

December 21, 2018

LANDMARK JUDGMENTS BY GENERAL COURT OF THE EUROPEAN UNION DECLARE STATE AID FOR TWO INFRASTRUCTURE PROJECTS ILLEGAL

To Our Clients and Friends:

In September and December 2018, Gibson Dunn attorneys won three cases before the General Court of the European Union (cases T-630/15, *Scandlines Danmark and Scandlines Deutschland v Commission* and T-631/15, *Stena Line Scandinavia v Commission* of 13 December 2018; and Case T-68/15 *HH Ferries and others v Commission* of 19 September 2018).

In the first two of those judgments, handed down on 13 December 2018, Gibson Dunn represented the ferry lines Scandlines and Stena Line Scandinavia. In both cases, the General Court annulled a European Commission decision of 15 July 2015 authorising State aid for a major infrastructure project, the Fehmarn fixed link, **worth 7.4 billion EUR** consisting of a 12-mile coast-to-coast underwater tunnel between Denmark and Germany for road and rail traffic.

With these two landmark judgments, the General Court declared that the financial support granted by Denmark in the form of State guarantees and State loans to the Fehmarn fixed link is illegal, effectively bringing the construction works of that infrastructure project to a halt. The cases attracted several third-party interveners. The Danish State intervened in order to support the European Commission, while the Swedish Shipping Association and NABU (a major German environmental organization) intervened to support Scandlines.

These two judgments followed an earlier Gibson Dunn victory before the General Court on 19 September 2018 in which the General Court annulled the European Commission's decision authorising State aid for another significant infrastructure project, the Øresund fixed link. In this case, Gibson Dunn represented the competing ferry line HH Ferries. The Øresund fixed link consists of a 10 mile long bridge and an underwater tunnel between Denmark and Sweden, **worth 3 billion EUR** (Case T-68/15 *HH Ferries and others v Commission*). Both the Danish and Swedish States intervened in the case to support the European Commission.

These three judgments are the latest in a list of prominent judgments of EU Courts setting out the compliance requirements for infrastructure projects within the EU. Specifically, the General Court makes clear that State aid to any major infrastructure project must be limited in time and amount.

For example, the European Commission argued in the Fehmarn fixed link cases that the State guarantees and loans were limited to a 55-year period after the opening of the fixed link. However, the General Court found that this period did not provide a precise indication of the exact duration and end date of the State guarantees and State loans. In fact, the General Court concluded that this '55-year' period was, in

itself, extremely long and indeterminate and relates, in any case, only to the availability of the State guarantees and State loans, without fixing a time limit of each State guarantee and State loan.

The judgments also clarify that the State aid for such infrastructure projects may not include any 'operating aid', that is support for operating costs, such as costs for electricity, water, and labour etc. which are costs that a company would normally have to bear in its day-to-day management or ordinary activities. In this context the General Court also ruled that loans taken out for refinancing investment costs constitute a form of prohibited operating aid, something that will have a major impact on the financing model underlying both infrastructure projects.

Finally, the General Court also held that the European Commission had erred by not requiring the Danish authorities to disclose to the European Commission the conditions for triggering the benefit of the guarantees. In this regard, the European Commission admitted that it did not know the conditions on which the guarantees would be triggered at the time when it approved the State aid.

As a result of the judgments, the European Commission may not authorise State aid to support the financial model underlying both the Fehmarn and Øresund fixed links. In addition, the annulment has the immediate effect of making any further State aid to the projects illegal. The European Commission is now tasked with determining whether it is feasible to issue a new authorisation of the State aid for these projects whilst complying with the strict limitations laid down by the General Court. As mentioned above, the effect of this is that the construction of the Fehmarn fixed link project will therefore most likely be ceased at least for the foreseeable future. The banks financing the Øresund fixed link may also withdraw their loans, thereby rendering the overall commercial operation of the fixed link non sustainable - unless prices for crossing the fixed link are significantly raised, something which the ferry lines would welcome.



The following Gibson Dunn lawyers assisted in preparing this client update: Lena Sandberg, Peter Alexiadis, and Yannis Ioannidis.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the following lawyers in Brussels:

*Peter Alexiadis (+32 2 554 7200, palexiadis@gibsondunn.com)
David Wood (+32 2 554 7210, dwood@gibsondunn.com)
Lena Sandberg (+32 2 554 72 60, lsandberg@gibsondunn.com)*

Please also feel free to contact any of the practice group leaders and members:

Brussels

*Peter Alexiadis (+32 2 554 7200, palexiadis@gibsondunn.com)
Jens-Olrik Murach (+32 2 554 7240, jmurach@gibsondunn.com)*

GIBSON DUNN

*Lena Sandberg (+32 2 554 72 60, lsandberg@gibsondunn.com)
David Wood (+32 2 554 7210, dwood@gibsondunn.com)*

London

*Patrick Doris (+44 20 7071 4276, pdoris@gibsondunn.com)
Charles Falconer (+44 20 7071 4270, cfalconer@gibsondunn.com)
Ali Nikpay (+44 20 7071 4273, anikpay@gibsondunn.com)
Philip Rocher (+44 20 7071 4202, procher@gibsondunn.com)
Deirdre Taylor (+44 20 7071 4274, dtaylor2@gibsondunn.com)*

Munich

*Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)
Kai Gesing (+49 89 189 33 180, kgesing@gibsondunn.com)*

Hong Kong

*Kelly Austin (+852 2214 3788, kaustin@gibsondunn.com)
Sébastien Evrard (+852 2214 3798, sevrard@gibsondunn.com)*

Washington, D.C.

*D. Jarrett Arp (+1 202-955-8678, jarp@gibsondunn.com)
Adam Di Vincenzo (+1 202-887-3704, adivincenzo@gibsondunn.com)
Scott D. Hammond (+1 202-887-3684, shammond@gibsondunn.com)
Joshua Lipton (+1 202-955-8226, jlipton@gibsondunn.com)
Richard G. Parker (+1 202-955-8503, rparker@gibsondunn.com)
Cynthia Richman (+1 202-955-8234, crichman@gibsondunn.com)*

New York

Eric J. Stock (+1 212-351-2301, estock@gibsondunn.com)

Los Angeles

*Daniel G. Swanson (+1 213-229-7430, dswanson@gibsondunn.com)
Samuel G. Liversidge (+1 213-229-7420, sliversidge@gibsondunn.com)
Jay P. Srinivasan (+1 213-229-7296, jsrinivasan@gibsondunn.com)
Rod J. Stone (+1 213-229-7256, rstone@gibsondunn.com)*

San Francisco

*Rachel S. Brass (+1 415-393-8293, rbrass@gibsondunn.com)
Trey Nicoud (+1 415-393-8308, tnicoud@gibsondunn.com)*

Dallas

*Veronica S. Lewis (+1 214-698-3320, vlewis@gibsondunn.com)
Mike Raiff (+1 214-698-3350, mraiff@gibsondunn.com)
Brian Robison (+1 214-698-3370, brobison@gibsondunn.com)
M. Sean Royall (+1 214-698-3256, sroyall@gibsondunn.com)
Robert C. Walters (+1 214-698-3114, rwalters@gibsondunn.com)*

GIBSON DUNN

Denver

Richard H. Cunningham (+1 303-298-5752, rhcunningham@gibsondunn.com)

© 2018 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.