ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

13 December 2018 *

(State aid — Public financing of the Fehmarn Belt fixed link project — Individual aid — Decision not to raise any objections — Decision finding no State aid and declaring the aid compatible with the internal market — Definition of State aid — Adverse effect on competition and effect on trade between Member States – Conditions governing compatibility — Aid to promote the execution of an important project of common European interest — Necessity of the aid — Incentive effect — Proportionality of the aid — Serious difficulties justifying the initiation of the formal investigation procedure — Obligation to state reasons — Communication on State aid to promote the execution of important projects of common European interest)

In Case T-630/15,

Scandlines Danmark ApS, established in Copenhagen (Denmark),

Scandlines Deutschland GmbH, established in Hamburg (Germany),

represented initially by L. Sandberg-Mørch and M.-E. Vitali, and subsequently by L. Sandberg-Mørch, lawyers,

applicants,

supported by

Naturschutzbund Deutschland (NABU) eV, established in Stuttgart (Germany), represented by T. Hohmuth, lawyer,

and by

Föreningen Svensk Sjöfart, established in Gothenburg (Sweden), represented by L. Sandberg-Mørch and J. Buendía Sierra, lawyers,

* Language of the case: English.

interveners,

v

European Commission, represented by L. Armati, L. Flynn and S. Noë, acting as Agents,

defendant,

supported by

Kingdom of Denmark, represented initially by C. Thorning, and subsequently by J. Nymann-Lindegren, acting as Agents, and by R. Holdgaard, lawyer,

intervener,

APPLICATION pursuant to Article 263 TFEU for annulment of Commission Decision C(2015) 5023 final of 23 July 2015 on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt fixed link project (OJ 2015 C 325, p. 5),

THE GENERAL COURT (Sixth Chamber),

composed of G. Berardis, President, D. Spielmann and Z. Csehi (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 26 April 2018,

gives the following

Judgment

I. Background to the dispute

A. The applicants

1 The applicants, Scandlines Danmark ApS and Scandlines Deutschland GmbH, are part of a ferry operator group founded in 1998 engaged in the transport of passengers, cars, trains and freight. They operate two ferry routes between Germany and Denmark, that is, respectively, between Puttgarden-Rødby and Rostock-Gedser.

B. The project

2 The Fehmarn Belt fixed link project between Denmark and Germany ('the project') was approved by the treaty between the Kingdom of Denmark and the Federal Republic of Germany concerning the Fehmarn Belt fixed link signed on 3 September 2008 and ratified in 2009 ('the international agreement').

3 The project consists of, on the one hand, infrastructure ('the fixed link'), and, on the other, road hinterland connections in Denmark ('the road connections') and rail hinterland connections in Denmark ('the rail connections') (together, 'the hinterland connections'). The Federal Republic of Germany is responsible for the financing of and modifications to the German hinterland connections, which are not at issue in the present proceedings.

4 The fixed link takes the form of an immersed tunnel between Rødby on the island of Lolland in Denmark and Puttgarden in Germany; it will be approximately 19 kilometres long and consist of an electrified railway line and a motorway. The rail connections will include the expansion and upgrade of the existing rail link between Ringsted (Denmark) and Rødby, covering approximately 120 kilometres, which is owned by Banedanmark, the Danish State public rail infrastructure manager.

5 The project was preceded by a planning phase. The Commission was given notification of the financing of that phase, as regards the fixed link and the hinterland connections, for reasons of legal certainty. By its decision of 13 July 2009 in Case N 157/2009 — Financing of the planning phase of the Fehmarn Belt fixed link (OJ 2009 C 202, p. 2, 'the project planning decision'), the Commission concluded, first, that the measures relating to the financing of the planning of the project may not constitute State aid and, second, that those measures were in any event compatible with the internal market. It therefore decided not to raise any objections within the meaning of Article 4(2) and (3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1).

6 The estimated cost of the entire project, in fixed 2014 prices, is 64.4 billion Danish krone (DKK) (approximately EUR 8.7 billion): DKK 54.9 billion (approximately EUR 7.4 billion) for the planning and construction of the fixed link, and DKK 9.5 billion (approximately EUR 1.3 billion) for the planning and construction of the upgrading of the hinterland connections.

7 According to Article 1 of the international agreement, the Kingdom of Denmark will be the sole owner of the fixed link and will have sole responsibility and bear the full risk of financing the fixed link, as well as the upgrading of the Danish hinterland connections.

8 Pursuant to Article 6 of the international agreement and the Lov n^{o} 575 om anlæg og drift af en fast forbindelse over Femern Bælt med tilhørende landanlæg i Danmark (Law No 575 on the construction and operation of the Fehmarn Belt

fixed link project and Danish hinterland connections) of 4 May 2015 ('the Construction Law'), two public undertakings were entrusted with the execution of the project. The first, Femern A/S, established in 2005, is responsible for financing, construction and operation of the fixed link. The second, A/S Femern Landanlæg, established in 2009, is responsible for the construction, operation and financing of the Danish hinterland connections. Femern Landanlæg is a subsidiary of Sund & Bælt Holding A/S, which is owned by the Danish State. Femern became a subsidiary of Femern Landanlæg following the latter's establishment.

9 The works relating to the construction of the fixed link will be carried out by Femern under construction contracts subject to public procurement procedures. Once the fixed link is operational, Femern will collect fees paid by users for using the link. Construction of the works necessary for upgrading the road connections will be undertaken by the Danish Highways Directorate on behalf of the Danish State. The latter will retain ownership of the hinterland road infrastructure, which will be made available free of charge to all users. Femern Landanlæg will be responsible for the construction and management, including maintenance, of the rail connections. Ownership of the rail connections is to be shared between Banedanmark (20%) and Femern Landanlæg (80%). Banedanmark will be responsible for all the costs relating to the operation of the rail connections, while the costs relating to the maintenance of the rail connection will be borne by Femern Landanlæg and Banedanmark on a pro rata basis according to their respective shares.

10 Femern and Femern Landanlæg have obtained loans to finance the project (see paragraph 12 below). Those undertakings will be unable to obtain loans for activities other than the financing, planning, construction and operation of the fixed link and hinterland connections. In addition, Femern will receive the charges paid by users of the fixed link in order to discharge its debt and will pay dividends to Femern Landanlæg, which the latter will use to discharge its own debt. Femern Landanlæg will also receive 80% of the fees paid by the railway operators for use of the rail connections, charged by Banedanmark, as ownership of those connections will be shared by it and Banedanmark.

C. The contested measures

11 The contested measures, notification of which was given by the Danish authorities, include (i) a capital injection for the benefit of Femern and (ii) a State guarantee and State loans for the benefit of Femern and Femern Landanlæg ('the measures at issue').

12 More specifically, the planning, construction and operation of the fixed link and the hinterland connections are financed by loans, raised on the international financial markets and covered by the State guarantee, or, as an alternative method of financing, by government-backed State loans from Danmarks nationalbank (National Bank of Denmark).

D. Administrative procedure

13 During 2014 and 2015, the Commission received five complaints, the first lodged on 5 June 2014, claiming that the Kingdom of Denmark had granted unlawful State aid that was incompatible with the internal market to Femern and Femern Landanlæg.

14 During that same period, the Commission's departments sent several requests for information to the Danish authorities, which replied and provided further information on a number of occasions.

15 By letter of 22 December 2014, the Danish authorities gave the Commission notification, pursuant to Article 108(3) TFEU, of the measures at issue.

E. The contested decision

16 On 23 July 2015, the Commission adopted Decision C(2015) 5023 final on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt fixed link project (OJ 2015 C 325, p. 5, 'the contested decision').

17 The operative part of that decision is divided into two parts.

18 In the first part, the Commission concluded that the measures granted to Femern Landanlæg for the planning, construction and operation of the hinterland connections do not constitute State aid within the meaning of Article 107(1) TFEU.

19 In particular, the Commission concluded, in the first place, that the upgrading of the road links did not constitute an economic activity and, in the second place, (i) that the national rail network was operated and managed on a market that is not open to competition and (ii) that the financial support granted to Femern Landanlæg is not liable to affect trade between Member States, as its activities were carried out on a national, separate and geographically closed market.

20 In the second part, the Commission concluded that, even if the measures granted to Femern for the planning, construction and operation of the fixed link did constitute State aid within the meaning of Article 107(1) TFEU, they are compatible with the internal market pursuant to Article 107(3)(b) TFEU.

21 More specifically, the Commission took the view that the aid allegedly granted to Femern was compatible with Article 107(3)(b) TFEU and with the Communication of 20 June 2014 on the criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ 2014 C 188, p. 4, 'the IPCEI Communication'), as well as with the Notice on the application of Articles [107] and [108 TFEU] to State aid in the form of guarantees (OJ 2008 C 155, p. 10, 'the Guarantee Notice'), for the following reasons:

– first, in accordance with Section 3.1 of the IPCEI Communication, the construction of the fixed link (and hinterland connections) is a specific, precise and clearly defined project;

– second, in accordance with Section 3.2 of the IPCEI Communication, the project is, on the one hand, a project of European interest and, on the other, an important project which benefits the European Union as a whole;

– third, in accordance with paragraph 28 of the IPCEI Communication, the aid is necessary because no private investor would carry out the project without public support;

– fourth, in accordance with paragraph 31 of the IPCEI Communication, the aid is proportional since: (i), its intensity is below the project's funding gap; (ii), it is limited in scope and time and covers only the debt related to the planning, construction and operation of the fixed link until that debt is fully repaid; and (iii), the Danish authorities undertook to limit the guarantee and State loans to loans obtained no later than 55 years after the opening of the fixed link, to give fresh notification of any subsequent measure, and to report annually on progress in the repayment of Femern's debt;

– fifth, in accordance with paragraph 40 of the IPCEI Communication, the significant positive effects of the project for the European Union as a whole outweigh the limited negative effect on competition and trade between Member States;

– sixth, in accordance with paragraph 49 of the IPCEI Communication, the Kingdom of Denmark has undertaken to submit annual reports regarding progress in the repayment of Femern's debt;

– seventh, in accordance with Section 5.3 of the Guarantee Notice, the mobilisation of the State guarantees is contractually linked to specific conditions, which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking.

22 The Commission therefore decided not to raise any objections to the measures at issue.

II. Procedure and forms of order sought

23 By application lodged at the General Court Registry on 10 November 2015, the applicants brought the present action.

24 On 17 February 2016, the Commission lodged its defence. The reply and the rejoinder were lodged within the period prescribed.

25 By separate document lodged at the Court Registry on 16 March 2016, the applicants requested the adoption of measures of organisation of procedure. The Commission submitted its observations within the period allowed.

26 By document lodged at the Court Registry on 16 April 2016, the Kingdom of Denmark sought leave to intervene in the present proceedings in support of the Commission. By order of 29 June 2016, the President of the Ninth Chamber of the General Court granted such leave and allowed the application for confidential treatment in relation to the Kingdom of Denmark submitted by the applicants.

27 The Kingdom of Denmark lodged its statement in intervention and the main parties lodged their observations on the statement within the period prescribed.

28 Following a change in the composition of the Chambers of the General Court, pursuant to Article 27(5) of the Rules of Procedure of the General Court, the President of the Court reallocated the case to another Judge-Rapporteur, who was assigned to the Fifth Chamber.

29 By documents lodged at the Court Registry on 7 April 2016, Föreningen Svensk Sjöfart and Naturschutzbund Deutschland (NABU) eV applied for leave to intervene in the present proceedings in support of the applicants. By order of 30 November 2016, the President of the Fifth Chamber of the General Court granted those parties leave to intervene and allowed the application for confidential treatment in relation to Föreningen Svensk Sjöfart and NABU submitted by the applicants. The interveners lodged their statements in intervention and the main parties lodged their observations on those statements within the period prescribed.

30 On 10 January 2017, pursuant to Article 27(2) of the Rules of Procedure, the President of the Court reallocated the case, for reasons relating to the fact that the cases are connected, to another Judge-Rapporteur, assigned to the Sixth Chamber.

31 By separate act lodged at the Court Registry on 16 May 2017, the applicants, on the basis of Article 84 of the Rules of Procedure, introduced new pleas in law in order to take account of certain matters of law and of fact which had come to light in the course of the procedure. The other parties lodged their observations within the period prescribed.

32 On a proposal from the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties, which answered them within the period allowed.

33 The parties presented oral argument and answered the questions put by the Court at the hearing on 26 April 2018.

34 The applicants, supported by Föreningen Svensk Sjöfart and NABU, claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

35 The Commission, supported by the Kingdom of Denmark, contends that the Court should:

– dismiss the application;

– order the applicants to pay the costs.

III. Law

36 In support of their action, the applicants rely on four pleas in law:

– the first plea alleges infringement of Article 107(1) TFEU in so far as the Commission erred in finding that the measures granted to Femern Landanlæg for the planning, construction and operation of the rail connections do not constitute State aid;

– the second plea, divided into five parts, alleges infringement of Article 107(3)(b) TFEU in so far as the Commission erred in finding that the aid measures granted to Femern for the planning, construction and operation of the fixed link are compatible with the internal market;

– the third plea, alleging breach of Article 108(2) TFEU in so far as the Commission infringed its obligation to initiate the formal investigation procedure, is made up of two parts, the first alleging infringement of the obligation to initiate the formal investigation procedure on account of the length of the procedure and certain circumstances connected with the conduct of the procedure, and the second alleging such infringement on account of an insufficient and incomplete analysis of certain aspects of the contested decision concerning (i) the measures granted to Femern Landanlæg and (ii) the measures granted to Femern;

– the fourth plea alleges failure to state adequate reasons.

37 The applicants also introduced new pleas in law to take account of the Commission's position, as set out in its letter to the applicants of 30 September 2016 and in its defence of 23 March 2017 in Case T-890/16, *Scandlines Danmark and Scandlines Deutschland* v *Commission*.

38 The Court considers that it is appropriate to examine first of all whether the new pleas put forward by the applicants are admissible.

39 As regards the merits of the pleas in the application, it is appropriate to examine them in the following order:

– first, the fourth plea, alleging an inadequate statement of reasons;

– second, the first plea and the second part of the third plea in so far as it concerns the measures granted to Femern Landanlæg;

– third, the second plea and the second part of the third plea in so far as it concerns the measures granted to Femern.

A. Preliminary issues

1. The introduction of new pleas

40 The applicants contend that the contested decision does not take account of two subsequent aid measures: first, the non-commercial railway charges paid to Femern by Danske Statsbaner (DSB), the current State-owned railway operator, for the use of the fixed link and, second, the free use by Femern of State-owned property, such as the maritime areas and parts of the seabed to be used for the construction of the fixed link.

41 Accordingly, the applicants first lodged a complaint with the Commission concerning those measures and, in response to the Commission's reply in its letter of 30 September 2016, brought two actions, the first, registered as Case T-890/16, for annulment of that letter, and the second, registered as Case T-891/16, for a declaration that the Commission failed to act, in the event that the Court were to consider that the letter of 30 September 2016 did not constitute a genuine decision rejecting their complaint.

42 Next, the applicants, supported by NABU and Föreningen Svensk Sjöfart, produced new pleas in the present case, on the basis of Article 84 of the Rules of Procedure, in order to take account of certain matters of law and of fact which had come to light in the course of the procedure (see paragraph 31 above). They seek to 'expand' the third and fourth pleas and to raise a new plea.

43 The applicants claim that the pleas and arguments referred to in paragraph 42 above are based on matters of law and fact which came to light in the course of the procedure, namely the Commission's position as set out in its letter of 30 September 2016 and 'clarified' in its defence in Case T-890/16. In both those documents the Commission claimed that the contested decision addressed the two measures that were the subject of the complaint. The applicants contend that, in the event that the Court were to share the Commission's position that the contested decision did in fact deal with the two measures referred to in paragraph 40 above, it should also annul that decision on the grounds of failure to state adequate reasons, error of law, manifest error of assessment and failure to initiate the formal investigation procedure in respect of those two measures. They add, first, that the new pleas and arguments are simply amplifications of the original third and fourth pleas and, second, that in any event the plea alleging

failure to state adequate reasons is a plea involving a matter of public policy which must be raised by the EU Courts of their own motion.

44 The Commission contends that the new pleas are inadmissible.

45 As a preliminary point, it should be noted that Article 84(1) of the Rules of Procedure provides that 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 or an argument which amplifies a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared admissible (judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 46).

46 Admittedly, in the present case the arguments alleging infringement of the obligation to state reasons and the obligation to initiate the formal investigation procedure in respect of the potential aid granted in connection with the non-commercial railway charges and the free use by Femern of Danish State-owned property were put forward by the applicants as 'expansions' of the third and fourth pleas.

47 Nevertheless, it is clear that, by their arguments, the applicants are referring to aid measures which were not mentioned in the application or in the reply.

48 It follows that the new pleas and arguments put forward by the applicants must be interpreted as a new application and are, therefore, inadmissible (see, to that effect, judgment of 17 February 2017, *Islamic Republic of Iran Shipping Lines and Others* v *Council* (T-14/14 and T-87/14, EU:T:2017:102, paragraphs 41 to 47).

49 In any event, the position set out by the Commission in its letter of 30 September 2016 and in its defence in Case T-890/16 does not constitute a matter of fact or of law justifying the production of new pleas and nor does it contain any such matter.

50 Indeed, the Commission's position is simply an interpretation of the subject matter of the contested decision, which has no bearing on the matters of fact and of law on which that decision is based and does not constitute an 'authentic' interpretation of the decision. As the Commission has pointed out, according to case-law, it is the task of the EU Courts to interpret the decisions of the Commission in the light of the reasons stated in those decisions and to do so, in some cases, regardless of the arguments developed by the Commission in the course of proceedings (see judgment of 9 November 2017, *TV2/Danmar*k v *Commission*, C-649/15 P, EU:C:2017:835, paragraph 55 and the case-law cited). It is also case-law that the mere interpretation of a legal provision given by the Commission in its defence does not constitute a matter of law which came to light in the course of the procedure, for the purposes of Article 84(1) of the Rules of Procedure (see, to that effect, judgment of 13 September 2007, *Common Market Fertilizers* v *Commission*, C-443/05 P, EU:C:2007:511, paragraph 108).

51 Furthermore, with regard in particular to the expansion of the fourth plea, admittedly, as the applicants maintain, it is established case-law that a failure to state reasons or a failure to state adequate reasons constitutes an infringement of essential procedural requirements for the purpose of Article 263 TFEU and raises a matter of public policy which the EU Courts may, and even must, raise of their own motion (see judgment of 20 July 2017, *Badica and Kardiam* v *Council*, T-619/15, EU:T:2017:532, paragraph 42 and the case-law cited).

52 Nevertheless, in the present case, the applicants contend that the Commission failed to give any reasons in respect of aid measures which were not examined in the contested decision and which therefore go beyond the subject matter of the decision. Accordingly, the arguments put forward by the applicants in that context do not concern, in the strict sense, a failure to state reasons in the contested decision, as adopted.

2. The application for measures of organisation of procedure

53 By their application for measures of organisation of procedure (see paragraph 25 above), the applicants have requested the Court, in the first place, to order the Commission to produce documents forming part of its administrative file and, in the second place, to request the Commission to produce further information, to the extent that that information is not included in those documents.

54 The Commission opposes that application.

55 As the Commission observes as a preliminary point, the application for measures of organisation of procedure is out of time, as it was submitted after the first exchange of pleadings and without any valid reason for the delay, in breach of the second sentence of Article 88(2) of the Rules of Procedure.

56 In that regard, contrary to the applicants' arguments, the delay caused by the existence of a pending application for access to the documents in question, pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), does not constitute a valid reason for the purpose of the second sentence of Article 88(2) of the Rules of Procedure, as the procedure laid down by Regulation No 1049/2001 is different from and independent of that laid down for measures of organisation of procedure for the purpose of the Rules of Procedure.

57 The request for measures of organisation of procedure must therefore be refused.

58 In any event, the Court, in order to have sufficient information to assess all the evidence in the file, adopted measures of organisation of procedure in the form of written questions to the parties, as provided for in Article 89(3)(a) of the Rules of Procedure (see paragraph 32 above).

B. Substance

1. The fourth plea, alleging failure to state adequate reasons

59 By their fourth plea, the applicants claim that the Commission failed to provide an adequate explanation in the contested decision regarding a number of matters it considered. That matters concern: (i) the analysis of the market for the operation of railway infrastructure in Denmark; (ii) the assessment of the common European interest of the project, the reasons given in the contested decision being, in their view, contradictory as regards the taking into account of competition from ferries; (iii) the examination of the incentive effect of the project; (iv) the analysis of the proportionality of the aid; and (v) the assessment of the negative effects of the aid on competition.

60 As a preliminary point, it should be noted that, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 8 July 2010, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-396/08, not published, EU:T:2010:297, paragraph 143 and the case-law cited).

61 It should also be noted, with regard to the nature of the measure in question, that the contested decision was adopted at the end of the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, the sole purpose of which is to enable the Commission to form a prima facie opinion on whether the aid concerned is wholly or partially compatible with the internal market, without opening the formal investigation procedure laid down in Article 108(2) TFEU, which, in turn, is designed to enable the Commission to be fully informed of all the facts pertaining to that aid (see judgment of 11 October 2016, *Søndagsavisen* v *Commission*, T-167/14, not published, EU:T:2016:603, paragraph 110 and the case-law cited). Such a decision, which is taken within a short period of time, must simply set out the reasons why the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market (see judgment of 11 October 2016, *Søndagsavisen* v *Commission*, T-167/14, not published, EU:T:2016:603, paragraph 111 and the case-law cited).

62 It is in the light of those principles that it is necessary to examine the applicants' arguments.

63 In the first place, it should be noted that, in recitals 53 to 55 of the contested decision, the Commission sets out the reasons why it took the view that the market for the operation of Danish railway infrastructure is not open to competition.

64 Thus, the Commission concluded, in essence, that the rail connections owned by Femern Landanlæg would be operated by Banedanmark on the same conditions as those of other parts of the Danish railway system and that, given that the management and operation of the Danish national railway is carried out on a national, separate and geographically closed market, which is not open to competition, the public financial support made available to Femern Landanlæg for the rail connections was not liable to affect trade between Member States.

65 In the second place, it should be noted that, in recitals 88 to 93 of the contested decision, the Commission sets out the reasons why it took the view that the project has a common European interest.

66 The Commission relied essentially on four factors. First, it noted, in recital 89 of the contested decision, that the common European interest of the project had been recognised in the project planning decision. Second, it observed, in recital 90 of the contested decision, that the fixed link is a trans-European transport network project ('TEN-T'), in particular, a priority TEN-T project (No 20), and will contribute to improving the connection between the Nordic countries and central Europe as well as providing greater flexibility and time savings for road and rail traffic. Third, it stated, in recital 91 of the contested decision, that the project involves two Member States and will bring benefits which have been defined and quantified in a profitability study prepared for the Danish ministry of transport, which showed that the project will produce an economic return of 4.7%. Fourth, it observed, in recital 92 of the contested decision, that the project had received EU funding for the planning activities and an application had been submitted for EU funding for the construction phase.

67 In the third place, in recitals 98 to 105 of the contested decision, the Commission sets out the reasons why it considered that the project had an incentive effect.

68 The Commission observed, in essence, that the Danish authorities, while stating that there was no viable counterfactual scenario, provided information concerning a scenario in which no public support was granted to Femern, and that the analysis carried out in the preliminary phases as well as an inquiry as to commercial interest conducted in 2001 ('the 2001 inquiry as to commercial interest') had concluded that the project could be realised only with substantial public support and that the private sector was interested in participating in the project on condition that support well in excess of that envisaged by the project, as approved, was granted. The Commission also stated that, according to the information provided by the Danish authorities, the internal rate of return ('the IRR') of the

project, on a debt-free basis, was 4.2% over the expected repayment period of 55 years and was therefore below the weighted average cost of capital ('the WACC') that a private investor would be expected to require, estimated at 11.0%.

69 In the fourth place, in recitals 106 to 111 of the contested decision, the Commission set out the reasons why it took the view that the aid was proportional.

70 After calculating the project's funding gap ratio at 54.9%, the Commission stated that the aid element granted to Femern was below that ratio. It also noted that the aid was limited in time and scope, because the guarantee covers only debt relating to the planning, construction and operation of the fixed link until the debt is fully repaid, and the Danish authorities had undertaken to limit the State guarantee and loans to the loans obtained in order to finance eligible costs no later than 55 years after the opening of the fixed link, to give fresh notification of any public financing measure granted after that period and to report annually on progress in the repayment of Femern's debt.

71 In the fifth place, in recital 116 of the contested decision, the Commission examined the negative effects of the aid on competitors.

72 The Commission took the view that the opening of the fixed link would have a negative impact on ferry operators and probably, as a consequence, also on the ports used by the ferries in terms of traffic volume and revenue. Nonetheless, the Commission considered that those effects were inherent in the project, which seeks to offer a quicker and more convenient alternative to ferry services.

73 In the light of the foregoing, it must be concluded that the statement of reasons in the contested decision meets the requisite legal standard.

74 It should also be added that, by their fourth plea, the applicants refer, on certain specific points, to the arguments put forward in the first and second pleas concerning the merits of the Commission's findings.

75 Suffice it to observe in this regard that, according to settled case-law, the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (judgments of 22 March 2001, *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 35, and of 18 January 2005, *Confédération nationale du Crédit mutuel* v *Commission*, T-93/02, EU:T:2005:11, paragraph 67).

76 Lastly, it should also be noted that the applicants have been able to develop their arguments in support of the first, second and third pleas and that the Court is in a position to conduct its review in the light of all the arguments raised by the applicants.

77 The fourth plea must therefore be rejected.

2. The first plea and the second part of the third plea, alleging infringement of Article 107(1) TFEU and infringement of the obligation to initiate the formal investigation procedure in so far as concerns the analysis of the measures granted to Femern Landanlæg for the planning, construction and operation of the rail connections

78 In the first plea, the applicants submit that the Commission made an error of fact and of law by concluding that the measures granted to Femern Landanlæg concerning the rail connections did not constitute State aid as they were not liable to distort competition or to affect trade between Member States within the meaning of Article 107(1) TFEU.

79 In the first complaint in the second part of the third plea, the applicants refer to the errors alleged in the first plea, arguing that those errors show that the Commission conducted an incomplete and insufficient examination, which brought to light serious difficulties that should have prompted it to initiate the formal investigation procedure.

80 The Commission disputes the applicants' arguments. The Kingdom of Denmark also raises doubts concerning the admissibility of the action, in so far as it relates to measures granted to Femern Landanlæg, on the basis that the applicants are not individually affected.

81 It is appropriate to examine first of all whether the applicants' arguments are well founded.

82 Article 107(1) TFEU states as follows:

'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

83 Classification of a measure as aid incompatible with the internal market, within the meaning of Article 107(1) TFEU, requires all the conditions laid down in that provision to be fulfilled.

84 With regard, in particular, to the conditions relating to the effect on trade between Member States and the distortion of competition, it should be noted that, according to established case-law, the Commission is not required to establish that the aid will in fact have an impact on trade and that competition will actually be distorted and is required only to examine whether the aid is liable to affect such trade and distort competition (see judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 134 and the case-law cited). In particular, according to case-law, the fact that an economic sector has been liberalised at EU level may serve to determine that the aid has a real or potential effect on competition and

affects trade between Member States (see judgment of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraphs 56 and 57 and the case-law cited). Moreover, it is not necessary for the recipient undertaking itself to take part in intra-EU trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned (see judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 67 and the case-law cited).

85 In the present case, in recitals 53 to 55 of the contested decision, first, the Commission expressed the view that the measures granted to Femern Landanlæg would not give rise to any distortion of competition, as the rail connections owned by Femern Landanlæg would be upgraded and operated by Banedanmark, the national railway infrastructure manager, under the same conditions as the other parts of the Danish national rail network, and that there was no competition 'on' or 'for' the market for the operation and management of the national rail network. Second, it found that those measures were not liable to affect trade between Member States, as the management and operation of the network in question were carried out on a national, geographically closed and separate market, which was not open to competition.

86 It is in the light of the principles outlined in paragraphs 82 to 84 above and the wording of the contested decision that the applicants' arguments must be examined.

(a) The preliminary finding that the fixed link and rail connections constitute a single integrated project

87 The applicants claim, as a preliminary point, that the fixed link and the rail connections constitute a single integrated project and that, given that the Commission confirmed that the aid relating to the fixed link was liable to distort competition and to affect trade between Member States, it follows that the aid relating to the rail connections was also liable to distort competition and to affect such trade.

88 That claim is incorrect. It cannot be concluded that the measures granted to Femern Landanlæg in relation to the rail connections constitute State aid for the sole reason that they were adopted in connection with the same project which granted measures for Femern in relation to the fixed link, and that those measures were categorised as State aid by the Commission. Those are two separate aid measures which, admittedly, concern the same project, but they have a different purpose and different beneficiaries.

89 Moreover, the applicants claim that there is a contradiction between, on the one hand, the conclusion that the financing of the costs relating to the hinterland connections does not constitute State aid for the benefit of Femern Landanlæg and, on the other, the fact that the costs relating to the hinterland connections were

taken into account for the purpose of determining whether the aid received by Femern for the fixed link was compatible with the internal market.

90 In that regard, a distinction must be made between the measures granted to Femern Landanlæg in connection with the cost of the hinterland connections and the measures granted to Femern in connection with the costs of the project as a whole.

91 First, as is apparent from paragraphs 95 to 127 below, the measures granted to Femern Landanlæg for the hinterland connections do not constitute State aid because they produce their effects on a market that is closed to competition.

92 Second, the measures granted to Femern for the project as a whole may constitute State aid because those measures have an impact, in the main, on the management and operation of infrastructure that is in competition with other transport services, in particular ferry services.

93 Against that background, whether the aid granted to Femern is compatible with the internal market must be established in the light of all the measures granted to that company, including those covering the costs of the rail connection. In other words, the fact that the indirect financing of the hinterland connections by dividends paid by Femern to Femern Landanlæg does not constitute State aid for the benefit of the latter company does not mean that the arrangements for the financing of the entire project cannot be examined, in the light of the measures granted to Femern, to determine whether the aid granted to the latter is compatible.

(b) The finding that the rail connections form part of the main Danish national rail network

94 The applicants maintain that the mere fact that the rail connections will be operated by Banedanmark is not sufficient to establish that they form part of the main Danish national rail network.

95 In that regard, it should be noted that, as is apparent from recital 5 of the contested decision, the rail connections entail the expansion and upgrading of the existing rail link between Ringsted and Rødby, which belongs to Banedanmark, and that, as is made clear in recital 55 of that decision, they will be managed by the latter in accordance with rules applicable to the entire national network. Therefore, according to the provisions governing the project, the rail connections simply connect the fixed link to the existing national network and will thus form an integral part of it.

96 In any event, the applicants' argument is ineffective because the claim that the rail connections do not form part of the main rail network, even if it were established, is not, of itself or in conjunction with the arguments that will be dealt with below,

capable of proving that those connections form part of a network the management or operation of which are open to competition.

(c) Competition on the markets for the operation and management of the Danish railway infrastructure

97 As regards the distortion of competition, the applicants maintain that the measures at issue granted to Femern Landanlæg affect the markets for the operation and management of the Danish railway infrastructure and that those markets are, *de lege and de facto*, open to competition.

98 The Court must therefore examine whether the Commission committed errors of fact or of law or encountered serious difficulties when it stated, in recitals 53 to 55 of the contested decision, that there was no competition 'on' or 'for' the market for the management and operation of the national railway network.

(1) Preliminary considerations as to the relevant terminology

99 As a preliminary point, it should be noted that the words 'operation' and 'management', as used in connection with the railway network, are not used very precisely in the contested decision or in the parties' pleadings, which, moreover, is a reflection of the fact that there is no specific definition of those terms in the relevant EU legislation, in particular Council Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

100 According to the Commission's interpretation in these proceedings, the contested decision distinguishes between the operation of the railway infrastructure, in the sense of the making available of the infrastructure to railway undertakings for consideration, and the management of that infrastructure, in the sense of establishing and maintaining the physical infrastructure. As the Commission acknowledges, that terminology does tally exactly with that used in Directive 2012/34.

101 Article 3(2) of Directive 2012/34 defines 'infrastructure manager' as 'any body or firm responsible in particular for establishing, managing and maintaining railway infrastructure, including traffic management and control-command and signalling', while at the same time specifying that 'the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or firms'.

102 The second subparagraph of Article 7(1) of Directive 2012/34 defines the 'essential functions' of the infrastructure manager as follows:

'(a) decision-making on train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths; and

(b) decision-making on infrastructure charging, including determination and collection of the charges …'.

103 The third subparagraph of Article 7(1) of Directive 2012/34 states as follows:

'Member States may, however, assign to railway undertakings or any other body the responsibility for contributing to the development of the railway infrastructure, for example through investment, maintenance and funding.'

104 Moreover, Article 3(12) of Directive 2012/34 defines an 'operator of service facility' as 'any public or private entity responsible for managing one or more service facilities or supplying one or more services to railway undertakings referred to in points 2 to 4 of Annex II', namely access to infrastructure (point 2 of Annex II) and additional and ancillary services (points 3 and 4 of Annex II).

105 After the contested decision was adopted, Article 1(2)(a) of Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34 as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ 2016 L 352, p. 1) altered the definition of 'infrastructure manager' in Article 3(2) of Directive 2012/34, which is now defined as 'any body or firm responsible for the operation, maintenance and renewal of railway infrastructure on a network, as well as responsible for participating in its development as determined by the Member State within the framework of its general policy on development and financing of infrastructure'.

106 Furthermore, Article 1(2)(b) of Directive 2016/2370 added a paragraph 2b to Article 3 of Directive 2012/34, which introduces a definition of the term 'operation of the railway infrastructure', namely 'train path allocation, traffic management and infrastructure charging'.

107 As a further preliminary point, it should be noted that, notwithstanding the fact that Directive 2012/34 does not give a definition, the interpretation of the notion of 'maintenance' of railway infrastructure does not give rise to any doubt, as that term may be equated with 'works intended to maintain the condition and capability of existing infrastructure', which corresponds to the definition introduced, after the contested decision was adopted, by Article 1(2)(b) of Directive 2016/2370, which added paragraph 2c to Article 3 of Directive 2012/34. According to the applicants, that activity is included in the activity of 'operation' in the broader sense.

(2) The opening 'de lege' of the relevant markets by Law No 1249

108 The applicants submit that, from a legal standpoint, the operation of the railway infrastructure, including its maintenance, and the management of that infrastructure were opened up to competition by the Bekendtgørelse af lov n^{o} 1249 om jernbane (Law No 1249 on railways) of 11 November 2010 and that there are

in fact a number of railway infrastructure management companies which have been granted a licence as well as various companies active in the railway infrastructure operating sector.

109 The applicants based their arguments on Sections 2 and 3 of Sub-Chapter 3 of Chapter 3 of Law No 1249, entitled 'Authorisation to operate railways and manage railway infrastructure', which are worded as follows:

– Section 2: 'Management of the railway infrastructure requires authorisation and a safety certificate issued by the Transport Authority';

– Section 3: 'Permits issued by other Member States of the European Union under EU rules are valid in Denmark'.

110 However, contrary to what is claimed by the applicants, Section 2 of Sub-Chapter 3 of Chapter 3 of Law No 1249 simply provides that, in order to manage railway infrastructure, it is necessary to obtain authorisation and a safety certificate issued by the transport authority and does not imply, in any event, that railway infrastructure is open to competition.

111 Indeed, it should be noted that, as stated in recital 71 of Directive 2012/34, railway infrastructure is a natural monopoly and EU directives on the liberalisation of the railway sector have not required Member States to open up the management of that infrastructure to competition.

112 In that context, it should be noted, as observed by the Commission, that the fact that an undertaking that meets certain conditions can obtain a licence to manage railway infrastructure and that there are in fact companies in possession of licences to manage such infrastructure does not mean that there is competition 'on' or 'for' the market for the operation and management of the Danish national railway network, including the rail connections at issue in the present dispute. The fact that such companies may operate on sections of the railway network which form a kind of natural monopoly, separate from the national railway network, is not sufficient to show that the latter, which is managed by Banedanmark under a statutory monopoly, is open to competition. The same applies with regard to the rail connections, which involve the expansion and upgrading of the existing infrastructure held by Banedanmark and will be jointly owned by it and Femern Landanlæg (see paragraphs 4 to 9 above).

113 Moreover, Section 3 of Sub-Chapter 3 of Chapter 3 of Law No 1249 simply allows undertakings established in other EU Member States to rely on permits issued by their country of origin in Denmark, which does not mean, of itself, that the market for the management and operation of railway infrastructure in that country is open to competition.

114 It should also be noted that, as observed by the Commission, Sub-Chapter 16 of Chapter 5 of the Jernbanelov n° 686 (Law No 686 on the railways) of 27 May 2015, which was in force at the date of the contested decision, provides that

Banedanmark is responsible for the management of the State railway infrastructure and rail connections.

115 The same considerations justify the dismissal of the arguments alleging, first, that Law No 686 dispensed with the obligation to obtain a licence, merely requiring infrastructure managers to obtain security approval, and, second, that that law does not impose Banedanmark as manager of railway infrastructure that is owned by others than the Danish State, merely providing for such a possibility, subject to the prior agreement of the infrastructure owner.

116 Any dispensation from the requirement to hold a licence and the fact that it is possible for railway infrastructure that is owned by third parties to be managed by operators other than Banedanmark do not show that the markets for the management and operation of the State infrastructure and, in particular, the rail connections, are open to competition.

(3) The 'de facto' opening of the relevant markets, as evidenced by the presence of network management companies

117 The applicants submit that the markets for the management and operation of railway infrastructure in Denmark are de facto open to competition, They rely on the existence of a number of companies other than Banedanmark which operate as managers of certain sections of the Danish railway network under a licence or which are appointed as infrastructure managers in connection with certain projects in which they participate, in particular the Great Belt Bridge, the Øresund tunnel-bridge and the Fehmarn Belt fixed link tunnel itself.

118 As the Commission and the Kingdom of Denmark have acknowledged, there are admittedly local railway networks in private hands which do not have to be managed by Banedanmark. Moreover, that situation is envisaged by Directive 2012/34, in particular in Article 2(4), which allows Member States to exclude from the scope of Article 8(3) of the directive, concerning the financing of the infrastructure manager, 'local and regional railway infrastructures which do not have any strategic importance for the functioning of the rail market' and to exclude from the scope of Chapter IV, concerning the levying of charges for the use of infrastructure and the allocation of railway infrastructure capacity, 'local railway infrastructures which do not have any strategic importance for the functioning of the rail market'.

119 That being the case, even if there was competition 'for' the market for the management of certain local networks, for which concession contracts are awarded, it must be noted, first, that those networks are natural monopolies separate from the national railway infrastructure, including the railway connections (see paragraph 111 above) and, second, that, according to paragraph 2 of Chapter 1 of the Construction Law, Femern Landanlæg is 'authorised to construct and operate the Danish hinterland connections and to take the measures necessary to carry those tasks out' — tasks which are mentioned in that

company's articles of association as forming part of its objects. Therefore, the documents before the Court do not show that Femern Landanlæg is active or may be active on other markets, such as those for which contracts are awarded for the management of local railway networks.

120 In conclusion, the existence of local infrastructure managed by operators other than Banedanmark does not show that the rail connections are also operated as a result of competitive tendering procedures or that Femern Landanlæg is active on markets open to competition.

(4) The opening of the markets for the construction and maintenance of the railway infrastructure

121 The applicants argue that the activities of constructing and maintaining the railway network, which are open to competition, are part of the activities included in the concept of 'railway network operation', activities with which Femern Landanlæg is entrusted by the Construction Law, as acknowledged by the Kingdom of Denmark and that company's articles of association.

122 It is, admittedly, common ground between the parties that the markets for the construction and maintenance of the railway infrastructure are open to competition. Nevertheless, those markets, on which Femern Landanlæg is not active, are separate from the market for the management and operation, in the strict sense, of the railway infrastructure. Those markets are not therefore affected by the measures at issue.

123 The Lov n° 285 om projektering af fast forbindelse over Femern Bælt med tilhørende landanlæg i Danmark (Law No 285 on the planning of the Fehmarn Belt fixed link and Danish hinterland connections) of 15 April 2009 ('the Planning Law'), referred to in recital 13 of the contested decision, confines the activities of Femern Landanlæg to planning the hinterland connections, whereas the Construction Law, referred to in recital 50 of that decision, adds the activities relating to the construction and operation of the hinterland connections.

124 In particular, paragraph 2 of Chapter 1 of the Construction Law, referred to by the applicants, provides that Femern Landanlæg is 'authorised to construct and operate the Danish hinterland connections and to take the measures necessary to carry out those tasks' and that company's articles of association refer to the same tasks as forming part of the company's objects. Moreover, as observed by the Kingdom of Denmark, under Article 2(1) of the Bekendtgørelse n° 1222 om Banedanmarks opgaver og beføjelser (Regulation No 1222 on the tasks and powers of Banedanmark) of 21 November 2014, Banedanmark is responsible for, inter alia, the construction, upgrading and maintenance of public railway infrastructure.

125 Accordingly, while the provisions referred to in paragraphs 123 and 124 above confer responsibility on Femern Landanlæg for ensuring that the rail connections

are constructed and operated, it is not apparent from those provisions that that company is in a position to carry out the tasks of constructing and maintaining the network itself in competition with other operators — a claim which is not, moreover, made by the applicants.

126 In those circumstances, the existence of companies that construct and maintain certain parts of the Danish railway network, including following a competitive tendering procedure, does not demonstrate that the activities of managing or operating the railway infrastructure, as referred to in the contested decision and performed by Femern Landanlæg, are open to competition.

127 Therefore, irrespective of whether the activity of maintaining the railway network is technically part of the activity of operating the network, it is clear, first, that Femern Landanlæg does not directly perform that activity, or indeed that of constructing the network, and, second, that the references in the contested decision to the activities of managing and operating the railway network do not go so far as to include the exercise of the construction and maintenance activities described to above.

(d) The effect on trade between Member States

128 With regard to the effect on trade between Member States, the applicants submit that the measures at issue granted to Femern Landanlæg may prevent infrastructure operators established in other Member States from penetrating the Danish market and strengthen that company's competitive position on railway infrastructure markets in other Member States.

129 In the first place, it is clear that it is the fact that there is no competition on the market for the management of the Danish railway infrastructure which prevents other companies established in other Member States from penetrating that market, so that the measures granted to Femern Landanlæg cannot affect the entry of non-Danish operators onto the Danish market.

130 In the second place, it should be noted that the Planning Law, referred to in recital 13 of the contested decision, does not allow Femern Landanlæg to engage in activities other than those relating to the planning of the hinterland connections, whereas the Construction Law, referred to in recital 50 of that decision, does not allow Femern Landanlæg to engage in activities other than those relating to the construction and operation of the hinterland connections (see paragraphs 123 to 125 above).

131 It follows that the applicants have not succeeded in showing that Femern Landanlæg was authorised to carry out activities other than those relating to the project and that it could therefore penetrate markets in other Member States.

132 Moreover, the claim that Banedanmark maintains the Danish railway network in competition with other companies and that it may penetrate other national

markets, even if established, does not show, first, that the measures granted to Femern Landanlæg, but not to Banedanmark, constitute indirect aid for the benefit of Banedanmark — a claim not made by the applicants — or, second, that such measures are liable to distort competition on a market on which Femern Landanlæg operates.

(e) Conclusion

133 In the light of all the foregoing, it must be concluded that there is no basis for the applicants' claim that the Commission's examination is vitiated by an error of fact or of law, and that they have failed to demonstrate that the Commission encountered serious difficulties which should have prompted it to initiate the formal investigation procedure.

134 As a consequence, the Court rejects as unfounded the first plea and the first complaint in the second part of the third plea, in so far as concerns the analysis of the measures granted to Femern Landanlæg for the planning, construction and operation of the rail connections.

3. The second plea and the second part of the third plea, alleging infringement of Article 107(3)(b) TFEU and infringement of the obligation to initiate the formal investigation procedure in so far as concerns the compatibility with the internal market of the measures granted to Femern for the planning, construction and operation of the fixed link

135 The second plea alleges infringement of Article 107(3)(b) TFEU in so far as the Commission concluded that the aid measures granted to Femern were compatible with the internal market. That plea is made up of five parts, by which the applicants allege errors of law and manifest errors of assessment in respect of: (i) the common European interest of the project; (ii) the necessity of the aid; (iii) whether the aid was proportional; (iv) the distortion of competition; and (v) the conditions for mobilising State guarantees.

136 The second part of the third plea alleges infringement of the obligation to initiate the formal investigation procedure, for the purpose of Article 108(2) TFEU, in so far as the Commission conducted an insufficient or incomplete assessment of the compatibility of the aid measures. That part of the plea is made up of five complaints, the first of which has been dealt with at the same time as the first plea. The second to fifth complaints concern: (i) the common European interest of the project; (ii) the necessity of the aid; (iii) the proportionality of the aid; and (iv) distortion of competition.

137 The Court considers it appropriate to examine first the first four parts of the second plea together with the corresponding complaints in the second part of the third plea and, afterwards, the fifth part of the second plea.

(a) The relevant case-law

138 As a preliminary point, with regard to the arguments alleging failure to initiate the formal investigation procedure, it should be borne in mind that, according to settled case-law, the procedure under Article 108(2) TFEU must be followed whenever the Commission encounters serious difficulties in determining whether aid is compatible with the internal market. It follows that the Commission, when taking a decision in favour of aid, may restrict itself to the preliminary examination under Article 108(3) TFEU only if it is able to satisfy itself after an initial examination that the aid is compatible with the internal market. If, on the other hand, the initial review leads the Commission to the opposite conclusion or even if it does not enable the Commission to overcome all the difficulties involved in determining whether the aid is compatible with the internal market, the Commission is under a duty to obtain all the requisite opinions and, for that purpose, to initiate the procedure under Article 108(2) TFEU (see judgment of 27 September 2011, *3F* v *Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 53 and the case-law cited).

139 Although it has no discretion in relation to the decision to initiate the formal investigation procedure, where it finds that such difficulties exist, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties (see judgment of 27 September 2011, *3F* v *Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 54 and the case-law cited).

140 According to case-law, the concept of serious difficulties is an objective one. The existence of such difficulties must be sought both in the circumstances in which the contested measure 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 compatibility of the disputed aid with the internal market. It follows that judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond simple consideration of whether or not there has been a manifest error of assessment. The applicant bears the burden of proving the existence of serious difficulties and may discharge that burden by reference to a body of consistent evidence, concerning, first, the circumstances and the length of the preliminary examination procedure and, second, the content of the contested decision (see judgment of 27 September 2011, *3F* v *Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 55 and the case-law cited).

141 Furthermore, with regard to the applicants' pleas concerning the application of Article 107(3)(b) TFEU, it should be borne in mind that that article confers on the Commission a discretion, the exercise of which involves complex economic and social assessments (see judgment of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 78 and the case-law cited). Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been

complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (judgment of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 78 and the case-law cited). In particular, it is not for the Court to substitute its own economic assessment for that of the author of the decision (judgment of 25 June 1998, *British Airways and Others* v *Commission*, T-371/94 and T-394/94, not published, EU:T:1998:140, paragraph 79).

(b) The common European interest of the project

142 By the first part of the second plea, the applicants raise two complaints, alleging (i) a manifest error of assessment in calculating the socio-economic return of the project and (ii) misapplication of Article 107(3)(b) TFEU and of the IPCEI Communication. The second complaint in the second part of the third plea alleges infringement of the obligation to initiate the formal investigation procedure in so far as concerns the calculation of the socio-economic return of the project.

143 The Commission disputes the applicants' arguments.

144 It is appropriate to examine, first, the Commission's assessment concerning the calculation of the socio-economic return of the project in terms of the alleged manifest error of assessment and infringement of the obligation to initiate the formal investigation procedure and, second, the Commission's assessment concerning the alleged misapplication of Article 107(3)(b) TFEU in terms of manifest error of assessment.

(1) The calculation of the socio-economic return of the project

145 In the contested decision, the Commission based its assessment of the common European interest of the project on four factors. First, in recital 89 of the decision, it stated that the common European interest of the project had been recognised in the project planning decision. Second, in recital 90, it observed that the fixed link was a priority TEN-T project (No 20) and contributed to improving the connection between the Nordic countries and central Europe. Third, in recital 91, it stated that the project will produce a positive economic return and, lastly, in recital 92, that the project had obtained EU funding for the planning activities and that an application had been submitted for EU funding for the construction phase.

146 In particular, recital 91 of the contested decision, which is disputed in the complaint under consideration, states as follows:

'The Project involves two Member States, i.e. Denmark and Germany, and the benefits go beyond those two Member States. The benefits of the Project were clearly defined and quantified in a cost benefit study prepared for the Danish Ministry of Transport. The cost benefit analysis shows that the Project will have wide benefits for Europe. Despite significant investment costs, the Fixed Link will return a net benefit and produce an economic return of 4.7 [%].'

147 It is common ground between the parties that that conclusion is based on two documents: the study of 5 January 2015 and the study of 27 March 2015, carried out for the Danish Ministry of Transport.

148 The applicants put forward three arguments in support of the complaints under consideration.

149 By their first argument, the applicants maintain, in the first place, that it is not the study of 5 January 2015 but the updated version of that study, namely that of 27 March 2015, which indicates a socio-economic return of 4.7% at European level.

150 The Commission acknowledges that the figure of 4.7% is based on the new, updated calculation carried out in the study of 27 March 2015 in response to the applicants' observations.

151 It must therefore be concluded that the Commission's statement in recital 91 and footnote 31 of the contested decision that the figure of 4.7% is based on the study of 5 January 2015 is incorrect, as it is common ground between the parties that the source of that figure is the updated calculation given in the study of 27 March 2015.

152 However, although regrettable, that error did not, of itself, have any bearing on the Commission's examination. It is common ground between the parties that, as is apparent from the wording of recital 91 of the contested decision and irrespective of the merits of that assessment, which will be examined below, the Commission based its decision on an economic return at European level of 4.7%.

153 In the second place, the applicants contend that the calculation of a socio-economic return of 4.7% is based on the incorrect premiss that the fixed link will not be in competition with ferries.

154 In that regard, it should be noted that in the contested decision the Commission based that premiss on the conclusions of the study of 5 January 2015, as revised by the study of 27 March 2015. That study does not take account of competition from ferries, 'in accordance with normal practice' and the experience gained from the Great Belt and Øresund bridge projects. Nevertheless, that study measures, in the interests of prudence, the impact of competition from ferries operating at reduced frequency. Under that scenario, the socio-economic return was estimated at 4.1%.

155 The applicants maintain that they will continue with their activities, that the study is based on a 'simplistic simulation' of ferry traffic and that the projects referred to by the Commission do not support the premiss that the fixed link will not face competition from ferries, which the Commission disputes.

156 Those arguments are not sufficient to show that the Commission made a manifest error of assessment or that it carried out an insufficient or incomplete examination.

157 First, the socio-economic return of 4.7% is just one of the four factors on which the Commission based its assessment of the common European interest of the project (see paragraph 145 above). It joins the other factors taken into account by the Commission, including the classification of the project as a 'priority TEN-T' project, which is a strong indication of the common European interest of the project.

158 Second, it is reasonable, or at the very least not manifestly incorrect, to conclude that the opening of the fixed link will lead to the disappearance of ferry services on the line covered by the fixed link.

159 In any event, the 0.9% reduction, due to account being taken of the presumption that the ferry services will continue in the sensitivity calculations, even if it slightly reduced the socio-economic return of the fixed link to a level below the 4% threshold, is not in any event indicative of a manifest error of assessment on the part of the Commission. As the Kingdom of Denmark observed, the applicants cannot include the 0.9% negative sensitivity calculation in relation to the assumption that ferries will continue to operate when all the positive and negative sensitivity calculations have been disregarded. Moreover, the percentage figure of 4% is simply an indicative ceiling, and merely one of the factors taken into account by the Commission, including the socio-economic return at Danish level, which is above 4%.

160 The same applies with regard to the applicants' argument that the socio-economic return measured by the Commission does not take account of the costs incurred by the project before 2015, which, according to the applicants, would give rise to a further reduction in the return of 0.3%.

161 As the Kingdom of Denmark observed, the applicants cannot take account of the sensitivity calculations relating to the inclusion of costs incurred before 2015 when all the other sensitivity calculations are disregarded. Moreover, that argument does not alter the conclusion that the socio-economic return demonstrates that the project is of common European interest.

162 By their second argument, the applicants submit that the Commission relied on inconsistent evidence, in so far as it did not take account of competition from ferries in calculating the socio-economic return of the project, in order to establish common European interest, while at the same time taking account of that factor in calculating the IRR of the project and the funding gap when examining the necessity and proportionality of the aid.

163 The Commission states that, as regards the repayment period taken into account in examining the necessity and proportionality of the aid, it relied on the assumption

of an hourly ferry service in assessing the compatibility of the measure with the internal market under a more prudent scenario than that considered likely to occur.

164 It is clear in that regard that there is a certain inconsistency in the reasons put forward in the contested decision, as noted by the applicants. With regard to the calculation of the socio-economic return of the project, competition from ferries, which was taken into account by the Commission in the interests of prudence, is not referred to in the contested decision, in particular in recital 91 thereof, whereas the existence of such competition is one of the assumptions on which the calculation of the 55-year repayment period is based, as explained in recital 104 and part (ii) of footnote 35 of the contested decision.

165 However, the fact that competition from ferries was not taken into account or was taken into account purely in the interests of prudence in relation to the calculation of the socio-economic return of the project are reasonable assumptions, which cannot have the effect of vitiating the contested decision as a result of a manifest error of assessment in that regard (see paragraphs 158 and 159 above). Furthermore, those assumptions do not show that the Commission carried out an insufficient or incomplete examination. That conclusion is also without prejudice to the examination of the merits of the Commission's conclusion regarding the repayment period, which forms the subject matter of the first complaint in the third part of the second plea and the fourth complaint in the second part of the third plea and will be examined in the assessment of whether the aid is proportional.

166 By their third argument, the applicants maintain that the Commission was not entitled to conclude, as it did in recital 91 of the contested decision, that the 'Project will have wide benefits for Europe', as the socio-economic return of 4.7% at EU level, even if it were established, is only slightly above the Danish threshold of 4% and considerably below the 14% threshold of the Great Belt fixed link.

167 In that regard, as the Commission argues, it is sufficient to note that the fact that the anticipated return of the project, which is above the Danish threshold, is below that of other projects does not, of itself, show that the project is not of common European interest.

168 In conclusion, as regards the calculation of the socio-economic return of the project, first, the applicants are not entitled to claim that the Commission's examination is vitiated by an error of law or a manifest error of assessment and, second, the applicants have failed to show that there were difficulties of assessment which should have prompted the Commission to initiate the formal investigation procedure.

169 The first complaint in the first part of the second plea and the second complaint in the second part of the third plea, concerning the calculation of the socio-economic return of the project, must therefore be rejected.

(2) The application of Article 107(3)(b) TFEU and the IPCEI Communication

170 As a preliminary point, it should be noted that the concept of common European interest inherent in Article 107(3)(b) TFEU must be interpreted strictly and that a project may be so classified only if it forms part of a transnational European programme jointly supported by a number of Member State governments or arises from concerted action by a number of Member States to combat a common threat (see judgment of 6 October 2009, *Germany* v *Commission*, T-21/06, not published, EU:T:2009:387, paragraph 70 and the case-law cited).

171 The concept of common European interest was explained by the Commission in the IPCEI Communication, in the light of which that concept must be interpreted, a point which the applicants do not dispute.

172 In recitals 89 to 92 of the contested decision, the Commission based its examination of the common European interest of the project on the following factors:

– first, the common European interest of the fixed link was recognised in the decision regarding the planning of the project;

– second, the fixed link will contribute to the development of the TEN-T, in particular by improving the connection between the Nordic countries and central Europe;

– third, (i) the project involves two Member States and its benefits go beyond those two Member States and (ii) the benefits of the project were clearly defined and quantified, the economic return of the project having been assessed at 4.7%;

– fourth, the project obtained EU funding for the planning activities and an application for EU funding for the construction phase was submitted.

173 In support of the complaint under consideration, the applicants put forward three arguments.

174 In that regard, it is necessary, first, to dismiss the applicants' first argument, alleging, in essence, that the project planning decision and, more generally, the Commission's previous decision-making practice, were irrelevant for the purpose of examining whether the project was of common European interest.

175 Recital 40 of the project planning decision, which is echoed by the Commission in recital 89 of the contested decision, simply stresses the importance of the fixed link in the context of the TEN-T, a point which is repeated by the Commission in recital 90 of the contested decision and, moreover, is not a decisive factor in the Commission's conclusion on the common European interest of the project, albeit an important indication of the existence of such an interest. In that context, the argument that the Commission's earlier decision-making practice is irrelevant is

ineffective as the Commission did not base its conclusion on the project planning decision or any other earlier decision.

176 Next, it is appropriate to examine together the applicants' second and third arguments, alleging, in essence, that the importance of the project in the context of the TEN-T and the joint funding of the project by the European Union are not decisive factors for the purpose of establishing that the project is of common European interest and do not justify disregarding the other cumulative conditions set out in the IPCEI Communication.

177 It should be noted in that regard that the Commission's assessment in the contested decision of whether there is a common European interest is based on the two factors mentioned in paragraph 176 above, which are not disputed by the applicants, and on the fact that the project will provide benefits that go beyond the two Member States directly concerned and that those benefits are clearly defined and quantified, the economic return of the fixed link having been estimated at 4.7%.

178 Irrespective of the merits of the latter consideration, which was examined in paragraphs 145 to 169 above, those three factors meet the conditions set out in the IPCEI Communication, having regard to the common European interest test.

179 Indeed, those factors form part of the 'general cumulative criteria' in paragraphs 14 to 19 of Section 3.2.1 of the IPCEI Communication and include one of the 'general positive indicators', as set out in paragraph 20(f) of the communication.

180 Lastly, it is true that doubts may arise as to whether the condition laid down in paragraph 18 of the IPCEI Communication, namely that the project must involve co-financing by the beneficiary, which is disputed by Föreningen Svensk Sjöfart, is fulfilled. However, as submitted by the Commission, the project is funded in large part by the beneficiaries of the measures, on account of the fact that tolls and fees will be charged to users of the fixed link and rail connections, which satisfies that condition.

181 In conclusion, the Court finds, first, that there are no valid grounds for the applicants' claim that the Commission made a manifest error of assessment in concluding that the project was of common European interest and, second, that the applicants have failed to show that the Commission's examination disclosed serious doubts which should have prompted it to initiate the formal investigation procedure.

182 The first part of the second plea and the second complaint in the second part of the third plea, concerning the common European interest of the project, must therefore be rejected in their entirety.

(c) The necessity of the aid

183 By the second part of the second plea, the applicants raise two complaints, alleging an error of law and a manifest error of assessment in the assessment of the necessity of the aid, in so far as concerns, first, the incentive effect of the aid and, second, the counterfactual scenario, including the calculation of the project's IRR. By the third complaint in the second part of the third plea, the applicants also allege infringement of the obligation to initiate the formal investigation procedure in relation to those factors.

184 The Commission disputes those arguments.

(1) The incentive effect of the aid

185 As a preliminary point, it is appropriate to set out the content of paragraph 28 of the IPCEI Communication:

> 'The aid must not subsidise the costs of a project that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity. Without the aid the project's realisation should be impossible, or it should be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits …'

186 Footnote No 24, in paragraph 28, of the IPCEI Communication states as follows:

> 'The aid application must precede the start of the works, which is either the start of construction works on the investment or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever is the first in time …'

187 By their arguments, the applicants claim, in essence, that the aid, as referred to in paragraph 28 of the IPCEI Communication, does not have any incentive effect, as construction work on the fixed link had already started before an aid application had been made or a commitment given by the Danish authorities to grant such aid.

188 It should be noted in that regard, first, that a certain number of preparatory works, anticipated by the Planning Law, were authorised by the project planning decision, and, as stated in recital 13 of the contested decision, the Danish authorities confirmed that the standstill obligation had been observed, in accordance with the measures laid down in the Construction Law, as required by Article 108(3) TFEU.

189 Next, it is clear from the documents before the Court that Femern was established for the sole purpose of constructing and operating the fixed link. It is therefore required by its articles of association to do so.

190 Lastly, it is not disputed that Femern was not in a position to start work on the project unless it was granted the aid at issue.

191 In those circumstances, a prior aid application or a prior commitment on the part of the Danish authorities to grant aid are not prerequisites for demonstrating that the aid had an incentive effect for the purpose of paragraph 28 of the IPCEI Communication.

192 Moreover, the case-law relied on by the applicants does not alter that conclusion. The judgments of 15 April 2008, *Nuova Agricast* (C-390/06, EU:C:2008:224), and of 13 June 2013, *HGA and Others* v *Commission* (C-630/11 P to C-633/11 P, EU:C:2013:387), concern aid schemes approved on the basis of the Guidelines on national regional aid (OJ 1998 C 74, p. 9), the third subparagraph of Section 4.2 of which states that 'aid schemes must lay down that an application for aid must be submitted before work is started on the projects'. That is a very different context from that of the present case and cannot be compared with it.

193 It must therefore be concluded that the applicants are not entitled to claim that the Commission made a manifest error of assessment in concluding that the aid had an incentive effect and that they have failed to show that the Commission's examination disclosed serious doubts which should have prompted it to initiate the formal investigation procedure.

194 The first complaint in the second part of the second plea and the third complaint in the second part of the third plea must therefore be rejected in so far as concerns the examination of the incentive effect of the aid.

(2) The counterfactual scenario

195 As a preliminary point, it is appropriate to refer to the content of paragraphs 29 and 30 of the IPCEI Communication:

> '29. The Member State must provide the Commission with adequate information concerning the aided project as well as a comprehensive description of the counterfactual scenario which corresponds to the situation where no aid is awarded by any Member State. The counterfactual scenario may consist in the absence of an alternative project or in a clearly defined and sufficiently predictable alternative project considered by the beneficiary in its internal decision-making, and may relate to an alternative project that is wholly or partly carried out outside the Union.
>
> 30. In the absence of an alternative project, the Commission will verify that the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable, for example by making possible to achieve an IRR corresponding to the sector or firm specific benchmark or hurdle rate. Normal rates of return required by the beneficiary in other investment projects of a similar kind, its cost of capital as a whole or returns commonly observed in the industry concerned may also be used for this purpose. All relevant expected costs and benefits must be considered over the lifetime of the project.'

196 The applicants raise seven arguments in that regard. By the first and second, they dispute, in essence, the Commission's conclusion that there was no counterfactual scenario, which is at variance with the conclusions of a cost-benefit report commissioned in 2000 by the Danish and German Ministries of Transport ('the 2000 cost-benefit report').

197 In that connection, recitals 99 and 100 of the contested decision read as follows:

> '99 [With regard to paragraph 29 of the IPCEI Communication] the Danish authorities submit that there is no counterfactual or an alternative project. The Danish Parliament has sole decision-making authority as regards the project's scope and its means of financing. Hence, [Femern] and [Femern Landanlæg] have no power to decide to carry out an alternative project of a different scale. Consequently, no realistic description of an alternative project could be provided by Denmark.
>
> 100 However, the Danish authorities provided information regarding a scenario where no public support is granted to [Femern]. The analysis conducted in the preliminary phases shows that the Fehmarn Belt fixed link project can only be realised with substantial public support either in the form of State guarantees or direct grants.'

198 Recital 101 of the contested decision summarises the results of the 2001 inquiry as to commercial interest, which shows that the project was not feasible without public support.

199 It is apparent from recitals 99 to 101 of the contested decision that, in the Commission's view, the Danish authorities, while claiming that there was no counterfactual scenario or any realistic alternative project, provided information relating to a scenario in which no public support would be granted to Femern, a scenario which confirmed that the project could be completed only with substantial public support. Moreover, the 2001 inquiry as to commercial interest confirmed that the private sector was interested in participating in the project on condition that State subsidies far exceeding the support envisaged by means of the RTE or State guarantees were granted.

200 It follows that, notwithstanding the ambiguous wording of recital 99 of the contested decision, which states that 'the Danish authorities submit that there is no counterfactual or alternative project', the Commission based its decision on the premiss that there was no alternative project, not on the premiss that there was no counterfactual scenario at all.

201 It should be noted in that regard that, according to paragraph 29 of the IPCEI Communication, a counterfactual scenario may consist in the absence of an alternative project.

202 What now remains to be considered is the argument that the Commission did not take account of the 2000 cost-benefit report, which examined several alternatives

to the project, the most advantageous of which related to a scenario in which no fixed link was constructed and the existing ferry services were modernised.

203 As the Commission stated, the 2000 cost-benefit report is one of the documents which served as a basis for the 2001 inquiry as to commercial interest. The conclusion of that study is as follows:

'Evaluation results show that the relative efficiency of the investment in an improved ferry system is considerably higher than for the best ranked fixed link alternative, whereas the absolute magnitude of net benefits gained by the fixed link solution is by far not achievable by an improved ferry system.'

204 Therefore, while it is true that, according to the 2000 cost-benefit report, in terms of relative efficiency, improvement of the ferry system would be more advantageous than construction of the fixed link, that report acknowledges that the net benefits gained by the solution in the form of the fixed link would not be achieved by improvements to the ferry system. That report cannot call into question the Commission's assessment, based on the results of the 2001 inquiry as to commercial interest, that report, moreover, having been used as one of the references in that inquiry.

205 By their third argument, the applicants submit that the Commission has failed to establish market failure in the present case and has relied solely on the 2001 inquiry as to commercial interest, which is several years old and relates to a project which was different in scope and costs to those of the current project.

206 It is sufficient to note in that regard that the reference made by the Commission to the 2001 inquiry as to commercial interest was simply intended to show that the private sector would not have undertaken such a large project without State financial support. The applicants have not explained the extent to which that conclusion may be called into question by the changes in scope and cost in the original project, by showing, for example, that in the meantime a counterfactual scenario in which no aid was granted had become viable.

207 By their fourth to sixth arguments, the applicants criticise the lack of detail in the calculation of the IRR and allege that it is incorrect. They maintain that the calculation could not be based on a 55-year repayment period, contrary to what is stated in the contested decision, in particular in footnote 35, in recital 104 thereof. In particular, they dispute the claim that the IRR was calculated by reference to the repayment period, estimated by the Commission at 55 years, and not by reference to the lifetime of the project, which, as stated in an extract from Femern's website, is 120 years. The Commission, it is alleged, applied a test relating to the proportionality of the aid, not the necessity of the aid.

208 It is appropriate to examine first the arguments relating to the serious difficulties encountered by the Commission when carrying out its preliminary examination.

209 As a preliminary point, it should be noted that the IPCEI Communication is not very precise with regard to the analysis of the criteria of the necessity and proportionality of aid. Paragraph 28 et seq. of the communication does not make a distinction between those two criteria, as the Commission acknowledges, and even confuses them.

210 In particular, with regard to the calculation of the profitability of a project, paragraph 30 of the IPCEI Communication refers, inter alia, to 'an IRR corresponding to the sector or firm specific benchmark or hurdle rate' and states that, in order to calculate the IRR, 'all relevant and expected costs and benefits must be considered over the lifetime of the project'. That would therefore suggest a condition which seems to be based primarily on the necessity of the aid, as, if the project is not profitable during its lifetime, the aid is necessary. However, the beginning of paragraph 30 of the IPCEI Communication requires the Commission to verify that 'the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable', which seems to relate to the different, but complementary, condition that the aid must be proportional.

211 In recital 103 of the contested decision, the Commission applied the conditions laid down in paragraph 30 of the IPCEI Communication when examining the necessity of the aid. It took the view that, if the IRR was greater than the WACC, the net present value of the project would be positive and the project profitable, and that if, on the contrary, the IRR was lower than the WACC, the project would not be profitable and aid would therefore be necessary.

212 However, in recital 104 of the contested decision, the Commission calculated the IRR of the project 'over the expected repayment period of 55 years'. Footnote 35 specifies that the calculation of the 55-year repayment period is based, inter alia, on 'the project planning and construction costs of EUR 7.4 billion (2014 prices)'. The figure of EUR 7.4 billion, according to Table 1 in recital 8 of the contested decision, covers only the construction costs of the fixed link.

213 In that regard, first, the Court notes that, when referring to the repayment period for the aid, the Commission failed to apply correctly paragraph 30 of the IPCEI Communication, which states that the IRR is to be calculated taking into account all expected costs and benefits 'over the lifetime of the project'. Furthermore, to base the calculation of the IRR on a very uncertain repayment period, as in the present case, is also arbitrary, as that period may vary depending on subjective factors, including the type of aid and the arrangements for repayment negotiated between the beneficiary and the financial institution granting the loan.

214 Second, in the calculation of the IRR for the purpose of examining the necessity of the aid, the Commission did not take account of the construction costs of the fixed link, whereas it conducted its compatibility analysis by reference to the project as a whole, including the construction costs of the hinterland connections and the operating costs of the fixed link (see paragraph 240 below).

215 In its pleadings, the Commission states that the IRR was calculated over the expected repayment period of 55 years, in accordance with paragraph 31 of the IPCEI Communication, which indicates that the funding gap is defined as 'the difference between the positive and negative cash flows over the lifetime of the investment'. It adds that the lifetime of the investment refers to its economic lifetime, in accordance with the Directorate-General (DG) for Regional and Urban Policy's document of December 2014 entitled '*Guide to Cost-Benefit Analysis of Investment Projects*', which refers to a standard reference period of 25 to 30 years for calculating the funding gap for the purpose of establishing the maximum contribution from the European Regional Development Fund (ERDF) for infrastructure projects for roads and railways, while at the same time stating that, in the present case, given the exceptional nature of the project and the unusually long construction period, it took a more conservative approach.

216 In that regard, it is clear that paragraph 31 of the IPCEI Communication does not concern the calculation of the IRR but that of the funding gap, which relates mainly to the different requirement that the aid must be proportional (see paragraph 224 below). Next, it should be noted that the DG for Regional and Urban Policy's document referred to by the Commission provides only guide values as to the profitability of certain types of project, while at the same time indicating that, in cases involving unusually long construction periods, longer values may be used. In any event, that document cannot prevail over the wording of the IPCEI Communication. Lastly, the Commission does not explain in the contested decision in what way the lifetime of the investment corresponds to the repayment period, on which the calculation of the IRR is based.

217 In conclusion, while it cannot be ruled out that, in principle, aid was necessary for the realisation of such a large project, it must be nonetheless be found that the Commission's examination of the necessity of the aid in the contested decision was, at the very least, insufficient and imprecise. This indicates that there were serious difficulties, which should have prompted the Commission to initiate the formal investigation procedure, and also means that it is not possible to examine whether the Commission made a manifest error of assessment.

218 By their seventh and final argument, the applicants dispute the calculation of the WACC. They maintain that the 11.0% WACC level assumed in the contested decision is too high by comparison with the WACC for similar long-term infrastructure projects, according to data provided by a Professor at the New York University (New York, United States), which suggests a WACC level of between 5.68% and 6.71%.

219 As the Commission was correct to observe in that regard, the document referred to in paragraph 218 above simply shows a one-page table containing figures, without explanations or sources, which are, in any event, higher than the IRR of the project. That evidence cannot therefore call into question the Commission's assessment.

220 In the light of all the foregoing, the third complaint in the second part of the third plea must be upheld in so far as the Commission failed to have regard to its obligation to initiate the formal investigation procedure when faced with serious difficulties concerning its assessment of the necessity of the aid. It is not therefore possible, in the light of the inadequate examination carried out by the Commission, to rule on the second complaint in the second part of the second plea, alleging a manifest error of assessment.

(d) The proportionality of the aid

221 By the third part of the second plea, the applicants allege an error of law and a manifest error of assessment in the assessment of the proportionality of the aid. By the fourth complaint in the second part of the third plea, which refers to arguments set out in connection with the third part of the second plea, they submit that the Commission's analysis of whether the aid was proportional was insufficient and incomplete.

222 It is appropriate to consider first the arguments relating to the serious difficulties encountered by the Commission when carrying out its preliminary examination.

223 First, it should be noted that the principle of proportionality requires that measures adopted by EU institutions should not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 8 April 2014, *ABN Amro Group* v *Commission*, T-319/11, EU:T:2014:186, paragraph 74 and the case-law cited). As a general principle of EU law, the principle of proportionality is a criterion for determining whether any act of the institutions of the European Union is lawful, including decisions taken by the Commission in its capacity as competition authority (see judgment of 8 April 2014, *ABN Amro Group* v *Commission*, T-319/11, EU:T:2014:186, paragraph 75 and the case-law cited).

224 It should also be noted that paragraph 28 of the IPCEI Communication states that aid will be deemed proportionate only if the same result cannot be achieved with less aid. Paragraph 31 of that communication indicates that the maximum aid level will be determined with regard to the identified funding gap in relation to the eligible costs, the funding gap being defined as 'the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value on the basis of an appropriate discount factor reflecting the rate of return necessary for the beneficiary to carry out the project notably in view of the risks involved'. Aid is therefore proportionate up to the amount at which the project becomes profitable.

225 With regard in particular to State aid in the form of a guarantee, footnote 27, in paragraph 36 of the IPCEI Communication, states that 'aid in the form of guarantees must be limited in time, and aid in the form of loans must be subject to

repayment periods'. Moreover, point (b) of the third subparagraph of Section 4.1 of the Guarantee Notice, concerning guarantees, states that guarantees must be, inter alia, 'limited in time' and that 'unlimited' guarantees are incompatible with Article 107 TFEU.

226 In the contested decision, the Commission stated that the aid intensity was below the funding gap of the project. In recital 107 of the decision, the Commission indicated that the funding gap was EUR 3.1 billion and that the net present value of the eligible investment costs was EUR 5.6 billion, giving a funding gap ratio for the project of 54.9%. In recital 108 of the decision, it stated that the aid granted to Femern was EUR 2.8 billion, which gives aid intensity of 50.8%.

227 Furthermore, in recital 109 of the contested decision, the Commission added that the State guarantee and State loans were limited in scope and time. According to the Commission, the guarantee covers only the debt relating to the planning, construction and operation of the fixed link until the debt is fully repaid and there is no risk that the guarantee may be used to subsidise other non-eligible costs and activities.

228 In recital 110 of the contested decision, the Commission also stated that the Danish authorities had 'committed to limit the guarantees and State loans to loans obtained in order to finance eligible costs no later than 55 years after the opening of the Fixed Link', to give fresh notification of any public financing measures granted after that period and deemed necessary to ensure the sustainability of the project and to report annually on progress in the repayment of Femern's debt. The Commission also indicated that the guarantee would terminate earlier if the project debt was repaid before the end of that period.

229 The applicants claim, in essence, that the Commission erred in law or made a manifest error of assessment in so far as concerns the calculation of the duration of the aid and its scope, having regard to the eligible costs, and in therefore concluding that the maximum aid level was permissible.

230 In the first place, it should be noted that the contested decision does not contain any precise indications concerning the duration and end dates of the State guarantees and loans. As is apparent from recitals 109 and 110 of the decision, the grant of those measures is 'limited' to 55 years from the date — which remains uncertain — on which the fixed link will be opened, and those measures will cover Femern's debt until it 'is fully repaid'. In any event, a period of at least 55 years is, in itself, extremely long, especially as it relates only to the provision of guarantees in respect of loans taken out up to that date and which will therefore be repaid long after that date.

231 In its pleadings, the Commission argues that a temporal limitation is not, according to the IPCEI Communication, an essential requirement when determining proportionality, and states that, in recital 109 of the contested decision, it gave a precise indication of the scope and duration of the aid merely

for the sake of completeness. According to the Commission, linking the use of the guarantees to the repayment of the costs ensures, via a limitation that is as much in scope as it is in time, that the project will not receive more aid than is needed.

232 The question therefore arises as to whether, in principle, the very long and imprecisely determined duration of the measures referred to in paragraph 227 above has a bearing on the proportionality of those measures. That question must be addressed in the light of the principles set out by the Commission in the IPCEI Communication and in the Guarantee Notice, which expressly provide that guarantees must be 'limited in time'.

233 In those circumstances, first, it should be noted that those guarantees are linked to an object that is specific but the precise cost of which has not been determined, namely the loans and obligations relating to the debt connected with the planning, construction and operation of the fixed link until that debt has been repaid in full (recitals 31 and 109 of the contested decision). Second, it should also be noted that the provision of those guarantees is, in principle, limited to a period of 55 years from the opening of the fixed link, the Danish authorities having undertaken to give fresh notification of any new measure granted after that period (recital 110 of the contested decision), which, according to the Commission, is the expected repayment period of Femern's debt, as explained in footnote 35, in recital 104 of the contested decision. All guarantees still valid at that date will remain so until they 'naturally' expire, that is, until the underlying debts have been repaid, which may be long after that date.

234 Accordingly, the fact that the object is only partially determined and the extremely long and indeterminate, or indeed unforeseeable, debt repayment period, which determines the duration of the guarantees, should have prompted the Commission to investigate more closely the proportionality of that aid measure.

235 In the second place, the assessment of the Commission's analysis also raises difficulties as to the scope of the aid in the form of State guarantees and loans, in particular with regard to the account taken, as eligible costs, of the costs of the hinterland connections.

236 It is clear from recital 18 of the contested decision and, what is more, it is not disputed by the Commission, that it took into account the costs of the hinterland connections, as eligible costs, among the relevant costs when calculating the length of the repayment period and the funding gap.

237 It is true that, in the context of the project, as notified, the costs of the hinterland connections are indirectly payable by Femern, which is obliged, inter alia, to pay dividends to Femern Landanlæg to enable the latter to meet those costs. Those costs could therefore, in principle, be taken into account when examining whether the aid granted to Femern was compatible.

238 That said, the Commission fails to explain in the contested decision whether and to what extent those costs were taken into account in its analysis of compatibility,

which, in principle, appears to concern only the funding measures for the fixed link. Moreover, the Commission's assessment appears to be contradictory in that regard. While, in recital 107 of the decision, the Commission indicates that the calculation of the funding gap takes account of the financing of the hinterland connections, footnote 35, in recital 104 of the decision, states that the calculation of the repayment period, which is decisive for determining whether the measures at issue are proportional, is based only on the construction costs of the fixed link (see paragraph 212 above).

239 It follows that the Commission's examination of that aspect is incomplete, or even contradictory, so that it was not entitled to take the view that it had overcome all the serious difficulties raised by the analysis of the proportionality of the measures at issue.

240 In the third place, it is apparent from the contested decision that the measures at issue granted to Femern covered not only the debt connected to the planning and construction of the fixed link but also that relating to the operation of the link, until the debt has been repaid in full.

241 It should be borne in mind in that regard that, as the aid at issue covers the operating costs of the fixed link, it cannot be ruled out that, to some extent, it may constitute operating aid, that is, aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or ordinary activities (see, to that effect, judgment of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraph 30, and the case-law cited).

242 As observed by the applicants, the aid should have expired at 'the point in time when the beneficiary would be able, on the basis of its cash flow, to borrow on the open market without the support of State guarantees or State loans'. That point is normally reached when the amount of the beneficiary's debt has reached a level at which its income is likely to exceed operating costs and debt repayments under normal market conditions, and therefore before the debt has been repaid in full. Aid in excess of that level may therefore be regarded as operating aid, for which the Commission has not provided any justification in the contested decision.

243 That possibility was not even taken into account by the Commission, as the contested decision makes no distinction, in the analysis of the compatibility of the aid, on the basis of whether it covers, on the one hand, the costs relating to the planning and construction of the fixed link, which may, in principle, be classified as investment costs and, on the other, the costs of operating the link, which may, by contrast, constitute operating aid.

244 It follows from all the foregoing that the Commission's analysis in the contested decision concerning the proportionality of the measures at issue granted to Femern, in particular the calculation of the repayment period of the aid and of the eligible costs, was, at the very least, insufficient and imprecise, or even

contradictory, which is indicative of the existence of serious difficulties that should have prompted the Commission to initiate the formal investigation procedure.

245 The Court therefore upholds the fourth complaint in the second part of the third plea, in so far as the Commission failed to have regard to its obligation to initiate the formal investigation procedure when it encountered serious difficulties concerning the assessment of the proportionality of the aid, although it is not possible, on account of the inadequate examination carried out by the Commission, to rule on the third part of the second plea, alleging a manifest error of assessment.

(e) Undue distortion of competition and balancing test

246 By the fourth part of the second plea, the applicants contend that, contrary to the requirements of the IPCEI Communication, the Commission failed to examine whether the aid gave rise to undue distortion of competition. By the fifth complaint in the second part of the third plea, they also allege infringement of the obligation to initiate the formal investigation procedure in so far as concerns those matters.

247 Paragraph 40 of the IPCEI Communication states that 'the Member State should provide evidence that the proposed aid measure constitutes the appropriate policy instrument to address the objective of the project' and that 'an aid measure will not be considered appropriate if other less distortive policy instruments or other less distortive types of aid instrument make it possible to achieve the same result'.

248 Under Article 41 of the IPCEI Communication, 'for the aid to be compatible with the internal market, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of common European interest'.

249 In accordance with those principles, paragraph 42 of the IPCEI Communication states that 'in assessing the negative effects of the aid measure, the Commission will focus its analysis on the foreseeable impact the aid may have on competition between undertakings in the product markets concerned, including up- or downstream markets, and on the risk of overcapacity'. Paragraph 43 of the communication adds that 'the Commission will assess the risk of market foreclosure and dominance, in particular in case of absence of, or limited dissemination, of the research results' and that 'projects involving the construction of an infrastructure must ensure open and non-discriminatory access to the infrastructure and non-discriminatory pricing'.

250 In the present case, with regard to the positive effects of the project, the Commission refers in recital 115 of the contested decision to recitals 88 to 93 thereof, concerning the analysis of the common European interest of the project,

and states that 'the Fixed Link is part of a wider plan to promote mobility, further integration and cultural exchange of people living on both sides of the Fixed Link, and to improve the connection between the Nordic countries and central Europe for passengers as well as road and railway freight', expected benefits which have been 'recognised at a European level by including the Fixed Link in the list of TEN-T priority projects'. It refers, inter alia, to the 'positive effects on a number of economic sectors in the region, such as gas stations, retail, restaurants, hotels, amusement parks and rail and bus transport'.

251 With regard to the negative effects, in recital 116 of the contested decision the Commission states that the opening of the fixed link will have 'a negative impact on the ferry operators, both serving Rødby and Puttgarden routes as well as other ferry routes in the region', and that the decline in the number of ferry operations 'may also have a negative impact on the ports used by those ferries in terms of traffic volumes and revenues'. It adds that those effects 'are inherent in the project, which seeks to offer a quicker and more convenient alternative to the ferry services'.

252 The Commission states in recital 117 of the contested decision that the Fehmarn Belt fixed link will be open to all users on an equal and non-discriminatory basis and that the pricing structure will be non-discriminatory and transparent.

253 In recital 118 of the contested decision, the Commission adds, relying on the study of 5 January 2015, that 'the cost benefit analysis of the Fehmarn Belt Fixed Link project clearly shows that the expected socio-economic outcome of the Fehmarn Belt Fixed Link in the long run is positive, regardless of the fact whether the ferry service continues or is terminated'. It states that the study in question calculated, so far as possible, all possible gains and costs of the fixed link in comparison with a situation involving the continuation of the ferry services, and concluded that, despite the significant investment costs of the fixed link and the hinterland connections, the project will return a net benefit and produce an economic return of 4.7% for Europe (and an economic return of 5.3% for Denmark), a benefit consisting mainly in time saving and greater flexibility in departure times for the various users of the fixed link.

254 Essentially, the applicants contend that the Commission failed to analyse the effect of the aid on competition, with regard in particular to the creation of a dominant position for Femern and possible abuse of that position, and the risk of overcapacity on a market that is already saturated by ferry operators.

255 In that regard, in recital 116 of the contested decision, the Commission took into account — admittedly succinctly — the negative effect of the opening of the fixed link on ferry operators and the ports used by those operators, while at the same time stating that those effects 'are inherent in the project, which seeks to offer a quicker and more convenient alternative to the ferry services'. Moreover, in recital 118 of the decision, the Commission stated that the expected socio-economic

outcome of the Fehmarn Belt fixed link will in the long run be positive, whether or not the ferry services are discontinued.

256 The Commission's conclusion in this respect is not vitiated by a manifest error of assessment. It is reasonable to conclude that a project involving the construction of infrastructure that will provide an alternative to existing modes of transport entails the risk that the latter will disappear and, as that project provides a solution which, on the whole, has positive results, it is not for the Commission to call into question the choice made by the public authorities.

257 Furthermore, the argument that the calculation of the socio-economic return is incorrect because it does not take into account competition from ferries has already been addressed and rejected in connection with the first complaint in the first part of the second plea and the second complaint in the second part of the third plea, which should be referred to (see, in particular, paragraphs 153 to 159 above).

258 It follows, first, that the Commission did not make any manifest error of assessment in its examination of undue distortion of competition and of the balance test and, second, that that examination did not give rise to serious doubts which should have prompted it to initiate the formal investigation procedure.

259 The fourth part of the second plea and the fifth complaint in the second part of the third plea must therefore be rejected.

(f) The conditions for the mobilisation of State guarantees

260 The applicants contend that the Commission erred in law and made a manifest error of assessment with regard to the conditions for the mobilisation of State guarantees.

261 As a preliminary note, it should be observed that Section 5.3 of the Guarantee Notice is worded as follows:

> 'The Commission will accept guarantees only if their mobilisation is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure. These conditions will have to be agreed between the parties when the guarantee is initially granted. In the event that a Member State wants to mobilise the guarantee under conditions other than those initially agreed to at the granting stage, then the Commission will regard the mobilisation of the guarantee as creating new aid which has to be notified under Article [108(3) TFEU].'

262 As a further preliminary point, it should be noted that, in adopting rules of conduct and announcing through their publication that they will henceforth apply to the cases to which they relate, the Commission imposed a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal

treatment or the protection of legitimate expectations, unless it can provide reasons justifying its departure from its own rules, in view of those same principles (see, to that effect, judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 211, and of 11 September 2008, *Germany and Others* v *Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 60).

263 In the specific field of State aid, the EU Courts have previously indicated that the Commission may adopt guidelines on the exercise of its powers of assessment and that, in so far as they do not contradict Treaty rules, the policy rules which they contain are to be followed by that institution (see judgment of 13 June 2002, *Netherlands* v *Commission,* C-382/99, EU:C:2002:363, paragraph 24 and the case-law cited).

264 By their first argument, the applicants claim, in essence, that the conditions for the mobilisation of the guarantees had not been determined when the guarantees were initially granted.

265 The Commission maintains that the applicants' speculation that the Danish authorities might have granted guarantees before the adoption of the contested decision, without the Commission having been informed of the conditions for the mobilisation of those guarantees, is not supported by any evidence.

266 It should be recalled that in recital 122 of the contested decision the Commission, while acknowledging that the conditions for the mobilisation of the guarantees at issue are not set out in the Construction Law itself, states that, as confirmed by the Danish authorities, those conditions were determined by the Minister for Finance before Femern and Femern Landanlæg obtained loans and other financial instruments and form part of the loan agreements which those companies concluded with financial institutions.

267 It must therefore be found that the conditions for the mobilisation of the guarantees at issue, as referred to in Section 5.3 of the Guarantee Notice, were not known at the time the aid was granted. Those conditions were nevertheless determined, according to the Commission, by the Danish Minister for Finance before the guaranteed loans were granted and were included in the loan agreements concluded between Femern and the financial institutions concerned.

268 In that regard, it is nevertheless clear that the contested decision does not explain how the Danish Minister for Finance will impose those conditions.

269 Furthermore, it is apparent from the contested decision that the Commission found that the conditions for mobilisation were introduced, on a case-by-case basis, when the loans were granted, but that it did not formally impose those conditions as conditions for ensuring that the aid was compatible. There is therefore some doubt as to whether the Commission can intervene in a situation where, when a specific loan is granted, no condition for mobilisation may be imposed.

270 In any event, in the light of Section 5.3 of the Guarantee Notice, it is clear that the Commission was not in a position to find that the guarantees at issue were compatible with the internal market without knowing the conditions for mobilisation attaching to the grant of the guarantees.

271 Accordingly, the Court finds that the Commission erred in law and made a manifest error of assessment.

272 By their second argument, the applicants maintain, in essence, that, as regards the State guarantees covering non-financial obligations, the Commission was content to accept the assurance received from the Danish authorities that the principles of Danish law ensure that the rules laid down in the Guarantee Notice will be applied, without stating what those principles are or requiring an undertaking in that regard from the Danish authorities.

273 The Commission disputes the applicants' arguments.

274 It should be noted that in recital 123 of the contested decision the Commission states that, with regard to State guarantees covering non-financial obligations, as affirmed by the Danish authorities, the general principles of Danish law regarding obligations require Femern or Femern Landanlæg to be declared bankrupt before the guarantee can be mobilised.

275 It is true that the Commission has not provided any explanation concerning the provisions of Danish law applicable in the present case. Nevertheless, as the Commission itself observes, it had no reason to doubt the interpretation of the principles of Danish law provided to it by the Danish authorities, an interpretation which, moreover, the applicants have not disputed.

276 Therefore, there are no grounds to support the applicants' claim that the Commission made a manifest error of assessment in that regard.

277 That argument cannot therefore succeed.

278 In conclusion, the fifth part of the second plea must be upheld, as the Commission did not impose any conditions in respect of the mobilisation of the guarantees before the aid was granted.

(g) Conclusion

279 In the light of all the foregoing, it must be concluded that the Commission (i) failed to have regard to its obligation to initiate the formal investigation procedure in so far as concerns the assessment of the necessity and proportionality of the aid and (ii) erred in law and made a manifest error of assessment in so far as concerns the examination of the conditions for the mobilisation of the State guarantees.

280 As a consequence, the Court upholds the second part of the third plea, without there being any need to examine the first part of that plea, alleging infringement of

the obligation to initiate the formal investigation procedure on account of the length of and certain circumstances connected with the conduct of the procedure, and annuls the contested decision in so far as the Commission decided not to raise any objections to the measures granted by the Kingdom of Denmark to Femern for the planning, construction and operation of the Fehmarn Belt fixed link.

Costs

281 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been largely unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

282 Under Article 138(1) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. Accordingly, the Kingdom of Denmark, intervener in support of the Commission, must bear its own costs.

283 Article 138(3) of the Rules of Procedure provides that the Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article is to bear its own costs. In the present case, the Court has decided that Föreningen Svensk Sjöfart and NABU are to bear their own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Annuls Commission Decision C(2015) 5023 final of 23 July 2015 on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt fixed link project (OJ 2015 C 325, p. 5) in so far as the Commission decided not to raise any objections to the measures granted by the Kingdom of Denmark to Femern A/S for the planning, construction and operation of the Fehmarn Belt fixed link;

2. Dismisses the action as to the remainder;

3. Orders the Commission to bear its own costs and to pay the costs incurred by Scandlines Danmark ApS and Scandlines Deutschland GmbH;

4. Orders the Kingdom of Denmark, Föreningen Svensk Sjöfart and Naturschutzbund Deutschland (NABU) eV to bear their own costs.

Berardis Spielmann Csehi

Delivered in open court in Luxembourg on 13 December 2018.

E. Coulon

Registrar President

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