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 (Eighth Chamber)

19 September 2019*

(State aid — Banking sector — Aid granted to FIH in the form of a transfer of its impaired assets to a new subsidiary and the subsequent purchase thereof by the body responsible for guaranteeing financial stability — State aid for banks during the crisis — Decision declaring the aid compatible with the internal market — Admissibility — Calculation of the amount of the aid — Manifest error of assessment)

In Case T-386/14 RENV,

FIH Holding A/S, established in Copenhagen (Denmark),

FIH A/S, previously FIH Erhvervsbank A/S, established in Copenhagen,

represented by O. Koktvedgaard, lawyer,

applicants,

v

European Commission, represented by L. Flynn, A. Bouchagiar and K. Blanck, acting as Agents,

defendant,

ACTION on the basis of Article 263 TFEU for annulment of Commission Decision 2014/884/EU of 11 March 2014 on State aid SA.34445 (12/C) implemented by Denmark for the transfer of property-related assets from FIH to the FSC (OJ 2014 L 357, p. 89),

THE GENERAL COURT (Eighth Chamber),

* Language of the case: English.

composed of A.M. Collins (Rapporteur), President, R. Barents and J. Passer, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 21 March 2019,

gives the following

Judgment

Background to the dispute

Context of the Contested Decision

1 One of the two applicants, FIH A/S, formerly FIH Erhvervsbank A/S ('FIH'), is a limited liability company established in accordance with Danish banking legislation and supervised by the Danish banking authorities. FIH and its subsidiaries are wholly owned by the other applicant, FIH Holding A/S ('FIH Holding').

2 FIH benefited from certain measures adopted by the Kingdom of Denmark in order to stabilise its banking sector. In June 2009, FIH received a hybrid tier 1 capital injection of 1.9 billion Danish kroner (DKK) (approximately EUR 225 million) under the Danish Law on State-funded capital injections. That law had been approved by the European Commission as an aid scheme compatible with the internal market by Decision C(2009) 776 final of 3 February 2009 on State aid scheme N31a/2009 — Denmark. According to that decision, the aid scheme was open to fundamentally sound and solvent banking establishments.

3 In July 2009, the Kingdom of Denmark granted FIH a State guarantee totalling DKK 50 billion (approximately EUR 6.31 billion) under the Danish Law on financial stability. That law was also approved as an aid scheme compatible with the internal market by Decision C(2009) 776 final. FIH used the entire guarantee to issue bonds. As of 31 December 2011, the value of the bonds issued by FIH and guaranteed by the Danish State was DKK 41.7 billion (approximately EUR 5.56 billion), constituting 49.94% of FIH's balance sheet. Those bonds were due to mature in 2012 and 2013.

4 Between 2009 and 2011, Moody's ratings agency downgraded FIH's rating from A2 to B1 with negative outlook.

5 In order to overcome the liquidity problems that the maturity profile of the bonds was going to create, it appeared necessary to reduce FIH's balance sheet

significantly. On 6 March 2012, the Kingdom of Denmark therefore notified a package of measures to the Commission. Two phases were envisaged.

6 During the first phase, the most problematic assets (in particular, property loans and derivatives) were to be transferred to NewCo, a new subsidiary of FIH Holding. NewCo's initial liabilities consisted of two loans from FIH and an equity stake of DKK 2 billion (approximately EUR 268 million). In that context, the Financial Stability Company ('the FSC'), a public body set up by the Danish authorities in the context of the financial crisis, also provided NewCo with funding in the amount necessary to refinance its assets (namely, DKK 13 billion), so as to enable FIH to repay its State-guaranteed loans.

7 During the second phase, the FSC was to buy the shares in NewCo, which would be wound up in an orderly manner thereafter.

8 FIH Holding and the FSC concluded several side-agreements relating to NewCo's situation during that winding-up process. In particular, FIH Holding gave an unlimited loss guarantee to the FSC, guaranteeing that the FSC would fully recover the amounts it paid and the capital it provided to NewCo. The FSC agreed to finance and to recapitalise NewCo during the winding-up process, if that proved to be necessary.

9 By Decision C(2012) 4427 final of 29 June 2012 on State aid SA.34445 (12/C) (ex 2012/N) — Denmark, the Commission concluded that the measures notified constituted State aid to NewCo and the FIH Group. Nevertheless, for reasons of financial stability it temporarily approved the package of measures for a period of 6 months or, if the Kingdom of Denmark submitted a restructuring plan during that period, until the Commission adopted a final decision on that restructuring plan.

10 By the same decision, the Commission initiated a formal investigation procedure in respect of those measures. In particular, it expressed doubts as to the proportionality of the measures and their limitation to the minimum necessary. It also considered whether the FIH Group's own contribution was sufficient and whether distortions of competition were sufficiently limited.

11 On 2 July 2012, FIH repaid the Kingdom of Denmark the hybrid tier 1 capital of DKK 1.9 billion (approximately EUR 225 million) that it had received in 2009. As a result of the early repayment of those funds, the FSC was able to finance almost the entire amount of DKK 2 billion required for the purchase of NewCo.

12 On 4 January 2013, the Kingdom of Denmark submitted a plan for the restructuring of FIH, the final version of which is dated 24 June 2013.

13 On 3 October 2013, the Kingdom of Denmark submitted a package of proposed commitments, the final version of which is dated 3 February 2014, in order to address the concerns expressed by the Commission in the context of the investigation procedure.

Contested decision

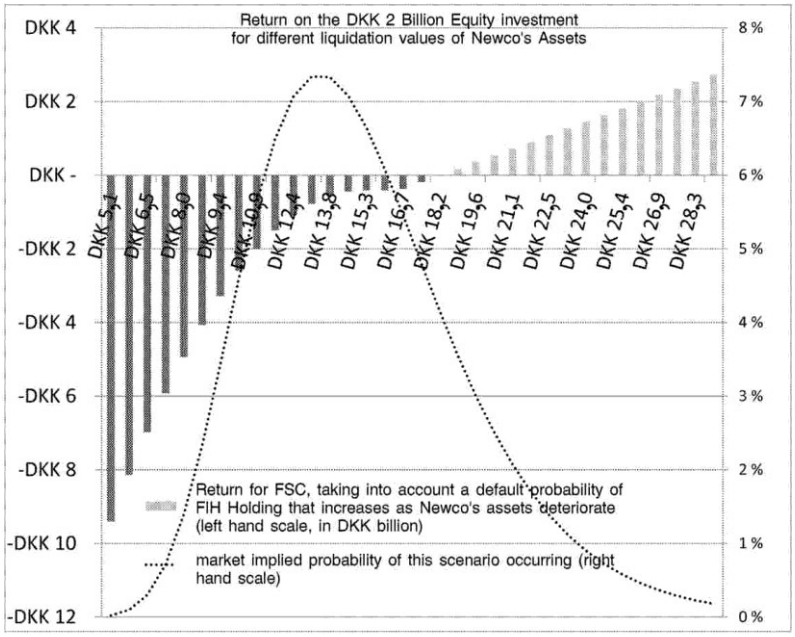
14 On 12 March 2014, the Commission notified the Kingdom of Denmark of Decision 2014/884/EU of 11 March 2014 on State aid SA.34445 (12/C) implemented by Denmark for the transfer of property-related assets from FIH to the FSC (OJ 2014 L 357, p. 89; 'the contested decision'). The aid in question was declared compatible with the internal market under Article 107(3)(b) TFEU in the light of the restructuring plan and the commitments made.

15 According to the contested decision, the measures in favour of FIH constituted State aid within the meaning of Article 107(1) TFEU.

16 In the first place, the Commission noted that the measures in question involved State resources, since they had been financed by the FSC, a State-owned company using public resources. First, the FSC had made a cash payment of DKK 2 billion (approximately EUR 268 million) for the equity stake in NewCo. Secondly, the FSC had committed itself to fund NewCo's assets while FIH repaid its State-guaranteed loans (see paragraph 6 above). Thirdly, the FSC had foregone part of the interest due in order to pay for the guarantee from FIH Holding against NewCo's losses (see paragraph 8 above).

17 In the second place, the Commission considered that the measures conferred an advantage on the FIH Group. It considered that, contrary to the assertions of the Danish authorities, these measures did not observe the principle of the market economy operator. In that regard, the contested decision indicates, in a graph reproduced in paragraph 18 below, the Net Present Value ('NPV') of the share purchase agreement for various liquidation values in respect of NewCo's assets, ranging from DKK 5.1 billion to DKK 28.3 billion. The probability of each situation materialising is indicated by the dotted line (from 0.1% to 7.5%). According to the Commission, in the most likely scenarios, the return is slightly negative.

18 According to the contested decision, the expected return on the measures at issue depends on the future stream of revenue from cash flows, discounted to the present day in order to derive its NPV using an appropriate discount rate.



19 The contested decision thus concludes that, according to the calculation of the Commission's external expert, the overall probability-weighted average NPV of the share purchase agreement amounts to DKK 726 million. As a result, the share purchase agreement generates a loss rather than a profit for the FSC. Moreover, a market economy operator would have required an equity remuneration of at least 10% per annum on a similar DKK 2 billion investment (approximately EUR 268 million), which would have generated about DKK 1.33 billion over the seven-year existence of NewCo.

20 In the third place, the Commission stated that the measures concerned only the FIH Group and NewCo and were, therefore, selective.

21 In the fourth place, the Commission considered that the measures were likely to distort competition and to have an effect on trade between Member States.

22 According to the Commission's calculations, supported by reports from external experts, the aid amount was approximately DKK 2.25 billion (approximately EUR 300 million). In order to quantify the amount of aid, the Commission considered the following:

– the benefit related to the share purchase agreement formula (DKK 0.73 billion) stemming from a mere 25% equity upside participation over a seven-year investment period (according to the Commission, a straightforward equity investment would entail a 100% participation in the equity returns);

– the annual equity investment remuneration foregone over a seven-year investment period (DKK 1.33 billion);

– the excess interest payments by NewCo on the first loan to FIH and its initial funding (DKK 0.33 billion);

– the payment of excess administration fees to FIH for asset management and hedging (DKK 0.14 billion).

23 As a mitigating factor, the Commission considered that the early cancellation of government guarantees amounting to DKK 0.28 billion should be deducted from the total aid amount.

24 As regards the aid's compatibility with the internal market, the Commission examined the measure on the basis of Article 107(3)(b) TFEU and in the light of the Communication on the treatment of impaired assets in the Community banking sector (OJ 2009 C 72, p. 1; 'the Impaired Assets Communication') and the Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ 2011 C 356, p. 7).

25 In that regard, the Commission noted that the remuneration required for the equity stake was based on the effective net capital relief of the measures. It assessed the gross capital relief effect of the measures at DKK 375 million, and the equivalent transfer value at DKK 254 million above the real economic value, an amount which ought to be remunerated and clawed back. In addition, DKK 143.2 million in excess fees should be recovered.

26 According to the Commission, an early payment of DKK 254 million (with a value date of 1 March 2012) reduced the net capital relief effect from DKK 375 million to DKK 121 million. Therefore, the payment of a one-off premium of DKK 310.25 million with a value date of 30 September 2013, an annual payment of DKK 12.1 million (corresponding to an annual remuneration of 10% of the capital relief) and the recovery of the excess administration fees would bring the measures in line with the Impaired Assets Communication.

27 In view of those various elements, the Commission considered that the measures were proportionate, limited to the minimum and ensured a sufficient contribution from FIH, in accordance with the Impaired Assets Communication.

28 Next, the Commission checked the compatibility of the measures with the Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis. It thus considered that a comprehensive restructuring plan had been submitted, demonstrating that FIH would restore its long-term viability without State aid. Moreover, according to the Commission, the restructuring plan ensured adequate burden-sharing and sufficient mitigation of distortion of competition.

29 In the light of the foregoing, the contested decision declared the aid compatible with the internal market.

Proceedings before the General Court and the Court of Justice

Earlier proceedings before the General Court

30 By application lodged at the Court Registry on 24 May 2014, the applicants brought an action seeking the annulment of the contested decision.

31 In support of their action, the applicants raised three pleas in law alleging, first, infringement of Article 107(1) TFEU in so far as the contested decision did not correctly apply the market economy operator principle, secondly, errors in the calculation of the amount of State aid and of aid incompatible with the internal market and, thirdly, infringement of the obligation to state reasons.

32 The Commission contended that the action had to be dismissed as unfounded, adding that the second plea in law was partly inadmissible in so far as, in their fifth head of claim, the applicants sought to challenge the decision authorising the aid on the basis of commitments offered by the Kingdom of Denmark.

33 The parties presented oral argument and replied to the questions put by the Court at the hearing on 25 February 2016.

34 By judgment of 15 September 2016, *FIH Holding and FIH Erhvervsbank* v *Commission* (T-386/14, 'the initial judgment', EU:T:2016:474), first, the General Court upheld the first plea in law put forward by the applicants and annulled the contested decision. Secondly, it rejected the third plea as unfounded. In addition, the General Court concluded that there was no need to examine the second plea and consequently no need to adjudicate on the admissibility of the fifth head of claim of the second plea.

Earlier proceedings before the Court of Justice

35 By application lodged at the Court Registry on 16 November 2016, the Commission brought an appeal against the initial judgment, raising a single ground of appeal alleging that the General Court erred in law in its interpretation of Article 107(1) TFEU.

36 By judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank* (C-579/16 P, 'the appeal judgment', EU:C:2018:159), the Court of Justice set aside the initial judgment. In the first place, the Court of Justice held that the General Court was wrong to accept the first plea raised before it, since an error was not made in the contested decision in applying the private investor principle rather than the private creditor principle. In the second place, it held that it had the information necessary to enable it to give final judgment on the first plea in law and rejected that plea. However, the Court of Justice held that the state of the proceedings did not permit it to give final judgment in relation to the second plea, on which the General Court had not given a ruling. Consequently, it decided

to refer Case T-386/14 back to the General Court for it to give judgment on the second plea in law raised before it and reserved the costs.

Procedure and forms of order sought

37 Following the appeal judgment, Case T-386/14 RENV was allocated to the Eighth Chamber of the General Court.

38 On 2 May 2018, the Commission and, on 15 May 2018, the applicants lodged their written observations in accordance with Article 217(1) of the Rules of Procedure of the General Court.

39 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

40 The Commission contends that the Court should:

– dismiss the action as in part inadmissible and in part unfounded;

– order the applicants to pay the costs.

41 On a proposal from the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, requested that the parties answer certain written questions. The parties answered those questions within the prescribed periods.

42 The parties presented oral argument and replied to the General Court's oral questions at the hearing on 21 March 2019.

Law

Admissibility of the action and of a head of claim

43 According to the Commission, in so far as the applicants dispute the assessment of the compatibility of the aid with the internal market made in that part of the contested decision that approved the aid the action is inadmissible. As State aid is in principle prohibited, the Commission considers that the applicants were not entitled to State aid. The commitments offered by the Kingdom of Denmark in the contested decision therefore have no legal effects capable of affecting the applicants' interests.

44 At the reply stage, the Commission adds that, contrary to the applicants' claims, it did not dictate the commitments to be given by the Kingdom of Denmark, while acknowledging that it made various suggestions in that regard.

45 In addition, the Commission contends that the contested decision does not impose conditions since it is based on Article 7(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), and not on Article 7(4) thereof.

46 Lastly, the Commission submits that, in so far as the applicants appear to maintain in their reply of 8 February 2019 to the written questions of the Court and in their oral arguments at the hearing that the Commission infringed its obligation to conduct a diligent and impartial investigation, that head of claim must be rejected as inadmissible.

47 The applicants claim that their action is admissible in its entirety. They observe that the decision is indivisible, since, without the commitments, the Commission would not have declared the aid compatible with the internal market. As regards the head of claim alleging infringement of the obligation to conduct a diligent and impartial investigation, it is apparent from their oral arguments at the hearing that the applicants consider that that criticism was implicit in the arguments put forward in the context of the second plea in law in the application.

48 According to settled case-law, only measures with binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position are capable of being the subject matter of an action for annulment (judgments of 30 January 2002, *Nuove Industrie Molisane* v *Commission*, T-212/00, EU:T:2002:21, paragraph 36, and of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 60).

49 In order to determine whether an act or decision produces such effects, it is necessary to look to its substance (judgments of 30 January 2002, *Nuove Industrie Molisane* v *Commission*, T-212/00, EU:T:2002:21, paragraph 37, and of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 61).

50 The mere fact that a Commission decision declares aid compatible with the internal market and that thus, in principle, it does not have an adverse effect on the applicant does not dispense the Court from examining whether certain Commission assessments produce binding legal effects such as to affect the applicant's interests (judgments of 30 January 2002, *Nuove Industrie Molisane* v *Commission*, T-212/00, EU:T:2002:21, paragraph 38, and of 20 September 2007, *Salvat père & fils and Others* v *Commission*, T-136/05, EU:T:2007:295, paragraph 36).

51 Thus, it is apparent from the case-law that an action for annulment brought against a decision declaring existing aid compatible with the internal market on the basis of commitments given by the Member State concerned is admissible (see, to that effect, judgment of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66,

paragraphs 69 to 73). It must also be borne in mind that, in paragraphs 77 to 83 of the judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep* (C-224/12 P, EU:C:2014:213), the Court rejected the Commission's arguments seeking to challenge the annulment of the commitments contained in its decision on the ground that the commitments offered by the Kingdom of the Netherlands were not attributable to it, but were merely the result of unilateral proposals by the Kingdom of the Netherlands.

52 In addition, it is apparent from the case-law that the commitments form an integral part of the measure notified and that, therefore, the Commission decision concerns the notified measure and the commitments taken together (see, to that effect, order of 1 December 2015, *Banco Espírito Santo* v *Commission*, T-814/14, not published, EU:T:2015:936, paragraph 31 and the case-law cited). Therefore, the Commission decision has the effect of making the commitments made by the State which are at issue binding in so far as it expressly makes the finding that the aid is compatible with the internal market conditional on compliance with those commitments (see, to that effect, judgment of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, EU:T:2018:563, paragraph 47 (not published)).

53 In the present case, it follows from Article 1(2) of the contested decision that the State aid in question is declared to be 'compatible with the internal market, in the light of the restructuring plan and the commitments set out in the Annex'.

54 Consequently, and contrary to the Commission's submissions, the action is admissible also in so far as it seeks to challenge the commitments and/or the restructuring plan which the Commission accepted. It cannot be denied that the commitments and restructuring plan have legal effects vis-à-vis the applicants and may affect their interests since the aid is authorised only if the commitments and the restructuring plan are complied with.

55 Moreover, even if the contested decision is partially favourable to the applicants, the latter, in so far as they dispute the commitments, have a legal interest in bringing proceedings in order to have the legality of that decision determined by the EU judicature.

56 More specifically, by the fifth head of claim put forward in the second plea, the admissibility of which the Commission disputes, the applicants challenge the calculation of the capital relief effect, estimated at DKK 375 million by the Commission and DKK 275 million by the applicants, and the application by the Commission of an annual rate of remuneration of 10% to the amount of capital relief in order to declare the measures compatible with the internal market in the light of the Impaired Assets Communication. In that regard, the contested decision affects the applicants' interests, who must make annual payments to the Kingdom of Denmark, the amount of which is contested, in order to ensure the aid's compatibility with the internal market.

57 Moreover, in view of the correspondence between the Commission and the applicants, the inclusion of that annual rate of remuneration does not appear to have been proposed on the initiative of the Kingdom of Denmark and without any intervention by the Commission, contrary to what the Commission claimed. In that regard, it should be noted, for example, that, in an email of 16 September 2013, the Commission's services stated as follows:

'*As pointed out by my colleagues, the annual remuneration of the remaining capital relief effect (121 Million DKK), amounting to 12.1 Million DKK per annum should indeed be added to the list [of] measures needed to achieve compatibility.*'

58 Furthermore, the present case can be distinguished from the case-law cited by the Commission in support of its position. In paragraph 27 of the judgment of 14 April 2005, *Sniace* v *Commission* (T-141/03, EU:T:2005:129), the Court held that the applicant had no interest in seeing the contested act annulled, since it approved, unconditionally and without limit of time, the aid in its favour, which is not the case here. As regards the case which gave rise to the judgment of 20 September 2007, *Salvat père & fils and Others* v *Commission* (T-136/05, EU:T:2007:295), it must be borne in mind that the Court expressly stated that, in order to rule that the action was inadmissible, it was not sufficient to find that the decision declared the aid compatible with the internal market, but, on the contrary, that it was necessary to examine the applicant's situation *in concreto* (judgment of 20 September 2007, *Salvat père & fils and Others* v *Commission*, T-136/05, EU:T:2007:295, paragraphs 36 and 37). In addition, the Commission has not explained why a comparison should be made between the present case and the case which gave rise to the judgment of 20 September 2007, *Salvat père & fils and Others* v *Commission* (T-136/05, EU:T:2007:295), which did not concern a decision taken on the basis of commitments.

59 The Commission's arguments concerning the partial inadmissibility of the action must therefore be rejected.

60 As regards the admissibility of the head of claim alleging infringement of the obligation to conduct an impartial and diligent investigation, it should be borne in mind 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 fact which come to light in the course of the procedure. However, a plea which constitutes an amplification of a plea previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible. To be regarded as an amplification of a plea or a head of claim previously advanced, a new line of argumentation must, in relation to the pleas or heads of claim initially set out in the application, present a sufficiently close connection with the pleas or heads of claim initially put forward in order to be considered as forming part of the normal evolution of debate in proceedings before the Court (judgment of 20 November 2017, *Petrov and Others* v *Parliament*, T-452/15, EU:T:2017:822, paragraph 46; see also, to that effect,

judgment of 22 April 2016, *Italy and Eurallumina* v *Commission*, T-60/06 RENV II and T-62/06 RENV II, EU:T:2016:233, paragraphs 45 and 46).

61 It must be stated that, as the Commission has rightly pointed out, the application contains no reference to an alleged infringement of the obligation to conduct a diligent and impartial investigation. Therefore, in so far as the applicants' argument can be understood as seeking to show that the Commission's investigation was insufficient, it must be held that that head of claim does not present a sufficiently close connection with the arguments put forward in the context of the second plea in law seeking a finding of the existence of manifest errors of assessment. That head of claim must therefore be rejected as inadmissible.

62 In the light of the foregoing, the action must be declared admissible and the head of claim alleging infringement of the obligation to conduct a diligent and impartial investigation must be rejected as inadmissible.

Substance

63 In the second plea in law put forward in support of their action, the applicants submit that the Commission made a series of five errors in calculating the amount of the State aid and the amount of the aid that is incompatible with the internal market. The first, second and fourth parts of the second plea concern the calculation of the amount of the State aid declared incompatible with the internal market, namely DKK 254 million, whereas the third and fifth parts concern the calculation of the capital relief effect in the context of the analysis of the compatibility of the aid with the internal market, namely DKK 375 million. Following that logic, the fourth part must be examined before the third.

First part, alleging errors in the calculation of the value of the transferred assets

64 In the first part of the second plea, the applicants claim that the Commission erred in calculating the value of the transferred assets, arriving at a value that was too low, which affected the assessment of the amount of State aid and the amount of incompatible aid. In support of that first part of the second plea, the applicants put forward, in essence, five series of heads of claim.

65 First, the applicants note that the FSC and the Danish financial supervisory authority specifically examined the exposures in the loan portfolio, whereas the Commission adjusted the value on the basis of a mathematical model. According to the applicants, that adjustment is incorrect. There was no reason to use a mathematical model instead of relying on the individual assessments made by the FSC and the Danish financial supervisory authority.

66 In their reply of 22 December 2015 to the Court's written questions, the applicants observe that, even though the preliminary expert's report of 9 January 2013 indicated that, in some cases, the rating given by the applicants to certain debtors

did not appear to be correct, that document stated that, in general, the default probabilities used by the applicants were sufficiently conservative. Moreover, the applicants disputed the criticisms relating to the rating of some debtors, stating that those criticisms related to three loans only, an insufficiently representative number of loans to enable general conclusions to be drawn. Furthermore, the Commission misinterpreted the rating of one of the loans concerned.

67 The Commission disputes that head of claim. According to it, the applicants made a false distinction between mathematical modelling and individual assessment of the value of the loan portfolio. In reality, even the FSC's 'individual assessment' involved modelling. It is misleading to claim that its approach is divorced from any individual assessment of the assets transferred, since it based its work on a sample of files. The Commission adds that the review of the portfolio undertaken by the FSC was not without problems, because the FSC used aggregate data, the methodology was not entirely clear and there were inconsistencies. Therefore, the Commission was obliged to conduct its own in-depth analysis.

68 As regards the applicants' first head of claim, it should be recalled that according to the Court's settled case-law, when the Commission adopts a measure involving a complex economic appraisal it enjoys a wide discretion, and judicial review of that measure on that point is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the Commission (see, to that effect, judgments of 11 July 2002, *HAMSA* v *Commission*, T-152/99, EU:T:2002:188, paragraph 127, and of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 282).

69 In order to establish that the Commission made a manifest error in assessing the facts such as to justify the annulment of the contested decision, the evidence adduced by the applicant must be sufficient to make the factual assessments made in the decision at issue implausible (judgments of 12 December 1996, *AIUFFASS and AKT* v *Commission*, T-380/94, EU:T:1996:195, paragraph 59, and of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T-162/13, not published, EU:T:2016;341, paragraph 52).

70 In the light of the foregoing, it must be held that the choice of method for evaluating a loan portfolio for the purposes of calculating the amount of aid within the meaning of Article 107(1) TFEU requires such a complex economic appraisal. Therefore, the fact that the Commission relied on its own analysis of the loan portfolio, instead of relying on the assessment provided by the Kingdom of Denmark, cannot be criticised, provided that that action is warranted in the reasonable exercise of its discretion.

71 In the present case, the Commission justifies its action on the basis of two main reasons.

72 First, in its reply of 15 February 2019 to the Court's written questions, and at the hearing, the Commission stated that the method used to evaluate FSC's portfolio was based on an accounting approach, whereas the valuation of the assets for the purposes of their immediate transfer had to be carried out on the basis of their market value. In other words, according to the Commission, it was necessary to calculate the value that a potential purchaser would be prepared to pay in order to acquire the assets immediately, which is often lower than the accounting or prudential value, because the market value will include a substantial risk discount, which is a multiple of the expected losses. The Commission therefore submits that the FSC's methodological approach was inappropriate in the present case.

73 Secondly, following its examination of a sample of loans, the Commission identified cases in which the rating given to certain debtors, in accordance with the applicants' internal system, appeared to be incorrect, which suggests that the default probabilities used by the applicants was not as reliable as they claimed. As regards the applicants' argument that the criticisms reflected in the preliminary expert's report of 9 January 2013 on the default probabilities chosen related only to three loans, which is insufficiently representative, the Commission stated at the hearing that those criticisms concerned the examination of a sample of loans, which explains why those criticisms might appear insufficiently representative in absolute terms.

74 It must be considered that, in the light of the explanations provided by the Commission, the applicants have not shown that the Commission exceeded the limits of its discretion when it decided to carry out its own assessment of the loan portfolio. Consequently, the first head of claim must be rejected.

75 Secondly, the applicants point out that the Commission used a stress factor of 2.21 in its assessment of the portfolio, multiplying the debtor default probability by that stress factor. FIH had already made a realistic upward revision of its internal assessments of the default probabilities. Therefore, the additional application of that stress factor leads to duplication and is contrary to the principle of equal treatment, effectively penalising banks which, like FIH, had reviewed their internal default probability assessments to take into account the economic crisis. In that regard, the applicants submit that, in 2011, they had put in place a new internal risk assessment model with a rating system for each client similar to that of Moody's, which they used to calculate potential losses on the loans. That system led to an increase in the average probability of payment default on the loan portfolio from approximately 2 to 3% in 2009 to 6.42% at the end of 2011. In those circumstances, the use of the 2.21 stress factor wrongly led to the increase of the default probability by around 7 percentage points, to 14.2% (2.21 x 6.42%). Moreover, the Commission did not justify the specific use of a stress factor of 2.21 in the present case.

76 The Commission disputes that head of claim.

77 In that regard, it must be noted that, according to the Commission, the use of a stress factor of 2.21 in respect of the probability of default by debtors in its portfolio valuation was consistently applied in State aid cases concerning the financial sector from 2009. As to the reasons for using that factor, the Commission refers to macro-economic studies validated by scientific literature. In particular, that factor corresponds to market averages for portfolios having a credit rating primarily in the range of B- to BBB- and a remaining weighted average life in the range of 3 to 7 years. In its reply of 21 December 2015 to the Court's written questions, the Commission stated that the portfolio in question was of average quality, with a slightly higher default probability, but a loss given default slightly lower than average on account of the good collateralisation of a part of the portfolio, and a weighted average life comparable to other cases.

78 Furthermore, the Commission added that, if FIH had not already implemented a strict internal ratings system, which was the basis for calculating the value of the loan portfolio, it would have had to take an even more rigorous approach, as it has done in other cases.

79 In the light of the Commission's explanations, referred to in paragraphs 77 and 78 above, it must be held that the applicants have not established that the Commission exceeded the limits of its discretion when it decided to apply a stress factor of 2.21. The second head of claim must therefore be rejected.

80 Thirdly, the applicants dispute the fact that the Commission's calculations were based on a loss of 100% in the event of default by the debtor. According to the applicants, their experience shows that, in the event of the debtor's default, a loss of approximately 30% on unsecured loans is appropriate.

81 The Commission disputes that head of claim.

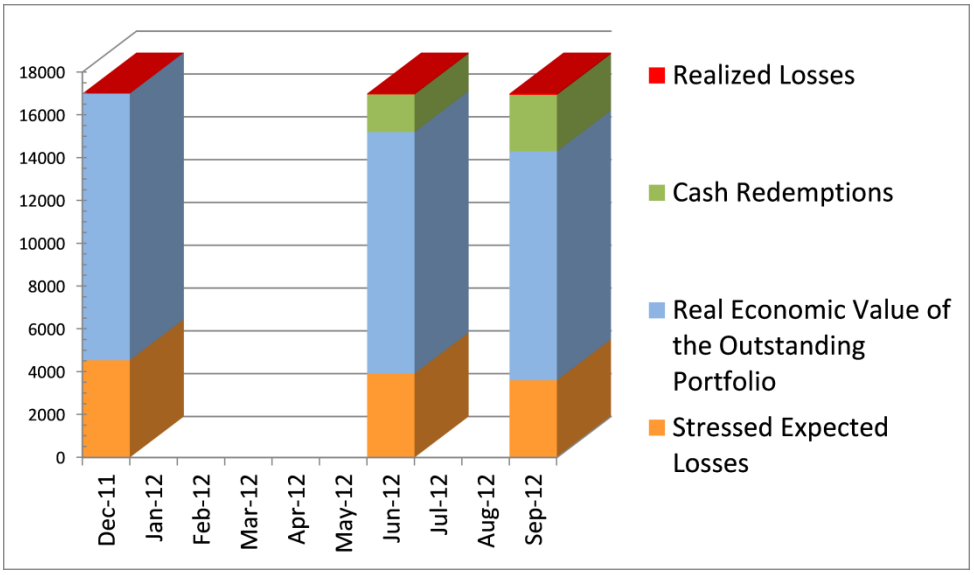
82 In that regard, the Commission explained that the assumption of loss given default of 100% on unsecured assets is standard practice. Where the loss given default is determined on the basis of collateral values, if no collateral is present, as is the case for unsecured assets, a loss rate of 100% automatically applies.

83 Therefore, it must be held that the applicants have not shown that the Commission exceeded its discretion when it considered that, in the event of default by a debtor, and in particular in the absence of any collateral, it was prudent to assume that the expected losses represent 100% of the unsecured assets. As is apparent from the Commission's reply of 15 February 2019 to the Court's written questions and at the hearing, in those circumstances, it is not possible to assume that there will be partial recovery of the debt, even if that does not necessarily imply that there will never be any recovery. Therefore, in such a situation, it cannot reasonably be ruled out that none of the debt may be recovered. In the light of the above, the third head of claim must be rejected.

84 Fourthly, the applicants criticise the Commission for disregarding that there was no risk of losses on the repaid loans, namely DKK 5.7 billion at the end of 2012.

85 The Commission disputes that head of claim. In the contested decision, the loan portfolio was determined by the reference date of 31 December 2011 and the valuation of that portfolio was carried out using all the information available to the Commission on the transaction completion date, namely 2 July 2012.

86 The Commission adds that it is incorrect to consider that the reduction of the portfolio volume as a result of reimbursements gives rise to a proportional reduction of the risk and so to a proportional reduction of the real economic value. That is due to the fact that the parties with the best credit rating, incentivised by the high loan renewal rates provided for by law, repaid their loans as quickly as possible instead of refinancing them, while parties with liquidity problems remained in the loan portfolio. Therefore, despite the reimbursements, the overall quality of the portfolio deteriorated. Since the remainder of the portfolio was of lower quality, the reduction in the expected losses was less marked, as is clear from the diagram below:



87 As regards the present head of claim, it should be noted that the transaction completion date was 2 July 2012, even though, for the sake of simplicity, the parties refer to 30 June 2012, that is to say, the last working day before the completion date. However, the loan portfolio was regarded as having been transferred to the FSC on 1 January 2012. Therefore, as is apparent from its written pleadings and from its reply of 21 December 2015 to the Court's written questions, it was on the basis of the composition of the loan portfolio as at 31 December 2011 that the Commission valued that portfolio on 30 June 2012, taking account of the change in the value of the portfolio between those two dates, while specifying that, in the absence of data for 30 June 2012, it applied an interpolation on the basis of the information available as at 30 September 2012.

88 It is apparent from the foregoing that, in order to determine whether the applicants' argument is well founded, it is necessary to establish whether the relevant date for the purposes of the analysis is 31 December 2011, 30 June 2012 or the end of 2012.

89 In that regard, it must be held that the relevant date is the date on which the transaction was completed once all the conditions were met, namely 30 June 2012 (2 July 2012). Even though the Commission decided to take into account the date of 31 December 2011 for the purposes of defining the composition of the loan portfolio, because the transfer was regarded as having been carried out on that date, it could not disregard the period from 31 December 2011 to 30 June 2012 (2 July 2012), since the risk of non-repayment effectively disappeared in respect of a series of loans during that period. In other words, in its calculation of the value of the transferred assets, the Commission had to take into account that there was no risk of non-repayment of the loans actually repaid on 30 June 2012 (2 July 2012), as it did. On the other hand, the Commission was entitled to refuse to take account of the actual repayment of loans after that date.

90 Therefore, in the light of the explanations given by the Commission as regards the calculations performed, the fourth head of claim must be rejected.

91 Fifthly, the applicants maintain that the Commission departed from the Impaired Assets Communication in its calculation of the State aid and the aid which was incompatible with the internal market. Instead of calculating the transfer value and comparing it with the market value and the real economic value, the central element of the contested decision is a calculation of the value of the variable purchase price for the FSC, that is, the return for the FSC.

92 The Commission disputes that head of claim. It maintains that, according to the Impaired Assets Communication, several models of valuation are potentially acceptable, without it, however, being obliged to apply a single method. Moreover, it notes the role played by the applicants, whose exceptionally elaborate package of measures required the adoption of a specific approach.

93 It should be recalled that it has been held that rules such as guidelines set out rules of practice from which the Commission may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. By adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes 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 (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, paragraphs 209 and 211, and of 30 May 2013, *Quinn Barlo and Others* v *Commission*, C-70/12 P, not published, EU:C:2013:351, paragraph 53).

Accordingly, the Commission was required to comply with the Impaired Assets Communication in the absence of any reasons justifying a departure from it.

94 In that regard, it should be noted that it is apparent, inter alia, from paragraphs 111 et seq. of the contested decision that the Commission based its analysis of the compatibility of the transfer on the Impaired Assets Communication. Furthermore, as regards the valuation of assets, it should be observed that paragraphs 37 et seq. of the Impaired Assets Communication provide that several models may be envisaged, as the Commission rightly points out. Therefore, the applicants' fifth head of claim must be rejected.

95 In the light of the foregoing, the first part of the second plea must be rejected in its entirety.

The second part, alleging errors in the calculation of the risk of FIH becoming insolvent

96 By the second part of the second plea, the applicants take the view that the Commission erred in its calculations of the risk of FIH becoming insolvent and being unable to fulfil its obligations to the FSC.

97 First, the Commission wrongly assumed dividends of 0% in the event of default. In their reply of 22 December 2015 to the Court's written questions, the applicants explained that the loss expectation rate is calculated by multiplying the loss given default by the probability of default. Therefore, the loss expectation rate of 16% in respect of the FSC calculated by the Commission was reached by multiplying the probability of default by a financial institution rated B1 by Moody's, such as FIH, by a loss given default of 100% (in other words, a 'dividend' of 0% in the event of default).

98 Secondly, the extent of the FSC's net exposure was exaggerated. In particular, the Commission did not take into account the loan repayments between 1 January and 2 July 2012 (the date of completion of the asset transfer) and the repayments made soon after, up to the end of 2012.

99 The Commission disputes the arguments put forward by the applicants.

100 It must be borne in mind that, as is apparent from the case-law cited in paragraphs 68 and 69 above, the Commission enjoys a broad discretion when it has to carry out a complex economic assessment, as in the present case.

101 First, as regards the argument relating to the expected dividends allegedly of 0% for the FSC in the event of default by FIH or, in other words, the alleged rate of expected losses of 100% in the event of default by FIH, it should first be noted that the Commission considers the formula on the basis of which the applicants put forward that argument to be excessively simplistic. In reality, in its reply of 15 February 2019 to the Court's written questions, the Commission expressly stated that it did not use that formula. The formula used by the Commission is

described in paragraphs 17 to 19 above and the result of the application of that formula is set out in the graph in paragraph 18 above.

102 The applicants' first head of claim must therefore be rejected, without it being necessary to examine the other arguments put forward by the Commission.

103 Secondly, as regards the question concerning the reference date and the repayments made in 2012, that head of claim must be rejected for the reasons referred to in paragraphs 87 to 90 above.

104 In the light of the foregoing, the second part of the second plea must be rejected as unfounded.

The fourth part, alleging errors in the calculation of the interest payable to the FSC in respect of its financing of NewCo

105 By the fourth part of the second plea, the applicants claim that the Commission erred in assessing the interest payable by NewCo to the FSC for its financing of NewCo. In particular, the Commission's starting assumptions significantly overstate NewCo's actual and expected debt and, therefore, its need for liquidity. In particular, the applicants submit that the loan portfolio had been reduced by DKK 5.7 billion at the end of 2012. On that basis, the starting point for the funding need should have been assessed at DKK 7.97 billion instead of DKK 13.37 billion.

106 The Commission disputes the arguments put forward by the applicants for the reasons set out in paragraph 85 above.

107 By the fourth part of the second plea, the applicants submit, in essence, that the Commission did not take proper account of the reduction in the loan portfolio towards the end of 2012 and, consequently, overestimated NewCo's need for liquidity and, therefore, the interest payable by NewCo to the FSC. In the light of the considerations set out in paragraphs 87 to 90 above, in accordance with which the Commission was entitled to refuse to take account of the repayment of loans after 30 June 2012 (2 July 2012), the fourth part of the second plea must be rejected as unfounded.

The third part, alleging errors in the calculation of the 10% remuneration in respect of FSC's capital investment

108 In the third part of the third plea, the applicants submit that the requirement that the FSC obtain remuneration of 10% per annum in respect of the DKK 2 billion equity investment is unfounded on account of the significant reduction of its risk of loss as a result of the planned asset transfer.

109 The Commission disputes the arguments put forward by the applicants. In its reply of 15 February 2019 to the Court's written questions, and at the hearing, the

Commission claimed that, in paragraphs 74 and 75 of the appeal judgment, the Court did not require the Commission to take into account considerations relating to the reduction of the State's economic exposure, but merely acknowledged that it had a discretion to take them into account in its analysis of the compatibility of the aid with the internal market.

110 In any event, the Commission maintains that it took into account certain economic effects resulting from the expiry of the aid measures previously granted. In particular, it is apparent inter alia from recital 125 of the contested decision that the Commission took into account, in the examination of the compatibility of the aid with the internal market, the fact that FIH redeemed the State-guaranteed bonds and also reimbursed the hybrid capital the State had granted to it.

111 In the third part of the second plea, the applicants criticise the contested decision, in particular in so far as it disregards the impact of the reduction of the risk for the Kingdom of Denmark on the calculation of the remuneration in respect of FSC's capital investment in NewCo.

112 It is apparent from paragraphs 58 and 62 of the appeal judgment that the risks to which the State is exposed and which are the consequence of State aid that it has previously granted are linked to its actions as a public authority and are not among the factors that a private operator would, in normal market conditions, have taken into account in its economic calculations. It follows that, in the present case, the Commission was fully entitled, when applying the private operator principle for the purposes of Article 107(1) TFEU, not to take into account risks related to State aid granted to FIH by the 2009 measures.

113 However, although the economic exposure of a Member State resulting from the earlier grant of State aid and its desire to protect its economic interests are not taken into account in the assessment, under Article 107(1) TFEU, of the existence of State aid, the fact remains that, as the Commission pointed out at the hearing before the Court of Justice and as Advocate General Szpunar noted in points 81 and 83 of his Opinion, such considerations may be taken into account in the assessment, under Article 107(3) TFEU, of the compatibility of any subsequent aid measure with the internal market and may therefore lead the Commission to find, as in the present case, that the measure is compatible with the internal market (appeal judgment, paragraphs 74 and 75).

114 In the light of the foregoing, irrespective of whether the Commission was required or merely had a discretion to take account of certain considerations relating to the reduction of the risk for the Kingdom of Denmark in the context of the analysis of the compatibility of the measures at issue with the internal market, it must be held, in the present case, that the Commission took into account those considerations to a certain extent, in particular the fact that FIH had redeemed the State-guaranteed bonds and had also reimbursed the hybrid capital which the State had granted to it, as is apparent from recital 125 et seq. of the contested decision. As the Commission points out, it is apparent from the contested decision that it took

those factors into account in its examination of the viability of FIH and the existence of adequate burden-sharing.

115 As regards the conclusion that that remuneration should have been at least 10% per annum of the capital investment, it should be noted that the Commission observed that, when the measures were adopted in 2012, FIH's senior unsecured bonds were quoted on the market with a yield greater than 10%. Therefore, according to the Commission, it is logical to assume that a market economy operator would require a higher return for equity, which has a more junior credit position.

116 In view of the discretion which it has when the Commission has to carry out a complex economic assessment, in accordance with the case-law cited in paragraph 68 above, and in the light of the considerations set out in paragraph 115 above, it must be noted that the applicants have not shown that the Commission exceeded the limits of its discretion.

117 Therefore, the third part of the second plea must be dismissed as unfounded.

Fifth part, alleging errors in the calculation of the amount of capital relief resulting from the transfer of assets

118 In the fifth part of the second plea, the applicants claim that the Commission erred in its calculation of the amount of capital relief resulting from the asset transfer.

119 First, according to the applicants, there were no grounds for claiming remuneration in respect of the capital relief. Furthermore, the commitments adopted by FIH were very burdensome and substantially limited its ability to engage in business activities and to benefit from its improved capital situation. Thus, FIH has already paid, and continues to pay, a very high price for the transfer of assets to the FSC.

120 Secondly, the assessment of the amount of the capital relief effect at DKK 375 million is based on the Commission's incorrect interpretation of information from the Danish financial supervisory authority, in particular Annex B.12 to the defence. The applicants add that the Kingdom of Denmark stated on several occasions that the correct amount was DKK 275 million.

121 The applicants add in their reply of 22 December 2015 to the Court's written questions that the capital relief effect was calculated at the level of FIH Holding, rather than the level of FIH. Therefore, according to the applicants, that effect was DKK 275 million resulting from the reduction in the liquidity risk, since, in the light of the unlimited loss guarantee provided by FIH Holding to the FSC, there was no reduction in the credit risk at the level of FIH Holding, even though there was a capital relief effect of DKK 100 million resulting from the reduction of the credit risk at the level of FIH. However, it was considered incorrectly in the contested decision that there was a capital relief effect of DKK 100 million

resulting from the reduction of other risks, in particular the risks linked to income. Even though in the initial estimates a capital relief effect had been included on that basis, the Danish financial supervisory authority and the applicants subsequently pointed out that there was an error in that respect.

122 In their reply of 8 February 2019 to the Court's written questions, the applicants stated that the earnings risk represented the anticipated effect of losses budgeted for the coming year, which had to be taken into account in the calculations of the capital requirements of the bank in question. In other words, if, in 2011, FIH anticipated losses of DKK 40 million for 2012, it had to have DKK 40 million in capital available in 2011 to cover those losses. In that context, the applicants add that the earnings risk may result only in a requirement to have additional capital available, not in a deduction of capital requirements. In Table 1 in Annex B.12 to the defence, the applicants erroneously accounted for the risks associated with negative earnings. When questioned by the Court at the hearing, the applicants expressly stated that the risk associated with earnings could never be negative.

123 The Commission disputes the applicants' arguments. It maintains that the capital relief effect was calculated correctly.

124 In so far as the applicants claim that neither the purchase of shares in NewCo by the FSC nor the level of remuneration for that investment constitutes State aid, the Commission refers to the arguments it put forward in the context of the first plea.

125 The Commission disputes the argument that the applicants do not benefit from capital relief because FIH did not need such relief and that, in any event, any benefits were eliminated on account of the commitments. In that regard, the Commission notes that the applicants accept that the transfer of assets to NewCo has had the effect of resolving the liquidity problems. In the absence of those measures, FIH would probably have been forced out of business, given that the supervisory authorities had warned it of the imminent risk of losing its licence. Furthermore, in the application, the applicants accept the existence of a capital relief effect, and dispute only the amount thereof. That was confirmed by the Danish financial supervisory authority.

126 As regards the calculation of the relief effect, the Commission explains that it had originally assessed it at DKK 847 million on the basis of the calculation performed by FIH, and verified by the FSC, which had been established at the level of FIH. The Commission accepted the Kingdom of Denmark's subsequent suggestion that the capital relief effect should be assessed at the level of FIH Holding and not at the level of FIH, which would have led to a significant reduction in the estimated relief. The Kingdom of Denmark estimated the relief at DKK 375 million and, therefore, the Commission legitimately relied on that amount, which resulted in a reduction in the liquidity risk buffer of DKK 275 million and a reduction in the buffer against other risks of DKK 100 million.

127 Finally, the Commission applied an annual remuneration rate of 10% in respect of capital relief, as it is standard practice in ensuring that aid is compatible with the internal market. According to the Commission, remuneration of 10% does not reflect the market price, which would eliminate any advantage and, therefore, the presence of aid. Rather, it was a level which allowed the Commission to ensure that the aid was limited to the minimum necessary, that the beneficiary contributed to the cost of the measure and that the providers of capital adequately shared the burden.

128 First, as regards the applicants' argument that there was no reason for claiming remuneration in respect of the capital relief and still less to claim an annual rate of remuneration of 10%, it should be noted that the commitments offered do not eliminate the existence of an advantage resulting from the capital relief. Therefore, in those circumstances, and having regard to the broad discretion enjoyed by the Commission when it has to carry out a complex economic assessment, as stated in paragraph 68 above, it cannot be criticised for having claimed annual remuneration for the purposes of declaring the aid compatible with the internal market. Moreover, the applicants have not shown that the Commission committed a manifest error of assessment in considering that annual remuneration of 10% served to ensure that the aid was limited to the minimum necessary and that the recipient contributes to the cost of the measure.

129 Second, as regards the argument that the amount of the reduction in the capital relief effect was incorrectly fixed at DKK 375 million, it must be stated that the Commission's assertion that it relied on documents provided by the Kingdom of Denmark, which does not dispute that amount, is incorrect. While it is true that the Kingdom of Denmark referred to that amount, including in the tables contained in the document in Annex B.12 to the defence, it must be observed that it stated in that document that the correct amount, in its view, was DKK 275 million. The text accompanying table 1 in Annex B.12 to the defence states:

'Please note that the figures in Table 1 have been used for illustrative purposes, as the argument is still maintained that the relevant figures to be used are from 30 June 2012, cf. the email sent to the Commission on 29 April 2013.'

130 In addition, in the footnote to which that sentence refers, which is at the end of the document, the following is stated:

'Based on these updated calculations the capital relief in FIH Holding Group is DKK 275 million (from liquidity risk) … '

131 For the sake of completeness, it must be noted that the email from the Kingdom of Denmark to the Commission of 29 April 2013, in Annex B.11 to the defence, contains a letter from the applicants and another from the Danish financial supervisory authority. In their letter, the applicants explain that they were informed by the Danish financial supervisory authority that the earnings risk could not be negative and that, consequently, there was no reason to consider that there

was a capital relief effect of DKK 100 million relating to the earnings risk, ranging from DKK -52 million before the transaction to DKK -152 million after the transaction. Moreover, in its letter, the Danish financial supervisory authority confirms that the earnings risk cannot be negative.

132 As is apparent from paragraph 120 above, the applicants submit that, after a certain period, even though they did not agree with the Commission on that point, they decided not to reiterate their disagreement each time in order to be constructive.

133 In the light of the foregoing, it must be held that the Commission was not entitled to confine itself to maintaining that the Kingdom of Denmark and the applicants had provided the data and that the applicants had accepted that data.

134 In addition, it should be noted that, when questioned in writing and at the hearing on the substantive grounds for taking the specific view that there was a capital relief effect in the amount of DKK 100 million relating to the earnings risk at the FIH Holding level, the Commission failed to provide such a reason and to rebut the applicants' argument that that risk could not be negative.

135 In the light of the foregoing, the fifth part of the second plea must be upheld in part and must be rejected, as to the remainder, as unfounded.

136 Accordingly, the contested decision must be annulled since it found that there was a capital relief effect in the amount of DKK 100 million relating to the earnings risk at FIH Holding level.

Costs

137 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 unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Annuls Commission Decision 2014/884/EU of 11 March 2014 on State aid SA.34445 (12/C) implemented by Denmark for the transfer of property-related assets from FIH to the FSC;

2. Orders the European Commission to bear its own costs and to pay those incurred by FIH Holding A/S and FIH A/S.

Collins Barents Passer

Delivered in open court in Luxembourg on 19 September 2019.

E. Coulon

Registrar President