



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

13 September 2023*

(State aid – Postal and road haulage sector – Complaint from a competitor – Capital contribution granted by a public undertaking to its subsidiary – Decision finding no State aid after the preliminary examination stage – Parent company of the group jointly controlled by two Member States – Approval of the capital contribution by the parent company of the group – Whether imputable to the State)

In Case T-525/20,

ITD, Brancheorganisation for den danske vejgodstransport, established in Padborg (Denmark),

Danske Fragtmænd A/S, established in Åbyhøj (Denmark),

represented L. Sandberg-Mørch, lawyer,

applicants,

supported by

Jørgen Jensen Distribution A/S, established in Ikast (Denmark), represented by L. Sandberg-Mørch, lawyer,

and by

Specialforeningen for Logistik og Distribution (SLD), established in Copenhagen (Denmark), represented by L. Sandberg-Mørch, lawyer,

interveners,

v

European Commission, represented by L. Flynn, acting as Agent,

defendant,

supported by

* Language of the case: English.

Kingdom of Denmark, represented by M. Søndahl Wolff, acting as Agent, and by R. Holdgaard, lawyer,

and by

Kingdom of Sweden, represented by C. Meyer-Seitz, H. Eklinder, A. Runeskjöld, M. Salborn Hodgson, H. Shev, R. Shahsavan Eriksson and O. Simonsson, acting as Agents,

and by

PostNord Logistics A/S, established in Køge (Denmark),

and

PostNord Group AB, established in Solna (Sweden),

represented by O. Koktvedgaard, lawyer,

interveners,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of R. da Silva Passos (Rapporteur), President, S. Gervasoni, N. Póltorak, I. Reine and T. Pynnä, Judges,

Registrar: A. Marghelis, Administrator,

having regard to the written part of the procedure,

further to the hearing on 2 February 2023,

gives the following

Judgment¹

- 1 By their action under Article 263 TFEU, the applicants, ITD, Brancheorganisation for den danske vejgodstransport A/S ('ITD') and Danske Fragtmænd A/S, seek the annulment of Decision C(2020) 3006 final of the Commission of 12 May 2020 concerning State aid SA.52489 (2018/FC) – Denmark and SA.52658 (2018/FC) – Sweden – Alleged State aid to PostNord Logistics ('the contested decision').

Background to the dispute

- 2 ITD is a trade association of companies incorporated under Danish law that are active on the national and international markets for road haulage and logistics services. Danske Fragtmænd is a company incorporated under Danish law and active, inter alia, on the Danish market for road haulage and parcel distribution services.

¹ Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

- 3 PostNord AB is a company incorporated under Swedish law whose share capital is 40% owned by the Kingdom of Denmark and 60% owned by the Kingdom of Sweden. It was formed in 2009, under the name Posten Norden AB, following a merger between Post Danmark A/S, the incumbent postal operator in the Kingdom of Denmark, and Posten AB, the incumbent postal operator in the Kingdom of Sweden.
- 4 PostNord owns 100% of PostNord Group AB, which itself owns 100% of Post Danmark and Posten, which are responsible for providing the universal postal service in Denmark and Sweden respectively. PostNord Group also owns 100% of PostNord Logistics A/S, a company incorporated under Danish law established in Copenhagen (Denmark) and responsible for road haulage services in Denmark.
- 5 On 22 November 2018, ITD lodged a complaint with the European Commission alleging that PostNord Logistics had announced, in its annual reports for 2017 and 2018, that it would receive capital injections from PostNord. According to ITD, those capital injections constituted unlawful State aid incompatible with the internal market.
- 6 PostNord Logistics had been loss-making since 2015 and had lost its entire share capital by the end of the 2017 financial year. It is in that context that, on 30 November 2018, at an extraordinary general meeting, PostNord Logistics recommended to the management of PostNord Group to make a capital injection of 115 million Danish kroner (DKK) (approximately EUR 15.4 million) in its favour ('the capital injection').
- 7 In view of the amount of the capital injection, on 7 December 2018 PostNord Group requested that the board of directors of its parent company, PostNord, approve that measure and the principle that it be paid in several tranches.
- 8 On 11 December 2018, the board of directors of PostNord approved the capital injection.
- 9 On 20 December 2018, PostNord Logistics received an initial tranche of the capital injection, in the amount of DKK 70 million (approximately EUR 9.37 million).
- 10 On 7 June 2019, ITD submitted additional comments to the Commission in respect of its complaint, in which it submitted, inter alia, that PostNord Logistics would benefit from cross-subsidisation of its activities by Post Danmark, which would allow it to use, free of charge, several of its infrastructures financed by the public compensation it received for providing the universal postal service in Denmark ('the cross-subsidisation').
- 11 On 30 March 2020, ITD submitted new observations to the Commission regarding the cross-subsidisation and a letter of formal notice stating that, if the Commission did not adopt a definitive position on its complaint within two months, it would bring an action for failure to act before the General Court under Article 265 TFEU.
- 12 On 12 May 2020, the Commission adopted the contested decision. First, it found that the statements in PostNord Logistics's annual reports for 2017 and 2018 did not entail the grant of an advantage and, therefore, did not constitute State aid. Second, it concluded that the capital injection was not imputable to the Danish and Swedish States and, therefore, did not constitute State aid, either. Third, it found that cross-subsidisation had not been established and that, therefore, the transactions between Post Danmark and PostNord Logistics did not involve State aid.

Forms of order sought

- 13 The applicants, supported by Jørgen Jensen Distribution A/S and Specialforeningen for Logistik og Distribution (SLD), submit that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 14 The Commission, supported by PostNord Group and PostNord Logistics, contends that the Court should:
- dismiss the action;
 - order the applicants to pay the costs.
- 15 The Kingdom of Denmark and the Kingdom of Sweden, also intervening in support of the form of order sought by the Commission, contend that the Court should dismiss the action.

Law

Subject matter of the action

- 16 In the contested decision, the Commission ruled on the aid character of three separate measures (see paragraph 12 above).
- 17 In support of their action, the applicants raise 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 two of those measures, namely, the capital injection, on the one hand, and the cross-subsidisation, on the other. By the present action, however, they are not calling into question the Commission's assessment regarding the statements in PostNord Logistics' annual reports for 2017 and 2018.
- 18 Thus, while the applicants formally seek the annulment of the contested decision in its entirety, the present action must be regarded as seeking the partial annulment of that decision, on the ground that the Commission infringed Article 108(2) TFEU by concluding that the capital injection was not State aid and that the existence of the cross-subsidisation had not been established.

Preliminary observations

- 19 According to the first sentence of Article 24(2) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), any interested party is entitled to submit a complaint to inform the Commission of any alleged unlawful aid. In accordance with the first sentence of Article 15(1) of that regulation, the lodging of such a complaint triggers the initiation of the preliminary examination stage provided for in Article 108(3) TFEU, entailing the adoption, by the Commission, of a decision under Article 4(2), (3) or (4) of Regulation 2015/1589.

- 20 The purpose of the preliminary examination stage provided for in Article 108(3) TFEU and governed by Article 4 of Regulation 2015/1589 is to enable the Commission to form an initial view on the measures submitted for its examination. On completion of that phase, the Commission is to make a finding either that the measure does not constitute aid, in which case it is to adopt a decision finding that there is no aid, under Article 4(2) of Regulation 2015/1589, or that the measure falls within the scope of Article 107(1) TFEU. If, following the preliminary examination, the Commission finds that, notwithstanding the fact that the measure in question falls within the scope of Article 107(1) TFEU, it does not raise any doubts as to its compatibility with the internal market, the Commission is to adopt a decision not to raise objections under Article 4(3) of Regulation 2015/1589.
- 21 The existence of doubts such as to justify initiating the formal investigation procedure laid down in Article 108(2) TFEU is reflected in the objective existence of serious difficulties which the Commission encountered when examining whether the measure at issue constituted aid or whether it was compatible with the internal market. It is apparent from the case-law that the concept of serious difficulties is an objective one (judgment of 21 December 2016, *Club Hotel Loutraki and Others v Commission*, C-131/15 P, EU:C:2016:989, paragraph 31). The existence of such difficulties must be sought both in the circumstances in which the contested act was adopted and in its content, in an objective manner, comparing the grounds of the decision with the information available to the Commission when it took a decision on the disputed aid, bearing in mind that the information available to the Commission includes that which seemed relevant for the assessment to be carried out and which could have been obtained, upon request by the Commission, during the preliminary examination stage (see, to that effect, judgment of 5 May 2021, *ITD and Danske Fragtmænd v Commission*, T-561/18, EU:T:2021:240, paragraph 48 and the case-law cited).
- 22 Moreover, if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes an indication of the existence of serious difficulties in the assessment of the measure at issue, which should have triggered the Commission's obligation to initiate the formal investigation procedure (see judgment of 2 September 2021, *Commission v Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 41 and the case-law cited).
- 23 Proof of the existence of serious difficulties must be furnished by the applicant seeking the annulment of the decision adopted after the preliminary investigation by reference to a body of consistent evidence (see, to that effect, judgment of 17 November 2022, *Irish Wind Farmers' Association and Others v Commission*, C-578/21 P, not published, EU:C:2022:898, paragraph 54 and the case-law cited).
- 24 It is in the light of the foregoing considerations that the applicants' arguments seeking to establish the existence of serious difficulties that should have led the Commission to initiate the formal investigation procedure must be examined.

The capital injection

- 25 The applicants, supported on this point by Jørgen Jensen Distribution, argue that the existence of serious difficulties is established by the conclusion reached by the Commission in the contested decision, according to which the capital injection does not constitute State aid since it is not imputable to the Danish and Swedish States.

- 26 In the first place, the contested decision is contradictory as regards the entity providing the capital injection. While certain passages of the contested decision impute such a measure to the parent company of the group, namely PostNord, which the applicants claim reflects the reality of the facts, the Commission concluded that the capital injection had been decided by PostNord Group, a subsidiary of that company.
- 27 In the second place, the applicants and Jørgen Jensen Distribution submit that the existence of serious difficulties is established by various indicators which, taken together, tend to establish that it is unlikely that the Danish and Swedish States were not involved in the adoption of the capital injection, which is therefore imputable to them.
- 28 First, the applicants base their argument on the appointment, by the Danish and Swedish States, of the majority of the members of PostNord's board of directors, two of whom are senior civil servants in those States. Second, it is apparent from PostNord's annual report for 2017 ('the 2017 annual report') that the Danish and Swedish States had a 'dialogue' with PostNord's board of directors on the capital injection. Third, PostNord is of political interest, in so far as its subsidiaries Post Danmark and Posten are responsible for the universal postal service in Denmark and Sweden, respectively, countries in which they are the incumbent postal operators. Fourth, in their observations on the statement in intervention of the Kingdom of Sweden and on that of PostNord Group and PostNord Logistics, the applicants submit that not only was the capital injection in itself significant, but also that that measure formed part of a series of other capital injections intended to write off PostNord Logistics' losses and prevent its bankruptcy.
- 29 The Commission, supported by the Kingdom of Denmark, the Kingdom of Sweden as well as PostNord Group and PostNord Logistics, contests the applicants' arguments.
- 30 In the first place, the Commission stresses that, in the contested decision, it always considered that the capital injection had been decided upon by PostNord Group. PostNord was only asked to approve that measure, in view of its amount.
- 31 In the second place, the Commission disputes that the applicants have adduced evidence capable of establishing that the capital injection is imputable to the Danish and Swedish States.
- 32 First, the Commission emphasises that the condition relating to the imputability of a measure to a State requires the active involvement of that State, which can be inferred from an assessment *in concreto* of a set of precise and convergent indicators. In the present case, however, the applicants rely essentially on factors that are organic in nature, which are not sufficient.
- 33 Second, as regards the composition of PostNord's board of directors, the Commission submits, first of all, that neither the Danish State nor the Swedish State appoints the majority of the members of that body on its own. Moreover, none of the members of PostNord's board of directors appointed by the Danish and Swedish States has a right of veto. The Kingdom of Denmark adds that it is not for the Danish and Swedish States to appoint the members of the management board of PostNord or PostNord Group and that the interests of the two States do not necessarily coincide. PostNord Group and PostNord Logistics further add that coordination between the Danish and Swedish States was unlikely, given the small amount of the capital injection and PostNord Logistics' minor political importance.

- 34 Next, the Kingdom of Denmark and the Kingdom of Sweden observe that their respective principles applicable to the governance of public undertakings mean that the members of a company's board of directors are chosen on the basis of their competence to ensure the proper management of that company, entirely independently of its owners. While it is possible for the shareholders of a company to give instructions to its board of directors at the general meeting, that was not the case here.
- 35 Finally, as regards the presence on PostNord's board of directors of a civil servant of the Kingdom of Denmark and a civil servant of the Kingdom of Sweden, the Commission submits that the applicants do not put forward any element establishing that those civil servants, who are supposed to act independently, received instructions from their States or that they could influence PostNord's decision-making process.
- 36 Third, with regard to the existence of a 'dialogue on financing' between PostNord's board of directors and its owners, mentioned in the 2017 annual report, the Kingdom of Denmark and PostNord Group and PostNord Logistics dispute that that circumstance involves instructions from the Danish and Swedish States regarding the capital injection, since such a dialogue concerned only the restructuring of Post Danmark and not the capital injection.
- 37 Fourth, the Commission disputes the relevance of the fact, highlighted by the applicants, according to which two of PostNord's subsidiaries are entrusted with a universal postal service obligation, since that is not the case with PostNord Logistics, the beneficiary of the capital injection, whose services are aimed solely at professionals. In the same vein, PostNord Group and PostNord Logistics note that the capital injection was a rational measure from an economic point of view since the logistics market is growing rapidly.
- 38 As a preliminary point, it should be stated that, contrary to what the applicants claim, the contested decision is not vitiated by a contradiction as regards the determination of the entity providing the capital injection.
- 39 It is true that, in recital 26 of the contested decision, the Commission indicated that, on 11 December 2018, PostNord had 'decided to proceed with the capital injection'.
- 40 However, in the following sentence, it immediately stated that 'the approval of the Board of Directors of PostNord AB was required', in view of the amount of the capital injection, referring to recital 20 of the contested decision, in the last sentence of which it indicated that 'decisions on internal group capital injections exceeding ... need[ed] to have the approval of the Board of Directors of PostNord AB'. Then, in its assessment of the imputability to the State of the capital injection, the Commission referred, in recital 76 of the contested decision, to 'the decision of [PostNord Group] to inject capital into [PostNord Logistics]' before noting, in the following recital, that PostNord was involved in the decision-making process owing to the amount of the capital injection, in line with the group's internal rules.
- 41 Moreover, it is apparent from its annual report for 2018 that PostNord Logistics restored its equity by means of a contribution from its parent company, PostNord Group.

- 42 Thus, a combined reading of the contested decision as a whole and the evidence in the file makes it possible to understand that the Commission was right to consider that the capital injection had been made by PostNord Group to PostNord Logistics and that, in view of its amount, the approval of PostNord's board of directors was required, in line with the internal rules of PostNord Group.
- 43 Furthermore, although it considered the capital injection to be a decision of PostNord Group, the Commission nevertheless did not disregard the role of PostNord in so far as, in recital 69 et seq. of the contested decision, it took account of the links between that company and the Danish and Swedish States in order to determine whether the capital injection was imputable to those States.
- 44 As regards the question whether the Commission's assessment of such imputability reveals the existence of serious difficulties, it should be borne in mind that, in order for it to be possible to classify advantages as 'aid' within the meaning of Article 107(1) TFEU, they must, inter alia, be imputable to the State (see, to that effect, judgment of 2 March 2021, *Commission v Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 58 and the case-law cited).
- 45 The imputability to the State of a measure, within the meaning of Article 107(1) TFEU, may not be inferred from the mere fact that that measure was taken by a public undertaking. Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of the measure in question (see judgment of 2 March 2021, *Commission v Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 59 and the case-law cited).
- 46 Thus, the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. In that regard it cannot be demanded that it be demonstrated, on the basis of a precise instruction, that the public authorities specifically incited the public undertaking to take the measure in question (see judgment of 2 March 2021, *Commission v Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 60 and the case-law cited).
- 47 Specifically, any indication, in the particular case, either, on the one hand, of the involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains, or, on the other hand, the absence of those authorities' involvement in the adoption of that measure is relevant (see judgment of 2 March 2021, *Commission v Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 61 and the case-law cited).
- 48 Evidence supporting the conclusion that the measure is imputable to the State includes, in addition, the fact that the public undertaking in question could not have taken the decision at issue without taking account of the requirements of the public authorities or the directives emanating from the public authorities, the integration of the public undertaking into the structures of the public administration, the nature of its activities and the exercise of those activities on the market in normal conditions of competition with private operators, the legal status of the undertaking as well as the intensity of the supervision exercised by the public authorities (see judgment of 2 March 2021, *Commission v Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 62 and the case-law cited).

- 49 In the case at hand, in the contested decision, as a first step, the Commission stated that PostNord's status as a public undertaking was not sufficient to consider that the measures which it adopted were imputable to its shareholders, the Danish and Swedish States. As a second step, it examined various factors on the basis of which it concluded that the capital injection was not imputable to the Danish and Swedish States and, therefore, did not constitute State aid. That conclusion is based, in essence, on the following 12 elements:
- the capital injection was decided upon following a request from its beneficiary, PostNord Logistics, and was implemented by PostNord Group and not by PostNord (recitals 76 and 78 of the contested decision);
 - the approval of the capital injection by PostNord was necessary in view of its amount, but it does not appear that the Danish or Swedish States, or the civil servants that they appointed to the board of directors of PostNord, expressed any particular view in favour of that measure (recital 77 of the contested decision);
 - the appointment of members of PostNord's board of directors by the Danish and Swedish States is not in itself sufficient to conclude that the capital injection is imputable to those States since there is no indication that those civil servants do not act independently, they do not have more voting power or a veto right and, moreover, the other members of PostNord's board of directors do not work for the shareholder States and are therefore independent (recitals 79 and 80 of the contested decision);
 - the members of PostNord's board of directors were not required to follow any particular instructions from the shareholder States and there is nothing to suggest that such instructions were given in relation to the capital injection (recitals 86 and 88 of the contested decision);
 - a simple majority of PostNord's board of directors was required to approve the capital injection, with the result that it was impossible for the Danish State or the Swedish State to allow its will to prevail within the board of directors (recital 95 of the contested decision);
 - PostNord and its subsidiaries are not integrated into the Danish or Swedish public administration (recital 89 of the contested decision);
 - the activities of PostNord and its subsidiaries are purely commercial, apart from those relating to Post Danmark's universal postal service obligation, which are not however linked to the activities of PostNord Logistics (recitals 90 and 91 of the contested decision);
 - PostNord Group is a company governed by private law (recital 92 of the contested decision);
 - PostNord Group, which is supervised by PostNord, and not by the Danish and Swedish States, is autonomous vis-à-vis those States (recitals 93 and 94 of the contested decision);
 - PostNord Logistics is a relatively small company which is not politically, socially or economically important, such that its bankruptcy would not have had a significant impact justifying State intervention in order to avoid it (recitals 97 and 99 of the contested decision);
 - the amount of the capital injection is, admittedly, significant for PostNord Logistics, but not for PostNord Group having regard to its total revenues (recital 98 of the contested decision);

– the capital injection is rational from an economic point of view since the logistics market is growing (recital 100 of the contested decision).

- 50 By presenting various indicators showing, in their view, that the Danish and Swedish States lack of involvement in the capital injection was unlikely, the applicants claim that the Commission's analysis shows that it faced serious difficulties which it did not overcome.

The organic links between PostNord and the Danish and Swedish States

- 51 The applicants emphasise the composition of PostNord's board of directors, the majority of whose members are appointed by the Danish and Swedish States, each State also having opted to appoint one of its civil servants to the board.
- 52 It is true that the appointment of the members of the board of directors is a prerogative of the owners of a company and does not, in principle, in itself give rise to a presumption that a measure taken by a public undertaking can be imputed to the State which controls it (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT v Commission*, T-305/13, EU:T:2015:435, paragraphs 42 and 61).
- 53 However, when assessing the imputability to the State of a measure taken by the board of directors of a public undertaking, the appointment of the members of that body must be duly taken into consideration, in so far as it attests to the existence of special links between the public undertaking in question and the State which controls it (see, to that effect, judgment of 28 January 2016, *Slovenia v Commission*, T-507/12, not published, EU:T:2016:35, paragraphs 102 to 107). Those special links may constitute an indicator of the unlikelihood of the State's not being involved in the adoption of the measure at issue, within the meaning of the case-law cited in paragraph 47 above.
- 54 In particular, in certain cases, the circumstances surrounding the appointment of the members of the management bodies of a public undertaking are capable of establishing that that undertaking has a limited margin of independence from the State which controls it, with the result that such an appointment constitutes a significant indicator of imputability to the State (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT v Commission*, T-305/13, EU:T:2015:435, paragraph 63), or even is capable of demonstrating such imputability (see, to that effect, judgment of 17 September 2014, *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 35).
- 55 In the case at hand, first, it should be pointed out that, as is apparent from recital 20 of the contested decision, PostNord's board of directors consists of 11 members, 4 of whom are appointed by the Kingdom of Denmark, 4 by the Kingdom of Sweden and 3 by the employees of Post Danmark and Posten, subsidiaries of PostNord.
- 56 More specifically, it is apparent from PostNord's various annual reports, produced by the applicants as annexes to the application, that the eight members appointed by the Danish and Swedish States are appointed at the annual general meeting, a body on which the Kingdom of Denmark is represented by its Minister for Transport, with the Kingdom of Sweden being represented by its Minister for Enterprise and Innovation.
- 57 Moreover, it is common ground between the parties that, at the time of the capital injection, one of the four members of PostNord's board of directors appointed by the Danish State was, at the same time, a senior civil servant of that State, whereas one of the four members of the same

board of directors appointed by the Swedish State was also, at the same time, a senior civil servant of that State. The Danish civil servant held the position of Deputy Director-General of the Department of Companies, Productivity, Supply, Energy and the EU budget within the Danish Ministry of Finance. The Swedish civil servant, meanwhile, was Deputy Director at the Department of State-Owned Enterprises within the Swedish Ministry of Enterprise and Innovation.

- 58 As far as those two civil servants are concerned, the Commission noted that they had not expressed any particular view regarding the capital injection (recital 77 of the contested decision), that they had not been given particular instructions from the Danish and Swedish States in that regard (recital 86 of the contested decision), that they were presumed to be acting independently and that they were not in a position to impose their will, in so far as they had neither special voting powers nor a right of veto (recital 80 of the contested decision).
- 59 Those considerations alone, however, cannot render irrelevant, in the assessment of the imputability of the capital injection to the Danish and Swedish States, the presence of civil servants on PostNord's board of directors, given that proof of the imputability of a measure taken by a public undertaking to the State which controls it does not demand that it be demonstrated that, on the basis of a precise instruction, the public authorities specifically incited that undertaking to take the measure in question (see paragraph 46 above).
- 60 In that regard, the appointment, within PostNord's board of directors, of members simultaneously performing senior management duties in government ministries in Denmark and in Sweden, in areas of activity with a direct link to public undertakings – including PostNord – permits the inference that those civil servants enjoyed the confidence of those States, and that they were therefore likely to maintain informal contacts with agents of the ministries to which they belonged and, thus, to relay the influence of the said States in the decision-making process within PostNord.
- 61 Moreover, in recital 77 of the contested decision, the Commission stated that 'it [wa]s highly likely that Denmark and Sweden were aware of the intended capital injection (notably since two board members [we]re also active as civil servants in Denmark and Sweden respectively)'. Similarly, at the hearing, the Kingdom of Denmark essentially explained that it had specifically appointed a civil servant to PostNord's board of directors to inform the Ministry of Finance and the Ministry of Transport of the discussions, within that body, concerning the universal postal service in the context of Post Danmark's restructuring.
- 62 In those circumstances, the indicators of an organic nature put forward by the applicants tend to establish that, at the time of the capital injection, PostNord had a limited degree of independence from the Danish and Swedish States, given that its board of directors was composed of 8 members out of 11 the appointment of whom fell to the ministers of those States, and 2 of whom were, moreover, senior civil servants (see, by analogy, judgment of 25 June 2015, *SACE and Sace BT v Commission*, T-305/13, EU:T:2015:435, paragraphs 61 to 63).
- 63 That conclusion is corroborated by the finding, made in recital 21 of the contested decision, that meetings of PostNord's board of directors must be attended by at least one member appointed by the Danish State and one member appointed by the Swedish State.
- 64 It follows that the organic factors had to be duly taken into consideration and were capable of constituting a non-negligible indicator that the capital injection was imputable to the Danish and Swedish States.

- 65 In the contested decision, however, the Commission confined itself, in recitals 79 and 80, to considering, in essence, that the organic links between PostNord and the Danish and Swedish States were not sufficient to render the capital injection imputable to those States, without giving any particular weight to those factors over the other indicators of imputability examined.
- 66 Second, the Commission cannot be followed when it derives an argument from the fact that PostNord is owned by two Member States and that none of them could, on its own, appoint the majority, necessary for the approval of the capital injection, of the members of that company's board of directors.
- 67 After all, it is apparent from PostNord's shareholders' agreement, to which the Commission referred in recital 95 of the contested decision and which was therefore available to it during the administrative procedure, that the Danish and Swedish States must act in close cooperation when intervening in PostNord's affairs. First, according to point 3.1.1 of that document, the Danish and Swedish States undertook to act in good faith in relation to each other and PostNord. Second, according to point 3.11 of that document, in the event of a deadlock in the adoption of a decision falling within the remit of the board of directors, the Danish and Swedish States must each designate a senior representative responsible for resolving the deadlock.
- 68 In any event, it cannot be accepted that the Commission may, at the stage of the preliminary examination procedure, rule out the imputability of a measure taken by an undertaking controlled by two States merely by finding that neither of those States holds a simple majority of the voting rights on the board of directors, without examining that matter in more detail. To accept such an argument would be tantamount to allowing several Member States to join together, on an equal basis, in multinational institutions responsible for allocating aid, in order to circumvent the State aid rules.
- 69 Third, the circumstance, highlighted by the Kingdom of Denmark, that the Danish and Swedish States do not have the power to appoint the members of the board of management of PostNord or of PostNord Group is irrelevant, since, in the case at hand, the capital injection had to be approved by another body, namely PostNord's board of directors, the majority of whose members were appointed by those States.
- 70 It follows from the foregoing that the Commission's assessment of the organic links between, on the one hand, the Danish and Swedish States and, on the other, PostNord, demonstrates the incomplete and insufficient nature of its examination of the imputability, to those States, of the capital injection, and therefore constitutes an indication of the existence of serious difficulties.
- 71 However, given that the organic links between a public undertaking and the State which owns it cannot, in principle, suffice to establish the imputability to the State of a measure taken by that undertaking (see paragraph 52 above), it should still be examined whether other elements at the Commission's disposal are capable of constituting indicators of the existence of serious difficulties.

The other indicators relating to the unlikely nature of the lack of involvement of the Danish and Swedish States in the capital injection

– The existence of a dialogue between the members of PostNord’s board of directors and the Danish and Swedish States

- 72 The applicants base an argument on the 2017 annual report, which referred to a ‘dialogue with the owners on financing’.
- 73 In that regard, it must be stated that that mere mention does not give rise to a presumption that the Danish and Swedish States discussed all the financial aspects with PostNord’s management bodies or that, assuming that is the case, those aspects necessarily include any recapitalisation operation in favour of the subsidiaries of PostNord Group, and thus the capital injection.
- 74 Moreover, as the Kingdom of Denmark and PostNord Group and PostNord Logistics emphasise, a full reading of the sentence from which the passage reproduced in paragraph 72 above is taken makes it possible to understand that the term ‘financing’ used there refers not to all the financial aspects of the companies of the PostNord group, but to a specific transaction, namely the ‘restructuring of the Danish business’.
- 75 Although the Kingdom of Denmark, like PostNord Group and PostNord Logistics, acknowledges that the Danish and Swedish States were involved in that restructuring, those interveners maintain that the said restructuring concerned only the change of model within Post Danmark, decided upon in 2017 and financed in 2018, and that it therefore had no connection with the capital injection in favour of PostNord Logistics.
- 76 The applicants dispute that line of argument and assert that the concept of ‘the Danish business’ refers also to PostNord Logistics’s situation. In support of their assertion, they produce a document entitled ‘Reporting of Analyses for the 2020 Post Negotiations’ drawn up by the firm McKinsey & Company (‘the McKinsey analysis report’), the admissibility of which the Commission disputes on the ground that it was produced out of time.
- 77 The McKinsey analysis report was produced by the applicants not as an annex to the application, but only as an annex, first, to their observations on the statement in intervention of the Kingdom of Denmark and, second, to their observations on the statement in intervention of PostNord Group and PostNord Logistics.
- 78 In that regard, Article 85(1) of the Rules of Procedure of the General Court provides that evidence produced or offered is to be submitted in the first exchange of pleadings. However, evidence in rebuttal and the amplification of previous evidence, submitted in response to evidence in rebuttal put forward by the opposing party, are not covered by the time-bar rule in Article 85(1) of the Rules of Procedure (see, to that effect, judgment of 5 May 2021, *ITD and Danske Fragtmænd v Commission*, T-561/18, EU:T:2021:240, paragraph 102 and the case-law cited).
- 79 In the case at hand, as has been noted in paragraph 76 above, the McKinsey analysis report was produced in order to refute the line of argument of the Kingdom of Denmark and of PostNord Group and PostNord Logistics according to which the dialogue between the owners of PostNord and the latter’s board of directors concerned exclusively the restructuring of Post Danmark.
- 80 Accordingly, the McKinsey analysis report is admissible.

- 81 It is apparent from that report and from the information provided by PostNord Group and PostNord Logistics in response to a measure of organisation of procedure that PostNord is, from an operational point of view, structured into geographical units, namely, inter alia, PostNord Denmark in Denmark, PostNord Sweden in Sweden, PostNord Finland in Finland and PostNord Norway in Norway. It is also apparent that the PostNord Denmark geographical unit includes both Post Danmark and PostNord Logistics, the latter being a company incorporated under Danish law and operating in Denmark (see paragraph 4 above), and that PostNord Logistics' chief executive officer (CEO) reports to the operational manager of that geographical unit, who is also Post Danmark's CEO.
- 82 Therefore, it cannot be ruled out that the existence of a dialogue between PostNord and the Danish and Swedish States on the restructuring of 'the Danish business' could relate not only to Post Danmark's activities but also to those of PostNord Logistics.
- 83 That is all the more so since it is apparent from the 2017 annual report that it is PostNord Denmark, a geographical unit which encompasses both Post Danmark and PostNord Logistics (see paragraph 81 above), that underwent a 'restructuring into a profitable communication and logistics business ... via the implementation of a new production model', which tends to prove that PostNord Logistics could be concerned by that restructuring.
- 84 In the contested decision, however, the Commission did not examine whether such a dialogue on the restructuring of PostNord's business in Denmark had taken place, even though that matter had been put forward by ITD in its complaint, as an indication of the role of supervision and control exercised by the Danish and Swedish States over the capital injection, approved by PostNord.
- 85 In those circumstances, the Commission's failure to take into account the links between PostNord Logistics and the restructuring of PostNord's business in Denmark demonstrates the incomplete and insufficient nature of its examination of the imputability, to those States, of the capital injection and therefore constitutes an indication of the existence of serious difficulties.

– *The nature of PostNord's activities*

- 86 The applicants claim that PostNord's activities are linked to the universal postal service in Denmark and Sweden, which they argue tends to establish a link between the measures taken by PostNord and the Danish and Swedish States.
- 87 In that regard, the nature of the activities of a public undertaking granting aid constitutes a relevant indicator for assessing the imputability of that aid to the State (see paragraph 48 above). More specifically, the pursuit of public policy objectives by such an undertaking has already been deemed by the EU judicature to be an indication of imputability, to the State that controls it, of the measures it adopts (see, to that effect, judgments of 27 February 2013, *Nitrogénművek Vegyipari v Commission*, T-387/11, not published, EU:T:2013:98, paragraph 63, and of 12 March 2020, *Elche Club de Fútbol v Commission*, T-901/16, EU:T:2020:97, paragraphs 58 and 59), just like the exercise, by a public undertaking, of activities falling within the competence of that State (see, to that effect, judgment of 28 January 2016, *Slovenia v Commission*, T-507/12, not published, EU:T:2016:35, paragraph 92).

- 88 In the present case, in the first place, in recital 90 of the contested decision, the Commission found that the nature of PostNord's activities did not constitute an indicator of imputability, in so far as such activities were purely commercial, with the exception of the universal postal service in Denmark, for which Post Danmark received public compensation.
- 89 It is apparent from Article 3 of PostNord's articles of association, however, that the company's corporate purpose is, primarily, to operate, either directly or through subsidiaries, nationwide postal services in Denmark and Sweden and to operate activities in accordance with those services. It is moreover common ground that the only operators entrusted with the universal postal service for the territories of Denmark and Sweden are Post Danmark and Posten respectively, subsidiaries of PostNord, which are also the incumbent operators in those States.
- 90 In that regard, the universal postal service constitutes a service of general economic interest which Member States are obliged to ensure, in accordance with Article 3 of Directive 97/67/EC of the European Parliament and of 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 1998 L 15, p. 14).
- 91 It follows that PostNord, a company whose board of directors had to approve the capital injection, pursues public policy objectives falling within the competence of the Danish and Swedish States. Thus, as the applicants essentially argue, that fact tends to prove that those States, in principle, pay special attention to the decisions taken by that company.
- 92 In that regard, the circumstances, highlighted by the Commission as well as by PostNord Group and PostNord Logistics, according to which, first, PostNord carries out its activities in competitive markets and, second, the capital injection constitutes an economically rational operation – assuming them to be established – are not decisive in considering that measure not to be of interest to the State shareholders of that company. There is nothing to prevent the public authorities being able to be involved in an entrepreneurial operation of a public undertaking which, although it may, in some circumstances, satisfy the private investor test, can in any event be imputed to the State (see, to that effect, judgments of 25 June 2015, *SACE and Sace BT v Commission*, T-305/13, EU:T:2015:435, paragraph 49, and of 28 January 2016, *Slovenia v Commission*, T-507/12, not published, EU:T:2016:35, paragraph 92).
- 93 In the second place, in recital 91 of the contested decision, the Commission noted that there was no link between PostNord Logistics's activities and those of Post Danmark falling within the scope of the universal postal service.
- 94 In that regard, it is true that the content of the measure at issue may constitute a relevant indicator for assessing the imputability of that aid to the State (see paragraph 47 above) and that, in the case at hand, the beneficiary of the injection was PostNord Logistics, a subsidiary of PostNord Group not entrusted with a universal service obligation.
- 95 However, since the capital injection had to be approved by the board of directors of PostNord, a company whose corporate purpose is, primarily, to provide postal services in Denmark and Sweden and operate activities in accordance with those services, the decisions taken by its board of directors were deemed to coincide with such a corporate purpose. Thus, the Commission could not limit itself, at the stage of the preliminary examination procedure, to finding that the

beneficiary of that measure was not responsible for the universal postal service. The Commission should have been able to rule out, in a sufficiently concrete manner, the notion that the capital injection would have any impact, positive or negative, on the fulfilment of that service.

- 96 In those circumstances, the Commission's failure to take into account the corporate purpose of PostNord, which was required to approve the capital injection, is such as to demonstrate the incomplete and insufficient nature of its assessment of the imputability of that measure to the Danish and Swedish States, and therefore constitutes an indication of the existence of serious difficulties.

– *The compass of the capital injection*

- 97 In their observations on the statement in intervention of the Kingdom of Sweden and of PostNord Group and PostNord Logistics, the applicants stress that the amount of the capital injection is significant. In response to a question put by the Court in the context of a measure of organisation of procedure, the Commission, in essence, disputed the admissibility of that argument, in so far as it was a new argument put forward for the first time in their observations on the statement in intervention of the Kingdom of Sweden and on that of PostNord Group and PostNord Logistics.
- 98 In that regard, it is appropriate to recall that, under Article 84(1) of the Rules of Procedure, 'no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'. However, a plea which constitutes an amplification of a plea previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible. To be regarded as an amplification of a plea or a head of claim previously advanced, a new line of argumentation must, in relation to the pleas or heads of claim initially set out in the application, present a sufficiently close connection with the pleas or heads of claim initially put forward in order to be considered as forming part of the normal evolution of debate in proceedings before the Court (see judgment of 5 May 2021, *ITD and Danske Fragtmænd v Commission*, T-561/18, EU:T:2021:240, paragraph 183 and the case-law cited).
- 99 In the case at hand, it is true that, in the application, the applicants did not present the size of the amount of the capital injection, as such, as an indication of the existence of serious difficulties encountered by the Commission in the examination of the imputability of that measure.
- 100 However, in the application, in order to demonstrate the existence of serious difficulties encountered by the Commission, the applicants claimed that the capital injection was imputable to the Danish and Swedish States, emphasising that that measure fell within the competence of PostNord's board of directors, given that it was a 'significant' financial decision.
- 101 Thus, the application already contained an indication that, for the applicants, the amount of the capital injection had to be regarded as significant, contrary to what the Commission stated in the contested decision. Accordingly, in so far as it presents a close connection with a complaint set out – at least implicitly – in the application, the applicants' line of argument relating to the amount of the capital injection must be considered as forming part of the normal evolution of debate in the court proceedings and, therefore, as the amplification of that complaint. Such a line of argument must therefore be declared admissible.

- 102 As for the merits of that line of argument, it should be borne in mind that the compass of a measure may constitute a relevant factor in the assessment of the imputability of that measure to the State (see paragraph 47 above).
- 103 In the present case, in recital 98 of the contested decision, the Commission considered that the amount of the capital injection did not raise suspicions as to the involvement of the Danish and Swedish States, since that amount represented 0.3% of PostNord Group's total revenues.
- 104 However, first, it is not apparent from the contested decision that the Commission took into account the amount of the capital injection in absolute terms, which, at more than EUR 15 million, cannot be regarded as negligible. In that regard, the EU Courts have already taken into account the compass of a EUR 10 million recapitalisation measure, taken by a public undertaking, in the context of the assessment of its imputability to the State (see, to that effect, judgment of 28 January 2016, *Slovenia v Commission*, T-507/12, not published, EU:T:2016:35, paragraph 186). That sum appears to be all the more important for the beneficiary of the capital injection, PostNord Logistics, whose economic viability was depending on it.
- 105 Second, at the stage of the examination of the amount of the capital injection, the Commission also failed to take account of the fact that such an amount exceeded the threshold above which capital injections within the group had to obtain approval from PostNord, the parent company of that group, whose board of directors had close links with the Danish and Swedish States (see paragraph 62 above).
- 106 In those circumstances, the Commission's assessment that the amount of the capital injection did not raise suspicions as to the involvement of the Danish and Swedish States in the adoption of that measure demonstrates the incomplete and insufficient nature of its examination of the imputability, to those States, of the said measure, and therefore constitutes an indication of the existence of serious difficulties.
- 107 In the light of all the foregoing, the applicants have succeeded in establishing that the Commission's examination of whether the capital injection constituted aid was incomplete and insufficient. Thus, the applicants have adduced evidence of the existence of serious difficulties which the Commission did not overcome when assessing the capital injection. The present action must therefore be upheld in so far as it is directed against the part of the contested decision in which the Commission, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, concluded that the capital injection was not imputable to the Danish and Swedish States and, therefore, did not constitute State aid.

...

Costs

- 132 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

- 133 As the action has been successful in part, the Court will make, in this case, an equitable assessment of the circumstances of the case and hold that the applicants should bear half of their own costs, with the rest of their costs being paid by the Commission, and that the Commission should bear its own costs.
- 134 In accordance with Article 138(1) of the Rules of Procedure, the Kingdom of Denmark and the Kingdom of Sweden shall bear their own costs. Pursuant to Article 138(3) of the same rules, Jørgen Jensen Distribution, SLD, PostNord Group and PostNord Logistics shall bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

- 1. Annuls Decision C(2020) 3006 final of the Commission of 12 May 2020 concerning State aid SA.52489 (2018/FC) – Denmark and SA.52658 (2018/FC) – Sweden – Alleged State aid to PostNord Logistics to the extent that it was found, after the preliminary examination stage, that the capital injection in favour of PostNord Logistics A/S, approved by PostNord AB on 11 December 2018, did not constitute State aid;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders ITD, Brancheorganisation for den danske vejgodstransport and Danske Fragtmænd A/S to bear half of their own costs, with the rest of their costs being borne by the European Commission;**
- 4. Orders the Commission, the Kingdom of Denmark, the Kingdom of Sweden, Jørgen Jensen Distribution A/S, Specialforeningen for Logistik og Distribution (SLD), PostNord Group AB and PostNord Logistics to bear their own costs.**

da Silva Passos

Gervasoni

Póltorak

Reine

Pynnä

Delivered in open court in Luxembourg on 13 September 2023.

[Signatures]