

European Commission  
DG MOVE  
Att.: Director Mr Kristian Schmidt

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## DANISH LEGISLATIVE INITIATIVES REGARDING NATIONAL SAFETY OF LOAD REQUIREMENTS

The members of the association Dansk Banegods, in English “Danish Rail Freight Association”, finds it necessary to update DG MOVE on two very important legislative initiatives taken by the Danish authorities regarding railway safety of load requirements.

- The Danish Civil Aviation and Railway Authority (Danish NSA) has adopted a new Danish Executive Order on the transportation of pocket wagons with semi-trailers in Denmark. The new regulation conflicts with the EU interoperability regulation and the new regulation have been implemented into Danish law on a permanent basis despite a rejection from ERA, cf. (1) below.
- The Danish Ministry of Transport has issued a consultation draft for an act amending the Danish Railway Act. Contemplated changes as to safety of load and sanctions of violations gives rise to serious concern, cf. (2) below.

Danish Rail Freight Association fears that the legislative initiatives do not enable the requirements for railway interoperability to be fulfilled and that the TSIs in force are not fully respected. Consequently, the initiatives result in actual restrictions on rail freight transport operations between Denmark and other Member States.

We will in the following elaborate on our concerns regarding the Danish initiatives.

### 1 - New Danish Executive Order on the transportation of pocket wagons with semi-trailers in Denmark

The Danish NSA has with effect from 1 October 2022 adopted a new Danish Executive Order on the transportation of pocket wagons with semi-trailers in Denmark.

Please find attached a translation of the new Danish Executive Order.

For transportation of pocket wagons with semi-trailers on the Danish railway infrastructure the Executive Order stipulates the following requirements:

- Minimum 85 kN vertical locking force on the hitch.
- Compliance with the JNS "urgent procedure" recommendations dated 25 April 2022 on the control and loading of semi-trailers on pocket wagons.
- Validation of technical requirements etc. by an independent third party.
- Requirements for operators regarding agreements with terminals.

In addition to these requirements, at least one of the following requirements must also be met for operations across the railway infrastructure on the Great Belt bridge:

- 1) Semi-trailers on pocket wagons must have a gross weight of at least 14 tons.
- 2) The transport must be carried out using a supplementary fastening method approved by the Danish NSA in addition to the fastening by king pin and lock. The procedures for the use of the supplementary fastening method must be adopted in the safety management system of the railway undertaking.
- 3) The transport must be carried out using a supplementary control method that has been validated by an independent third party and approved by the Danish NSA to ensure that the king pin is in the lock of the pocket wagon and that the lock has engaged.

The substance of the new Danish Executive Order is in our opinion not justified under Directive (EU) 2016/798 on railway safety.

As a central part of the new executive order, special requirements are stipulated for freight operations crossing the rail infrastructure on the Great Belt bridge. Danish Rail Freight Association is of the clear opinion that this part of the order should be amended. In accordance with the EU interoperability rules, requirements should thus be imposed on the Infrastructure Manager of the part of the Danish railway infrastructure in question, rather than on the railway undertakings making use of the infrastructure. If problems with dangerous parts of the European railway

infrastructure are rectified by introduction of special and individual requirements for the railway undertaking's use of each dangerous part of the infrastructure, then the core principle behind interoperability in the European railway system is at stake.

Instead, the problems with dangerous parts of the European railway infrastructure should be solved by safety measures aimed at the relevant infrastructure, thereby preserving the interoperability which is central to European railway operations. Danish Rail Freight Association is therefore calling for a higher degree of safety to be imposed on the Infrastructure Manager of the infrastructure on the Great Belt bridge, whereby the requirements in the new Executive Order are not necessary.

We are deeply concerned about the consequences of the minimum weight requirement introduced without any scientific support or reference. The requirement conflicts with Directive (EU) 2016/797 on the interoperability of the rail system within the European Union as well as with Directive (EU) 2016/798 on railway safety and the Executive Order causes significant restrictions on rail freight transport operations between Denmark and other Member States.

The new Executive Order has been adopted as part of Danish law and to our knowledge further to a rejection from ERA issued under Regulation (EU) 2016/796. The railway undertakings operating on the Danish railway infrastructure as well as NSAs in other member states have – in parallel to ERA's rejection – argued that the new Executive Order is detrimental to the interoperability of the Danish railway infrastructure. Reference is made to the Swedish NSA addressing the following towards ERA on 15 November 2022:

**“We cannot understand how they [Danish NSA] can publish this national regulation.**

**What's is the reaction from ERA and COM. It should not be possible to have national rules like this.”**

The Danish NSA participated in a JNS Task Force procedure and the Danish NSA has been fully aware of ERA's opinion. Further to the JNS Task Force procedure ERA published a report on 25 April 2022 concerning “Great Belt bridge Accident/Incident”.

ERA recommends that the weight requirement is withdrawn. The following is mentioned on page 123 in the report:

**“If a minimum threshold value of locking force is fixed, there is absolutely no need for supplementary safety barriers such as additional weight of the semi-trailer currently implemented on the Great Belt Bridge. In any case, it is recommended to carry out an analysis on the wagon running stability under critical windy conditions in order to guarantee a constant running behavior of the wagon on the GBB.”**

The following recommendation is included in the report, cf. page 124:

**“Recommendation #3**

**As the systemic risk analysis (as referenced by the EU regulation) has not demonstrated its pertinence so far, the current temporary mitigation measure (14t additional weight) shall be immediately removed after the closure of this JNS.”**

Unfortunately, the Danish NSA did not follow the recommendation from ERA. Rather the Danish NSA moved in the other direction with the introduction on 1 October 2022 of the new Executive Order.

The Danish NSA has on 3 October 2022 published the following announcement to the introduction of the new Executive Order:

**“The Great Belt accident has made it clear that there is a need to increase safety with pocket wagons. That is why I am very satisfied that we now have the strictest requirements in Europe when it comes to using pocket wagons for goods transport. At the Danish NSA, we have worked for common European safety requirements when semi-trailers are transported on pocket wagons, but unfortunately it has not been possible to reach an agreement on this on the European level.”**

It must be emphasized that the railway undertakings take full responsibility of the obligations on their part and that the railway undertakings are very focused on the management of the specific risk that the railway operations on the Great Belt bridge represents. Thus, it is the railway undertaking’s responsibility to ensure correct train preparation and to carry out all technical checks and the railway undertakings are cooperating with all relevant stakeholders to manage the safety risks. The railway undertakings are acting fully in line with the obligations in Regulation (EU) 2019/773 on the technical specification for interoperability relating to the operation and traffic management subsystem of the rail system within the European Union. However, the train preparation must necessarily be based on the wagons and semi-trailers being approved according to applicable EU standards and that the equipment is properly maintained by a certified ECM unit. Anything else will be contrary to the core principles of the directives for rail safety and interoperability.

A minimum weight requirement practically makes it impossible to transport light freight units through Denmark. Consequently Denmark, as the only EU member state, will be cut off from the connected and integrated European market and the rail freight on the ScanMed Corridor will continuously diminish. Dansk Banegods fears that significant freight volumes will return from rail to road.

## 2 – Contemplated amendment to the Danish Railway Act.

On 29 June 2022 the members of Dansk Banegods received a consultation draft for an act amending the Danish Railway Act.

The consultation draft includes the following proposal for a new § 57 a:

“Goods must be placed in such a way that they cannot present a danger to persons or cause damage to property. Furthermore, goods must not be able to drag or fall off, cause disturbing inconveniences or be able to move outside the profile of the train while driving.”

In addition, a new § 116, para. 1, no. 4 was proposed in the Railway Act stipulating that a fine or imprisonment for up to 4 months will be imposed for violations of the new § 57 a.

The proposal has been notified by the Danish Ministry of Transport to ERA under Regulation (EU) 2016/796. The proposal is to our knowledge currently under examination by ERA.

Dansk Banegods naturally agrees that goods must not cause any danger or damage, and by our members safety is prioritized above everything else. The problem, however, is that the proposed provision, and especially the proposed preparatory notes, do not comply with the applicable interoperability principles for European rail freight. Thus, it does not consider that loading of trains and maintenance of equipment often takes place in other Member States with completely different companies as the responsible entities, each of which is subject to supervision by the safety authorities of the relevant Member States.

The proposal seems to place the full responsibility on the railway undertaking that transports a freight train through Denmark. It is thus stated in the preparatory notes concerning situations where companies must incur criminal liability that:

**"This must be the case, among other things, when railway undertakings act in such a way that it endangers railway safety, e.g. by not carrying out proper maintenance of equipment that is to be used on the railway..."**

In addition, it is stated that:

**"companies must ensure that their goods are secured in such a way that they cannot pose a danger to persons or cause damage to property".**

The railway undertaking that transports a freight train through Denmark is often not itself responsible for the maintenance of the equipment on the train, and it is not the railway undertaking's own goods that are being transported.

The maintenance regime in the EU is based on the ECM rules, where up to several responsible ECM entities are appointed to each individual transport unit. The ECM responsibility is thus divided into several levels, and these levels can either be handled by the same ECM entity or by different ECM entities in different Member States.

It is also not unusual for a rolling stock to be domiciled in one Member State, used in another Member State, and maintained in a third Member State. There are thus often many actors involved in railway freight operations.

ERA's AMOC on safety of load illustrates as well that the responsibility lies with many different entities and that the railway undertaking itself does not have full responsibility.

The AMOC states, among other things, that a railway undertaking must "take account in their safety management systems of the risks associated with the activities of other actors and third parties".

In addition, a railway undertaking must, in accordance with what is stated in the AMOC, "recognize the need to collaborate with other interested parties (such as railway undertakings, infrastructure managers, manufacturer, maintenance supplier, entity in charge of maintenance, railway vehicle keeper, service provider and procurement entity), where appropriate, on shared risks and the putting in place of adequate safety measures".

In the AMOC, the following is stated about interoperability: "According to TSI OPE point 4.4.2 and Appendix I, national rules on the defined AMOC topics are generally not permitted. Therefore, if a Member State (MS) and/or a NSA or any other entity requires a RU or IM to comply with additional national requirements, then that MS or NSA or the other entity will have to provide, in line with Article 8 of the Railway Safety Directive, evidence as to why their national requirements provide a higher degree of risk control than that set out in the AMOC."

Central parts of freight transport by rail depend on cooperation between terminals, railway undertakings and other third parties. Rail freight in Europe is thus characterized by freight wagons circulating freely in Europe and being exchanged between many different railway undertakings across the borders between Member States. Safety is the heart of rail transport. Exchange of wagons is for most wagon holders and freight operators governed in terms of safety by the provisions of the General Contract of Use for wagons (GCU). The GCU agreement establishes obligations and rights for each party to ensure railway safety and improve the efficiency of rail freight traffic. The GCU agreement is the basis for assessment, categorization, and reporting of errors on the freight wagons, including



incorrect marking of the wagons. Most European railway undertakings have joined the GCU and are thus contractual partners with all the other railway undertakings and holders listed in Appendix 1 of the GCU.

The entire regulation is based on the principle that, with each handover from one railway undertaking to another, new independent checks of all aspects of the transport are not carried out. When trains are taken over from another railway undertaking at border stations, the Agreement on freight Train Transfer Inspections (ATTI), a multilateral agreement on cross-border freight traffic that most European rail operators have signed, will apply.

Similarly, to avoid repeated checks when trains are taken over from another railway undertaking at border stations, there is a multilateral agreement on cross-border transport of dangerous goods, which many European railway operators have also signed.

The entire regulatory framework places the tasks and the responsibilities on many different parties and not only on the railway undertaking.

#### Proposed sanctions

The proposed section 57 a contains a general statement that goods must be placed securely. This principle is the basis of the overall EU rail freight regulation.

The preparatory notes, however, significantly change the basic criminal law rules of the Railway Act, as criminal responsibility seems to be centralized around the railway undertaking.

The proposed preparatory notes go very far in relation to the intended criminal sanctions of the new provision against railway undertakings and individuals. The following is stated in the preparatory notes:

**"The duty according to the proposed section 57 a falls primarily on the company as such. This means that a company will always be responsible for violations of the proposed § 57 a, and violations must always be sanctioned with a fine to the responsible company."**

Both tort law and criminal law aim to regulate *behavior*, which is why an element of guilt on the part of the responsible subject is required.

However, there are significant areas outside the railway undertaking's control. Consequently, the proposal is not appropriate to regulate the behavior of the entities involved.

The overall EU rail regulation is complex, and there are many independent actors who do not have the opportunity to make demands towards each other, as the individual actors are individually responsible according to EU

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regulations and national regulation for fulfilling their own part of the set of rules, which rests on the same underlying consideration of safety. Thus, it is not possible for a railway undertaking to check that all other actors have performed all their tasks correctly in relation to a loaded railway wagon with goods received from some of the other actors approved by the railway safety authorities in the same or in another Member State.

Sanctions on the railway undertaking for negligence on the part of such actors cannot in any way become behavioral regulation by the railway undertaking and will therefore be an objective criminal liability which is not generally used in Danish legislation.

In addition, there is a significant problem concerning self-incrimination by sanctioning § 57 a. The railway undertakings make regular reports to the authorities of detected incidents and errors. If these reports automatically trigger punishment according to § 57 a, then there cannot be a duty to report, cf. the prohibition against self-incrimination in Article 6 of the European Convention on Human Rights, and the way it is interpreted in Danish law.

It is absolutely central that the preparatory work for the new § 57 a, and for the provision on imposing sanctions in the new provision be radically changed.

Dansk Rail Freight Association would highly appreciate your view on the Danish approach to implement national rules and would highly appreciate an opportunity to discuss our concerns during a meeting with the Commission.

Kind regards

Dansk Banegods / Danish Rail Freight Association

Chair of the board

Rasmus Munk Kolind

