Debt ratio	[...] %
WACC	[...] %

Note: Tax rate 22 %

⁽⁶⁶⁾ Post Danmark's annual report 2019, page 14.

⁽⁶⁷⁾ PostNord AB's annual report 2018, page 4 and 47.

- (149) Furthermore, Denmark and Sweden claim that the performance of Post Danmark would have improved compared to the targets set in the business plan for 2018 to 2020 as stated in PostNord AB's annual report 2018 at page 25. In both Denmark's and Sweden's opinion, this supports the conclusion that the assumptions of the DCF calculation were prudent and conservative. It also disproves ITD's claim that the trend in Post Danmark's operating results since 2017 has been exclusively and increasingly negative. On the contrary, there has been an upward trend in the EBIT before items effecting comparability. As stated in PostNord AB's annual report 2018, the reduced losses are due to the implementation of the transformation plan.
- (150) Contrary to ITD's arguments, Denmark and Sweden consider that their capital injections into PostNord AB should not have been included in the DCF for the group capital injection. However, Denmark and Sweden argue that even if the capital injections were included in the calculation of the NPV of PostNord Group's capital injection in Table 1 of the opening decision, thereby increasing the capital injection (A) by SEK 667 million (DKK 460 million), the total value net of the capital injection (G) would remain positive, namely about DKK [...] (DKK [...] – DKK 460 million).
- (151) Contrary to ITD's arguments, Denmark and Sweden also consider that the one-off effect related to the real-estate credits in Denmark (DKK [...]) should have been included in the DCF for the PostNord Group capital injection, because the inclusion of this effect was based on cross-default clauses in PostNord Group's credit facility. In any event, according to the States, the inclusion of the real-estate one-off effect in the DCF does not have any substantive impact on the result, and even if the real-estate one-off effect had been excluded, the total value net of the capital injection would have remained positive.
- (152) In response to ITD's argument that the USO compensation involves State aid and thus should be excluded from the DCF analysis, the two States claim that the USO compensation was neutralised in the DCF by corresponding costs connected with the loss-giving USO.
- (153) Finally, in response to ITD's argument that the DCF model was designed by PostNord itself, the States argue that public undertakings such as PostNord obviously have internal competent people who are perfectly capable of carrying out an investment analysis, which satisfies the MEOP, rather than assigning it to an independent expert.

5. ASSESSMENT

5.1. Qualification of the capital injections as one measure or three separate measures

- (154) ITD (as well as other third parties) claims that all capital injections should be considered as one measure (see Section 3.1.1). Denmark and Sweden, on the contrary, claim that the capital injections should be considered as three separate measures (see Section 4.1.1). The Commission in the opening decision considered that the three capital injections are three separate measures each requiring their own proper assessment (see recital (69) of the opening decision).
- (155) After reviewing all comments received in the formal investigation procedure, the Commission maintains its view in the opening decision that the three capital injections are three separate measures each requiring its own distinct assessment.

5.1.1. *Different investors*

- (156) PostNord Group, Denmark and Sweden are not the same investor. The logic and the decisional process for carrying out the capital injections are different for each of the investors concerned (as shown by the different reasoning presented by Denmark and Sweden in Sections 4.2 and 4.3). The market conformity of those measures cannot be assessed as a single measure since Sweden, Denmark and PostNord Group each have their own distinct financing cost and each require their own return on investment. This means, for example, that an operation could be economically justified for either Sweden or Denmark, but not for the other Member State.

- (157) The decisional processes of the two States are entirely distinct (see recital (98) and (99)) and involve completely different actors. As regards the respective capital injections of Denmark and Sweden, with respect to their capacity as shareholders of PostNord AB, Sweden and Denmark are also in different financial situations from each other, as they have different financial costs and requirements for return on investments and have also different borrowing costs. At the same time, Sweden and Denmark are in different situations from PostNord Group. PostNord Group also has its own internal decision making process and already had started with the preparations for the implementation of the transformation plan in autumn 2016, which eventually led to its capital injection. Even if PostNord Group needs to take into account the position of its shareholders with regard to its own capital injection to Post Danmark, it is not possible to align its decisional process with the independent decisional processes of Denmark and Sweden. The market conformity of the PostNord Group capital injection therefore needs to be assessed in light of the consequences of that investment for PostNord Group.

5.1.2. Different beneficiaries

- (158) Contrary to what ITD and the other third parties argue, all three capital injections do not have the same beneficiaries. PostNord Group's capital injection was paid to Post Danmark, while the capital injections from Denmark and Sweden were paid to PostNord AB.
- (159) ITD and other third parties dispute that fact (see recital (58)) on the basis of the terms of the October Agreement. Firstly, the way in which ITD has presented the quote of the October Agreement ('the Company [PostNord] will transfer **[that]** capital to Post Danmark') creates the false image that in the end PostNord AB would transfer capital in the amount of SEK 5 billion to Post Danmark. The word 'that' has been added by ITD and, according to the Commission changes the meaning. The full quote reads as follows:

'In order to meet the challenges of digitalization in Denmark, the Company has developed a new production model with an estimated cost of approximately SEK 5,0 bn, including a reduction in the number of employees in the Danish business by approximately 4 000 between 2017 and 2020 ("the new production model"). As an element in the implementation of the new production model, the Company will transfer capital to Post Danmark as outlined in the Company's board of directors' proposal of 29 September 2017.' ⁽⁶⁸⁾.

- (160) It follows from this quote that no link is being made between a capital injection of SEK 5 billion and the alleged fact that this would all be transferred to Post Danmark. It is simply stated that as an element in the implementation of the new production model, the Company would transfer capital to Post Danmark. This does not preclude the fact that as another element of the new production model, separately, capital would be transferred to PostNord AB. This is precisely what happened, as it results from paragraph 4 of the October Agreement:

The Company has estimated the need for capital to be SEK 3,0 bn whereof the Swedish Shareholder agrees to invest SEK 400 m and the Danish Shareholder agrees to invest SEK 267 m to support the implementation of the new production model and the Company will provide the additional funding. **These investments are to be made as a contribution of capital to the Company** ⁽⁶⁹⁾ on market terms without issuing new shares ⁽⁷⁰⁾ (emphasis added).

- (161) Secondly, both the Danish Decree referred to in recital (101)(a) and the Swedish parliament's decision referred to in recital (101)(b) speak about a transfer of capital to PostNord AB. The Danish Decree states [...] ⁽⁷¹⁾. The Swedish parliamentary decision states: 'the bill is proposed to the Riksdag to authorise the Government to decide on capital injections to PostNord AB of a maximum of SEK 400 million' ⁽⁷²⁾.
- (162) Moreover, the Commission did not find in the course of its formal investigation any element contradicting the information submitted by Denmark and Sweden (recital (94)).

⁽⁶⁸⁾ Paragraph 1 of the October Agreement.

⁽⁶⁹⁾ It follows from the preamble of the October Agreement that PostNord AB is meant by 'Company' in this agreement.

⁽⁷⁰⁾ Paragraph 4 of the October Agreement.

⁽⁷¹⁾ [...].

⁽⁷²⁾ 'I propositionen föreslås riksdagen bemyndiga regeringen att besluta om kapitaltillskott till PostNord AB på högst 400 miljoner kronor'.

- (163) Therefore, the Commission considers that the October Agreement was an agreement, in principle (see recital (143) (a)), that did in fact leave significant margin to the States and PostNord AB in the actual implementation of concrete measures. For example, the amount finally granted to Post Danmark through the PostNord Group capital injection does not correspond to the amounts envisaged in the October Agreement. The terms of the October Agreement cannot therefore be considered as a decisive proof of the beneficiaries of the capital injections from Denmark and Sweden.
- (164) The Commission considers that the capital injections from Denmark and Sweden by benefitting PostNord AB and all its subsidiaries, also indirectly benefits Post Danmark by protecting PostNord AB. By contrast, the PostNord Group capital injection benefits directly Post Danmark, which can make use of the capital received to finance the transformation plan.

5.1.3. *Different purpose*

- (165) It is undisputed that the PostNord Group capital injection has the explicit purpose of permitting Post Danmark to implement its transformation plan.
- (166) The capital injections from Denmark and Sweden are paid to PostNord AB, and benefit the whole Group. Denmark and Sweden have explained that the purpose of their respective capital injections is the preservation of the investment grade shadow rating of PostNord AB (see recitals (30) and (33)). As PostNord AB does not have an official credit rating, the objective would be essentially to ensure a financial risk level corresponding to a credit rating of, or close to, investment grade quality [...] (see recitals (30) and (33)). The Commission considers that, as such, preserving the creditworthiness of PostNord AB, which finances itself on the market, is an understandable and rationale economic objective for its shareholders.

5.1.4. *Requirement to have implementing measures*

- (167) The Commission considers that the October Agreement is not the act by which any of the three capital injections have been granted. Indeed, it results from the terms of the October Agreement that it was an agreement in principle, and the granting of all three capital injections required subsequent implementation measures, as explained by Denmark and Sweden (see recital (143)(b)).

5.1.5. *Response to the third parties arguments*

- (168) ITD argues that the Commission should have looked at a different set of criteria to establish whether the three capital injections constitute in fact one single measure.
- (169) However, based on settled case law ⁽⁷³⁾ and Article 6(1) of Council Regulation (EU) 2015/1589 ⁽⁷⁴⁾, the Commission is to rely on all the relevant elements of fact and law in its assessment, and not on a set of criteria determined in a limitative manner, and in this case the Commission has taken into account all relevant elements of fact and law. However, also when looking at the criteria put forward by ITD, the Commission comes to the same conclusion, namely that the three capital measures are separate measures.
- (170) Firstly, ITD's claim that the chronology for all three capital measures is identical since all three were in their view granted on the date of the conclusion of the October Agreement, namely on 20 October 2017. This claim is strongly linked to the granting date of the measure. As explained in Section 5.2, the Commission considers the capital injections to be granted on different dates. For this reason, the chronology of the capital injections is different.
- (171) Secondly, as regards the purpose of the three capital injections, the Commission maintains its conclusion that the capital injection from the PostNord Group and those from the States have a different purpose. The Commission considers that the funding gap that ITD observes (see recital (55)(b)) cannot be proof that the capital injections of Denmark and Sweden also had the purpose to facilitate the implementation of the transformation plan and

⁽⁷³⁾ Joined cases T-415/05, T-416/05 and T-423/05, *Greece and Others v Commission*, EU:T:2010:386, paragraph 178.

⁽⁷⁴⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

therefore, together with the Post Nord Group injection, would have constituted one single measure, all the more since there would still be a funding gap even if those measures were taken into account. Moreover, the States have explained that the funding gap corresponds in fact to the estimated operating losses incurred by Post Danmark (see recital (140)).

- (172) Thirdly, considering that the capital injections have different beneficiaries and/or different investors it follows that also the context in which those capital injections were made is different and that the circumstances of the beneficiaries is equally different. Therefore, the Commission concludes that the circumstances of the capital injections are not the same.
- (173) The Commission also maintains that the case law cited by ITD in its original complaint and in its comments on the opening decision do not support its argument that the three capital injections constitute one measure.
- (174) First of all, as already emphasised in recital (169), in *Greece and Others v Commission* ⁽⁷⁵⁾, the General Court found at paragraph 178 that all elements of fact and law which are relevant for that case are to be taken into account. This goes beyond taking into account only the chronology, purpose and circumstances.
- (175) Second, as regards *Bouygues and Bouygues Télécom v Commission and Others* ⁽⁷⁶⁾ (see recital (33) of the opening decision) and *BP Chemicals v Commission* ⁽⁷⁷⁾, the Commission notes that the facts of those cases are different from those of the present case, as in the present case there are different grantors, each requiring its own assessment. The pertinence of this difference is illustrated by the *BP Chemicals* judgment (to which *Bouygues and Bouygues v Télécom v Commission* refers), where the General Court found that the Commission must determine whether the measures are severable 'in a case such as this, which concerns three capital injections made by the same investor [...]' ⁽⁷⁸⁾ (emphasis added). This shows that the identity of the investor(s) is one of the elements to be taken into account when assessing if the capital injections are a single measure or several, using also other relevant elements.
- (176) Third, it should be noted that even though *Bouygues and Bouygues Télécom v Commission* refers to the chronology, purpose and circumstances of the undertaking when assessing whether consecutive interventions constitute State aid, this does not exclude that other criteria can also be taken into account. Indeed, the Court stated 'that [i.e. considering several consecutive interventions as a single intervention] could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another' ⁽⁷⁹⁾ (emphasis added).
- (177) Fourth, in its comments, ITD refers to *Arriva Italia and Others* and states that the Court of Justice confirmed that an implementing measure was necessarily required by an existing national law providing for the grant of State aid. At the moment of the submission of ITD's (and the other third parties') comments, the Court of Justice had not yet handed down its judgment in that case. ITD therefore most likely based its arguments on the opinion of the Advocate General. In any event, in its judgment of 19 December 2019, the Court concluded that in that specific case, it could be concluded that the aid had been granted; however, it was for the national court to verify whether the legal basis at issue had already conferred the right for the allocation to the funds ⁽⁸⁰⁾. The Commission does not dispute the Court's approach, on the contrary, because in the present case implementing measures were actually required, as the October Agreement did not confer a right for the allocation of the funds and thus the capital injections cannot be considered granted on the date of this agreement.

⁽⁷⁵⁾ Joined cases T-415/05, T-416/05 and T-423/05, *Greece and Others v Commission*, EU:T:2010:386.

⁽⁷⁶⁾ Joined cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, EU:C:2013:175.

⁽⁷⁷⁾ Case T-11/95, *BP Chemicals v Commission*, EU:T:1998:199.

⁽⁷⁸⁾ Case T-11/95, *BP Chemicals v Commission*, EU:T:1998:199, paragraph 170.

⁽⁷⁹⁾ Joined cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, EU:C:2013:175, paragraph 104.

⁽⁸⁰⁾ Case C-385/18, *Arriva Italia Srl and Others v Ministero delle Infrastrutture e dei Trasporti*, ECLI:EU:C:2019:1121, paragraph 41.

- (178) Finally, as regards *Kingdom of Belgium and Magnetrol International v Commission* ⁽⁸¹⁾, different from the circumstances of that case, in the present case, the beneficiaries have been identified (that is, Post Danmark and PostNord AB). While the identification of the beneficiaries was not an obstacle for granting the aid in the present case, there were other obstacles, such as the national decision making procedures in order to make the granting of the capital injections legally binding. Similar considerations applied when the Commission referred to *BSCA v Commission* in recital (81) of the opening decision. In *BSCA v Commission*, the General Court states 'the criterion for determining the time of granting aid is that of the legally binding act by which the competent national authority undertakes to grant the aid to its recipient [...] by an unconditional and legally binding promise' ⁽⁸²⁾. Such an unconditional and legally binding promise was only made at the moment of granting of the different capital injections and such condition was not met on the date of the October Agreement.
- (179) Moreover, ITD appears to take a narrow interpretation of *BSCA v Commission* when it explains that when the aid amount and beneficiary are known a measure can be considered granted (see recital (59)). The Court in *BSCA v Commission* rather uses the absence of the identification of the beneficiary as an additional argument that the measure at issue in that case has not been granted. At paragraph 74, it is stated:

'It is thus clear from that decision that the Walloon Government did not make an undertaking to the applicant to grant it the aid, but, on the contrary, that the competent minister made an undertaking only to submit to the Walloon Government the implementing measures for the investment programme. Moreover, it must be stated that the applicant is not identified as a potential recipient of aid.' (emphasis added).

- (180) In addition, at paragraph 77 of that judgment, the Court states:

'It follows that, contrary to what the applicant claims, the decisions of 20 July and 8 November 2000 did not contain binding and precise legal undertakings to the applicant on the part of the Walloon Government. Thus, as the applicant itself acknowledges in the reply, those decisions constituted an undertaking by the Walloon Government as regards its political objectives and were the result of ministerial consensus within that government. On the other hand, a mere reading of the 2002 agreement highlights the fact that it is only in that document that details concerning the infrastructure and services were set out in the form of legal obligations. In fact, that 2002 agreement is characterised by an investment programme as well as by the expenditure commitments made by the Walloon Region-Sowaer[⁽⁸³⁾] and by the concession fee which the applicant agreed to pay in return.' (emphasis added).

Hence, the October Agreement is similar to the decisions of 20 July and 8 November 2000 which contained political objectives mentioned in paragraph 77 of *BSCA v Commission* (and not with the 2002 Agreement mentioned in the same paragraph), as it also reflects political objectives and is the result of consensus between Denmark and Sweden, and is not the act by which the capital injections may be considered as granted.

5.1.6. Conclusion

- (181) Based on the reasoning provided in recitals (156) to (180), the Commission concludes that the capital injections constitute three separate measures, which are therefore assessed separately in Section 5.2.

5.2. Date of granting of the capital injections

5.2.1. Date of granting of the Group capital injection

5.2.1.1. Assessment

- (182) Denmark and Sweden agree with the Commission's assessment in the opening decision that the PostNord Group capital injection was granted on 11 June 2018 (recital (101)). ITD maintains that the PostNord Group capital injection was granted on 20 October 2017 (recital (62)).

⁽⁸¹⁾ Case T-131/16, *Kingdom of Belgium and Magnetrol International v European Commission*, ECLI:EU:T:2019:91, paragraph 119. The judgment is currently under appeal (C-337/19 P, *Commission v Belgium and Magnetrol International*). The Advocate General has concluded that the General Court was wrong in stating that for the identification of the beneficiaries implementing measures were required, see Opinion of Advocate General Kokott, Case C-337/19 P, *European Commission v Kingdom of Belgium and Magnetrol International*, paragraph 113.

⁽⁸²⁾ Case T-818/14, *Brussels South Charleroi Airport (BSCA) v European Commission*, ECLI:EU:T:2018:33, paragraph 72.

⁽⁸³⁾ Société Wallonne des Aéroports Sa.

- (183) When the granting of a measure depends on certain conditions being met, it cannot be considered to be granted unless and until those conditions are met ⁽⁸⁴⁾. In the October Agreement, it is stated that: 'The shareholders agree to the following subject to [...] as regards the State aid elements, approval from the European Commission'. The comments from third parties could not alter the Commission's conclusion that this is a clear condition that needs to be fulfilled before the PostNord Group capital injection can be considered granted. Therefore, the capital injection of PostNord Group could at the earliest be considered granted as of 28 May 2018, the day that the 2018 Decision was adopted.
- (184) According to the October Agreement, if the Commission had not approved the USO compensation by its 2018 Decision, the three capital injections could simply not take place. The timing of the payment of the capital injections is coherent with that condition.
- (185) Moreover, the PostNord Group capital injection was in any event part of the implementation agreement concluded between Denmark and PostNord AB (see recital (25) and (100)). It is only on the basis of that agreement that the Board of Directors of PostNord AB made the investment decision and therefore PostNord Group's obligation to inject capital into Post Danmark became 'unconditional and legally binding', the criterion applied by the Courts ⁽⁸⁵⁾.
- (186) In light of recitals (183) to (185), the Commission considers that the PostNord Group capital injection was granted as of 11 June 2018.
- (187) Moreover, as regards the relatively insignificant and partial transfer in April 2018 ⁽⁸⁶⁾ (see recital (107)), this is in line with what the October Agreement states in paragraph 6: 'Awaiting [approval from the Commission on the State aid elements of the Agreement], [PostNord] may provide the funding necessary for Post Danmark A/S in order for the company to run the day to day business.'. Such a very limited transfer, aiming at ensuring short-term continuity, awaiting more structural measures such as the USO compensation for 2017 to 2019, cannot be compared with the PostNord Group capital injection of in total DKK 2,339 billion to Post Danmark.
- (188) The Commission also observes that the October Agreement differs from the Intergovernmental Agreement concluded between Denmark and Sweden on the establishment of a consortium that would deal with the construction, management and operations of the so-called Øresund Fixed Link (see recital (64)). Contrary to the Intergovernmental Agreement, in the October Agreement, Denmark and Sweden do not jointly guarantee anything or commit to provide financial support.
- (189) This is illustrated by recital (32) of the Commission's decision on the Øresund Fixed Link (see footnote 38), which refers to Article 12 of the Intergovernmental Agreement which states the following:
- Danish:** 'Artikel 12 – Danmark og Sverige garanterer solidarisk for forpligtelser vedrørende konsortiets lån og andre finansielle instrumenter, som benyttes i forbindelse med finansieringen. Staterne er indbyrdes ansvarlige i lige forhold.'
- Swedish:** 'Artikel 12 – Danmark och Sverige garanterar solidariskt för förpliktelse avseende konsortiets lån och andra finansiella instrument som utnyttjas i samband med finansieringen. Staterna är inbördes ansvariga i lika omfattning.'
- English:** 'Article 12 – Denmark and Sweden jointly and severally guarantee obligations relating to the Consortium's loans and other financial instruments used in connection with the financing. States are equally responsible.' (emphasis added)

5.2.2. Date of granting of the Danish capital injection

- (190) Contrary to the Commission's conclusion in the opening decision that the Danish capital injection was granted on 11 June 2018 (see recital (108) of the opening decision), Denmark considers that its capital injection was only granted on 10 December 2018, the same date as on which it was paid out. ITD considers that the capital injection was granted on the date of the October Agreement, namely 20 October 2017.

⁽⁸⁴⁾ See e.g. C-129/12, *Magdeburger Mühlenwerke*, EU:C:2013:200, paragraphs. 40 and 41.

⁽⁸⁵⁾ Case T-818/14, *BSCA v Commission*, EU:T:2018:33, paragraph 72 and the case law cited.

⁽⁸⁶⁾ On 4 April 2018, PostNord Group transferred capital for an amount of DKK 150 million into Post Danmark, 6,4 % of the value of the Group capital injection.

- (191) The Commission maintains that similarly to the capital injection of PostNord Group, further subsequent measures to the October Agreement were necessary for Denmark to carry out its capital injection. First, the Ministerial Decree of 17 May 2018 constituting the approval of the Finance Committee of the Danish Parliament was necessary. The Danish Ministry of Transport, Building and Housing needed this approval of the Danish Parliament in order to proceed with the capital injection.
- (192) Secondly, the Commission observes that it follows from the comments on the opening decision from the States that the Ministerial Decree was not binding and the Danish government could at any moment decide not to act upon on the Ministerial Decree, since it did not impose an obligation on Denmark to grant the aid.
- (193) Since the October Agreement clearly states that the consent of the Danish Government is equally required for the implementation of the October Agreement (see recital (24)) and considering that the Ministerial Decree does not constitute such consent nor does it provide an obligation for the Government in this regard, the Commission concludes that the Danish capital injection can only be considered granted at the moment it was paid, on 10 December 2018.
- (194) The Commission therefore corrects its conclusion as expressed in the opening decision as regards the date on which the Danish capital injection was granted. However, it should be noted that the modification of the granting date of the aid from 11 June 2018 to 10 December 2018 does not have any impact on the market conformity assessment in Section 5.3.2 of this Decision.

5.2.3. Date of granting of the Swedish capital injection

- (195) Contrary to the Commission's conclusion in the opening decision that the Swedish capital injection was granted on 28 May 2018 (see recital (118) of the opening decision), Sweden considers that its capital injection was only granted on 29 November 2018. ITD considers that the Swedish capital injection was granted on the date of the October Agreement, namely 20 October 2017.
- (196) Similarly with the Danish capital injection, implementing measures were needed following the October Agreement to implement the Swedish capital injection. The implementing measure for the Swedish capital injection is the mandate from the Swedish parliament given on 12 December 2017 (recital (100) and (101)). As explained in the opening decision (see recital (117) of the opening decision), that mandate was conditional upon the Commission's approval of the USO compensation, which happened on 28 May 2018.
- (197) It follows from the comments on the opening decision from the States that the mandate, while enabling the government to act, does not oblige the government to do so. In this regard, Sweden has provided examples of other situations where mandates were given by the Parliament, but following which the government has not acted (yet) (see recital (99)).
- (198) On the basis of recitals (195) to (197), the Commission concludes that it is only once the government decides to act which makes a legally binding decision by which the transfer of funds authorised in the mandate can be considered granted. This decision was taken on 29 November 2018 (see recital (101)).
- (199) The Commission therefore corrects its conclusion as expressed in the opening decision as regards the date on which the Swedish capital injection was granted. However, it should be noted that the modification of the granting date of the aid from 28 May 2018 to 29 November 2018 does not have any impact on the market conformity assessment in Section 5.3.3 of this Decision.

5.3. Existence of aid

- (200) Pursuant to Article 107(1) TFEU, a measure qualifies as State aid if the following cumulative conditions are met: (i) the measure is granted by Member States through State resources; (ii) it confers a selective economic advantage to certain undertakings or the production of certain goods; (iii) the advantage distorts or threatens to distort competition; and (iv) the measure affects intra-EU trade.

5.3.1. Capital injection from PostNord Group into Post Danmark

5.3.1.1. Economic activity and notion of undertaking

- (201) According to settled case law, the Commission must first establish whether the beneficiary is an undertaking within the meaning of Article 107(1) TFEU. 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. Any activity consisting in offering goods and services on a given market is an economic activity ⁽⁸⁷⁾.
- (202) The Danish and Swedish authorities acknowledge that Post Danmark carries out activities of an economic nature. Post Danmark offers postal services against remuneration on the Danish postal market and in competition with other providers. Therefore, the provision of postal services on that market constitutes an economic activity. For those reasons, with regard to the activities financed by the capital injection, Post Danmark qualifies as an undertaking in the meaning of Article 107(1) TFEU.

5.3.1.2. Imputability and State resources

- (203) To assess whether a measure granted through public undertakings is imputable to the State, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure ⁽⁸⁸⁾.
- (204) In addition, State resources include all resources of the public sector ⁽⁸⁹⁾, including resources of public undertakings ⁽⁹⁰⁾. It is irrelevant whether an institution within the public sector is autonomous or not ⁽⁹¹⁾.
- (205) The Commission maintains its assessment in the opening decision that the PostNord Group capital injection is imputable to Denmark and Sweden. While the October Agreement cannot be considered a granting act, it is a bilateral agreement between two States in which they agree in principle with the implementation of the transformation plan for Post Danmark. The Group capital injection is part of the October Agreement as follows from paragraph 4 thereof (see recital (22)).
- (206) Since the PostNord Group capital injection has been agreed upon in principle by the two States through the October Agreement, and that such agreement has never been put into question by the two States, the Commission considers that the PostNord Group capital injection is a consequence of that agreement and is therefore imputable to the Danish and Swedish States. Moreover, this conclusion is reinforced by the implementing agreement (see recital (25)), in which Denmark and PostNord AB explicitly agree on the granting of the Group capital injection. In addition, as PostNord Group is a public undertaking and State resources include resources of public undertakings, the measure is granted through State resources.

5.3.1.3. Selectivity

- (207) In order to fall within the scope of Article 107(1) TFEU, a State measure must favour certain undertakings or the production of certain goods. Therefore, only those measures which grant an advantage in a selective way to certain undertakings fall under the notion of aid.
- (208) The capital injection carried out by PostNord Group is an individual measure specifically targeting Post Danmark. The Commission therefore considers that the measure is selective.

⁽⁸⁷⁾ Case 118/85, *Commission v Italy*, ECLI:EU:C:1987:283 and Case C-35/96 *Commission v Italy*, ECLI:EU:C:1998:303.

⁽⁸⁸⁾ Case C-482/99, *France v Commission*, ECLI:EU:C:2002:294, paragraph 52.

⁽⁸⁹⁾ Case T-358/94, *Air France v Commission*, ECLI:EU:T:1996:194, paragraph 56.

⁽⁹⁰⁾ Case C-482/99, *France v Commission*, ECLI:EU:C:2002:294, paragraph 38. See also Case C-278/00, *Greece v Commission*, ECLI:EU:C:2004:239, paragraphs 53 and 54, and Joined Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia SpA v Commission*, ECLI:EU:C:2003:252, paragraphs 33 and 34.

⁽⁹¹⁾ Case T-358/94, *Air France v Commission*, ECLI:EU:T:1996:194, paragraphs 58-62.

5.3.1.4. Advantage

- (209) An advantage for the purposes of Article 107(1) TFEU is any economic benefit that an undertaking would not have obtained under normal market conditions, that is, in the absence of State intervention ⁽⁹²⁾. Only the effect of the measure on the undertaking is relevant, not the cause or the objective of the State intervention ⁽⁹³⁾. Whenever the financial situation of the undertaking is improved as a result of State intervention, on terms differing from normal market conditions, an advantage is present.
- (210) Economic transactions carried out by public bodies do not confer an advantage, and therefore do not constitute aid, if they are carried out in line with normal market conditions ⁽⁹⁴⁾. To that effect, the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions. Whether a State intervention is in line with market conditions is to be examined on an *ex-ante* basis, having regard to the information available at the time the intervention was decided upon ⁽⁹⁵⁾.
- (211) The Commission considers that the two DCF models presented by the Danish and Swedish authorities are well in line, from a methodological viewpoint, with acceptable practice for assessing the market conformity of an investment. The NPV of the future cash flows of a company (adjusted for debt) is a commonly used way to evaluate equity investment decisions. The models provided consider two cash flows, one resulting from the bankruptcy of Post Danmark (negative cash flows, which would be avoided), and the other from Post Danmark's future operational profits (positive cash flows).
- (212) As regards the doubts expressed in the opening decision, based on the further information obtained, the Commission considers that the profitability forecasts used in the DCF models are reasonable and justified by market studies (see recital (122)). In particular, the assumptions on the growth rates of revenues and the profitability of Post Danmark were benchmarked against a sample of Post Danmark's peers (see recital (122)). That sample included a number of publicly listed companies in the postal services and logistics sectors. For each of Post Danmark's peer companies, the market analyst forecasts of revenues and profits were retrieved. Overall, that benchmarking exercise revealed that, in comparison to the market analyst forecasts, the forecasts underpinning Post Danmark's business plan appeared conservative.
- (213) According to the business plan, the profitability of Post Danmark in the initial years following the PostNord Group injection would be negative. This is one of the arguments that ITD has raised concerning the alleged economic advantage granted to Post Danmark. While the substantial restructuring costs incurred in the years immediately after the Post Nord Group injection do lead to losses, the expected profitability after the turnaround of Post Danmark would be sufficient, from an *ex-ante* perspective, to consider that PostNord Group injection is in line with the market conditions.
- (214) The profitability analysis, using the free cash flow to equity approach, demonstrated that the *ex-ante* expected profitability of the PostNord Group injection would still be sufficient in market terms, even if the losses that would occur in case Post Danmark would go bankrupt were excluded from the calculations. That analysis revealed that, as a shareholder of Post Danmark, PostNord Group expected a return higher than the cost of the equity injection.
- (215) Furthermore, the *ex-ante* expected profitability of the Post Nord Group injection derived from the accurate determination and justification of the WACC and cost of equity, which were used to discount the free cash flows to the firm and to shareholders, respectively. In contrast to what ITD argued, those discount rates adequately reflected the risk level of Post Danmark's cash flows. The WACC notably took account relevant risk premiums (see recital (148)).

⁽⁹²⁾ Case C-39/94, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, EU:C:1996:285, paragraph 60 and Case C-342/96, *Kingdom of Spain v Commission of the European Communities*, EU:C:1999:210, paragraph 41.

⁽⁹³⁾ Case C-173/73, *Italian Republic v Commission of the European Communities*, EU:C:1974:71, paragraph 13.

⁽⁹⁴⁾ Case C-39/94, *SFEI and others*, ECLI:EU:C:1996:285, paragraphs 60-61.

⁽⁹⁵⁾ Case C 124/10 P, *Commission v EDF*, ECLI:EU:C:2012:318, paragraphs 83-85 and 105; case C-482/99, *France v Commission*, ECLI:EU:C:2002:294, paragraphs 71-72; case T-16/96, *Cityflyer Express v Commission*, ECLI:EU:T:1998:78, paragraph 76.

- (216) With regard to ITD's argument that the DCF analysis report has been conducted by PostNord itself and not by an independent expert, the Commission notes that State aid rules do not require that the assessment reports is to be conducted by an expert that is independent from the beneficiary entities. State aid rules only require that the market conformity analysis itself is to be established on the basis of a generally accepted, standard assessment methodology, based on available objective, verifiable and reliable data ⁽⁹⁶⁾, which should be sufficiently detailed and should reflect the economic situation at the time at which the transaction was decided, taking into account the level of risk and future expectations ⁽⁹⁷⁾.
- (217) With regard to ITD's argument that the DCF analysis report should have taken into account all three capital injections, the Commission notes that the capital injection from PostNord Group to Post Danmark is a separate measure that has a different purpose than the capital injections from Denmark and Sweden into PostNord AB. Therefore, the DCF analysis correctly factors in only the capital injection from PostNord Group to Post Danmark.
- (218) With regard to ITD's argument that the DCF analysis took into account ineligible costs related to the real estate mortgage debt and loans that Post Danmark would not be able to repay in case of liquidation, Sweden and Denmark have informed the Commission that the cross-default clauses in Post Nord Group's credit facility are such that in the event that Post Danmark goes bankrupt, PostNord Group is legally bound to pay back those loans. Therefore, the DCF analysis correctly factors in those costs. By acting as a [...] in the context of a credit facility agreement, PostNord Group does not act as a public authority but as a market economy operator fulfilling its obligations in the context of a commercial debt agreement. Therefore, the Commission notes that Post Danmark costs related to real estate mortgage debt and loans occurred in case of bankruptcy are eligible to the DCF analysis.
- (219) With regard to ITD's argument that the DCF analysis took into account ineligible costs related to the indirect bankruptcy costs, namely the alleged higher borrowing costs of PostNord Group and PostNord Group's loss 'of not being able to offer comprehensive Nordic logistics solutions' as well as the 'loss of synergies and scale to its Nordic operations', the Commission notes that those costs are indeed indirect costs to be borne by PostNord Group, as any prudent market operator would do so, in case of Post Danmark's bankruptcy. Therefore, those costs are eligible to the DCF analysis.
- (220) With regard to ITD's argument that the DCF analysis includes ineligible cash flows, such as the USO compensation, the Commission notes that since the USO compensation is regarded as a compatible aid, it is eligible to the DCF analysis. Indeed, a prudent investor would factor in compatible aid in its assessment of the relevance of an investment.
- (221) With regard to ITD's claim that even if direct and indirect costs of Post Danmark's bankruptcy scenario were to be included in the DCF analysis, only a part of those costs and not the entire amount should have been included, since Post Danmark's bankruptcy would not necessarily be avoided through the grant of PostNord Group's capital injection, the Commission notes on the contrary that the calculations submitted by Denmark and Sweden demonstrated that the group's capital injection would prevent Post Danmark's bankruptcy, which was also actually prevented.
- (222) With regard to ITD's claim that the revenues in the DCF are too high and do not account for the risk that the USO entrustment would not be extended beyond 2019, the Commission notes that such a risk is merely hypothetical. The USO has always lied with Post Danmark and PostNord Group had no reason to expect a change in this respect. In this regard, it can be noted that the USO is generally delivered by the historic national postal operator in the vast majority of Union Member States.
- (223) With regard to ITD's claim that in view of the 10 % decrease in Post Danmark's net sales in 2017, the estimates in the DCF of the growth rates in the letter and logistics market are too optimistic and thus questionable, the Commission reiterates its assessment in recital (212) and considers that the market analyst forecasts underpinning Post Danmark's business plan can be considered conservative.

⁽⁹⁶⁾ Case T-274/01, *Valmont Nederland BV v Commission*, ECLI:EU:T:2004:266, paragraph 71.

⁽⁹⁷⁾ Case T-366/00, *Scott v Commission*, ECLI:EU:T:2007:99, paragraph 158.

- (224) With regard to ITDs' claim that WACC in the DCF is too low, since it took into account PostNord Group's peers, rather than Post Danmark's peers, it did not consider the risk for bankruptcy due to the ambitious Post Danmark's plan and it did not factor in the model highly sensitivity to arbitrary assumptions regarding future market conditions, the Commission reiterates its assessment in recital (215) and notes that the DCF analysis took into account Post Danmark's peers benchmarks while the top up premiums reflected appropriately the relevant risks for the calculation of the WACC.
- (225) With regard to ITD's claim that the likely downgrading of PostNord Group considered by the States would confirm that the PostNord Group capital injection would be financially unsound and would not meet the private market investor test, the Commission reiterates the assessment in recitals (211) to (215) concerning the market conformity of the Group's capital injection and considers on that basis that a downgrading of PostNord Group due to PostNord Group's capital injection to Post Danmark, does not appear particularly likely (see recital (240)). Notwithstanding that, a very temporary adjustment of PostNord AB's shadow rating would not necessarily be contradictory with a sound investment.
- (226) With regard to UPS' claim that the realism of the assumed growth rate in the DCF calculations may be validated by comparing the growth rate of the overall segment (see recital (81)) as reported in a number of research papers and other sources in conjunction to PostNord's ability to accurately forecast expected results on specific targets, the Commission re-iterates its comments in recital (212) that growth rates assumed in the DCF analysis appeared conservative and adds that PostNord Group's ability to accurately forecast expected results on specific target cannot be factored in a State aid assessment by the Commission.
- (227) With regard to UPS' claim that additional borrowing costs should be included in the DCF analysis, not only in Post Danmark's bankruptcy scenario in the absence of the PostNord Group's capital injection, but also in the PostNord Group's capital injection scenario in line with the Danish authorities statement that PostNord AB's shadow credit rating could also deteriorate as a consequence of the capital injection in Post Danmark, the Commission notes that since the capital injection from PostNord Group to Post Danmark is sufficiently profitable in the medium term, a downgrading of PostNord Group does not seem particularly likely, and therefore, no additional borrowing costs should be added in PostNord Group's capital injection scenario.
- (228) In conclusion, based on the two quantitative profitability analyses that Denmark and Sweden have submitted, the Commission concludes that the PostNord Group capital injection is in line with market conditions, as those analyses demonstrated that a private investor in the position of PostNord Group would also have injected capital into Post Danmark.

5.3.1.5. Distortion of competition and effect on trade

- (229) In order to be qualified as State aid, a measure must distort or threaten to distort competition and affect trade between Member States.
- (230) A measure granted by a State is considered to distort or to threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes ⁽⁹⁸⁾. A distortion of competition is thus assumed as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.
- (231) As regards the measure's effect on trade, it is not necessary to establish that the aid has an actual effect on trade between Member States ⁽⁹⁹⁾. In particular, the Union courts have ruled that 'where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid.' ⁽¹⁰⁰⁾.

⁽⁹⁸⁾ Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* EU:C:1980:209, paragraph 11; and Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and others v Commission of the European Communities* EU:T:2000:151, paragraph 80.

⁽⁹⁹⁾ Case C-518/13, *Eventech Ltd v The Parking Adjudicator (Eventech)*, EU:C:2015:9, paragraph 65 and Joined cases C 197/11 and C 203/11, *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering (Libert and others)*, EU:C:2013:288, paragraph 76.

⁽¹⁰⁰⁾ Case C 518/13, *Eventech Ltd v The Parking Adjudicator (Eventech)*, EU:C:2015:9, paragraph 66; Joined cases C 197/11 and C 203/11, *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering (Libert and others)*, EU:C:2013:288, paragraph 77; and Case T-288/97, *Regione Friuli Venezia Giulia v Commission of the European Communities*, EU:T:2001:115, paragraph 41.

- (232) Post Danmark provides postal services in the Danish territory as well as abroad. The Danish postal services market has been liberalised as of 1 January 2011. According to the Danish authorities, in 2016 Post Danmark had a market share of approximately [...] % in the distribution of letters, [...] % in the distribution of business-to-business and business-to-consumer parcels, and [...] % in the distribution of newspapers and magazine mail.
- (233) There are several undertakings that provide postal services on the territory of Denmark. Those undertakings are in direct competition with Post Danmark, and several of them, such as UPS and GLS, are also active in other Member States.
- (234) Therefore, the Commission considers that the capital injection from the PostNord Group into Post Danmark is liable to affect trade and distort competition.

5.3.1.6. Conclusion

- (235) Since the PostNord Group capital injection was found to be in line with market conditions, as the relevant analyses demonstrated that a private investor in the position of PostNord Group would have injected similar equity into Post Danmark, there is no economic advantage for Post Danmark and hence one of the criteria of Article 107(1) TFEU is not fulfilled.
- (236) Since those criteria are cumulative, the Commission finds that the capital injection from PostNord Group into Post Danmark does not constitute State aid within the meaning of Article 107(1) TFEU.

5.3.2. Capital injection from Denmark into PostNord AB

5.3.2.1. Economic activity and notion of undertaking

- (237) The Danish authorities acknowledge that the PostNord Group carries out activities of an economic nature. PostNord Group is the sole owner of Post Danmark, who offers postal services against remuneration on the Danish postal market and in competition with other providers, which is an economic activity. Moreover, other subsidiaries of the group also provide services on several postal services and logistics markets. For those reasons, with regard to the activities financed by Denmark's capital injection into PostNord Group, Post Nord Group qualifies as an undertaking in the meaning of Article 107(1) TFEU.

5.3.2.2. Imputability and State resources

- (238) Since the Danish authorities grant that measure directly, it is by definition imputable to the State. Moreover, as noted in recital (204), State resources include all resources of the public sector. As the Danish authorities grant the capital injection from their national budget, the Commission considers that this condition is also fulfilled.

5.3.2.3. Selectivity

- (239) The capital injection is an individual measure in favour of PostNord AB. For that reason, it is selective.

5.3.2.4. Advantage

- (240) As also noted by ITD, the Commission considers that the Danish (or Swedish) authorities have still not demonstrated convincingly that PostNord AB's credit rating would deteriorate in the absence of the capital injections from Denmark and Sweden. As an unlisted company, PostNord AB does not formally have a credit rating, and a financial institution could be expected to take into account more factors than PostNord AB's net debt/EBITDA ratio to determine PostNord AB's credit rating. The assumption that a financial institution would necessarily have imposed significantly stricter financing conditions only because that ratio would increase temporarily into undesirable territory in the absence of the capital injections from Denmark and Sweden has not been substantiated sufficiently, which is all the more necessary considering that PostNord Group's capital injection into Post Danmark is in line with the market conditions (see recital (228)) and therefore, profitable in the medium term.

- (242) However, the Commission considers that, assuming a temporary deterioration of PostNord AB's shadow credit rating would materialise, at least for the terminal value ⁽¹⁰¹⁾ calculation, which starts in the year 2027, the normal WACC of [...] % (pre-PostNord Group's capital injection) should be used and not a degraded one to reflect the temporary character of any deterioration of PostNord AB's shadow credit rating. Using the normal WACC of [...] % for the terminal value in the calculation submitted by the States would lead to the conclusion that the investment is not compliant with the market economy operator principle contrary to the conclusion of the States, which was reached based on a permanently degraded WACC of [...] %.
- (243) The adjusted calculation (using the normal WACC), based on the free cash flow of Denmark and Sweden's DCF analysis (presented in Table 7) illustrates that the capital injections of Denmark and Sweden ('D') of SEK 667 million increase PostNord AB's enterprise value ('C') by only SEK 62 million, which is less than the amount of that capital injections.

Table 7

(amounts in SEK million)

Scenario A: Enterprise value with State injections – WACC = Lower WACC (before PostNord AB's downgrading)

Year	2018	2019	2020	2021	2022	2023	2024	2025	2026	Ter- minal Value	Total	WAC- C	Term- inal grow- th rate
NPV	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]		
Time factor	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]		
Discount factor	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...] %	[...] %
Free Cash Flow	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]		

Scenario B: Enterprise value without State injections – WACC = Higher WACC (after PostNord AB's downgrading) only in 2018-2026 & Lower WACC in perpetuity

Year	2018	2019	2020	2021	2022	2023	2024	2025	2026	Ter- minal Value	Total	WAC- C	Term- inal grow- th rate
NPV	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...] % until 2026 & [...] from 2026 onwards	
Time factor	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]		
Discount factor	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...] % from 2026 onwards	[...] %
Free Cash Flow	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]		
Enterprise value with capital injections (Scenario A)		(A)	[...]										
Enterprise value without capital injections (Scenario B)		(B)	[...]										
Enterprise value increase due to capital injections		(C)=(A)-(B)	62										
Capital injections from Denmark and Sweden		(D)	667										

⁽¹⁰¹⁾ Terminal value is the value of an asset, business, or project beyond the forecasted period when future cash flows can be estimated. Terminal value assumes a business will grow at a set growth rate forever after the forecast period.

- (244) That adjusted calculation shows that contrary to what is argued by the States, the increase in the enterprise value attributable to capital injections from Denmark and Sweden would not exceed SEK 62 million so much below the SEK 667 million investment. The gain in financing cost is much lower than expected by the States because the deterioration of financing conditions, if it happens, would only have temporary effects.
- (245) As to the argument raised by the States that the burden of proof required by the Commission is allegedly excessive, it should be noted that according to State aid rules and Commission's practice, the burden of proof always lies with the Member State. Pursuant to relevant Union case law, if a Member State argues that it acted as a market economy operator it must, where there is doubt, provide evidence showing that the decision to carry out the transaction was taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational market economy operator (with characteristics similar to those of the public body concerned) would have had carried out to determine the profitability or economic advantages of the transaction ⁽¹⁰²⁾.
- (246) The Commission considers that the Danish authorities failed to demonstrate that it is credible that PostNord AB would have lost shadow investment grade rating in the absence of the capital injections from Denmark and Sweden and would have kept it with the capital injections from Denmark and Sweden. Moreover, the Danish authorities also failed to demonstrate that the financial consequences of that loss of investment grade, assuming it would happen, would exceed the amount of their capital injection. A rational market economy operator would not have carried out the capital injection in the absence of such analysis showing that the operation is profitable or that there are economic advantages of this operation.
- (247) The Commission therefore cannot consider that the capital injection from Denmark was in line with the market conditions and therefore, the Commission concludes that the capital injection conferred an advantage to PostNord AB.

5.3.2.5. Distortion of competition and effect on trade

- (248) To the extent that the measure benefits PostNord AB, it can also distort competition and have an effect on trade, as PostNord AB is present in several internationally competitive markets through Post Danmark and its other subsidiaries such as PostNord Sverige. PostNord Sverige is active on the Swedish postal market, which has been liberalised since 1993. Moreover, it provides logistics services on several markets in the Nordic region and the rest of Europe (see recital (15)).

5.3.2.6. Conclusion

- (249) In light of recitals (240) to (248), the Commission considers that the Capital injection from Denmark into PostNord AB constitutes State aid within the meaning of Article 107(1) TFEU.

5.3.3. Capital injection from Sweden into PostNord AB

5.3.3.1. Economic activity and notion of undertaking

- (250) The Swedish authorities acknowledge that the PostNord Group carries out activities of an economic nature. PostNord Group is the sole owner of Post Danmark, who offers postal services against remuneration on the Danish postal market and in competition with other providers, which is an economic activity. Moreover, other subsidiaries of the group provide services on several postal services and logistics markets. For those reasons, with regard to the activities financed by Sweden's capital injection into PostNord AB, PostNord AB qualifies as an undertaking in the meaning of Article 107(1) TFEU.

⁽¹⁰²⁾ Case C-124/10 P, *Commission v EDF*, ECLI:EU:C:2012:318, paragraphs 82 to 85. See also Joined cases C-214/12 P, C-215/12 P and C-223/12 P *Land Burgenland v Commission*, ECLI:EU:C:2013:682, paragraph 61. The level of sophistication of such an *ex-ante* assessment may vary depending on the complexity of the transaction concerned and the value of the assets, goods or services involved. Normally, such *ex-ante* evaluations should be carried out with the support of experts with appropriate skills and experience. Such evaluations should always be based on objective criteria and should not be affected by policy considerations. Evaluations conducted by independent experts may provide an additional corroboration for the credibility of the assessment.

5.3.3.2. Imputability and State resources

- (251) Since the Swedish authorities grant that measure directly it is by definition imputable to the State. Moreover, as noted in recital (204), State resources include all resources of the public sector. As the Swedish authorities grant the capital injection from their national budget, the Commission considers that this condition is also fulfilled.

5.3.3.3. Selectivity

- (252) The capital injection is an individual measure in favour of PostNord AB. For that reason, it is selective.

5.3.3.4. Advantage

- (253) For the same reasons as those set out in recitals (240) to (247) and in line with ITD's comments, Denmark and Sweden failed to substantiate or to quantify the risk of PostNord AB losing its shadow investment grade absent the capital injection from Denmark and Sweden before and after the opening decision. The likelihood of losing investment grade is not *prima facie* obvious and the estimation of the consequences of such loss are problematic both from a theoretical viewpoint (namely permanent degradation of the cost of debt) as well as a quantitative viewpoint (calculation of the enterprise value).

5.3.3.5. Distortion of competition and effect on trade

- (254) To the extent that the measure will benefit PostNord AB by preserving its investment grade credit rating, it can also distort competition and have an effect on trade, as PostNord AB is present in several internationally competitive markets through Post Danmark and its other subsidiaries such as PostNord Sverige. PostNord Sverige is active on the Swedish postal market, which has been liberalised since 1993. Moreover, it provides logistics services on several markets in the Nordic region and the rest of Europe (see recital (15)).

5.3.3.6. Conclusion

- (255) In light of recitals (250) to (254), the Commission considers that the Capital injection from Sweden into PostNord AB constitutes State aid within the meaning of Article 107(1) TFEU.

5.4. Compatibility

- (256) With regard to the measures assessed in the present decision that are found to constitute State aid within the meaning of Article 107(1) TFEU, it is necessary to assess whether those measures can be considered compatible with the internal market.
- (257) According to the case law of the Court, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met ⁽¹⁰³⁾.
- (258) The Danish and Swedish authorities have however not invoked any arguments that would demonstrate the compatibility of the measures in question with the internal market.
- (259) In light of recitals (256) to (258), the Commission concludes that the capital injection from Denmark into PostNord AB and the capital injection from Sweden into PostNord AB constitute State aid that is incompatible with the internal market.

⁽¹⁰³⁾ Case C-364/90, *Italian Republic v Commission of the European Communities*, ECLI:EU:C:1993:157, paragraph 20.

6. RECOVERY OF THE CAPITAL INJECTIONS FROM DENMARK AND SWEDEN

- (260) According to the Treaty and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned is to alter or abolish aid when it has found that it is incompatible with the internal market ⁽¹⁰⁴⁾. The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽¹⁰⁵⁾.
- (261) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored ⁽¹⁰⁶⁾.
- (262) In line with the case law, Article 16(1) of Regulation (EU) 2015/1589 states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'
- (263) Therefore, given that the capital injections from Denmark and Sweden were implemented in breach of Article 108(3) Treaty and are to be considered as unlawful and incompatible aid, those capital investments should be recovered in order to re-establish the situation that existed on the internal market prior to their granting.
- (264) The nominal recovery amounts corresponding to the two capital injections granted by Sweden and Denmark to PostNord AB respectively are SEK 400 million, which should be recovered by Sweden, and SEK 267 million, which should be recovered by Denmark.
- (265) The recovery amounts should cover the period from the date when the aid was put at the disposal of PostNord AB until effective recovery. The amount to be recovered should bear interest until effective recovery.

7. CONCLUSION

- (266) The Commission finds that the capital injection from PostNord Group into Post Danmark does not constitute aid within the meaning of Article 107(1) TFEU.
- (267) The Commission finds that the capital injection from Denmark into PostNord AB and the capital injection from Sweden into PostNord AB constitute State aid within the meaning of Article 107(1) TFEU and that Denmark and Sweden have unlawfully implemented them in breach of Article 108(3) TFEU. The Commission also finds that those capital injections are incompatible with the internal market. Denmark and Sweden should therefore recover the unlawful and incompatible aid from PostNord AB,

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a capital injection from Sweden of SEK 400 million into PostNord AB unlawfully put into effect by Sweden in breach of Article 108(3) TFEU is incompatible with the internal market.

Article 2

The State aid in the form of a capital injection from Denmark of SEK 267 million into PostNord AB unlawfully put into effect by Denmark in breach of Article 108(3) TFEU is incompatible with the internal market.

⁽¹⁰⁴⁾ Case C-70/72, *Commission v Germany*, ECLI:EU:C:1973:87, paragraph 13.

⁽¹⁰⁵⁾ Case C-142/87, *Belgium v Commission*, ECLI:EU:C:1990:125, paragraph 66.

⁽¹⁰⁶⁾ Case C-75/97, *Belgium v Commission*, ECLI:EU:C:1999:311, paragraphs 64 and 65.

Article 3

The capital injection into Post Danmark by PostNord Group AB does not constitute State aid within the meaning of Article 107(1) TFEU.

Article 4

1. Sweden shall recover the incompatible aid referred to in Article 1 from the beneficiary of that aid.
2. Denmark shall recover the incompatible aid referred to in Article 2 from the beneficiary of that aid.
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
4. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁰⁷⁾ and Commission Regulation (EC) No 271/2008 ⁽¹⁰⁸⁾.

Article 5

1. Recovery of the aid referred to in Articles 1 and 2 shall be immediate and effective.
2. Sweden and Denmark shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 6

1. Within 2 months following the date of notification of this Decision, Sweden and Denmark shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interest) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and of those planned to be taken in order to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Sweden and Denmark shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid in accordance with Article 4 has been completed. On request by the Commission, it shall immediately submit information on the national measures already taken and on those planned to be taken in order to comply with this Decision, including detailed information on the amounts of aid and recovery interest already recovered from the beneficiary.

Article 7

This Decision is addressed to the Kingdom of Sweden and the Kingdom of Denmark.

Done at Brussels, 10 September 2021.

For the Commission
Margrethe VESTAGER
Member of the Commission

⁽¹⁰⁷⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

⁽¹⁰⁸⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).