

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

19 September 2018 (*) (1)

(State aid — Aid in favour of the Øresund road-rail fixed link — Public financing granted by the Swedish State and the Danish State to the Fixed Link infrastructure project across the Øresund — State guarantees — Tax aid — Decision not to raise any objection — Decision that there was no State aid — Action for annulment — Challengeable act — Admissibility — Failure to initiate the formal investigation procedure — Serious difficulties — Concept of ‘aid scheme’ — Aid to promote the execution of an important project of common European interest — Assessment of the aid element in a guarantee — Whether the aid contained in a guarantee is limited — Proportionality — Legitimate expectations)

In Case T-68/15,

HH Ferries I/S, formerly Scandlines Øresund I/S, established in Helsingør (Denmark),

HH Ferries Helsingør ApS, established in Helsingør,

HH Ferries Helsingborg AB, formerly HH-Ferries Helsingborg AB, established in Helsingborg (Sweden),

represented by M. Johansson, R. Azelius, P. Remnelid and L. Sandberg-Mørch, lawyers,

applicants,

v

European Commission, represented by L. Flynn, S. Noë, R. Sauer and L. Armati, 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,

and by

Kingdom of Sweden, represented initially by E. Karlsson, L. Swedenborg, A. Falk, C. Meyer-Seitz, U. Persson and N. Otte Widgren, and subsequently by A. Falk, C. Meyer-Seitz, L. Zettergren and H. Shev, acting as Agents,

interveners,

APPLICATION brought under Article 263 TFEU for the annulment of Commission Decision C(2014) 7358 final of 15 October 2014 not to classify certain measures as aid and not to raise any objection following the preliminary investigation procedure provided for in Article 108(3) TFEU to State aid SA.36558 (2014/NN) and SA.38371 (2014/NN) — Denmark, and SA.36662 (2014/NN) — Sweden, concerning the public financing of the

Øresund Fixed Link road/rail infrastructure project (OJ 2014 C 418, p. 1 and OJ 2014 C 437, p. 1),

THE GENERAL COURT (Sixth Chamber),

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

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure and further to the hearing on 4 October 2017,

gives the following

Judgment

I. Background to the dispute

A. The applicants

- 1 HH Ferries I/S, formerly Scandlines Øresund I/S, is a joint venture owned in equal shares by two private companies, the Danish company HH Ferries Helsingør ApS and the Swedish company HH Ferries Helsingborg AB, formerly HH-Ferries Helsingborg AB ('the applicants'). Since the end of January 2015, the First State European Diversified Infrastructure Fund FCP-SIF has been the sole owner of HH Ferries Helsingør ApS and HH Ferries Helsingborg AB, and thereby the sole owner of HH Ferries.
- 2 The applicants have for more than one hundred years operated the transport link across the Øresund strait, between Helsingør in Denmark and Helsingborg in Sweden, using short distance ferries for heavy goods vehicles, buses, private vehicles and foot passengers.

B. The beneficiary

- 3 Øresundsbro Konsortiet ('the Consortium') owned in equal shares by two limited liability companies: A/S Øresundsforbindelsen, ('A/S Øresund'), which is itself 100% owned by Sund & Bælt Holding A/S ('Sund & Bælt'), the latter being 100% owned by the Danish State, and Svensk-Danska Broförbindelsen AB ('SVEDAB'), which is 100% owned by the Swedish State ('the parent companies of the Consortium').
- 4 The Consortium owns, plans, finances, constructs and operates the 16 km fixed combined road and railway link across the Øresund between Kastrup (Denmark) and Limhamn (Sweden).

C. The fixed link, the hinterland connections and the measures concerned

- 5 The Øresund Fixed Link consists of a toll-charging 16 km long bridge, the artificial island of Peberholm (Denmark) and a partially underwater tunnel for road and railway traffic between the Swedish coast and the Danish island of Amager ('the Fixed Link'). It is the longest combined road and rail bridge in Europe. It was constructed between 1995 and 2000 and has been in operation since 1 July 2000. The project was one of the trans-European networks in transport (TEN-T) priority projects, approved by the European Council in 1994.

- 6 The legal and operational aspects of the construction and operation of the Fixed Link are governed by:
 - The Treaty of 23 March 1991 between the Danish and Swedish Governments concerning a Fixed Link across [the Øresund] ('the Intergovernmental Agreement'), ratified by the Kingdom of Sweden on 8 August 1991 and by the Kingdom of Denmark on 24 August 1994;
 - The agreement of 27 January 1992 creating the Consortium concluded between the parent companies of the Consortium ('the Consortium Agreement').
- 7 Article 10 of the Intergovernmental Agreement provides for the formation of the Consortium 'which owns and is responsible, on ... the joint account [of the parent companies] and as one entity, for the project design and any other preparations for the Fixed Link, as well as for its financing, building and operation'.
- 8 Articles 14 and 15 of the Intergovernmental Agreement, paragraph 4 of the Additional Protocol to the Intergovernmental Agreement and point 4(6) of the Consortium Agreement provide, in essence, that the toll charges to be levied on the users of the Fixed Link and the annual fixed railway payment for the use of the rail line on the Fixed Link are intended to cover the costs of design, planning, construction, operation and maintenance of the Fixed Link, and the costs of construction of the road and rail hinterland connections. The Consortium is to determine and levy the toll charges, in accordance with the general rules agreed by the Danish and Swedish Governments.
- 9 Article 12 of the Intergovernmental Agreement provides that '[the Kingdom of] Denmark and [the Kingdom of] Sweden shall jointly and severally guarantee the obligations in respect of the Consortium's loans and other financial instruments used in connection with the financing [and that] the two States shall hold equal liability in all mutual undertakings'. In that regard, point 4(3) of the Consortium Agreement states that 'The Consortium's capital requirements for the planning, project design and construction of the Øresund Link, including loan servicing costs, and for covering the capital requirements arising as a consequence of book losses which are expected to occur for a number of years after the Øresund Link has been opened to traffic, shall, in accordance with that agreed in the Intergovernmental Agreement, be satisfied by obtaining loans or the issuance of financial instruments in the open market with security in the form of Swedish and Danish Government guarantees'.
- 10 According to paragraph 1 of the Additional Protocol to the Intergovernmental Agreement, no charge is to be levied by the Danish and Swedish States in consideration for the 'guarantee undertakings assumed by them in respect of the Consortium's loans and other financial instruments used in connection with the financing'.
- 11 In addition to the Fixed Link itself, the project also includes the road and rail land installations connecting the ends of the Fixed Link to the Danish and Swedish road and rail hinterland infrastructure ('the hinterland connections'). In accordance with Article 8 of the Intergovernmental Agreement, the responsibility for constructing the hinterland connections falls within the responsibility of each State with respect to its own territory. The tasks relating to the design, financing, construction and operation of the hinterland connections were delegated to the parent companies of the Consortium by the respective States (see recital 25 of the contested decision). In accordance with Article 17 of the Intergovernmental Agreement and point 2(5) of the Consortium Agreement, the Kingdom of Denmark and the Kingdom of Sweden decided that no toll charges would be levied for the use by vehicles of the road hinterland connections if those vehicles used the Fixed Link.

D. Administrative procedure

- 12 By letter of 1 August 1995, the Consortium informed the European Commission that it had received a joint and several guarantee from the Danish and Swedish Governments covering the loans taken out and other financial instruments issued in connection with the financing of the Fixed Link ('the State guarantees') and asked the Commission to confirm that those guarantees did not constitute State aid. The Commission replied in two identical letters of 27 October 1995, addressed respectively to the Danish State and the Swedish State, and stated that the State guarantees were attached to an infrastructure project of public interest that had to be considered to be a public asset improving the countries' infrastructure and transport services, and that guaranteeing investment in public assets was not, as a general rule, to be considered to be the grant of State aid within the meaning of Article 107(1) TFEU. The Commission concluded that the State guarantees did not have to be notified to it.
- 13 The Danish State and the Swedish State never formally notified the Commission of the financing model of the Fixed Link.
- 14 On 17 April 2013 HH Ferries lodged a complaint with the Commission alleging that the State guarantees constituted State aid that was unlawful under Article 107(1) TFEU and incompatible with the internal market (Cases registered under number SA.36558 for Denmark and number SA.36662 for Sweden).
- 15 On 8 January 2014 HH Ferries sent a letter to the Commission stating that the Consortium also benefited from a favourable taxation regime in Denmark, particularly as regards depreciation and the carrying forward of losses (a complaint registered under number SA.38371), that constituted, in its view, unlawful State aid. In a further letter dated 2 April 2014, HH Ferries added that, in its view, the tax regime did not satisfy the compatibility criteria set out in Article 107(3)(b) or (c) TFEU.
- 16 On 17 June and 9 September 2014, HH Ferries submitted to the Commission further information, arguing that the support measures to finance the hinterland connections, granted to the parent companies of the Consortium and to Sund & Bælt, also constituted State aid that was unlawful and incompatible, and that that financing could indirectly benefit the Consortium.
- 17 The Commission sent that information to the Kingdom of Denmark and to the Kingdom of Sweden and sent to them a number of requests for information in 2013 and 2014, to which those States responded (recital 5 and recitals 8 to 11 of the contested decision).
- 18 On 15 September 2014 the Kingdom of Denmark and the Kingdom of Sweden sent to the Commission a joint statement ('the commitments') which clarified the following points:
 - the State guarantees are limited to covering the actual accumulated debt of the Consortium at any point in time;
 - the State guarantees and any other economic advantages, including tax advantages, which the Consortium might receive are limited to the actual debt repayment period; thus, the Consortium will not receive any such advantage after it has fully repaid its debt;
 - if it were necessary for the Consortium to adopt new loans covered by the State guarantees after the end of 2040 or if it were necessary for the Kingdom of Denmark and the Kingdom of Sweden to grant any other economic advantages to the

Consortium after that date, the States undertake to notify the Commission of such measures, pursuant to Article 108(3) TFEU;

- the Kingdom of Denmark and the Kingdom of Sweden undertake to inform the Commission on an annual basis of developments regarding the repayment of the Consortium's debt.

E. The contested decision

19 On 15 October 2014 the Commission adopted Decision C(2014) 7358 final relating to State aid SA.36558 (2014/NN) and SA.38371 (2014/NN) — Denmark and SA.36662 (2014/NN) — Sweden, concerning the public financing of the Øresund Fixed Link road/rail infrastructure project (OJ 2014 C 418, p. 1 and OJ 2014 C 437, p. 1) ('the contested decision'). The Commission confined its examination to the following measures (recitals 50 to 55 of the contested decision):

- the State guarantees granted to the Consortium with respect to loans that the latter had taken out in order to finance the construction and operation of the Øresund Fixed Link infrastructure project;
- the following Danish tax measures:
 - the rules applicable to the Consortium on carrying forward losses;
 - the rules on depreciation of assets applicable to the Consortium;
 - the joint taxation regime;
- the measures of financial support granted to the parent companies of the Consortium for the financing of the planning, construction and operation of the road and rail hinterland connections.

20 The Commission stated that its decision did not cover other possible measures granted by the Kingdom of Denmark or the Kingdom of Sweden to the Consortium, A/S Øresund, SVEDAB, Sund & Bælt or to any other related company (recital 56 of the contested decision).

1. Existence of aid within the meaning of Article 107(1) TFEU

21 As regards the joint taxation regime, the Commission held that it did not represent the conferral of a selective advantage on the Consortium and, consequently, that it did not constitute State aid within the meaning of Article 107(1) TFEU (recitals 104 and 108 of the contested decision).

22 As regards the public funds granted to the parent companies of the Consortium for the financing of the planning, construction, management and operation of the hinterland connections, the Commission held, in essence, that those funds were not to be regarded as State aid within the meaning of Article 107(1) TFEU (recitals 80 to 82 of the contested decision).

23 As regards the State guarantees and the Danish tax measures concerning depreciation of assets and the carrying forward of losses ('the Danish tax aid') granted to the Consortium for the financing of the construction and operation of the Fixed Link, the Commission considered that those constituted State aid within the meaning of Article 107(1) TFEU

(recital 107 of the contested decision). The Commission thus considered that two State guarantees had been unconditionally granted on 27 January 1992, the day when the Consortium was formed (recital 52 of the contested decision). The Danish ‘loss carry forward’ measures were considered to have been selective for the period 1991 to the end of 2001 and for the period since 2013. The Danish measures on depreciation of assets were considered to have been selective since 1999 (recitals 92 to 97 and 99 to 103 of the contested decision).

2. *Classification as new or existing aid*

- 24 The Commission considered that the Danish guarantee granted to the Consortium with respect to its loans and the Danish tax aid conferred on the Consortium constituted new aid within the meaning of Article 1(c) 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) (recital 109 of the contested decision).
- 25 As regards the Swedish guarantee in favour of the Consortium, which, according to the Commission, had been granted before the accession of the Kingdom of Sweden to the European Union and before the entry into force of the Agreement on the European Economic Area (EEA) (OJ 1994 L 1, p. 3), on 1 January 1994, that guarantee was deemed to be existing aid within the meaning of Article 1(b)(i) of Regulation No 659/1999 (recital 110 of the contested decision).

3. *Examination of the compatibility of the State aid in the light of Article 107(3) TFEU*

- 26 The Commission examined the compatibility of the State guarantees and the Danish tax aid in the light of Article 107(3)(b) TFEU, which provides that aid to promote the execution of an important project of common European interest (an ‘IPCEI’) may be declared to be compatible with the internal market.
- 27 The Commission considered, in essence, that, taken together, the State guarantees and the Danish tax aid in favour of the Consortium were necessary and proportionate to the attainment of the general interest objective pursued, notably in the light of the commitments given by the Kingdom of Denmark and the Kingdom of Sweden in the course of the administrative procedure that, in particular, if it proved to be necessary that the Consortium should take out further loans covered by the State guarantees or that the Consortium should be granted some other economic advantage after 2040, the Kingdom of Denmark and the Kingdom of Sweden would notify the Commission in accordance with Article 108(3) TFEU (recitals 122 to 137 of the contested decision). As regards the Danish tax aid, the Commission also stated that the purpose of that aid was to contribute to the viability of the project, reducing the repayment period for the Consortium’s loans and reducing the associated risk. The Commission considered that the Danish tax aid lowered the risk associated with the State guarantees and, consequently, the advantage stemming from them, and that the advantage resulting from the State guarantees and the advantage resulting from the Danish tax aid appeared to be interdependent (recital 133 of the contested decision).
- 28 The Commission concluded that the State guarantees granted by the Kingdom of Denmark and by the Kingdom of Sweden and the Danish tax aid were compatible on the basis of Article 107(3)(b) TFEU and that there was no need for the Commission to propose appropriate measures to the Kingdom of Sweden (recitals 138 and 139 of the contested decision).

4. *Legitimate expectations*

- 29 The Commission considered, in recitals 138 and 140 to 153 of the contested decision, that, in any event, even if the aid measures concerned were to be deemed to be incompatible with the internal market, they could not be recovered by the Kingdom of Denmark and the Kingdom of Sweden, on the ground that recovery would be contrary to a general principle of EU law, in accordance with Article 14(1) of Regulation No 659/1999. The Commission considered, in essence, that there was, in this case, a combination of exceptional circumstances that justified the Consortium as well as the Kingdom of Denmark and the Kingdom of Sweden being entitled to have a legitimate expectation that the State guarantees and the Danish tax aid granted to the Consortium would not be challenged. The Commission thus recalled that its position, in 1992, was that the construction and operation of infrastructure projects did not constitute an economic activity. However, both its decision-making practice and EU case-law relating to the concept of ‘economic activity’ with respect to financing the construction and operation of infrastructure projects had evolved since the judgments of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290); of 17 December 2008, *Ryanair v Commission* (T-196/04, EU:T:2008:585); and of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission* (T-443/08 and T-455/08, EU:T:2011:117), the last having been confirmed by the judgment of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* (C-288/11 P, EU:C:2012:821) (recitals 61 to 66 of the contested decision). Further, the Commission’s staff had informed the Kingdom of Denmark and the Kingdom of Sweden, in 1995, that the State guarantees did not constitute State aid within the meaning of Article 107(1) TFEU. The Commission considered the latter conclusion, contained in its letters of 27 October 1995, sent to the Kingdom of Denmark and to the Kingdom of Sweden, extended to the Danish tax aid, in so far as that aid concerned an infrastructure project which, at the time, was not deemed to constitute an economic activity. According to the Commission, it was not necessary to determine whether those legitimate expectations extended beyond the date of the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), for the reason that, in any event, the measures concerned were compatible with the internal market (recital 153 of the contested decision).

5. Conclusion

- 30 The Commission decided:

- on the basis of the assessment of the compatibility of the measures at issue and taking account, in particular, of the commitments provided by the Kingdom of Denmark and the Kingdom of Sweden, not to raise any objection to the Danish tax aid and to the guarantees granted by the Kingdom of Denmark to the Consortium, on the ground that that State aid had to be deemed to be compatible with the internal market pursuant to Article 107(3)(b) TFEU;
- that the guarantee granted to the Consortium by the Kingdom of Sweden was existing aid and that, having regard in particular to the commitments of the Kingdom of Denmark and the Kingdom of Sweden, there was no need to initiate the procedure regarding existing aid schemes;
- that the Danish joint taxation regime and the measures granted to the parent companies of the Consortium for the financing of the road and railway hinterland connections in Sweden and Denmark did not constitute State aid within the meaning of Article 107(1) TFEU.

II. Procedure and forms of order sought

- 31 By application lodged at the Registry of the General Court on 12 February 2015, the applicants brought the present action.
- 32 By document lodged at the Court's Registry on 5 June 2015 the Kingdom of Sweden sought leave to intervene in the present proceedings in support of the forms of order sought by the Commission.
- 33 By document lodged at the Court's Registry on 17 June 2015, the Kingdom of Denmark sought leave to intervene in the present proceedings in support of the forms of order sought by the Commission.
- 34 By decisions of 13 July 2015, the President of the Ninth Chamber of the General Court granted leave to intervene. The Kingdom of Sweden and the Kingdom of Denmark lodged their statements in intervention on 28 September 2015.
- 35 The composition of the Chambers of the General Court having been altered, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present case was therefore allocated on 26 September 2016.
- 36 The applicants claim that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 37 The Commission contends that the Court should:
- dismiss the action;
 - order the applicants to pay the costs.
- 38 The Kingdom of Sweden and the Kingdom of Denmark submit that the Court should dismiss the action.

III. Law

A. Admissibility

- 39 Although it does not formally raise a plea of inadmissibility, the Commission, supported by the Kingdom of Sweden, claims in the rejoinder that the action is inadmissible in part. The Commission considers, in essence, that the contested decision, in so far as it finds, in section 6, headed 'Conclusion', that the guarantee granted to the Consortium by the Kingdom of Sweden constitutes an existing aid measure and that there is no reason to initiate the procedure regarding existing aid schemes, is not a challengeable act. The Commission considers that the contested decision is not one that produces binding legal effects that are such as to affect the interests of the applicants by bringing about a distinct change in their legal position, since a 'refusal to propose appropriate measures' to a Member State does not constitute a challengeable act.
- 40 The Commission has also requested that some annexes submitted by the applicants should be declared to be inadmissible on the ground that those annexes have not been translated into the language of the case.

- 41 Since the conditions governing the admissibility of an action are a matter of public policy, they may be examined at any time by a court of the European Union of its own motion (see, to that effect, judgment of 24 March 1993, *CIRFS and Others v Commission*, C-313/90, EU:C:1993:111, paragraph 23 and the case-law cited).
- 42 According to settled case-law, only measures the legal effects of which are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment under Article 263 TFEU. In order to ascertain whether an act or a decision produces such effects, it is necessary to look to their substance (judgment of 11 November 1981, *IBM v Commission*, 60/81, EU:C:1981:264, paragraph 9; see also, to that effect, judgment of 5 October 1999, *Netherlands v Commission*, C-308/95, EU:C:1999:477, paragraphs 26 to 30). As regards, more particularly, acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it follows from the case-law that, in principle, an act is open to review only if it is a measure definitively laying down the position of the institution concerned at the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (judgment of 11 November 1981, *IBM v Commission*, 60/81, EU:C:1981:264, paragraph 10). While measures of a purely preparatory nature may not themselves be the subject of an action for annulment, any legal defects therein may be relied on in an action directed against the definitive act for which they represent a preparatory step (judgment of 11 November 1981, *IBM v Commission*, 60/81, EU:C:1981:264, paragraph 12).
- 43 In this case, it is clear that the contested decision was adopted on the conclusion of a preliminary examination and that it constitutes a final decision, adopted, with respect to the Danish tax aid and the State guarantees, under Article 4(3) of Regulation No 659/1999 and, with respect to the Danish joint taxation regime and the measures granted to the parent companies of the Consortium, under Article 4(2) of Regulation No 659/1999. The Commission decided, in essence, that:
- in the light of, in particular, the commitments submitted by the Kingdom of Denmark and the Kingdom of Sweden, the Danish tax aid and the guarantees granted by the Kingdom of Denmark were to be deemed to be compatible with the internal market pursuant to Article 107(3)(b) TFEU;
 - the guarantee granted to the Consortium by the Kingdom of Sweden was existing aid and, in the light of, inter alia, the commitments of the Kingdom of Denmark and the Kingdom of Sweden, there was no need to initiate the procedure relating to existing aid schemes;
 - the Danish joint taxation regime, on the one hand, and the measures granted to the parent companies of the Consortium for the financing of the hinterland road and rail connections in Sweden and Denmark, on the other, did not constitute State aid within the meaning of Article 107(1) TFEU.
- 44 As regards the only part of the operative part of the contested decision which, according to the Commission, is not challengeable, relating to the Swedish guarantee (see the second indent of paragraph 43, above), it is clear that the applicants do not challenge the decision in so far as it concluded that there was no need to propose appropriate measures to the Kingdom of Sweden, but rather challenge, in essence, on the one hand, the classification of the Swedish guarantee in terms of the concept of an existing aid scheme, and, on the other, the finding that it was compatible under Article 107(3) TFEU, as well as the fact that the Commission caused ‘the commitments’ of the Kingdom of Denmark and the Kingdom of

Sweden, referred to in recital 13 of the contested decision, to become binding, by means of the contested decision.

- 45 First, it must be recalled that the FEU Treaty establishes different procedures according to whether the aid is existing or new. In accordance with Article 108(3) TFEU, new aid must be notified in advance to the Commission and may not be put into effect until the procedure has resulted in a final decision. New aid is therefore subject to a precautionary review by the Commission and may not, in principle, be put into effect until such time as the latter has declared it compatible with the FEU Treaty (judgment of 29 April 2004, *Italy v Commission*, C-298/00 P, EU:C:2004:240, paragraph 48). Existing aid, however, may be lawfully put into effect as long as the Commission has not found it to be incompatible (see judgments of 29 April 2004, *Italy v Commission*, C-298/00 P, EU:C:2004:240, paragraph 47 and the case-law cited, and of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 187 and the case-law cited), and can be the subject, if at all, only of a decision finding it incompatible that has future effects (see judgments of 15 June 2000, *Alzetta and Others v Commission*, T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151, paragraph 147, and of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 187). It is clear that the annulment of the contested decision in so far as it classifies the Swedish guarantee as existing aid may have binding legal effects that are capable of affecting the interests of the applicants by bringing about a distinct change in their legal position (see, to that effect, judgment of 18 November 2010, *NDSHT v Commission*, C-322/09 P, EU:C:2010:701, paragraphs 52 to 54 and the case-law cited).
- 46 Second, in accordance with settled case-law, the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (judgments of 15 May 1997, *TWD v Commission*, C-355/95 P, EU:C:1997:241, paragraph 21, and of 11 September 2014, *Gold East Paper and Gold Huasheng Paper v Council*, T-443/11, EU:T:2014:774, paragraph 148). In recitals 138 and 139 of the contested decision, the Commission ‘consider [ed] that measures under scrutiny [were] compatible with the internal market under Article 107(3)(b) [TFEU], that ‘the assessment ... applie[d] to both the Danish and Swedish guarantees’ and that, ‘with regards to the conclusion in recital 137 [that the Danish tax aid and the State guarantees, taken together, were necessary and proportionate to the general interest objective pursued], there [was] no need to propose appropriate measures to Sweden’. Although it is not expressly stated in the conclusions of the contested decision, the assessment of compatibility carried out by the Commission concerns the Swedish guarantee to the same extent as the Danish guarantee, on the basis of the commitments submitted by the Kingdom of Denmark and the Kingdom of Sweden during the preliminary examination stage. In the conclusions of the contested decision, it is expressly stated that, ‘on the basis of the foregoing assessment, including in particular the commitments provided by [the Kingdom of] Denmark and [the Kingdom of] Sweden, the Commission considers that there is no reason to initiate the procedure regarding existing aid schemes’.
- 47 Consequently, the effect of the contested decision is that ‘the commitments’ made by the Kingdom of Denmark and the Kingdom of Sweden, mentioned in recital 13 of the contested decision, become binding, including with respect to the Swedish guarantee, since that decision expressly predicates the finding that the Danish and Swedish aid is compatible on compliance with those commitments. The fact that the Commission did not follow the procedure laid down in Articles 17 to 19 of Regulation No 659/1999 in relation to existing aid schemes and did not have to propose appropriate measures, since the Kingdom of

Denmark and the Kingdom of Sweden offered commitments during the preliminary examination stage, does not affect that conclusion.

- 48 Consequently, the contested decision constitutes a measure that has the nature of a decision, including the classification within it of the Swedish guarantee as an 'existing' aid scheme, and holds that guarantee to be compatible with the internal market, subject to the 'commitments' that permit, notably, the Kingdom of Denmark and the Kingdom of Sweden to grant State aid measures in favour of the Consortium at least until the end of the year 2040.
- 49 That conclusion is not contradicted by the case-law referred to by the Commission, which has no relevance to the present case.
- 50 As regards the case which gave rise to the judgment of 22 October 1996, *Salt Union v Commission* (T-330/94, EU:T:1996:154), the complainant had asked the Commission to propose appropriate measures to the Netherlands in order to review the conditions of an aid scheme that had already been declared to be compatible with the internal market, which the Commission had refused to do. That refusal was challenged. The Court held that a refusal by the Commission to propose to the Netherlands Government appropriate measures within the meaning of Article 108(1) TFEU could not be the subject of an action for annulment since the act that the complainant had asked the Commission to undertake did not in itself constitute a measure that produced legal effects. According to the wording of Article 108(1) TFEU, the appropriate measures are merely proposed and the Netherlands State or the Netherlands Government, to whom those measures were to be proposed, would in no way be obliged to accede to them. The Court stated that, if the State had decided not to adopt them, the Commission, if it thought that it remained necessary, would have had to adopt a decision under Article 108(2) TFEU in order to require alteration of the Netherlands scheme. The Court concluded that only that decision, adopted under Article 108(2) TFEU, could be regarded as being binding.
- 51 In this case, not only is the contested decision, in so far as it concerns the Swedish guarantee in particular, a definitive decision not to raise any objection, adopted pursuant to Article 107(3) TFEU, whereby the Commission, for the first time, expressed its view on the compatibility of the aid at issue with the internal market, but, moreover, it is plain from paragraphs 46 and 47 above that the effect of that decision is to make the commitments provided by the Kingdom of Denmark and the Kingdom of Sweden to the Commission binding, that effect being comparable to that of a decision recording the acceptance by the Member State of appropriate measures, adopted on the basis of Article 19(1) of Regulation No 659/1999 or a conditional positive decision adopted on the basis of Article 7(4) of that regulation.
- 52 As regards the case which gave rise to the order of 14 May 2009, *US Steel Košice v Commission* (T-22/07, not published, EU:T:2009:158), it is clear from paragraphs 42 to 49, 52, 53 and 55 of that order that the act that was challenged was merely a letter that was not decision-making, that was purely informative, requesting information under Article 17(1) of Regulation No 659/1999 and stating an 'opinion' of a member of the Commission's staff, and it is not apparent from that letter that the member of staff was authorised to take a decision.
- 53 It follows from the foregoing that the contested decision is an act that is challengeable in its entirety, in particular in so far as it adjudicates on the nature of the Swedish guarantee as an existing aid scheme, on the compatibility of that guarantee with the internal market and on the commitments offered by the Kingdom of Denmark and the Kingdom of Sweden.

- 54 Last, as regards the Commission's request that some annexes to the application should be declared to be inadmissible on the ground that they had not been translated into the language of the case, that request must be rejected, since the applicants, in response to a request by the Registrar that the situation be put in order, have provided translations of those annexes in the language of the case, in some cases by means of extracts, in accordance with Article 46(3) of the Court's Rules of Procedure.

B. Substance

- 55 In support of their claim for annulment, the applicants rely, in essence, on five pleas in law. The first plea alleges errors of law and manifest errors of assessment in relation to Article 107(1) TFEU as regards, in the first place, the measures granted to the parent companies of the Consortium for the financing of the rail hinterland connections and, in the second place, the State guarantees given to the Consortium for the financing of the Fixed Link. The second plea in law alleges errors of law and errors of assessment in relation to the compatibility of the State guarantees and the Danish tax aid granted to the Consortium, in the light of Article 107(3) TFEU, and an error in the failure to classify the Danish joint taxation regime as State aid. The third plea in law alleges that errors of law were committed by the Commission when it concluded that, if the State guarantees and the Danish tax aid to the Consortium were nevertheless to be considered to be incompatible with the internal market, the Consortium as well as the Kingdom of Denmark and Kingdom of Sweden had legitimate expectations that that aid would not be challenged in accordance with the State aid rules and that there was no need to determine whether those legitimate expectations continued after the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290). The fourth plea alleges a breach of the obligation to initiate the formal investigation procedure provided for in Article 108(2) TFEU. The fifth plea alleges a breach of the obligation to state reasons.
- 56 The Court considers that those pleas in law should be examined in relation to whether they concern (i) the measures which were considered to be State aid compatible with the internal market, namely the State guarantees and the Danish tax aid granted to the Consortium for the construction and operation of the Fixed Link and (ii) the measures that were not considered to constitute State aid, namely the financial support measures granted to the parent companies of the Consortium for the construction and operation of the rail hinterland connections and the Danish joint taxation regime. Those pleas will also be examined in relation to whether they (iii) claim that the Commission erred in not having stated reasons and in failing to take into account the cumulative effect of all the aid measures granted to the Fixed Link project. Those pleas will be also examined in relation to whether they (iv) criticise the finding, made on the assumption that the aid measures granted to the Consortium might nonetheless have to be deemed to be incompatible with the internal market, that the Kingdom of Denmark and the Kingdom of Sweden, and also the Consortium, had legitimate expectations that the aid measures to the Consortium would not be challenged under the State aid rules.
- 57 First, as regards the State aid measures deemed to be compatible on the conclusion of the preliminary examination, the Court considers that it should begin by examining the fourth plea in law, which seeks to demonstrate that the Commission experienced serious difficulties which ought to have compelled it to initiate the formal investigation procedure.

1. The fourth plea in law: infringement of the procedural rights of the interested parties, in so far as it concerns the measures classified as State aid granted to the Consortium

- 58 In their fourth plea in law, the applicants refer explicitly to the arguments that they had raised in the context of their first two pleas in law, arguments which they claim highlight the inconsistencies and inaccuracies in the Commission's analysis with respect to the State guarantees and the Danish tax aid to the Consortium. According to the applicants, the Commission committed errors, first, in the classification of the State guarantees in the light of Article 107(1) TFEU and, second, in the examination of the compatibility with the internal market of the State guarantees and the Danish tax aid. The insufficient and incomplete analysis carried out by the Commission is, according to the applicants, evidence that the Commission experienced serious difficulties during the initial review and that it had 'doubts' as to the classification and compatibility of the contested measures.
- 59 The Commission, supported by the Kingdom of Denmark, does not accept those arguments and refers to, *inter alia*, its own arguments set out in the examination of the first and second pleas in law.
- 60 According to the case-law, where the Commission is unable to reach a firm view, following an initial examination in the context of the procedure under Article 108(3) TFEU, that a State aid measure either is not 'aid' within the meaning of Article 107(1) TFEU or, if classified as aid, is compatible with the FEU Treaty, or where that procedure has not enabled the Commission to overcome all the difficulties involved in assessing the compatibility of the measure under consideration, the Commission is under a duty to initiate the procedure provided for in Article 108(2) TFEU, and has no discretion in that regard (see judgment of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, paragraph 113 and the case-law cited; see also, to that effect, judgment of 10 May 2005, *Italy v Commission*, C-400/99, EU:C:2005:275, paragraph 48). That duty is, moreover, expressly confirmed by the provisions of Article 4(4) in conjunction with Article 13(1) of Regulation No 659/1999 (judgment of 22 December 2008, *British Aggregates v Commission*, C 487/06 P, EU:C:2008:757, paragraph 113).
- 61 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 (see judgment of 28 March 2012, *Ryanair v Commission*, T-123/09, EU:T:2012:164, paragraph 77 and the case-law cited). 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 (see judgments of 27 September 2011, *3F v Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 55 and the case-law cited, and of 10 July 2012, *Smurfit Kappa Group v Commission*, T-304/08, EU:T:2012:351, paragraph 80 and the case-law cited). A decision adopted by the Commission without initiating the formal investigation phase may be annulled on that ground alone, because of the failure to initiate the *inter partes* and detailed examination laid down in the FEU Treaty, even if it has not been established that the Commission's assessments as to substance were wrong in law or in fact (see, to that effect, judgment of 9 September 2010, *British Aggregates and Others v Commission*, T-359/04, EU:T:2010:366, paragraph 58).
- 62 It is apparent also from the case-law that if the examination carried out by the Commission during the preliminary examination phase is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see judgment of 9 December 2014, *Netherlands Maritime Technology Association v Commission*, T-140/13, not published, EU:T:2014:1029, paragraph 49 and the case-law cited).

63 The onus is on the applicants to prove the existence of serious difficulties, proof that can take the form of a consistent body of evidence (see, to that effect, judgment of 17 March 2015, *Pollmeier Massivholz v Commission*, T-89/09, EU:T:2015:153, paragraph 51 and the case-law cited).

64 That case-law must guide the Court in its examination of the arguments, raised in the context of the fourth plea in law, relating to the State aid measures to the Consortium that were declared to be compatible with the internal market. Those arguments can be broken down into two parts, relating to, first, an insufficient and incomplete examination of the classification of the State guarantees granted to the Consortium in the light of Article 107(1) TFEU and, second, an insufficient and incomplete examination of the compatibility of the State guarantees and the Danish tax aid to the Consortium in the light of Article 107(3)(b) TFEU.

(a) The first part: insufficient and incomplete examination of the classification of the State guarantees granted to the Consortium in the light of Article 107(1) TFEU

65 In the first part of the fourth plea in law, the applicants' arguments can be broken down, in essence, into four grounds of objection, claiming that there was an insufficient and incomplete assessment of the following: (i) whether the State guarantees granted at the time when the Consortium was formed were unconditional, whether the Consortium had a legally enforceable right to obtain financing guaranteed by the Kingdom of Denmark and the Kingdom of Sweden at that time, whether third parties can rely on that right where the Consortium acts within its powers, and the number of guarantees; (ii) whether the State guarantees constituted individual aid or aid schemes; (iii) whether the Swedish guarantees constituted new aid or existing aid and, (iv) whether the State guarantees were limited to the financing of the Fixed Link.

66 The case-law cited in paragraphs 60 to 63 above must guide the Court in its examination of those arguments.

67 The Court considers that it should begin by examining the second ground of objection, with respect to the finding that the State guarantees are aid schemes.

68 In the case of an aid scheme, the Commission may confine itself to examining the general characteristics of the scheme in question, and is not required to examine each particular case in which it applies, in order to determine whether that scheme comprises aid elements (judgment of 15 November 2011, *Commission and Spain v Government of Gibraltar and the United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 122). Further, as the applicants claim, the rules that apply to individual aid differ from those that apply to aid schemes, according to the various Commission notices on guarantees, for example with regard to how the aid element is to be calculated.

69 By means of that ground of objection, the applicants claim that (i) the wording of the contested decision is contradictory; (ii) there is no analysis of the State guarantees with regard to the concept of aid 'scheme', and (iii) there is an error in law on the ground that the State guarantees do not fall within either of the two definitions of an aid scheme laid down in Article 1(d) of Regulation No 659/1999. According to the applicants, such inadequacies and contradictions constitute evidence that the Commission experienced serious difficulties in relation to the classification of the State guarantees as aid 'schemes'. In essence, the applicants consider that the State guarantees ought to have been analysed as being as many individual ad hoc guarantees as there were loans and financial instruments used by the Consortium for the construction and operation of the Fixed Link and covered by those guarantees.

- 70 The Commission disputes that assessment and considers, first, that it is plain from the reasons stated in the contested decision that the State guarantees were analysed as an aid scheme and that any specific loan guarantee that gives effect to the guarantee scheme definitively granted in 1992 constituted individual aid granted as part of that scheme, and not individual ad hoc aid. Second, the Commission contends that the State guarantees meet the definition of aid schemes given by the second part of Article 1(d) of Regulation No 659/1999 on the ground that the aid concerned is ‘not linked to a specific project’, since the guarantees cover both the construction and operation of the Fixed Link and were granted for an indefinite amount and an indefinite period of time, even if they are limited to the period required for the repayment of the Consortium’s debt. In that regard, the Commission explains that, at the time when the guarantees were granted, the Kingdom of Denmark and the Kingdom of Sweden were unaware how long it would take to repay the debt and how much debt would be incurred, and that, if the State guarantees had to be interpreted as being linked to a ‘specific project’, the Commission would never be able to call into question potentially open-ended aid measures, which would undermine the effectiveness of the State aid rules.
- 71 The Kingdom of Denmark contends, for its part, that the State guarantees should be considered to be one or two individual aid measures within the meaning of Article 1(e) of Regulation No 659/1999, granted unconditionally in 1992, and not as one or two aid schemes, given that all the economic advantage conferred by the guarantees was given to the Consortium at the time of the grant. The Kingdom of Denmark states, in that regard, that the State guarantees are indeed linked, both in quantitative terms and in terms of time, to the specific Fixed Link project. In response to a question from the Court, the Kingdom of Sweden declared its position to be akin to that of the Kingdom of Denmark and expressed doubts as to the classification of the State guarantees as an aid ‘scheme’ within the meaning of the definition laid down in the second sentence of Article 1(d) of Regulation No 659/1999, for the reason that the guarantees concern only one specific project.
- 72 The applicants consider that the argument of the Kingdom of Denmark, referred to in paragraph 71 above, should be rejected as being inadmissible, since that argument is contrary to the position of the Commission, although an intervention is limited to supporting, in whole or in part, the form of order sought by the Commission and to accepting the case as the intervener finds it at the time of the intervention, and may not put forward independent pleas in law.
- 73 In the first place, as regards the contradictory wording that is referred to, the Court must concur with the applicants that the contested decision variously refers to ‘the guarantee granted by the Danish State’, ‘the guarantee granted ... by the Swedish State’ (recitals 109 and 110), ‘the State guarantees’ (recitals 33, 51, 88, 114, 123, 124, 130, 131, 134 and 135), ‘the guarantees’ (recitals 85 and 137), the ‘two guarantees’ (recitals 34, 50, 52 and 129), ‘the guarantees granted by Denmark’ (first paragraph of the conclusion) or again ‘the guarantee granted to the Consortium by Sweden’ (second paragraph of the conclusion). However, in recital 52 of the contested decision, the Commission held that two guarantees had been unconditionally granted on 27 January 1992, the day when the Consortium had been founded and had achieved a legal right to obtain State guaranteed funding. In recital 53 of the contested decision, the Commission held that, although individual guarantees had been confirmed and issued for every lender by the Kingdom of Denmark and the Kingdom of Sweden, that did not alter the fact that those States had given definitive commitments to guarantee the obligations of the Consortium in relation to loans and other financial instruments for the financing of the Fixed Link. The Commission also concluded, in the operative part of the contested decision, that, in view of, in particular, the commitments provided by the Kingdom of Denmark and the Kingdom of Sweden, there was no need to

initiate the procedure regarding existing aid 'schemes', having regard to the guarantee granted by the Kingdom of Sweden (the second paragraph of the conclusion). Further, it is apparent from recitals 111 to 138 of the contested decision that the assessment whether the State guarantees were compatible with the internal market was carried out by the Commission as if it was dealing with one or more aid 'schemes', since the Commission did no more than assess the characteristics and compatibility of the guarantees as provided for in the Intergovernmental Agreement and the Consortium Agreement, while not making an individual assessment of every guarantee covering every specific Consortium loan.

- 74 Consequently, although the wording of the contested decision may not be entirely precise or consistent in that regard, it is apparent from the Commission's general reasoning and the operative part of the contested decision that the Commission did in fact consider the State guarantees to be one or two aid schemes adopted definitively in 1992 and saw the guarantees subsequently issued with respect to each loan taken by the Consortium as individual aid that stemmed from those aid schemes.
- 75 In the second place, as regards the failure to analyse the State guarantees with regard to the concept of aid 'schemes', it is clear that the contested decision provides no explanation of why the State guarantees are to be considered to be aid schemes, which is a factor that indicates the existence of an insufficient and incomplete examination.
- 76 In the third place, even if it might be inferred from the contested decision, as claimed by the Commission, that the State guarantees meet the definition of aid schemes given by the second part of Article 1(d) of Regulation No 659/1999, namely 'any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount', suffice it to state that, in this case, the contested decision does not at all explain how the aid contained in the State guarantees satisfies the condition that the aid must not be linked to a specific project.
- 77 The Intergovernmental Agreement, Article 12 of which provides that the Kingdom of Denmark and the Kingdom of Sweden are to 'jointly and severally guarantee the obligations in respect of the consortium's loans and other financial instruments used in connection with the financing', has the title 'Treaty ... concerning a Fixed Link across the [Øresund]'. Further, point 4(3) of the Consortium Agreement states that the State guarantees are to cover 'the Consortium's capital requirements for the planning, project design and construction of the Øresund link, including loan servicing costs, and for covering the capital requirements arising as a consequence of book losses which are expected to occur for a number of years after the Øresund Link has been opened to traffic'. Moreover, Articles 1 and 2 of the Intergovernmental Agreement and Annex 1 thereto identify precisely the geographical location of the Fixed Link and its specific technical characteristics. There is no question therefore of the guarantees being granted for any bridge whatsoever.
- 78 As stated by the applicants, the Commission, in the course of its assessment of compatibility with the internal market under Article 107(3)(b) TFEU, considered, in recitals 115 and 116 of the contested decision, that the Øresund Fixed Link was a 'specific, precise and clearly defined' project. The Commission made reference to Article 2 of and Annex 1 to the Intergovernmental Agreement, which demonstrated that the project was, both in terms of geographical location and technical design, very specifically and clearly defined.
- 79 The assertions, on the one hand, at the stage of classification of the State guarantees, that there are one or two aid schemes, as the aid resulting from those guarantees is not linked to a specific project, and, on the other, at the stage of assessing the compatibility of the measures

with the internal market, that the State guarantees relate to a project that is 'specific, precise and clearly defined', are irreconcilable. Contrary to what is claimed by the Commission, the issue turns not on different legal concepts, but a matter of fact, established in recitals 115 and 116 of the contested decision, which cannot vary from one legal assessment to another.

- 80 In that regard, the Commission also errs in claiming that the State guarantees ought not to be regarded as linked to a 'specific' project, on the ground that the aid contained in those State guarantees covers both the construction phase and the operational phase of the Fixed Link. Since the adjective 'specific' means 'specially or peculiarly pertaining to a particular thing', it is clear that the aid relating to the State guarantees must be regarded as linked to a specific project on the ground that the aid covers the borrowings of the Consortium in relation solely to the Fixed Link project, including its operational phase, to the exclusion of other projects or activities. The 'indefinite' nature of the operational phase, emphasised by the Commission, does not concern the specificity of the project, strictly speaking, but concerns in fact the assessment of whether or not the State guarantees are limited, as part of the assessment of their compatibility. As regards the Commission's argument that, in essence, the aid measures, in this case, were 'open-ended', that plainly contradicts recitals 51 and 131 of the contested decision, which state that the State guarantees are limited to the planning, construction and operation solely of the Øresund Fixed Link, to the exclusion of any other activity.
- 81 It follows from the foregoing that the Commission experienced, during the preliminary examination procedure, serious difficulties with respect to the classification of the State guarantees as aid 'schemes'.
- 82 However, the questions raised by the present case, namely whether the guarantees constitute one or more aid schemes adopted in 1992, or one or two individual ad hoc aid measures unconditionally granted in 1992, or as many individual ad hoc aid measures as there are Consortium loans covered by the State guarantees, are indissociable from an examination of the second ground of objection of the first part, but also an examination of the first ground of objection, which concerns the determination of the time when the State guarantees were unconditionally granted to the Consortium and the number of guarantees. Further, as the Commission itself acknowledges, the issues raised in the first two grounds of objection, in the first part of the fourth plea in law, also have an effect on the classification of the State guarantees in relation to the concept of 'existing' aid, defined in Article 1(b)(i) and (iv) of Regulation No 659/1999, which is the subject of the third ground of objection.
- 83 Consequently, the Court must uphold the second ground of objection in the first part of the fourth plea in law and, therefore, the first part of that plea in its entirety, there being no need to give a ruling on the first and third grounds of objection, or on the arguments of the Kingdom of Denmark, referred to in paragraph 71 above. The contested decision must therefore be annulled in so far as it classified the State guarantees as aid 'schemes' without initiating the formal investigation procedure, and the Court must refer back to the Commission the full analysis concerning the time when the State guarantees were granted, their number, and whether they should be classified as new aid or existing aid.
- 84 As regards the fourth ground of objection in the first part of the fourth plea in law, the Court considers that it should be assessed in conjunction with the ground of objection, raised as part of the second part of the fourth plea in law, claiming that there was an insufficient and incomplete examination of the distinction between the construction and operational phases of the Fixed Link (see paragraphs 99 to 117 below).

(b) The second part: insufficient and incomplete examination of the compatibility of the State aid granted to the Consortium with regard to Article 107(3)(b) TFEU

- 85 In the second part of the fourth plea in law, the applicants claim that the examination of the compatibility of the State guarantees and the Danish tax aid with the internal market was insufficient and incomplete. The applicants put forward, in essence, seven grounds of objection. First, the Commission failed to quantify the aid element in the State guarantees. Second, the Commission failed to investigate whether there were conditions governing the mobilisation of the State guarantees. Third, the Commission's analysis of the distinction between the construction and operational phases of the Fixed Link was insufficient and incomplete, and it failed to examine the compatibility of the State guarantees with regard to the operational phase alone. Fourth, the Commission's analysis with respect to whether the State guarantees and the Danish tax aid were limited in amount and in time was insufficient and incomplete. Fifth, the Commission's analysis of the necessity and the proportionality of the State guarantees and the Danish tax aid was insufficient and incomplete. Sixth, the Commission failed to examine the negative effects of that aid on competition and trade and failed to apply the 'balancing' test. Seventh, the Commission's analysis of the link between the tax advantages and the State guarantees was, in essence, insufficient and incomplete.
- 86 The Commission, first, considers that the applicants' general line of argument consists in inviting the Court to review the legality of the contested decision in the light of the practices and guidelines that existed at the time of adoption of the contested decision, rather than those that existed when the State aid was granted, that being an error in law. The Commission, supported by the Kingdom of Denmark, observes that, in accordance with its Notice on the determination of the applicable rules for the assessment of unlawful State aid of 22 May 2002 (OJ 2002 C 119, p. 22), it is necessary to assess the compatibility of the aid in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted. According to the Commission, the State guarantees were definitively granted in January 1992, when the Consortium was formed.
- 87 It must be recalled that, in applying Article 107(3) TFEU, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made at EU level. The Court, in reviewing whether that discretion was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must restrict itself to examining whether the authority's assessment is vitiated by a manifest error or misuse of powers (see judgment of 15 December 2005, *Italy v Commission*, C-66/02, EU:C:2005:768, paragraph 135 and the case-law cited; see also, to that effect, judgment of 8 March 1988, *Exécutif régional wallon and Glaverbel v Commission*, 62/87 and 72/87, EU:C:1988:132, paragraph 21). Since the wide discretion conferred upon the Commission, clarified, where appropriate, by the guidance rules adopted by the Commission, involves complex economic and social appraisals that have to be carried out at EU level, the Court's review is limited. That review is confined to determining whether the rules governing procedure and the requirement for a statement of reasons have been complied with, whether the facts are accurately stated and whether there has been any manifest error of assessment or any misuse of powers (judgment of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis v Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 132).
- 88 However, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of data of an economic nature. The Courts of the European Union must not only establish whether the evidence relied on is factually accurate, reliable and consistent but must also review whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is

capable of substantiating the conclusions drawn from it. However, when conducting such a review, those courts must not substitute their own economic assessment for that of the Commission. In addition, it must be noted that, where an EU institution enjoys broad discretion, the review of observance of certain procedural safeguards is of fundamental importance. Those safeguards include the obligation on the competent institution to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision (see judgment of 22 November 2007, *Spain v Lenzing*, C-525/04 P, EU:C:2007:698, paragraphs 56 to 58 and the case-law cited).

89 In the light of that case-law and also the case-law cited in paragraphs 60 to 63 above, the Court must assess whether the Commission carried out a complete and sufficient examination of the contested measures and whether the Commission was in possession of all the evidence required to conclude, following an initial review, that the State guarantees and the Danish tax aid were compatible with the internal market.

90 The Court considers that it is appropriate to begin by examining the second, third and fourth grounds of objection, then to examine together the first, fifth and sixth grounds of objection and, last, the seventh ground of objection.

(1) The second ground of objection: no verification of the existence of conditions governing the mobilisation of the guarantees

91 The applicants refer, in essence, to the arguments relied on in support of the plea in law claiming an error in law in the failure to examine the existence of the conditions governing mobilisation of the State guarantees, in accordance with point 5.3 of the Commission 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 2008 Notice on guarantees’).

92 The Commission does not deny that it did not verify whether such mobilisation conditions existed. The Commission considers however that there was no need for such conditions, given that the 2008 Notice on guarantees was not applicable, *ratione temporis*, to an aid scheme granted in 1992. Further, the Commission considers that, in this case, the particular circumstances were very specific, in that there was a partnership between State-owned entities created with the specific objective of constructing and operating the Fixed Link, and not a legal person under Danish or Swedish law that could be declared bankrupt by the courts of those Member States. The Commission states that the Kingdom of Denmark and the Kingdom of Sweden have full strategic and operational control of the Consortium, a control which Member States do not normally have of an independent private operator that benefits from a guarantee. The Commission also states that such mobilisation conditions, in any event, would probably have been incompatible with the Intergovernmental Agreement.

93 As a preliminary point, the Court observes that there is no need to determine whether point 5.3 of the 2008 Notice on guarantees was applicable to the present case, given that, as the Commission has itself acknowledged, the requirement that there be such mobilisation conditions existed previously in 1992, the date accepted in the contested decision as the date when the guarantees were granted. The Commission’s letter to the Member States, reference SG(89) D/4328, of 5 April 1989 previously stated that ‘the Commission [would] accept the guarantees only if their mobilisation [was] contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the benefiting undertaking or any similar procedure [and that those] conditions [would] have to be agreed at the initial, and only, examination by the Commission of the proposed guarantee/State aid within the normal procedures of [Article 108(3) TFEU], at the granting stage’.

- 94 In the specific field of State aid, the Courts of the European Union have already had occasion to state that the Commission may adopt guidelines for the exercise of its powers of assessment and, in so far as those guidelines do not contradict rules in the FEU Treaty, the indicative rules that they contain are binding on the Commission (see judgment of 13 June 2002, *Netherlands v Commission*, C-382/99, EU:C:2002:363, paragraph 24 and the case-law cited). It must also be noted that, by adopting rules of conduct and announcing by publishing them that it will henceforth apply them to the cases to which they relate, the Commission imposes a limit on the exercise of its own discretion and cannot depart from those rules under pain of being found, where appropriate, to be 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).
- 95 In this case, it is common ground that the contested decision is silent on the existence of conditions governing the mobilisation of the State guarantees. Consequently, having regard to paragraphs 93 and 94 above, the Commission erred in not verifying the existence of conditions governing the mobilisation of the State guarantees. It follows that the examination of the compatibility of the State guarantees was insufficient and incomplete, which is evidence of the existence of serious difficulties, in accordance with the case-law cited in paragraph 62 above.
- 96 As regards the Commission's explanations, set out in paragraph 92 above, it must be observed that the Commission does not explain how the fact that the Kingdom of Denmark and the Kingdom of Sweden have full strategic and operational control of the Consortium constitutes an assurance that, in the event that the State guarantees had to be mobilised, the Kingdom of Denmark and the Kingdom of Sweden would go so far as to bring about the liquidation of the Consortium. The Commission does not refer to any provision that would compel them to take such action. On the contrary, the Commission even suggests that a liquidation of the Consortium would be legally impossible having regard to the Intergovernmental Agreement.
- 97 In any event, it is clear that those considerations cannot offset the Commission's failure to undertake any examination with respect to the conditions governing the mobilisation of the State guarantees.
- 98 Consequently, the Court must uphold the second ground of objection, that the examination of the existence of conditions governing mobilisation of the State guarantees was insufficient and incomplete.
- (2) *The third ground of objection: insufficient and incomplete assessment of the distinction between the construction and operation of the Fixed Link and failure to assess the compatibility of State guarantees with respect to the operation of the Fixed Link, and the fourth ground of objection in the first part: insufficient and incomplete assessment of whether the State guarantees were limited to the financing of the Fixed Link*
- 99 In the third ground of objection, the applicants claim that the Commission erred in making no distinction between the phases of construction and operation of the Fixed Link, in the analysis of the compatibility of the State guarantees. According to the applicants, the Commission should have analysed how the State guarantees covering the phase of operation

were to be considered to be compatible with the internal market, when the reality was that they constituted operating aid, which is, by its nature, incompatible with the internal market.

- 100 In that regard, in the context of the fourth ground of objection in the first part (see paragraphs 65 and 84 above), the applicants also refer to what they claim to have been the Commission's manifest error of assessment, in recital 33 of the contested decision, where the Commission stated that 'the State guarantees [were] limited to the special tasks of the financing of the Fixed Link and [might] not be used by the Consortium to increase capacity or extend its activities on any market (Article 4(5) of the Consortium Agreement)'.
- 101 The Commission does not accept that interpretation, and considers that it is clear from the contested decision that the State guarantees and the Danish tax aid did concern both the construction and operation of the Fixed Link and that its examination of compatibility did cover both those phases. The Commission considers that it is 'logical' that the contested decision focuses more on aid for the construction of the Fixed Link, and therefore on investment aid, since the construction costs constitute the greater part of the costs. The Commission denies any suggestion that there is operating aid, on the ground that the Consortium is repaying its debts, which presupposes revenues being sufficient to cover the operating costs, on the one hand, and the Kingdom of Denmark and the Kingdom of Sweden having given commitments to give notice of any further loans that are guaranteed and of any further advantage granted after 2040 (the prescribed period for repayment of the debt being between 30 and 43 years from the opening of the Fixed Link in 2000), on the other. Last, the Commission argues that its decision-making practice with respect to an IPCEI does not distinguish between the construction and operation of infrastructure.
- 102 As regards the fourth ground of objection in the first part, the Commission does not accept the applicants' argument.
- 103 In accordance with the case-law, aid which is intended to relieve an undertaking of the expenses which it would normally have to bear in its day-to-day management or its normal activities must be classified as operating aid (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).
- 104 It follows from the case-law that operating aid does not, as a general rule, fall within the scope of Article 107(3) TFEU. According to the case-law, the effect of such aid is, as a general rule, to distort competition in the sectors in which it is granted, whilst nevertheless being incapable, by its very nature, of achieving any of the objectives of the exceptions there provided for (see, to that effect, judgments of 14 February 1990, *France v Commission*, C-301/87, EU:C:1990:67, paragraph 50; of 6 November 1990, *Italy v Commission*, C-86/89, EU:C:1990:373, paragraph 18; and of 8 June 1995, *Siemens v Commission*, T-459/93, EU:T:1995:100, paragraph 48). A presumption therefore arises from the case-law that operating aid distorts, by its very nature, competition (judgment of 5 October 2000, *Germany v Commission*, C-288/96, EU:C:2000:537, paragraph 77) and affects trading conditions to an extent contrary to the common interest (judgment of 6 November 1990, *Italy v Commission*, C-86/89, EU:C:1990:373, paragraph 18). Such aid is as a general rule prohibited (see, to that effect, judgments of 19 September 2002, *Spain v Commission*, C-113/00, EU:C:2002:507, paragraphs 69 to 71, and of 20 October 2011, *Eridania Sadam v Commission*, T-579/08, not published, EU:T:2011:608, paragraph 41).
- 105 In recitals 32 and 33 of the contested decision, it is stated that the State guarantees cover 'all loans and other financial instruments used by the Consortium in connection with the financing of the [Fixed Link]'. That is also apparent from Article 12 of the

Intergovernmental Agreement, which states that '[the Kingdom of] Denmark and [the Kingdom of] Sweden shall jointly and severally guarantee the obligations in respect of the consortium's loans and other financial instruments used in connection with the financing [of the Fixed Link]'. In the part of the contested decision devoted to analysis of the necessity and the proportionality of the aid, reference is made, in very general terms, to the 'financing' of the Fixed Link (recitals 123, 124, 129 and 131).

- 106 In recital 126 of the contested decision, the Commission states exclusively the estimated figures in the initial budget relating to the costs of planning and construction of the Fixed Link, but makes no reference to the amount that the Consortium had to borrow and would have to borrow to cover operating costs. In recital 130 of the contested decision, the Commission explained that 'the main purpose of the State guarantees [was] to ensure the financing of the construction of the Fixed Link and to make sure that the Consortium [could] not obtain loans covered by the guarantees with a view to [extending] its activities beyond that objective'.
- 107 However, Article 10 of the Intergovernmental Agreement, which exhaustively lists the responsibilities of the Consortium, refers also to the operation of the Fixed Link. Point 4(3) of the Consortium Agreement also provides that the State guarantees will cover the Consortium's capital requirements 'arising as a consequence of book losses which are expected to occur for a number of years after the Øresund Link has been opened to traffic'. In that regard, neither the Commission, nor the Kingdom of Denmark, nor the Kingdom of Sweden deny that the State guarantees also cover loans taken out in order to meet the Consortium's operating costs, as is also stated in recital 50 of the contested decision. The operating costs are costs which the Consortium ought normally to have borne itself in its day-to-day management or its normal activities.
- 108 Consequently, where it is common ground that the State guarantees cover both the construction costs and the operating costs of the Fixed Link, the examination of the compatibility of the aid involved in the State guarantees, and in particular its necessity and proportionality, fails to distinguish, or makes an inadequate distinction between, the aid for the construction and the aid for the operation of the Fixed Link, and there is no examination at all with respect to the operational phase in itself. Accordingly, the aid covering the operating costs of the Fixed Link was not the subject of a particular compatibility analysis, even though that aid is likely to constitute operating aid.
- 109 None of the Commission's arguments, even from the perspective of the fourth plea in law, on the existence of serious difficulties, are capable of calling into question that finding.
- 110 First, even if it were established, as the Commission suggests, that the operating costs were not as high as the construction costs, it cannot be ruled out that the guarantees covering the Consortium's operating costs may constitute operating aid.
- 111 Second, as regards the argument that any classification of operating aid is ruled out, because the Consortium regularly repays its debts, it is clear that the regular repayment of its loans does not preclude the Consortium from having the benefit of an advantage as compared with its competitors, in the fact that it has available to it, for no consideration, guarantees that cover 100% of its borrowing, in particular its borrowing to meet costs which it would normally have had to bear itself, as part of the day-to-day management of its normal activities, in other words, operating costs. The State guarantees therefore allow it to have access to very favourable borrowing terms. Further, it must be said that it is not inconceivable, on reading the contested decision, that the regular repayment of its loans by the Consortium may in fact be supported by the further loans covered by those guarantees,

since it is stated, in recital 131 of the contested decision, that the State guarantees are to cover the financing or refinancing requirements of the Consortium's debt and that other guaranteed loans may be taken out without prior notice to the Commission until the end of the year 2040.

- 112 Third, the Court must reject the argument that, in any event, a classification of operating aid is ruled out, because the Kingdom of Denmark and the Kingdom of Sweden have given commitments to give notice of any further guaranteed loans after the end of the year 2040 and any further advantage granted after that date. The Commission does not explain, either in the contested decision, or in the course of these proceedings, how any classification as operating aid is ruled out with respect to guarantees that cover loans taken out in order to cover operating costs before the end of the year 2040.
- 113 Fourth, the Court must reject the argument in relation to the Commission's decision-making practice, since that practice, concerning other cases, cannot affect the validity of a contested decision, which can be assessed only in the light of the objective rules of the FEU Treaty (judgment of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 21).
- 114 Consequently, the Court must uphold the third ground of objection, claiming an insufficient and incomplete examination with respect to the distinction, in the analysis of the compatibility of the State guarantees, between the construction phase and the operational phase of the Fixed Link and the lack of any specific compatibility analysis with regard to the guarantees linked to the operation of the Fixed Link.
- 115 As regards the fourth ground of objection in the first part (see paragraph 100 above), in relation to recital 33 of the contested decision and the question whether the Commission sufficiently examined whether the State guarantees could be used by the Consortium to increase its capacity or to develop its activities in existing markets and in new markets, it must be observed that the State guarantees cannot be used to increase the capacity of the Consortium or to extend its activities to a market other than that relating to the Fixed Link, according to the wording of Articles 10 and 12 of the Intergovernmental Agreement and of Point 4(3) of the Consortium Agreement (see paragraphs 7 and 9 above) as well as Point 4 (5) of the Consortium Agreement. The latter provision states in effect that the capital requirements of the Consortium for purposes other than those specified in Point 4(3) and (4) (namely, the planning, project design, construction and financing costs of the Fixed Link and the coverage of negative results that were expected for several years after the opening of the Fixed Link), are in the first place to be satisfied by other forms of financing, namely loans or financial instruments that may be covered by securities in the form of pledges of assets in the Consortium or by guarantees given by the parent companies. Further, the applicants fail to demonstrate that the Consortium had used the State guarantees in markets other than that of the Fixed Link.
- 116 However, the assertion, in recital 33 of the contested decision, that the State guarantees could not be used to increase the Consortium's capacity or to extend its activities on 'any' market is insufficient and incomplete. The concept of the State guarantees being limited to the 'financing of the [Fixed Link]' also covers the operational phase of that project. Consequently, the State guarantees theoretically permit the Consortium to increase its capacity and its market share on the market corresponding to the operation of the Fixed Link, as is moreover acknowledged by the Commission.
- 117 Consequently, the fourth ground of objection in the first part must also be upheld.

(3) The fourth ground of objection: insufficient and incomplete examination of whether the State guarantees and the Danish tax aid granted to the Consortium are limited, in time and in amount

- 118 In the fourth ground of objection in the second part, the applicants claim that the examination, in recital 131 of the contested decision, of whether the State guarantees are limited, in time and in amount, was insufficient and incomplete. The applicants state that unlimited aid constitutes, as a general rule, State aid that is incompatible with the internal market. The applicants also argue that the assessment of whether the Danish tax aid granted to the Consortium was limited was insufficient.
- 119 The Commission does not accept those arguments and explains that the fact that the Consortium's accumulated debt varies over time cannot alter the fact that the State guarantees are, in fact, limited to the accumulated debt of the Consortium at any point in time, a debt which ought in reality to steadily decrease. The mere fact that the Commission is as yet unaware when the debt will be repaid in full does not alter the fact that the guarantees are limited to the time which is necessary to repay the debt. In addition, the Commission states that the commitments offered by the Kingdom of Denmark and the Kingdom of Sweden constitute an important factor in its assessment as to whether the aid is limited, since they enable the Commission to act against other loans covered by the State guarantees that are taken out after the end of 2040 and against other economic advantages granted after that date.
- 120 In accordance with the case-law, the Court must hold that the grant of a guarantee on terms which are not equivalent to market terms, such as an unlimited guarantee granted without consideration, is, as a rule, liable to confer an advantage on the beneficiary, in that that party thereby enjoys an improvement in its financial position through a reduction in charges which would normally burden its budget. An unlimited State guarantee enables its beneficiary, inter alia, to obtain more favourable credit terms than it would have obtained solely on its own merits and, therefore, eases the pressure on its budget (judgment of 20 September 2012, *France v Commission*, T-154/10, EU:T:2012:452, paragraphs 106 and 108).
- 121 In this case, it is apparent from recital 127 of the contested decision that, at the end of 2000, the Consortium's net debt, including accumulated interest, amounted to 19.4 billion Danish kroner (DKK), that, at the end of 2003, the debt had risen to DKK 20.1 billion, but that it had fallen at the end of 2013 to DKK 16.6 billion, and that the Consortium expected that debt not to increase above the 2013 level. In recital 128 of the contested decision, the Commission stated that the repayment period for the investment undertaken by the Consortium was estimated, in 1991, at 30 years as from 2000, but that that estimate had fluctuated between 30 and 36 years, the Consortium's estimated repayment period being calculated on an annual basis and published in the Consortium's annual reports. The 2013 annual report estimated that the debt would be repaid by 2034. The calculation of the length of the Consortium's debt repayment period was based on a number of forecasts concerning, inter alia, the development of traffic revenues, operational costs, reinvestment costs, financing costs and dividend payments to the parent companies of the Consortium. Of those, the most important was the forecast concerning road traffic revenues, which accounted for 75% of the total revenue and which had varied considerably over time. The Commission also stated that, given the uncertainty concerning future traffic developments, the Consortium had set out three possible scenarios: a base case scenario with a repayment period of 34 years, a growth scenario with a repayment period of 30 years, and a stagnation scenario with a repayment period of 43 years.

- 122 In recital 129 of the contested decision, the Commission stated that the State guarantees covered 100% of the Consortium's liabilities. The Commission then stated, in recital 130 of the contested decision, that the main purpose of the State guarantees was to enable the Consortium to finance the construction of the Fixed Link, any extension of its activities being excluded. The Commission concluded, in recital 131 of the contested decision, that the State guarantees were limited to what was necessary for the Consortium to finance or refinance its accumulated debt in the context of its tasks of financing the Fixed Link. The Commission also stated that, since the State guarantees could not be used for purposes other than the financing of the Fixed Link, the guarantees were in effect limited to covering 'the total amount of the Consortium's accumulated debt at any point in time'. In addition, the Commission held, referring to recitals 128 and 129 of the contested decision, that the State guarantees were in effect limited in time, since the Consortium would not be able to benefit from the guarantees after its debt was fully repaid.
- 123 The Commission also considered, in recitals 132 and 133 of the contested decision, that the advantage resulting from the State guarantees and that resulting from the Danish tax aid were interdependent.
- 124 In recitals 134 to 136 of the contested decision, the Commission concluded that the State guarantees and any other economic advantage, including tax advantages, that the Consortium might receive, were limited to the 'actual debt repayment period' and that the Kingdom of Denmark and the Kingdom of Sweden had given commitments that the Consortium would not receive such advantages after it had 'fully repaid its debt'. The Commission also took into account, in recital 135 of the contested decision, the commitments of the Kingdom of Denmark and the Kingdom of Sweden to notify it of any new loan covered by the State guarantees taken out after the end of 2040 or of any other economic advantage granted after that date, and to send to it an annual report on progress in the repayment of the Consortium's debt.
- 125 In the first place, there is no dispute that the State guarantees cover 100% of the loans required by the Consortium both for the construction of the Fixed Link and for its operation. Nor is there any dispute that the Kingdom of Denmark and the Kingdom of Sweden set no limit on the amount or on the duration of the State guarantees in the texts governing those guarantees that are referred to in the contested decision.
- 126 That is indeed confirmed by recital 51 of the contested decision, which states that 'it follows from the wording of the Intergovernmental Agreement that the State guarantees are not limited in time'. While Point 4(3) of the Consortium Agreement indicates that the State guarantees will cover the Consortium's capital requirements 'arising as a consequence of book losses which are expected to occur for a number of years after the Øresund Link has been opened to traffic', it has to be said that the expression 'for a number of years' is very vague and does not set any real limit, as to time or amount, as regards coverage of the operational phase by the State guarantees.
- 127 Admittedly, it must be stated that, with respect to the guaranteed loans already taken out by the Consortium at the date of the contested decision, they are certainly defined by the terms of each loan contract, setting an amount to be repaid and a period for repayment. The contested decision, however, has no details as to any limit on the total amount of borrowing that can theoretically be covered by the State guarantees. In response to a written question from the Court, the Commission, moreover, explained that it was even unaware of the length of the repayment periods and the amount of the borrowing taken out by the Consortium since the beginning of the project and that it had never asked for or examined the Consortium's existing loan contracts.

- 128 In the second place, while, in recital 128 of the contested decision, the Commission states the probable length of time for repayment of the Consortium's overall debt as assessed in 2013, the Commission also states that that period has already fluctuated from 30 to 36 years and is likely to change again in the future, various repayment scenarios having been envisaged, dependent on a number of economic factors. The Commission also confirmed, in paragraph 93 of the Defence, that it was not known exactly when that debt would be repaid.
- 129 In the third place, as the applicants argue, the fact that there is no limit on the amounts guaranteed or on the period for repayment, combined with the possibility of taking out new loans that are 100% covered by the State guarantees, at least until the end of 2040, may mean that there may be many extensions of the repayment period for the Consortium's loans and an increase in the total amount of the debt covered by the State guarantees. In that regard, it is clear from the contested decision, in particular from recitals 131 and 135, that the Consortium is likely to take out new guaranteed loans and to engage in regular refinancing until the end of 2040, without having to give notice of those guaranteed loans to the Commission. In that regard, it must be observed that the principal uncertainty, in this case, lies in the fact that no ceiling was placed on the amount of the Consortium's debt that might be covered by the State guarantees up to the end of 2040. Consequently, it is not sufficiently clear from the contested decision that the Consortium's debt is limited in time and in amount.
- 130 It follows from the foregoing that the assertion, in recital 131 of the contested decision, that 'the State guarantees [are] limited to the extent that the Consortium needs to (re)finance its debt, which has been accumulated in the context of the Consortium's tasks relating to the financing of the Fixed Link' does not sufficiently demonstrate that there is a limit in the time and in the amount covered by those guarantees, since, in particular, the financing of the Fixed Link covers its operation. Accordingly, the assertions that '[s]ince the State guarantees can only be used for the tasks relating to the financing of the ...[Øresund] Fixed Link and not for any other purposes, they are in effect limited to covering the total amount of the Consortium's accumulated debt at any point in time' or that 'the guarantees are in effect limited in time, since the Consortium will not be able to benefit from the guarantees after the debt has been full repaid' depend on reasoning that is circular and form an inadequate approach to determining precisely the limit on the duration and amount of the State guarantees, since the debt of the Consortium, in itself, is clearly not limited.
- 131 None of the arguments put forward by the Commission is capable of undermining that finding.
- 132 First, the Commission's assertion, in its Defence, that the debt must in reality steadily decline is neither proved nor substantiated. That assertion is, moreover rebutted simply by the finding, in recital 127 of the contested decision, that the total debt of the Consortium had increased between the end of the year 2000 and the end of the year 2003. The fact that the State guarantees cover the operation of the Fixed Link, the absence of any limit on the amount of, and on the period for repayment of, the debt covered by the State guarantees and the possibility open to the Consortium to take out new guaranteed loans, unlimited in amount, to refinance its debt until the end of the year 2040, and even to give notice again of all loans taken out after 2040, prove that there is no real certainty that the debt will diminish and will in fact be repaid before the end of the year 2040.
- 133 Second, the Commission contends that the State guarantees concern an economic activity that is clearly defined, namely the financing of the Fixed Link, to the exclusion of other activities, unlike general guarantees which cover all the economic activities of an undertaking. However, even if the State guarantees are limited to the financing of the Fixed

Link, in the first place, it is apparent from paragraph 108 above that that project encompassed the operation of the Fixed Link and, consequently, that the State guarantees are liable to be classified as operating aid and, in the second place, it is apparent from paragraphs 125 to 128 above that no maximum amount covered by the guarantees is specified and their precise duration is not stated.

- 134 Third, as regards the commitment of the Kingdom of Denmark and the Kingdom of Sweden, offered in the course of the preliminary examination phase, to give notice to the Commission, in accordance with Article 108(3) TFEU, of any further loan covered by the State guarantees that might be taken out by the Consortium after 2040, the Commission recognised, in response to a question from the Court, that that commitment did not limit the duration of the State guarantees themselves to the end of the year 2040 since that commitment applied only to the grant of new loans covered by those guarantees. That date therefore represents only the cut-off date up to which the Kingdom of Denmark and the Kingdom of Sweden may grant further guarantees of loans without notifying the Commission. That date gives no indication of the duration of those guarantees, which is linked to the duration of the period of repayment of the loans covered by the guarantees. However, the duration of the period of repayment of those loans is again not limited by the commitments. Further, the Commission has accepted that it obtained no information on the lifetime of the loans already taken out by the Consortium. Consequently, the Court must hold that the commitment of the Kingdom of Denmark and the Kingdom of Sweden, mentioned in recital 13 of the contested decision, does not preclude the State guarantees that cover loans that have already been taken out or new loans that will be taken out before the end of the year 2040 from extending well beyond 2040.
- 135 Further, as stated in paragraph 125 above, the commitments do not set any limit on the amount of the loans or on the guarantees themselves. Accordingly, new loans that are taken out before the end of the year 2040, 100% guaranteed, of unlimited amount, are liable to increase the Consortium's actual debt and, consequently, the amount of the aid linked to the State guarantees.
- 136 If, by its arguments, the Commission seeks to argue that the 'commitment' in question sets a theoretical limit on the State guarantees in so far as, logically, loan agreements entered into before the end of 2040 will refer to an amount and a repayment period and will ultimately be repaid at some point, suffice it to state that the effective duration of the State guarantees could thereby extend well beyond 2040 and for an unknown maximum amount, potentially greater than the Consortium's current debt, while the contested decision offers no information on those matters. Consequently, the Commission did not have precise information on the duration and the maximum amount of the aid contained in the State guarantees.
- 137 Accordingly, it is clear that the examination undertaken by the Commission as to whether the State guarantees and, as a consequence, the aid contained in those guarantees was limited, in time and in amount, was insufficient and incomplete.
- 138 Since, in recital 134 of the contested decision, the Commission considered that the State guarantees and any other economic advantage, including the tax advantages, which the Consortium might receive were limited to the actual period for repayment of the debt, the inadequacies of the Commission's examination, identified especially in paragraph 129 above, also extend to the Danish tax aid.
- 139 Those inadequacies are additional evidence that the Commission experienced in the analysis of the compatibility of the State guarantees with the internal market serious

difficulties, which ought to have compelled the Commission to initiate the formal investigation procedure. Consequently, the fourth ground of objection must be upheld.

(4) The first, fifth and sixth ground of objections: insufficient and incomplete examination of, respectively, the quantification of the aid element in the State guarantees, the necessity and the proportionality of the aid measures and, last, the 'balancing' test

- 140 The first ground of objection in the second part is that the Commission failed to quantify, or insufficiently quantified, the aid in the State guarantees, although such quantification was essential for the assessment of the necessity and the proportionality of the aid. The fifth ground of objection is that the Commission failed sufficiently to examine the necessity and proportionality of the State guarantees and the tax advantages. The sixth ground of objection concerns in particular the claim that the Commission did not carry out any 'balancing' of the positive effects of the aid at issue, in terms of its contribution to the execution of the objective of common interest concerned, against its negative effects on competition and trade. Those errors concern both the State guarantees and the Danish tax aid.
- 141 In accordance with Article 107(3)(b) TFEU, 'aid to promote the execution of an important project of common European interest' 'may be considered to be compatible with the internal market'.
- 142 It must be recalled that, as a derogation from the general principle of the incompatibility of State aid with the internal market laid down in Article 107(1) TFEU, Article 107(3)(b) TFEU must be interpreted strictly (see judgment of 9 April 2014, *Greece v Commission*, T-150/12, not published, EU:T:2014:191, paragraph 146 and the case-law cited).
- 143 It is apparent from the case-law that the Commission may declare aid compatible with Article 107(3) TFEU only if it can establish that the aid contributes to the attainment of one of the objectives specified, something which, under normal market conditions, a recipient undertaking would not achieve by using its own resources. In other words, the Member States must not be permitted to make payments which, although they would improve the financial situation of the recipient undertaking, are not necessary for the attainment of the objectives specified in Article 107(3) TFEU (see judgment of 14 January 2009, *Kronoply v Commission*, T-162/06, EU:T:2009:2, paragraph 65 and the case-law cited).
- 144 The principle of proportionality requires the measures imposed by the acts of the EU institutions to be appropriate to achieve the aim pursued and must not exceed the limits of what is necessary for that purpose (judgment of 18 September 1986, *Commission v Germany*, 116/82, EU:C:1986:322, paragraph 21). As a general principle of EU law, the principle of proportionality is a criterion for the lawfulness of any act of the institutions of the European Union, 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). According to the case-law, it is not acceptable for aid to include arrangements, in particular as regards its amount, whose restrictive effects exceed what is necessary to enable the aid to attain the objectives permitted by the FEU Treaty (see, to that effect, judgment of 14 January 2009, *Kronoply v Commission*, T-162/06, EU:T:2009:2, paragraph 66 and the case-law cited).

(i) The first ground of objection, on the determination of the aid element contained in the State guarantees

- 145 In their first ground of objection, the applicants claim that the Commission should have quantified the aid element resulting from the State guarantees in accordance with points 4.1 and 4.2 of the 2008 Notice on guarantees. The applicants consider that the quantification of

the aid element in the State guarantees was an essential prerequisite of assessing the necessity and proportionality of those guarantees.

- 146 The Commission states that the 2008 Notice on guarantees was not applicable *ratione temporis* to the State aid at issue in this case, since the Commission considers that the aid was granted in 1992. The Commission considers that the quantification of aid is not a prerequisite of analysing the necessity and proportionality of the aid and that, since the Commission had concluded that the aid was necessary and proportionate to achieving the objective of raising financing for the project in the circumstances existing at the time, there was no need to quantify the amount of the aid so as to avoid any overcompensation. Further, the Commission argues that, under the 2008 Notice on guarantees itself, the only purpose served by quantification of the aid element is to be able to assess whether the aid can be found to be compatible under a specific exemption.
- 147 As a preliminary point, it is clear that, by their first ground of objection, the applicants are not criticising the Commission for an absence of final and precise figures as to the total amount of the aid resulting from the State guarantees, but for the absence or inadequacy of any determination of the aid element resulting from the State guarantees, in other words, of the method to be followed in order to calculate the aid contained in a guarantee. The Court must therefore examine whether the quantification of the aid contained in the State guarantees, that is to say the determination of the aid element linked to those guarantees, was necessary for the assessment of its compatibility and, if it was, ascertain whether the Commission sufficiently quantified that aid element in the contested decision.
- 148 It must also be recalled that, since, in particular, Article 107(3)(b) TFEU must be interpreted strictly, it was the duty of the Commission to verify that the aid contained in the State guarantees and the Danish tax aid was necessary and proportionate to the objective pursued, in this case the execution of the IPCEI constituted by the Fixed Link. That is not, it may be said, challenged by the Commission.
- 149 In the first place, it must be stated that, whatever the substantive rules applicable *ratione temporis* to the present case, the knowledge of how to determine the aid element contained in a guarantee, that is to say being familiar with the method for determining the aid element, while there is no requirement for a final precise figure, is an essential prerequisite in order to assess whether that aid is necessary and proportionate, contrary to what is contended by the Commission.
- 150 In accordance with the case-law cited in paragraph 144 above, the assessment of the proportionality of aid implies verification whether that aid is limited to the minimum necessary to achieve the objectives of the various derogations covered by Article 107(3) TFEU, which implies knowledge of the extent to which the aid is necessary to achieve the objective concerned and therefore knowledge of how to calculate the aid element in advance.
- 151 It must be stated that that is consistent with the case-law, which states that no provision of EU law requires the Commission, when ordering the recovery of aid declared to be incompatible with the internal market, to fix the exact amount of the aid to be recovered, and that it is sufficient for the Commission's decision to include information enabling the recipient to work out itself, without overmuch difficulty, that amount (judgments of 12 May 2005, *Commission v Greece*, C-415/03, EU:C:2005:287, paragraph 39, and of 18 October 2007, *Commission v France*, C-441/06, EU:C:2007:616, paragraph 29).
- 152 In that regard, the Commission's argument that, even on the wording of point 4.1 of the 2008 Notice on guarantees, in relation to 'general' aspects of 'guarantees with an aid

element', quantification would be of assistance solely to determine whether the aid is compatible by virtue of a 'specific exemption', but not by virtue of Article 107(3) TFEU, must be rejected, since, in that context, the expression 'specific exemption' makes reference to the exemptions set out in Article 107(3)(a) to (e) TFEU.

- 153 The Commission is wrong to consider that, since it had concluded that the aid was necessary and proportionate in order to attain the objective of raising financing for the project under the circumstances that existed at that time, there was no need to quantify the aid in order to avoid any overcompensation. On the contrary, in the course of examining the proportionality of the aid, it was necessary, in accordance with the case-law referred to in paragraph 144 above, to know how to determine the aid element in the State guarantees, in order to be satisfied that its restrictive effects would not go beyond what was necessary for the aid to be able to attain the objective of execution of the IPCEI.
- 154 In response to a question from the Court, the Commission also stated that it was not necessary to determine a precise amount of aid for the purposes of examining compatibility, and in particular for assessing the proportionality of the aid, since what mattered was knowing that the project could not have been executed without aid, which was assessed in recitals 129 to 131 of the contested decision. It has to be said that that argument deals only with the necessity of the aid, when it also has to be verified that the aid was in fact limited to the minimum necessary, in accordance with the principle of proportionality.
- 155 In the second place, the applicants claim, in essence, that the aid element in the State guarantees was not quantified in the contested decision or was not sufficiently quantified, since, for example, no special attention was devoted to the question whether the State guarantees could be properly measured when they were granted, or to the specific characteristics of the guarantees and the loans, or of any other financial obligation, for the purposes of determining the market premium of the guarantee, on the basis of which the aid element is calculated by comparing it with the premium actually paid, in accordance with point 4.1(b) and (d) of the 2008 Notice on guarantees, for example. The applicants also claim that, in cases where no rational private investor would have engaged in the financing of the project concerned, which seems to be the situation in this particular case, having regard to recital 124 of the contested decision, the aid element should be calculated in the same way as the grant equivalent of a soft loan, in accordance with point 4.2 of the 2008 Notice on guarantees.
- 156 The Commission does not accept that argument, in particular the applicability of the 2008 Notice on guarantees to the present case.
- 157 In this case, in recital 88 of the contested decision, the Commission defined the advantage resulting from the State guarantees, within the meaning of Article 107(1) TFEU, as arising from the fact that the guarantees reduced the costs that the Consortium would normally have borne through the payment of a premium on market terms 'or' the costs that it would have had to bear through financing the Fixed Link without the guarantees. Accordingly, even if the methods described in the 2008 Notice on guarantees are not applicable *ratione temporis*, as contended by the Commission, it is clear that the Commission had itself made reference, in the contested decision, to those two alternative methods as methods for the determination of the aid element, in other words, of the advantage relating to the State guarantees.
- 158 However, it must be observed that the Commission failed to specify which method it claims that it applied in its analysis of the compatibility of the aid.
- 159 In response to a written question from the Court, the Commission stated that recital 88 of the contested decision ought not to be interpreted as leaving the choice open as to the

method of calculating the aid element, since both methods ought to lead to the same outcome for the undertaking in terms of costs without aid.

- 160 Such an argument is ineffective, given that the Commission did not, in this case, apply either of the two methods envisaged in recital 88 of the contested decision in its analysis of the compatibility of the aid. The contested decision makes no reference to either a market premium for equivalent guarantees, or to a grant equivalent of a soft loan, namely the difference between the specific market interest rate in the absence of guarantees and the interest rate obtained by means of the guarantees.
- 161 None of the arguments of the Commission, the Kingdom of Denmark and the Kingdom of Sweden call into question that finding.
- 162 The Commission contends that it was impossible to quantify the aid contained in the State guarantees with a sufficient degree of precision, in 1992, given the large scale and the uncertainties of the Fixed Link project. In its response to the Court's questions, the Commission also explains that the number and the amount of future loans to be guaranteed were unknown when the contested decision was adopted and that the guarantees were to cover a long period of time in which the market conditions, and hence the aid element, might vary considerably. The Kingdom of Denmark adds that the fact that the State guarantees were not quantified was a logical consequence of the Commission having classified them as aid schemes, granted for 'an indefinite period of time and/or for an indefinite amount'.
- 163 In that regard, suffice it to state, by way of illustration, that point 4.4 of the 2008 Notice on guarantees is itself evidence that there are methods for calculating an aid element in the context of guarantee schemes, where the characteristics of each guaranteed loan are not known in advance. Point 4.4 states that, '[s]ince, in the case of State guarantee schemes, the specific features of the individual cases may not be known at the time when the scheme is to be assessed, the aid element must be assessed by reference to the provisions of the scheme'. That provision also corresponded, in essence, to point 3.5 of the Commission Notice on the application of Articles [107] and [108 TFEU] to State aid in the form of guarantees (OJ 2000 C 71, p. 14), where the Commission stated that, in such circumstances, the aid element was to be assessed by reference to the scheme provisions concerning, inter alia, the maximum amount and the duration of loans, the category of enterprise and the type of project eligible, the security required from the borrowers, the premium to be paid and the rates of interest obtained by them (judgment of 17 March 2015, *Pollmeier Massivholz v Commission*, T-89/09, EU:T:2015:153, paragraph 165).
- 164 In this case, such verification is lacking in the contested decision, in so far as, in particular, no maximum is defined for the amount and duration of the guaranteed loans, or for the guarantees themselves.
- 165 The Commission fails to demonstrate, moreover, how the indefinite nature of the project precluded the Commission from establishing, if not a definite figure, at the least a maximum amount for the aid granted by the Kingdom of Denmark and the Kingdom of Sweden. In that regard, it is apparent from recital 126 of the contested decision that there existed, in 1990, estimates of the budget necessary for the construction of the Fixed Link.
- 166 Last, as regards more specifically the argument in relation to the large scale and the uncertainties of the project, the Commission cannot rely on the complexity of an analysis to justify its not undertaking that analysis. If the analysis was so complex and difficult as to prevent the Commission, at the stage of the preliminary review, from determining the aid elements in the State guarantees, it has to be said that that only confirms the existence of

serious difficulties which ought to have compelled the Commission to initiate the formal investigation procedure.

- 167 Consequently, the Court must find that there was an insufficient examination with respect to the determination of the aid element resulting from the State guarantees which affects the whole of the analysis of compatibility, in particular of the proportionality of the aid contained in the State guarantees. The first ground of objection in the second part must thereby be upheld.

(ii) *The fifth ground of objection, on the necessity and the proportionality of the State aid*

- 168 In relation to the fifth ground of objection, the Court must examine the other arguments with respect to an insufficient and incomplete examination of the necessity and proportionality of the aid concerned.
- 169 In the first place, the applicants claim, in essence, that the Commission infringed point 4 of 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’). The applicants state, in that regard, that it was however indicated, in recitals 113 and 122 of the contested decision, that the Commission was applying the IPCEI Communication.
- 170 The Commission, as a preliminary point, considers that the IPCEI Communication was not applicable *ratione temporis*. In recitals 112 and 113 of the contested decision, the Commission contends that it did no more than state that it would apply the general criteria of necessity and proportionality ‘in the light of’ the IPCEI Communication. The Commission recalls its wide discretion in assessing the compatibility of aid.
- 171 In this case, in the wording of recital 113 of the contested decision, ‘[a]lthough the principles set out in [the IPCEI Communication] are only applicable to non-notified aid granted after that communication was published in the *Official Journal of the European Union*, the Commission considers it appropriate to apply the criteria of necessity and proportionality to the present case in the light of the IPCEI Communication’. Consequently, it is clear that, in the contested decision, the Commission stated that it would apply the IPCEI Communication in order to assess the necessity and proportionality of aid granted to the Consortium.
- 172 Consequently, and irrespective of whether the IPCEI Communication was in fact applicable to the present case, it must be observed that the Commission is incorrect in maintaining, before the Court, that it did not in the contested decision assess the compatibility of the State guarantees and the Danish tax aid on the basis of the IPCEI Communication.
- 173 In this case, recital 122 of the contested decision accurately reproduces paragraph 28 of the IPCEI Communication. That recital states that, according to the IPCEI Communication, 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 [would have to] be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits, and last, aid will only be considered proportionate if the same result could not be achieved with less aid. It is clear that paragraph 28 of the IPCEI Communication is no more than a restatement of the general criteria with respect to the assessment of compatibility, in particular the necessity and proportionality of the aid, which are applicable whatever substantive law provisions may be applicable *ratione temporis*.

- 174 Accordingly, the Court must determine whether the Commission's examination of those criteria was sufficient.
- 175 First, the applicants claim that the contested decision failed to examine, contrary to the first sentence of paragraph 28 of the IPCEI Communication, whether a guarantee premium is a cost that the Consortium would have incurred in any event, and whether the State guarantees offset a normal business risk to be borne by the Consortium.
- 176 The Commission does not accept that argument.
- 177 It must be emphasised that the first sentence of paragraph 28 of the IPCEI Communication is a restatement of the prohibition on operating aid. It follows from paragraph 108 above in particular that the Commission in fact failed to ascertain whether the State guarantees covered operating costs.
- 178 Second, the applicants complain that the Commission failed to ascertain whether, without the aid, 'the project's realisation should be impossible or it [would have to] be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits'. The applicants claim that there is no specific evidence for the unsubstantiated assertion, in recital 124 of the contested decision, that 'no rational private investor would have engaged in the financing of such a project under normal market conditions'. Further, the applicants criticise the fact that the contested decision contains no counterfactual scenario, contrary to paragraph 29 of the IPCEI Communication, and the fact that the Commission appears not even to have asked the Kingdom of Denmark and the Kingdom of Sweden to provide information on a possible counterfactual scenario.
- 179 The Commission considers, in essence, that the only imaginable counterfactual scenario would have been to not build the Fixed Link. In that regard, according to the Commission, the applicants fail, in addition, to demonstrate that any undertaking would have been capable of constructing an infrastructure project, such as that involved in this case, without State aid, given the huge investment that can only be recovered in the very long term and the uncertainties in relation to revenues.
- 180 In this case, in recital 123 of the contested decision, the Commission considered, in essence, that the State guarantees and the Danish tax aid in favour of the Consortium were necessary and proportionate to the objective pursued, namely raising private financing for the project, under the circumstances that existed at that time. In recital 124 of the contested decision, the Commission also stated that the possibility of constructing a fixed link between Denmark and Sweden had been on the agenda for more than 35 years prior to the conclusion of the Intergovernmental Agreement, in 1991, but that there had been no indications, during that period, that such a large-scale infrastructure project could be realised without public support. According to the Commission, the Fixed Link required substantial capital investments that could only be recovered in the very long term and there were numerous uncertainties in relation to the revenues of the Fixed Link. The Commission stated that no rational private investor would have engaged in the financing of such a project under normal market conditions and that, without the aid, the project would not have been realised. Further, the Commission observed that, according to the Kingdom of Denmark and the Kingdom of Sweden, all calculations of the project financing were based on the assumption that the loans obtained by the Consortium to finance the Fixed Link would be fully covered by the State guarantees and that, consequently, no comparison of the profitability of the project in an equivalent scenario without the State guarantees or tax measures had been carried out.
- 181 In recital 125 of the contested decision, the Commission stated that EU level funding had been provided for the project, amounting to EUR 127 million, representing 6% of its total

costs, which demonstrated the necessity of public funding for the realisation of the project. Recital 126 of the contested decision mentions the total cost of the project, estimated in 1990 at EUR 1.55 billion solely for the planning and construction of the Fixed Link and EUR 2.25 billion including the costs of the hinterland connections.

- 182 It is clear moreover from recital 124 of the contested decision that the Kingdom of Denmark and the Kingdom of Sweden informed the Commission that the only possible counterfactual scenario consisted, in this case, of there being no alternative scenario. However, even paragraph 29 of the IPCEI Communication, relied on by the applicants, accepts that 'the counterfactual scenario may consist in the absence of an alternative project'.
- 183 Even if the Commission could be regarded as having undertaken a sufficient examination with respect to the question whether the construction of the Fixed Link could not be realised without aid or had to be realised by different means, in any event, it is clear from paragraph 114 above that no separate analysis of the necessity of the aid with respect to the operational phase of the Fixed Link was carried out. Consequently, the assessment of the necessity of the aid concerned is plainly insufficient and incomplete.
- 184 Third, the applicants claim, in essence, that the Commission failed to examine whether the amount of the aid provided to the Consortium exceeded what was necessary to attain the objective pursued. In that regard, the assertion, in recital 129 of the contested decision, that the aid linked to the State guarantees covering 100% of the Consortium's liabilities and to the tax advantages is proportionate and limited to the minimum necessary, given the nature and size of the Fixed Link project, is, according to the applicants, unsubstantiated. The applicants also claim, in essence, an infringement of paragraph 30 of the IPCEI Communication.
- 185 The Commission denies that its examination was in any way insufficient and considers that argument to be unsubstantiated. First, the Commission states that the quantification of the aid element is not a necessary step in the assessment of the necessity and proportionality of the aid. Second, the Commission contends that the applicants do not demonstrate that any undertaking would have been capable of constructing an infrastructure project such as that involved in this case without State aid. Further, there is no indication that the project could have been realised with less aid. The choice of a State guarantee ensured that the aid was considerably lower than if the Kingdom of Denmark and the Kingdom of Sweden had granted subsidies or loans to the Consortium. Further, the commitments given by the Danish and Swedish Governments made it possible to avoid a situation in which the guarantees would become unnecessary or disproportionate. Last, as regards the alleged infringement of paragraph 30 of the IPCEI Communication, the Commission states that, even if that provision had been applicable, which it does not accept, that provision would not require the Commission to calculate the internal rate of return in all cases. In the present case, the uncertainties were such that detailed calculations would not have added any insights to its assessment.
- 186 In this case, recital 129 of the contested decision states that, given the nature and size of the Fixed Link, the aid contained in the chosen financial structure involving two State guarantees covering 100% of the Consortium's liabilities and the tax advantages should be considered to be proportionate and limited to the minimum necessary. The Commission also stated, again in recital 129, that 'any other means of financing the Fixed Link would have resulted in the same project but entailed a significant risk of higher financing costs for [the Kingdom of Denmark and the Kingdom of Sweden]' and that, 'for example, [if those States] had provided capital injections or loans to the Consortium, there would have been a risk that

the total burden on [their] budgets would have been higher and, as a consequence, the total costs of the project would have increased'. The Commission also stated that, so far, no guarantee had been drawn on and there were no indications that the Consortium would not be able to meet its obligations in the future.

- 187 First, it is apparent from, in particular, paragraphs 167, 114 and 137 above that the lack of any quantification of the aid linked to the State guarantees, the lack of any distinction between the construction and operational phases and the lack of any sufficiently precise limitation on the aid linked to the State guarantees in terms of its amount and in terms of time already demonstrate that the analysis of the compatibility of the State guarantees with the internal market was insufficient.
- 188 Second, the applicants correctly argue that the Commission also failed to examine whether the same result could have been achieved by requiring less aid, for example, by introducing a form of limited guarantee premium, by limiting the guarantees to cover less than 100% of the amount of each loan covered, by limiting the duration of the State guarantees or by verifying whether the extent of the aid was limited to the minimum necessary. No analysis of that kind was carried out in the contested decision.
- 189 The assertion, in recital 129 of the contested decision, that the aid linked to the State guarantees covering 100% of the Consortium's liabilities and to tax advantages is proportionate and limited to the minimum necessary, merely because of the nature and size of the Fixed Link project, is plainly insufficient and unsubstantiated. It must be recalled that Article 107(3)(b) TFEU, as a derogation from the general principle of the incompatibility of State aid with the internal market laid down in Article 107(1) TFEU, must be interpreted strictly (see judgment of 9 April 2014, *Greece v Commission*, T-150/12, not published, EU:T:2014:191, paragraph 146 and the case-law cited).
- 190 The Commission is indeed correct to state that the requirement, in paragraph 30 of the IPCEI Communication, to calculate an internal rate of return in cases where there is no counterfactual scenario, in order to verify that the amount of the aid does not exceed the minimum necessary, so that the project qualifying for the aid is sufficiently profitable, is mentioned solely as an 'example'. However, the obligation to 'verify that the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable' is no more than an expression of the general principle of proportionality, which is applicable in this case. It is clear that the Commission did not undertake an examination that was sufficient to verify whether the aid linked to the State guarantees was limited to the minimum necessary.
- 191 Last, the explanations, set out in recital 129 of the contested decision, that the use of more direct forms of aid would have increased the burden on the budgets of the Kingdom of Denmark and the Kingdom of Sweden and therefore the total cost of the project and that no guarantee had to date been drawn on, fail to dispel the doubts as to whether the aid element linked to the State guarantees was, in itself, limited to the minimum necessary. First, the 'burden on the budget' of the Kingdom of Denmark and the Kingdom of Sweden and the 'total cost of the project' are not necessarily equivalent to the aid element in the guarantees. Second, the contested decision does not sufficiently explain how to calculate the aid element linked to the guarantees and it follows from the foregoing that the aid granted to the Consortium is not sufficiently limited in amount or in duration, even when the commitments are taken into account. Consequently, even though more direct forms of aid might have been liable to generate more significant aid than the guarantees, it is not apparent from the contested decision that the aid linked with the State guarantees was, in itself, limited to the minimum necessary for attaining the objective of execution of the Fixed Link project of

common European interest. Third, it must be recalled that aid is granted at the time when a guarantee is offered, and not when the guarantee is mobilised or when it requires payments. Consequently, the fact that, to date, no guarantee has been drawn upon is of no relevance to an assessment of whether the aid contained in the guarantees is limited to the minimum possible. Moreover, a guarantee may, nonetheless, be drawn upon and may entail an actual loss of revenue for the State that is all the greater when the guarantees, as in this case, cover 100% of loans on the amount of which the limit is unknown.

192 None of the Commission's other arguments are capable of calling into question that finding.

193 First, the fact that the applicants do not demonstrate that any undertaking would have been capable of constructing an infrastructure project such as that involved in this case without State aid is not in any event of any relevance, since it relates to whether the aid was necessary and whether it was incentive aid, and not to whether it was proportionate.

194 Further, even if the commitments given by the Kingdom of Denmark and the Kingdom of Sweden are taken into consideration, it is apparent from paragraphs 128, 129, 132, 134 to 137 above that the Commission failed to conduct a sufficient examination of whether there was any limit on the aid contained in the guarantees and, a fortiori, whether that aid was limited to the minimum necessary for attaining the objective pursued, when the loans that are 100% covered by the guarantees may be taken out over a period that extends until the end of the year 2040, with no indication of any limit on their amount and on their maximum repayment periods.

195 It is therefore not apparent from the Commission's examination that the Commission had sufficient evidence to assert, as it did, that the aid contained in the State guarantees was limited to the minimum necessary for the execution of the Fixed Link.

196 It follows from the foregoing that the applicants have shown that there was an insufficient and incomplete examination with respect to the necessity and the proportionality of the aid at issue, an indication of serious difficulties which should have led the Commission to initiate the formal investigation procedure.

197 The fifth ground of objection in the second part must therefore be upheld.

198 In so far as, particularly in recitals 129, 134 and 137 of the contested decision, the Commission assessed the limits, necessity and proportionality of the Danish tax aid in the same way as for the State guarantees and concluded that, assessed 'jointly', the Danish tax aid and the State guarantees were necessary and proportionate to the objective of general interest pursued, the Court must hold that the insufficiencies identified in the examination of the State guarantees extend also to the examination of the compatibility of the Danish tax aid.

199 Consequently, there is no need to give a ruling on the seventh ground of objection, that there was an insufficient examination of the interdependence of the advantages relating to the State guarantees and to the Danish tax aid and of the relevance of the link between those tax advantages and the repayment period of the Consortium's loans.

(iii) The sixth ground of objection, on the lack of examination of the negative effects of the aid granted to the Consortium in terms of distortion of competition and the effect on trade between Member States and the failure to weigh the positive and negative effects of that aid

200 In the sixth ground of objection, the applicants rely, in essence, on two arguments. First, they claim that there was no examination at all of the negative effects of the State aid

granted to the Consortium on competition and trade between Member States. Second, they claim more specifically that there was no weighing of the positive effects of that aid in terms of the realisation of the objective of common interest concerned against its negative effects on competition and trade between Member States.

- 201 According to the applicants, the Commission erred in focusing, in recital 129 of the contested decision, on the effects which recourse to other forms of aid would have had on the budgets of the Kingdom of Denmark and the Kingdom of Sweden, instead of examining the effects of the aid at issue on competition and trade between Member States. The applicants state that the so-called ‘balancing’ test, weighing the positive effects of the aid on the realisation of the IPCEI against the negative effects on competition and trade between Member States was however applicable in this case, since it was laid down by the General Court in the judgment of 25 June 1998, *British Airways and Others v Commission* (T-371/94 and T-394/94, EU:T:1998:140, paragraph 283), and has been incorporated in almost all guidelines since, not least in paragraph 26 and paragraphs 40 to 44 of the IPCEI Communication.
- 202 The Commission does not accept that argument and contends, in essence, that the origin of the balancing test was the wording of Article 107(3)(c) TFEU, in relation to aid to facilitate the development of certain economic activities or of certain economic areas, but that this test is not part of the normal criteria used in the examination of compatibility under Article 107(3)(b) TFEU. Although the IPCEI Communication mentions the balancing test, the Commission considers that it was inapplicable *ratione temporis* in this case.
- 203 In the first place, by their arguments, the applicants complain that the Commission did not analyse, in the examination of compatibility, the effects of the aid at issue in terms of distortion of competition and the effects on trade within the European Union.
- 204 In accordance with the case-law, economic assessments pursuant to Article 107(3)(c) TFEU, in respect of which the Commission enjoys a broad discretion, must be made in an EU context, which means that the Commission is under an obligation to examine the impact of the aid on competition and trade within the European Union (see judgment of 25 June 1998, *British Airways and Others v Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 282 and the case-law cited).
- 205 It must be recalled that, according to Article 107(1) TFEU, ‘[s]ave 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 is, in so far as it affects trade between Member States, incompatible with the internal market. As a derogation from the general principle of the incompatibility of State aid with the internal market laid down in Article 107(1) TFEU, Article 107(3)(b) TFEU must be interpreted strictly (see judgment of 9 April 2014, *Greece v Commission*, T-150/12, not published, EU:T:2014:191, paragraph 146 and the case-law cited).
- 206 It has however also been held that the Commission enjoys a wide discretion when applying Article 107(3)(b) TFEU, the exercise of which involves assessments of an economic and social nature which also have to be made within an EU context (judgment of 12 December 2014, *Banco Privado Português and Massa Insolvente do Banco Privado Português v Commission*, T-487/11, EU:T:2014:1077, paragraph 83).
- 207 Consequently, the Commission is also bound to examine the impact of aid on competition and trade within the European Union in its economic assessments for the purposes of the application of Article 107(3)(b) TFEU. That is moreover consistent with settled case-law

(see judgment of 6 July 1995, *AITEC and Others v Commission*, T-447/93 to T-449/93, EU:T:1995:130, paragraphs 136, 137, 141 and 142 and the case-law cited).

- 208 In this case, there is no dispute that the Commission did not carry out such an examination. In recital 129 of the contested decision, the Commission considered the potential effects of other forms of aid (capital injections, State loans) on the total cost of the project and on the budgets of the Kingdom of Denmark and of the Kingdom of Sweden, but at no time did the Commission envisage the effects of the aid at issue on competition or trade within the European Union, as part of the analysis of compatibility. However, the applicants' particular complaint seems to have been that the aid at issue enabled the Consortium to set the toll charges for the Fixed Link artificially low.
- 209 Consequently, the Court must uphold the sixth ground of objection, in that it concerns the lack of an examination of the effects of the aid granted to the Consortium on the distortion of competition and the effects on trade between Member States.
- 210 In the second place, as regards more specifically the failure to weigh the positive effects of aid against its negative effects, in the judgment of 25 June 1970, *France v Commission* (47/69, EU:C:1970:60, paragraph 7), the Court of Justice held that, in order to determine whether aid adversely affects trading conditions to an extent contrary to the common interest, it is necessary to consider, in particular, whether there is an imbalance between the charges imposed on the undertakings concerned on the one hand and the benefits derived from the aid in question on the other. The General Court concluded that the Commission is under an obligation, when examining the impact of State aid, to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition, as the Commission itself pointed out in its *XIVth Report on Competition Policy* (1984, p. 130, paragraph 202) (judgment of 25 June 1998, *British Airways and Others v Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraphs 282 and 283).
- 211 While that statement was made in the context of a case relating to Article 107(3)(c) TFEU, it is clear that the need for such a 'weighing' of the expected positive effects in terms of realisation of the objectives set out in Article 107(3)(a) to (e) TFEU against the negative effects of aid in terms of distortion of competition and the effect on trade between Member States is no more than an expression of the principle of proportionality and the principle that the exemptions set out in Article 107(3) TFEU must be interpreted strictly.
- 212 Further, if it were to be accepted, as is suggested by the Commission, that such a weighing should take place with respect to some of the exemptions laid down in Article 107(3) TFEU, but not with respect to others, that would be equivalent to recognising that, with respect to some of the objectives referred to in Article 107(3) TFEU, aid could be declared to be compatible even if its positive effects in terms of realisation of the specified objectives were inferior to its negative effects in terms of distortion of competition and the effect on trade. Such an interpretation would be likely to establish an asymmetry in the assessment of the various exemptions referred to in Article 107(3) TFEU, which would undermine the effectiveness of the State aid rules.
- 213 For the sake of completeness, it must be observed that the fact that the IPCEI Communication mentions that test, in paragraph 26 and in point 4.2, headed 'Prevention of undue distortions of competition and balancing test', clearly shows that the Commission itself considers that test to be applicable for the assessment of compatibility carried out with regard to Article 107(3)(b) TFEU. Contrary to what is contended by the Commission, if the IPCEI Communication were not to be applicable *ratione temporis*, that cannot invalidate the

idea that the balancing test is applicable *ratione materiae* to aid that promotes an IPCEI, in accordance with Article 107(3)(b) TFEU.

- 214 The Court must therefore reject the Commission's argument that the balancing test is not applicable to the analyses carried out with regard to Article 107(3)(b) TFEU.
- 215 In this case, the Commission contends that it is clear that the negative effects of the aid in terms of competition are limited to the introduction of a service that was an alternative to the ferry services that traditionally provided transport across the Øresund Strait; that the Kingdom of Denmark and the Kingdom of Sweden considered however that it was in the common interest of the European Union to have an improved connection, and that, consequently, the positive effects of the aid clearly outweighed the negative effects. It must however be said that that argument is nowhere stated in the contested decision, which reflects the lack of any examination of that matter by the Commission.
- 216 Consequently, the Court must also uphold the sixth ground of objection in the second part, in so far as it concerns the failure to weigh the negative and positive effects of the aid at issue, that inadequacy being an indication of serious difficulties.
- 217 In conclusion, there being no need to give a ruling on the applicability *ratione temporis* of the 2008 Notice on guarantees and the IPCEI Communication, it is apparent from the second part of the fourth plea in law that the examination of the compatibility of the State aid granted to the Consortium was insufficient and incomplete in that the Commission, (i) did not verify the existence of conditions governing the mobilisation of the State guarantees; (ii) was incapable, following its preliminary review, of determining the aid element contained in the State guarantees; (iii) failed to verify the possibility that operating aid covered operating costs; (iv) was unaware of any limit on the amount or any limit on the precise duration of the aid at issue; (v) was not in possession of sufficient evidence that the aid linked to the State guarantees and the aid linked to the Danish tax aid were limited to the minimum necessary for the realisation of the IPCEI and, (vi) failed to examine the effects of the aid at issue on competition and trade between the Member States, and failed to weigh its negative effects against its positive effects. Consequently, it is clear that the Commission experienced serious difficulties in relation to determining the compatibility of the State aid at issue, which ought to have compelled the Commission to initiate the formal investigation procedure.

(c) Conclusion on the fourth plea in law in relation to the State aid granted to the Consortium

- 218 In the light of the foregoing, and in particular paragraphs 81 to 83 and 217 above, it must be concluded that there is a body of objective and consistent evidence that establishes that the Commission was not, at the time of adoption of the contested decision, in a position to overcome the serious difficulties identified in this case (see, to that effect, judgment of 25 November 2014, *Ryanair v Commission*, T-512/11, not published, EU:T:2014:989, paragraph 106).
- 219 In those circumstances, it was the duty of the Commission to initiate the formal investigation procedure, in order to gather all evidence relevant to the verification of the disputed matters and to enable the applicants and other interested parties to submit their observations in the course of that procedure.
- 220 Accordingly, the Court must, on the basis of the fourth plea in law on the infringement of the procedural rights of the interested parties, annul the contested decision in so far as it raises no objection with respect to the State guarantees granted to the Consortium by the

Kingdom of Denmark and the Kingdom of Sweden and the Danish tax aid granted to the Consortium.

- 221 It must be recalled that the applicants had also claimed that there were errors of law and manifest errors of assessment relating to the classification of the State aid granted to the Consortium and its compatibility with the internal market, as part of their first two pleas in law, and a breach of the obligation to state reasons with respect to the analysis of its classification and its compatibility, in their fifth plea in law. It follows, however, from paragraph 220 above, that there is no longer any need to examine the arguments concerning the State guarantees and the Danish tax aid granted to the Consortium that are relied on in those pleas in law.

2. The first, second, fourth and fifth pleas in law, in so far as they concern measures not classified as State aid

- 222 In the third paragraph of Section 6 of the contested decision, headed 'Conclusion', the Commission found, inter alia, that the Danish joint taxation regime, on the one hand, and the measures granted to the parent companies of the Consortium for the financing of the rail hinterland connections in Sweden and Denmark, on the other, did not constitute State aid within the meaning of Article 107(1) TFEU. Those two findings are challenged by the applicants in a number of their pleas in law.
- 223 The Court considers it appropriate to begin by examining the measures of financial support granted to the parent companies of the Consortium.

(a) The first, fourth and fifth pleas in law, in so far as they concern measures of financial support granted to the parent companies of the Consortium

- 224 In their fifth and in their first pleas in law, respectively, the applicants challenge the statement of reasons for and the merits of the Commission's analysis to the effect that the measures of State support in favour of the parent companies of the Consortium for the construction and operation of the rail hinterland connections cannot be classified as State aid within the meaning of Article 107(1) TFEU. In their fourth plea in law, the applicants refer, in essence, to the manifest errors of assessment complained of in the first plea in law, and argue that those errors are evidence of an insufficient and incomplete examination, which proves that there were serious difficulties which ought to have obliged the Commission to initiate the formal investigation procedure. In response to a question from the Court, the applicants explained that their arguments concerned only the rail hinterland connections, and not the road hinterland connections.
- 225 It must be stated that the Kingdom of Denmark contends that the applicants have no standing to bring proceedings with respect to the measures relating to the financing of the rail hinterland connections, on the ground that the applicants are not active in any market for the construction and operation of rail hinterland connections. That objection affects both the pleas in law challenging the merits of the part of the contested decision devoted to those connections and the fourth plea in law, relating to the infringement of the procedural rights of the interested parties.
- 226 The applicants maintain that that argument of the Kingdom of Denmark is itself inadmissible and unfounded.
- 227 Although the Kingdom of Denmark does not have, as an intervener in the present proceedings, standing to raise an objection of inadmissibility in relation to the action if that objection was not pleaded by the party in support of whose forms of order the Kingdom of

Denmark has intervened (see, to that effect, judgments of 24 March 1993, *CIRFS and Others v Commission*, C-313/90, EU:C:1993:111, paragraphs 20 to 22, and of 13 April 2011, *Germany v Commission*, T-576/08, EU:T:2011:166, paragraphs 38 and 39), the conditions governing the admissibility of actions involve public policy considerations and can be examined at any time by the Courts of the European Union of their own motion (see, to that effect, judgment of 24 March 1993, *CIRFS and Others v Commission*, C-313/90, EU:C:1993:111, paragraph 23 and the case-law cited).

- 228 According to the case-law, it is also for the Court to assess whether the proper administration of justice justifies, in the circumstances of the case, the dismissal of an action on the merits without ruling on admissibility (see, to that effect, judgment of 26 February 2002, *Council v Boehringer*, C-23/00 P, EU:C:2002:118, paragraphs 51 and 52).
- 229 In this case, in the interests of procedural economy, it is appropriate to examine the arguments relied on by the applicants with respect to the rail hinterland connections, without first ruling on the admissibility of the action in that regard, since those arguments fail, as it happens, for the reasons set out below, to demonstrate either that the Commission was in breach of the obligation to state reasons and of the obligation to initiate the formal investigation procedure, or that the Commission infringed Article 107(1) TFEU.
- 230 On the substance, the applicants' arguments in the fifth plea in law, on the statement of reasons, the fourth plea in law, on the infringement of procedural rights, and the first plea in law, on the merits, can be broken down, in essence, into two parts: (i) the fact that the construction and operation of the rail hinterland connections constitute in reality economic activities and (ii) the fact that the measures at issue are in reality liable to distort competition and to affect trade between Member States.

(1) The existence of an economic activity

- 231 In their fifth and in their first pleas in law, the applicants claim, in essence, that the Commission failed to state sufficient reasons for its decision and committed a manifest error of assessment, in finding that the construction and operation of the rail hinterland connections did not constitute economic activities and that, consequently, the parent companies of the Consortium ought not to have been considered to be undertakings within the meaning of Article 107(1) TFEU. In their fourth plea in law, the applicants claim that the examination in that regard was insufficient and incomplete.
- 232 The Commission, supported by the Kingdom of Denmark and by the Kingdom of Sweden, considers that those arguments are entirely ineffective and unfounded.
- 233 It is apparent from recital 80 of the contested decision that the Commission, in order to exclude the measures at issue from the scope of Article 107(1) TFEU, relied not on the criterion of the economic nature of the activity of construction and operation of the rail hinterland connections, but on the fact that the measures under consideration were not, in any event, liable to distort competition and affect trade between Member States. The Commission stated that, 'even if SVEDAB and A/S Øresund were considered as undertakings with respect to the planning, construction and management of the [rail hinterland connections], the measures they [received] for the financing of those activities [were] not liable to distort competition or affect trade between Member States'. Accordingly, even if that ground of objection were well founded, it would not entail the annulment of the contested decision.
- 234 Consequently, the first ground of objection must be rejected as being ineffective, in the context of the fifth plea in law and also in the context of the fourth and first pleas in law.

(2) *Distortion of competition and effect on trade between Member States*

- 235 In their fifth, fourth and first pleas in law, the applicants challenge, in essence, the finding that the measures of support granted to the parent companies of the Consortium are not liable to distort competition and affect trade between Member States.
- 236 In their fifth plea in law, the applicants claim that insufficient reasons were stated in the contested decision, in that recital 80 of that decision states that ‘there [was] no competition in the market for the operation and management of the national rail network[s]’. The applicants consider that that assertion is unsubstantiated.
- 237 According to recital 80 of the contested decision, ‘the management and operation of the national network concerned [are] carried out in national, geographically closed and separated markets that are not subject to competition’. The Commission inferred from that finding that there was no risk that the measures of support to the parent companies of the Consortium would distort competition with respect to the planning, construction and management of the rail hinterland connections and would affect trade between Member States.
- 238 The Court must hold that that statement, while very succinct, nonetheless sufficiently set out the facts and the legal considerations that were taken into account in the Commission’s assessment, and is not confined to reproducing the wording of the criteria in Article 107(1) TFEU. Consequently, the Court must reject any claim that the reasons stated in recital 80 of the contested decision are insufficient, in the context of the fifth plea in law.
- 239 In their fourth plea in law, the applicants refer to the manifest errors of assessment mentioned in their first plea in law, in that the Commission concluded, in recital 80 of the contested decision, that the State support to the parent companies of the Consortium was not liable to distort competition and affect trade between Member States in the market for the construction, management and operation of the rail hinterland connections. According to the applicants, those errors demonstrate that the Commission encountered serious difficulties in the classification of those measures under Article 107(1) TFEU.
- 240 The case-law referred to in paragraphs 60 to 63 above must guide the Court in its examination of the applicants’ arguments in relation to the serious difficulties encountered by the Commission in the classification of those measures under Article 107(1) TFEU.
- 241 Further, according to the Court’s case-law, State aid, as defined in the FEU Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Courts of the European Union must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission’s assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see judgment of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, paragraph 111 and the case-law cited).
- 242 In accordance with the case-law, the Commission is not required to establish that aid has a real effect on trade between Member States and that competition is actually being distorted, but is required only to examine whether that aid is capable of affecting such trade and distorting 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).
- 243 In the first place, it is appropriate to examine the applicants’ argument that the measures concerned are capable of affecting trade between Member States and distorting competition

for the sole reason that they placed the parent companies of the Consortium in a position that was more favourable than that of their competitors, by enabling them more easily to penetrate the market of another Member State where management of the railway infrastructure was open to competition. The applicants add that nothing in the rules governing the establishment of the parent companies of the Consortium or in their statutes prevents them from engaging in other activities.

244 The Commission and the Kingdom of Denmark and the Kingdom of Sweden do not accept that analysis. The Kingdom of Denmark states, with respect to A/S Øresund, that that company cannot undertake any tasks, either in Denmark or abroad, other than those assigned to it by the Lov om anlæg af fast forbindelse over Øresund (Law on the construction of the Fixed Link over the Øresund) of 19 August 1991, and cannot therefore offer its services on markets other than those defined by that law. In the same way, the Kingdom of Sweden argues that the objects of SVEDAB are restricted to the Fixed Link.

245 It is apparent from recitals 36, 39 and 74 to 77 of the contested decision that A/S Øresund and SVEDAB were created in order each to hold 50% of the share capital of the Consortium and to plan, construct and manage the hinterland connections. They are the owners of the rail hinterland connections, as, it may be said, is not disputed by the applicants. They delegated the operation and management of those connections to the respective national railway infrastructure managers (in 1998 to Banedanmark, in Denmark, and in 1999 to Trafikverket, in Sweden). It is stated that the parent companies of the Consortium are not engaged in any other activities.

246 Article 6 of the Law on the construction of the Fixed Link over the Øresund provides for the creation of A/S Øresund. It is stated that '[t]hat company shall be responsible, as the contracting authority, for the construction of the [Danish road and rail hinterland connections]' and that it 'shall conclude an agreement with a limited company created by the Swedish State in order to constitute the [C]onsortium which will be responsible for design and other preparatory work and for the financing, construction and operation of the [fixed] link over the Øresund'. Article 6(3) of the Law on the construction of the Fixed Link over the Øresund also states that '[t]he holding company and its subsidiaries may, on a commercial basis, provide contracting consultancy services with respect to the Øresund link'. It is not apparent from those provisions that A/S Øresund is permitted to carry out tasks other than those specified, which are expressly limited to the Øresund Fixed Link project, including any contracting consultancy services.

247 In any event, the Kingdom of Denmark states that Article 6(3) of the Law on the construction of the Fixed Link over the Øresund has since been repealed and that, under Article 5 of the Lov No 588 om Sund og Bælt Holding A/S (Law No 588 on Sund & Bælt Holding A/S) of 24 June 2005, which has superseded it, it is another company, Sund og Bælt Partner A/S, which can provide contracting consultancy services to A/S Øresund on a commercial basis.

248 Concerning SVEDAB, Article 3 of its articles of association states the following:

'The objects of the company's activities shall be, directly or indirectly through a consortium, to own, administer, operate and maintain (a) a fixed link across the Øresund for road and rail traffic between Copenhagen and Malmö, financed by toll charges, hereinafter referred as the Øresund link, including the necessary areas and infrastructures required for the collection of toll charges, customs procedures and passport control, and (b) the necessary rail and road connections up to Øresund bridge from the existing Swedish rail and road network, and to

own and administer shares in undertakings with activities within the infrastructure and to engage in activities compatible therewith.'

- 249 Consequently, the activity of SVEDAB, even through ownership of share capital of other undertakings, is expressly limited to the infrastructure of the Øresund Fixed Link. Further, according to the Kingdom of Sweden, any extension of the activity of SVEDAB would require its approval, as is not disputed by the applicants.
- 250 It is clear, in that regard, that the applicants' assertion that there is nothing in the rules governing the establishment of the parent companies of the Consortium or in their statutes that prevents them from engaging in other activities is unsubstantiated.
- 251 Moreover, it must be recalled that the parent companies of the Consortium delegated the management of the rail hinterland connections to their respective national railway infrastructure managers.
- 252 It follows from the foregoing that, even if it were the case that management of the railway infrastructure is indeed open to competition in other Member States, the parent companies of the Consortium would not be liable to penetrate such a foreign market.
- 253 In the second place, it must be recalled that it is not necessary, for aid granted by a Member State to strengthen the position of some undertakings as compared with that of other competing undertakings, that the beneficiary undertakings are themselves involved in trade within the European Union. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (see judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 67 and the case-law cited). In that context, the Court must examine whether the Commission experienced serious difficulties in stating, in recital 80 of the contested decision, that 'there [was] no competition in the market for the operation and management of the national rail network' in Denmark and Sweden.
- 254 In that regard, since the parent companies of the Consortium are confined to tasks relating to the hinterland connections of the Fixed Link, it would even be appropriate to ascertain whether, by increasing the capacity of those companies, the Danish and Swedish States prevented the entry of competitors into the market where those companies were active, or, in this case, into only the market sectors relating to the Danish and Swedish hinterland connections of the Fixed Link.
- 255 In recitals 76 and 77 of the contested decision, the Commission states that the parent companies of the Consortium are the owners of the Danish and Swedish hinterland connections, but that Banedanmark and Trafikverket are the infrastructure managers. It is added that Banedanmark carries out all tasks related to infrastructure management of the railway, including provision of capacity, traffic regulation and safety measures and also covers the costs for this purpose, for example costs related to maintenance and reinvestment. It is apparent, in essence, from the contested decision that Banedanmark and Trafikverket pay, respectively, to A/S Øresund and to SVEDAB a fee for the use of the network by the undertakings providing rail transport services. In recital 78 of the contested decision, it is stated that the hinterland connections form an integral part of transport infrastructure in each country. In recital 80 of the contested decision, the Commission considered, in essence, that 'due to the nature of the national rail infrastructure network in both Member States ... there [was] no competition in the market for the operation and management of the national rail network'. Consequently, the public financial support granted to the parent companies of the Consortium for the financing of the planning, construction and management of the rail

hinterland connections was not considered to be liable to distort competition and to affect trade between Member States.

- 256 As a preliminary point, the Commission, in response to a question from the Court, stated that, in the contested decision, the terms ‘management’ and ‘operation’ of the rail network were not fully aligned with the terminology of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) (OJ 2012 L 343, p. 32), that directive providing no definition of the ‘operation’ of the railway infrastructure. In the contested decision, the Commission states that it used the terms ‘management’ and ‘operation’ of the infrastructure in order to distinguish the activity of making the network available to railway undertakings against payment of consideration. According to the Commission, the essential functions of an infrastructure manager as described in Article 7 of Directive 2012/34 can be regarded as covering the ‘operation’ of the network within the meaning of the contested decision.
- 257 As a further preliminary point, it must be emphasised that the parties do not dispute that the EU directives on the liberalisation of the railway sector have not imposed on the Member States any obligation to open up management of the railway infrastructure itself to competition. According to recital 71 of Directive 2012/34, ‘railway infrastructure is a natural monopoly’.
- 258 Under Article 3(2) of Directive 2012/34, first, an ‘infrastructure manager’ is defined as ‘any body or firm responsible in particular for establishing, managing and maintaining railway infrastructure, including traffic management and control-command and signalling’, and, second, ‘the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or firms’.
- 259 Further, Article 7 of Directive 2012/34, on the independence of essential functions of an infrastructure manager, provides:

‘1. Member States shall ensure that the essential functions determining equitable and non-discriminatory access to infrastructure are entrusted to bodies or firms that do not themselves provide any rail transport services.

The essential functions [of an infrastructure manager] shall be:

- decision-making on train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths;
- decision-making on infrastructure charging, including determination and collection of the charges ...’.

- 260 It is stated in the third subparagraph of Article 7(1) of Directive 2012/34 that ‘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’.
- 261 For the purposes of the present case, except when setting out the parties’ arguments, reference will therefore be made solely to the ‘management’ of the railway network, that term to be understood as encompassing the levying of charges on rail operators for use of the infrastructure, that is to say, the ‘operation’ of the infrastructure within the meaning of the contested decision.

- 262 In support of their case that the management/operation of the railway infrastructure is open to competition in Denmark and Sweden, the applicants rely, in essence, on three types of argument. First, the applicants claim that there are licences to manage, operate and maintain the railway infrastructure in those two States. Second, Banedanmark itself won the right to operate the Danish rail hinterland connections following a procurement procedure in competition with other operators. Third, the applicants claim that some operators from other Member States compete fiercely in procurement procedures organised for the operation and maintenance of the Danish and Swedish railway infrastructure. In Sweden, it is the Swedish Transport Administration, or Trafikverket, that organises such procurement procedures for the operation and maintenance of the railways.
- 263 The Commission, and the Kingdom of Denmark and the Kingdom of Sweden, do not accept those arguments and state that the applicants confuse two distinct markets, namely the operation and management of the railway infrastructure, on the one hand, and the maintenance of the network, on the other. They contend that only the market for the maintenance of the network on behalf of the owner or the State rail network manager is open to competition.
- 264 The Kingdom of Denmark also disputes the assertion that Banedanmark currently has a unit called 'Banedanmark Enterprise' which carries out operational activities on the network in competition with other undertakings. According to the Kingdom of Denmark, Banedanmark has a division called 'Produktion' which is responsible for general maintenance of the railway infrastructure managed by Banedanmark, and that division can carry out maintenance tasks for other customers. Opening maintenance of the rail network to competition is, however, irrelevant, given that A/S Øresund does not operate and has never operated in that market. Since 1 September 2015 responsibility for, and the costs of, maintenance of the rail hinterland connections has been re-transferred from Banedanmark to A/S Øresund, although A/S Øresund cannot offer maintenance services to other parties, as it is responsible only for maintaining its own rail infrastructure, with the option of subcontracting such tasks.
- 265 In this case, as contended by the Commission and by the Kingdom of Denmark and the Kingdom of Sweden, it is apparent from the applicants' arguments as a whole that they confuse separate markets, namely the management of the railway infrastructure, on the one hand, and the maintenance of that infrastructure, on the other.
- 266 While maintenance appears to form part of the non-essential tasks of an infrastructure manager, in terms of the definition set out in paragraph 258 above read together with Article 7 of Directive 2012/34, it must be said that that does not contradict the fact that maintenance may constitute a market which is distinct from management as such, and with respect to which an infrastructure manager may organise tendering procedures that are open to competition.
- 267 As a preliminary point, it is clear that ownership of the Danish rail hinterland connections is governed by Article 1(3) of Law No 588 on Sund & Bælt Holding A/S, which conferred ownership on A/S Øresund, to the exclusion of any other undertaking. Likewise, SVEDAB is the owner of the Swedish rail hinterland connections. That is not disputed by the applicants.
- 268 First, it must be emphasised that the applicants do not challenge the fact that, as stated in recitals 36, 39 and 76 of the contested decision, management of the Danish and Swedish rail hinterland connections was delegated to Banedanmark in 1998 and to Trafikverket in 1999. Further, the legislature conferred on Banedanmark, which is a department of the Ministry for

Transport and Building, the management of the State railway infrastructure, including the railway infrastructure located on the hinterland connections of the Fixed Link. That is apparent from, inter alia:

- Article 4(1) of Law No 588 on Sund & Bælt Holding A/S;
- Article 2(1) of Bekendtgørelse No 1222 om Banedanmarks opgaver og beføjelser (Regulation No 1222 on the tasks and powers of Banedanmark) of 21 November 2014;
- Article 16(1) and (2) of the Jernbanelov No 686 (Law No 686 on railways) of 27 May 2015, which provides that ‘Banedanmark is the State railway infrastructure manager’ and that ‘except for maintenance and reinvestment, Banedanmark is the rail infrastructure manager with respect to ... the Danish rail connections to the fixed infrastructure crossing the Øresund (the line to Kastrup and the line to Vigerslev)’.

269 Consequently, the applicants’ claim that Banedanmark had ‘won’ the management of the railway infrastructure situated on the hinterland connections after a public tendering procedure is plainly misconceived.

270 Second, the press releases produced by the applicants with a view to proving that Banedanmark had failed or been successful in tendering procedures in competition with other undertakings refer to work of ‘reconstruction’, ‘improvement’ and ‘renewal’ of railway lines and therefore manifestly do not relate to the management of the infrastructure as such, but rather to maintenance, as the applicants recognise, it may be said, in paragraph 50 of the application, where they refer to the ‘fierce competition’ faced by Banedanmark Enterprise ‘for the contracts to maintain rail infrastructure’.

271 Third, as stated by the Commission, and by the Kingdom of Denmark and the Kingdom of Sweden, the fact that, both in Denmark and in Sweden, undertakings which satisfy certain conditions may obtain a licence or an authorisation to manage the railway infrastructure does not mean that there is competition ‘in’ or ‘for’ the management of the principal national rail networks. These are two separate issues.

272 Fourth, it is clear that the applicants fail to demonstrate that the companies mentioned in the application, InfraNord, Strukton, Intratrek and VR Track, are in fact active in relation to the management of the railway infrastructure as such, or that they carry out activities other than maintenance of some parts of the railway infrastructure, including, it may be said, the Fixed Link.

273 The circumstance that the companies mentioned in paragraph 272 above carry out maintenance of some parts of the Danish or Swedish rail network following a procurement procedure by tendering is not capable of demonstrating that the management of the Danish railway infrastructure as such and, a fortiori, that of the rail hinterland connections from the Fixed Link, is open to competition. Nor do the applicants demonstrate that the other undertakings to which they refer (A-Train AB and Inlandsbanen AB), which are, according to the Commission, operators of regional railway lines in Sweden whose main activity is the provision of transport services by rail for goods and passengers, carry out any management activity with respect to some parts of the network.

274 Fifth, as regards the complaint of VR Track to the Swedish competition authority, it is clear that, in the decision of that authority, VR Track is described as a ‘railway company’, and not as an infrastructure manager, and InfraNord is described as a ‘a State company which maintains all types of installations and plans and carries out all forms of new construction and remodelling projects related to rail’. In any event, no conclusion can be drawn from that

decision, since the Swedish competition authority concluded that, 'at this stage, [it had] not had an opportunity to take a position on which relevant market the contracts concerned'. Last, it is clear that the tendering procedures did not relate to the rail hinterland connections with the Fixed Link. As regard the document No 30 annexed to the application, that is no more than a brief description of the activity of VR Track extracted from that company's website. Suffice it to state that the text on that type of website, essentially for commercial purposes, is no basis for a clear legal assessment of the nature of an undertaking's activities.

275 Sixth, as regards the applicants' argument, raised in their Reply, that, since the Commission concluded that the aid granted to the Consortium was as such liable to distort competition and affect trade between Member States, on the one hand, and that the project was integrated, on the other, the aid granted for the rail hinterland connections would also affect trade and competition, suffice it to state that, following that argument, it is the market in transport across the Øresund, corresponding to the market in which the Consortium alone is active, that would be affected, and not that in management of the rail connections between the Fixed Link and the hinterland.

276 It follows from the foregoing that the applicants have not brought to light any aspect in which the examination was insufficient or any serious difficulties as regards the finding that the management of the Danish and Swedish rail networks, and in particular that of the rail hinterland connections with the Fixed Link, is not open to competition. Those arguments, in the context of the fourth plea in law, must therefore be rejected.

277 Consequently, since, in addition, no error of assessment has been demonstrated, those arguments must also be rejected in the context of the first plea in law.

(b) The second and fourth plea in laws, in so far as they concern the Danish joint taxation regime

278 The applicants claim, in their second plea in law, that the Commission erred in concluding that the joint taxation regime did not constitute State aid. They then argue, in their fourth plea in law, that the examination was insufficient, in that the Commission did not take into account the optimising effects of the Danish joint taxation regime on the distortion of competition resulting from the Danish tax aid granted to the Consortium.

279 The Commission disputes those arguments in their entirety.

280 In this case, in recitals 104 and 108 of the contested decision, the Commission considered, with respect to the joint taxation regime, that this was a mandatory scheme applicable to all Danish undertakings within a group and that it did not specifically relate to the Consortium. The Commission concluded that the joint taxation regime did not constitute a selective advantage in favour of the Consortium and, therefore, did not constitute State aid within the meaning of Article 107(1) TFEU.

281 It is evident that the applicants offer no argument in their written pleadings capable of demonstrating that that regime is applicable only to the group of which the Consortium is a member, to the exclusion of other groups in Denmark. Consequently, the finding that the advantage relating to that joint taxation regime is not selective and therefore does not constitute State aid has not been rebutted. Since the joint taxation regime does not constitute State aid, within the meaning of Article 107(1) TFEU, the argument that that regime 'optimises' the advantages resulting from the special tax rules in Denmark is, consequently, ineffective.

282 It follows from the foregoing there was no serious difficulty, and no error in law or error of assessment, with respect to the joint taxation regime. Consequently, those arguments must be rejected in the context of the fourth and second pleas in law.

3. The second, fourth and fifth pleas in law, in so far as they concern the failure to take account of the cumulative effect of all the aid measures

283 In the context of their fifth plea in law, the applicants complain that the Commission erred in failing to examine the option open to the Kingdom of Denmark and the Kingdom of Sweden to grant State loans to the Consortium and to the parent companies of the Consortium and in failing to state the reasons why it did not carry out such an examination.

284 In the context of their fourth plea in law, the applicants rely, in essence, on the arguments put forward in the context of their second plea in law concerning the merits of the contested decision. The applicants claim that the Commission erred in declining to verify, in recital 56 of the contested decision, the cumulative effect of all the aid granted with respect to the same eligible costs of the Fixed Link project. The applicants claim that the Commission failed to verify the cumulative effect of both the aid granted directly to the Consortium, which is examined in the contested decision, namely the State guarantees and the Danish tax aid, and the additional aid measures granted directly to the Consortium or indirectly by means of aid granted to the parent companies of the Consortium or to Sund & Bælt, with the result that it was impossible properly to assess the necessity and proportionality of the State guarantees and the Danish tax aid. Those additional measures were however brought to the attention of the Commission by HH Ferries in its observations of 17 June and 9 September 2014. The applicants state that there was nothing to prevent the Commission from opening the formal investigation procedure in order to properly assess the compatibility of the aid measures at issue.

285 The applicants claim that HH Ferries notably informed the Commission, in its observations of 17 June and 9 September 2014, of the existence of the following additional Danish aid measures:

- State loans granted to the Consortium and to A/S Øresund pursuant to Article 7(1) of the Law on the construction of the Øresund Fixed Link;
- unlimited State guarantees granted to A/S Øresund, in particular for obtaining loans in order to inject capital into the Consortium, pursuant to Article 7(1) of the Law on the construction of the Øresund Fixed Link;
- State guarantees granted to Sund & Bælt under Law No 588 on Sund & Bælt Holding A/S in order to obtain loans guaranteed by the Danish State to inject capital into A/S Øresund; according to the applicants, those guarantees benefit not only A/S Øresund, but also the Consortium.

286 As regards the additional Swedish aid, the applicants state that HH Ferries also informed the Commission of the existence of, inter alia, a guarantee securing the share capital of SVEDAB. It is apparent from its further complaint in September 2014 that HH Ferries also drew the attention of the Commission to State loans to SVEDAB and to other measures.

287 The Commission, supported by the Kingdom of Denmark, disputes those arguments in their entirety and, in particular, the existence of State loans and even the possibility of granting such loans to the Consortium.

288 In recital 49 of the contested decision, the Commission restricted the scope of its decision to the public financing of the Fixed Link and the hinterland connections. The Commission expressly limited its examination to the following measures:

- the State guarantees concerning the Consortium (recitals 50 to 53 of the contested decision);
- the following Danish tax aid:
 - the rules applicable to the Consortium with regards to the depreciation of assets (recital 54(a) of the contested decision);
 - the rules applicable to the Consortium with regards to loss carry forward (recital 54(b) of the contested decision);
 - the joint taxation regime (recital 54(c) of the contested decision);
- the financial support measures granted to the parent companies of the Consortium for the financing of the planning, construction and operation of the road and rail hinterland connections (recital 55 of the contested decision).

289 The Commission made plain, in recital 56 of the contested decision, that its decision did not cover ‘other possible measures granted by Denmark or Sweden to the Consortium, A/S Øresund, [SVEDAB], [Sund & Bælt] or to any other related company’.

290 As regards possible additional aid measures granted to the Consortium, such as possible State loans, which do not fall within the scope of the contested decision, it must be emphasised that there is no general principle obliging the Commission, in all circumstances, to assess the compatibility of all aid measures with respect to the same eligible costs of a project, cumulatively. Article 8 of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ 2014 L 187, p. 1), which is relied in support of the applicants’ arguments, even if it were to be regarded as applicable to the present case, lays down rules that make it possible to accumulate, inter alia, aid in relation to the same eligible costs, provided that that cumulation does not exceed a certain aid intensity or a certain aid amount, as defined in Regulation No 651/2014, but solely for the purposes of the possibility of exempting that aid from notification. The same is true in essence, as regards the guidelines relied on by the applicants, namely the Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1) and the Guidelines on regional State aid for 2014-2020 (OJ 2013 C 209, p. 1). Accordingly and, a fortiori, there was no obligation to state particular reasons in that regard. Consequently, the compatibility of any additional aid that might be granted to the Consortium in order to finance the same costs as those examined in the contested decision may, if appropriate, be the subject of a subsequent decision by the Commission. As stated by the Commission, any such future decision will have to take into account aid granted with respect to the same costs and examined in an earlier decision that was then final. However, any such future decision could not affect any findings as to compatibility concerning the aid initially examined in an earlier decision.

291 As regards the financial support measures granted to the parent companies of the Consortium, including State loans, it is clear that those measures were properly examined in the contested decision in that they made possible the successful completion of the tasks of the parent companies in relation to the hinterland connections. In that regard, the Commission listed their various forms in recitals 35 to 40 of the contested decision. They included, for A/S Øresund, an initial capital injection through the intermediary of Sund &

Bælt, State guarantees, State loans and tax measures consisting of measures relating to the carrying forward of losses and depreciation of assets (recitals 36 to 38, the latter referring to recitals 40 to 47 of the contested decision). They included, for SVEDAB, initial capital injections, State loans, a credit guarantee and a capital adequacy guarantee (recitals 39 and 40 of the contested decision). Most of those measures had been reported in the observations submitted by the applicants on 17 June and 9 September 2014.

- 292 However, all those measures were correctly considered not to constitute State aid under Article 107(1) TFEU, since the parent companies of the Consortium were engaged in activities that were not open to competition, which precludes any possibility that trade might be affected and competition distorted (see paragraphs 276 and 277 above). Consequently, the applicants' argument that the examination was insufficient is misconceived. Further, the contested decision sufficiently set out the facts and the legal considerations that were taken into account in the Commission's assessment and enabled interested parties to understand the grounds of the Commission's reasoning and the Courts of the European Union to exercise their power of review with respect to the support measures granted to the parent companies of the Consortium, in particular with respect to the State loans.
- 293 As regards any State guarantees granted to Sund & Belt in order to inject capital into A/S Øresund, suffice it to state that, if those measures existed and were not examined, they could still be the subject of a future decision by the Commission. In any event, since those measures promote the activities of A/S Øresund, it must be recalled that that company is not active in a sector that is open to competition and that such measures are not capable of constituting State aid.
- 294 As regards more specifically the State guarantees granted to A/S Øresund to obtain loans in order to inject capital into the Consortium pursuant to Article 7(1) of the Law on the construction of the Øresund Fixed Link (see the second indent of paragraph 285 above), the Commission confirmed, in response to a written question from the Court, that it had not explicitly considered that possibility in the contested decision. It must therefore be held that that possibility is not covered by the contested decision, but could be the subject of a future decision by the Commission.
- 295 As regards the claims that, in essence, the financing of the parent companies of the Consortium that was examined in the contested decision was indirectly of benefit to the Consortium's activities for the reason that the hinterland connections are part of the Fixed Link project, those claims must be rejected. The Court must find, as contended by the Kingdom of Denmark and the Kingdom of Sweden, that the road and rail hinterland connections are also an integral part of the road and rail networks of each country and may consequently be used as such, without necessarily passing over the Fixed Link. Further, it is not disputed by the applicants that, in this case, it is the Consortium that ultimately bears the costs of financing those connections, since it returns, in the form of dividends to the parent companies, some of the revenue deriving from the Fixed Link tolls and railway charges. Last, the same findings could be made with respect to the transport connections that link the ports where the applicants are active to the remainder of the national transport networks.
- 296 Consequently, the Court must reject the fourth, second and fifth pleas in law with respect to taking into account the cumulative effect of all the aid, direct or indirect, granted to the Consortium in relation to the Fixed Link project.

4. The third, fourth and fifth pleas in law, in so far as they concern the findings in relation to legitimate expectations

297 In the last sentence of recital 138 and in recitals 140 to 153 of the contested decision, the Commission examined whether the Kingdom of Denmark and the Kingdom of Sweden, and also the Consortium, had legitimate expectations that the aid granted to the Consortium would not be challenged by the Commission, even if that aid were to be considered to be incompatible with the internal market. That assessment is disputed by the applicants in their third, fourth and fifth pleas in law concerning, respectively, the merits of the analysis, the infringement of the procedural rights of the interested parties, and the Commission's obligation to state reasons. The arguments can be broken down, in essence, into two parts with reference to, first, the findings made by the Commission with respect to the period before the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), and second, the findings made with respect to the period after that judgment.

298 It is appropriate to begin by examining the assessment relating to the period before the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), which has been challenged only in the third plea in law relating to the merits of the contested decision.

(a) The third plea in law, concerning the finding that there were legitimate expectations in relation to the period before the judgment of 12 December 2000, Aéroports de Paris v Commission (T-128/98)

299 In their third plea in law, the applicants claim that errors of law were committed in recital 138 and in recitals 140 to 153 of the contested decision.

300 The Commission, supported by the Kingdom of Denmark, contends, in essence, that such arguments are ineffective, in that the part of its decision devoted to the existence of legitimate expectations was included for the sake of completeness and did not support the operative part of the contested decision. In any event, the Commission considers that those arguments are unfounded.

301 The operative part of the contested decision includes the conclusion that the State aid granted to the Consortium was compatible with the internal market. In recital 138 and in recitals 140 to 153 of the contested decision, the Commission considered that, if the opposite were the case, that is if the State aid granted to the Consortium were nonetheless deemed to be incompatible with the internal market, there existed, in the light of the particular circumstances of this case, legitimate expectations on the part of the Kingdom of Denmark and the Kingdom of Sweden, and on the part of the Consortium, which were capable of precluding any recovery of the aid for the period before the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290).

302 It is apparent from paragraphs 98, 114, 117, 137 to 139, 167, 197, 198, 209 and 216 above that the contested decision must be annulled in that it found that the aid measures were compatible on the conclusion of the preliminary examination, without initiating the formal investigation procedure for aid 'schemes'. Consequently, the General Court considers that it should examine the arguments concerning the merits of the finding that there were legitimate expectations if that aid were nonetheless to be deemed to be incompatible.

303 Article 14(1) of Regulation No 659/1999 provides:

'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of [EU] law.'

- 304 The principle of protection of legitimate expectations is a general principle of EU law (judgment of 3 May 1978, *Töpfer v Commission*, 112/77, EU:C:1978:94, paragraph 19) which confers rights on individuals (judgment of 19 May 1992, *Mulder and Others v Council and Commission*, C-104/89 and C-37/90, EU:C:1992:217, paragraph 15).
- 305 In accordance with settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where an EU institution has caused him or her to have justified expectations (see judgment of 11 March 1987, *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik) v Commission of the European Communities*, 265/85, EU:C:1987:121, paragraph 44 and the case-law cited).
- 306 Three cumulative conditions must be satisfied for a claim of entitlement to the protection of legitimate expectations to be well founded. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (see judgment of 30 June 2005, *Branco v Commission*, T-347/03, EU:T:2005:265, paragraph 102 and the case-law cited; judgments of 23 February 2006, *Cementbouw Handel & Industrie v Commission*, T-282/02, EU:T:2006:64, paragraph 77; and of 30 June 2009, *CPEM v Commission*, T-444/07, EU:T:2009:227, paragraph 126).
- 307 According to the case-law, with respect to the recovery of State aid, in view of the mandatory nature of the review of State aid by the Commission, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless the aid has been granted in compliance with the procedure laid down in Article 108 TFEU, a diligent business operator being normally able to determine whether that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (judgment of 8 December 2011, *France Télécom v Commission*, C-81/10 P, EU:C:2011:811, paragraph 59). It is clear that that case-law lays down a general rule, to which therefore there can be exceptions.
- 308 The Commission considered, in essence, in recital 138 and in recitals 140 to 153 of the contested decision that, even if the aid measures concerned were to be considered to be incompatible with the internal market, the aid could not be recovered by the Kingdom of Denmark and the Kingdom of Sweden, since recovery would be contrary to a general principle of EU law, pursuant to Article 14(1) of Regulation No 659/1999. The Commission took into account the ‘highly specific circumstances’ described in recitals 144 to 152 of the contested decision. Those circumstances include, in essence, the following:
- the fact that, in 1992 and before the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), it was very clear from the Commission’s decision-making practice and from its various guidelines and communications that the construction and operation of transport infrastructure did not constitute economic activities;
 - the existence of the Commission’s general policy with regard to measures for financing the construction and operation of infrastructures that were definitively adopted before the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), on the basis of which public authorities could legitimately consider that such measures did not constitute State aid and did not have

to be notified to the Commission; the Commission refers in particular to paragraphs 28 and 29 of the Guidelines on State aid to airports and airlines of 4 April 2014 (OJ 2014 C 99, p. 3);

- the fact that the Commission's staff had themselves stated to the Kingdom of Denmark and the Kingdom of Sweden, in the letters of 27 October 1995, that the construction and operation of the Øresund Fixed Link did not constitute an economic activity and that the State guarantees therefore did not constitute State aid within the meaning of Article 107(1) TFEU;
- the fact that the Commission had been duly informed of the existence of the State guarantees by the Consortium in 1995, that is to say, before the entry into force of Regulation No 659/1999 and of Commission Regulation No 794/2004 of 21 April 2004 implementing [Regulation No 659/1999] (OJ 2004 L 140, p. 1), which introduced new formalities for State aid notifications;
- the existence of EU financing following approval as a TEN-T project, showing that the Commission was duly informed of the implementation of the State guarantees.

309 The letters of the Commission of 27 October 1995, signed by the Director-General of the Directorate-General (DG) for Transport, must be considered to originate from 'authorised and reliable sources' within the meaning of the case-law cited in paragraph 306 above. Those letters are worded as follows:

'... Building and operation [are] the responsibility of the [Consortium] ...

The costs of financing, design, preparation, building and operation will be covered entirely by special toll charges to be levied on users. ...

[The Kingdom of] Denmark and [the Kingdom of] Sweden jointly and severally guarantee the obligations arising from [the Consortium's] loans and other financial instruments in connection with the financing of the project. The guarantee is provided at no charge to the Consortium.

After examining the arrangements undertaken by [the Kingdom of Denmark and the Kingdom of Sweden] in relation to the [Øresund Fixed Link], the Commission's services are of the opinion that the guarantee is attached to an infrastructure project of public interest, improving the countries' infrastructure and transport services. Guaranteeing investment in public goods cannot, in principle, be considered as State aid within the meaning of Article 92.1 [EC]: governments provide many such goods and services because of the inability of the market system to provide these goods effectively. These goods tend to be indivisible and collectively consumable by all citizens, whether they pay for them or not.

A public good, such as the current infrastructure project guaranteed by the two governments, benefits society in a collective manner. As it is not conferred on any specific enterprise or industry, it does not fall within the scope of Article 92.1 [EC], but constitutes a general measure of economic policy and land planning.

Consequently, and on the basis of the information at its disposal, the services of the Directorate-General for Transport consider that the guarantee issued by [the governments] for the construction of the [Øresund Fixed Link] does not fall under the scope of Article 92.1 [EC] and in accordance with [the second paragraph, *in fine* of] the letter [SG(89) D/4328] sent to Member States on [5 April 1989], should not be notified to the Commission.'

- 310 The content of those letters is precise, attaches no prior conditions and provides a consistent explanation of why the State guarantees granted to the Consortium ought not to be considered to be State aid. Those letters were therefore such as to confer on the persons to whom they were addressed 'precise, unconditional and consistent assurances', within the meaning of the case-law cited in paragraph 306 above, such as to give rise to a legitimate expectation that the aid measures granted to the Consortium did not fall within the scope of Article 107(1) TFEU and therefore did not have to be notified. Last, it is also clear that the assurances given were consistent with decision-making practice at that time and the case-law concerning the concept of economic activity existing before the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290) (see paragraph 316 below).
- 311 Thereafter, the case-law stemming from the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), recognised, as from 2000, that the managers of airports carried out, in principle, an economic activity within the meaning of Article 107(1) TFEU, to which the State aid rules apply, as was confirmed by the judgment of 17 December 2008, *Ryanair v Commission* (T-196/04, EU:T:2008:585, paragraph 88). The Courts of the European Union have already had occasion to state that the Commission was bound to take account of those developments and of that interpretation and that the Commission did not err in considering that, as from 2000, it was no longer possible a priori to exclude the application of State aid rules to airports (see, to that effect, judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 106). That reasoning can be transposed to the present case.
- 312 It must be stated that, in the circumstances of this case, legitimate expectations were conferred on the Kingdom of Denmark and on the Kingdom of Sweden, to whom the letters of 27 October 1995 were addressed, but also on the Consortium, the recipient of the State aid, since, first, it was the Consortium that sent a letter to the Commission, on 1 August 1995, asking the Commission to confirm that the State guarantees did not constitute State aid and, second, the Consortium was a 100% owned subsidiary of companies that belonged to the two States concerned.
- 313 It must be added that the letters of 27 October 1995 could equally confer legitimate expectations with respect to the Danish tax aid and the operational phase of the Fixed Link, contrary to what is claimed by the applicants, since it was the activity of the Consortium, that is, to use the wording of the letters of 27 October 1995, 'the building and operation' of the Fixed Link, that fell outside the scope of the State aid rules. The Kingdom of Denmark and the Kingdom of Sweden, and also the Consortium, could therefore interpret the letters of 27 October 1995 as meaning that all measures of State support to the Consortium, even those not specified in those letters, were consequently not subject to the State aid rules.
- 314 None of the applicants' arguments is such as to invalidate that conclusion.
- 315 The applicants claim, first, that before 2000, there was no settled decision-making practice of the Commission suggesting that the commercial operation of infrastructure did not constitute an economic activity, within the meaning of Article 107 TFEU.
- 316 In recital 144 of the contested decision, the Commission correctly stated, in essence, that in 1992 its position was to consider that the construction and operation of public infrastructure were not economic activities. Further, the decisions of the Commission cited by the applicants to support the argument to the contrary do not precede the letters of 27 October 1995. In any event, it must be recalled that the Courts of the European Union have already

had occasion to find that the Commission had considered, in the past, in 1994, that the execution of infrastructure projects constituted a general policy measure which the Commission could not control under the EC Treaty rules on State aid (see, to that effect, judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 103).

- 317 Second, according to the applicants, the Commission letters of 27 October 1995 do not constitute a formal approval decision. Nonetheless, it is apparent from paragraphs 309 and 310 above that those letters satisfied the three cumulative conditions to confer on the persons to whom they were addressed and on the Consortium legitimate expectations that it was not necessary to give formal notification of the aid measures granted to the Consortium. Consequently, the fact that those letters do not constitute a formal approval decision is of no relevance.
- 318 Third, the applicants claim that only one judgment has accepted in the past the existence of legitimate expectations (judgment of 24 November 1987, *RSV v Commission*, 223/85, EU:C:1987:502), while the present case is different. Such an argument is of no relevance, since the conditions relating to the principle of protection of legitimate expectations are satisfied in the present case.
- 319 Fourth, the applicants claim that, contrary to what was stated by the Commission in recital 151 of the contested decision, the fact that the Fixed Link was approved as a TEN-T project in 1994 by the European Council and obtained EU financing is of no relevance to the assessment on the classification and compatibility of the State guarantees.
- 320 It has to be said that that argument is ineffective, since the essential factor that establishes the existence of legitimate expectations that the aid measures granted to the Consortium did not constitute State aid is the existence of the Commission letters of 27 October 1995. The existence of TEN-T financing was mentioned only for the sake of completeness in the contested decision.
- 321 Fifth, the applicants dispute the right of the Kingdom of Denmark and the Kingdom of Sweden to rely on the legitimate expectations of the Consortium in order to set aside their obligation to notify State aid under Article 108(3) TFEU. In this case, it follows from the foregoing that there were valid reasons for the Kingdom of Denmark and the Kingdom of Sweden themselves to have legitimate expectations that they did not have to notify the State guarantees, since the letters of 27 October 1995 were addressed to them.
- 322 Consequently, in any event, the Court must reject the third plea in law in so far as it concerns the finding that the Consortium and the Kingdom of Denmark and the Kingdom of Sweden could claim the benefit of legitimate expectations that precluded recovery, in the event that the aid granted to the Consortium were to be considered to be incompatible with the internal market, for the period before the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290).

(b) The third, fourth and fifth pleas in law, on the analysis with respect to the period after the judgment of 12 December 2000, Aéroports de Paris v Commission (T-128/98)

- 323 In their third plea in law, the applicants claim in essence, that the Commission's reasoning as set out in recitals 138 and 153 of the contested decision is circular. The applicants also consider that the contradiction is indicative of serious difficulties, which they plead in their fourth plea in law, and of an insufficient statement of reasons, which they plead in their fifth plea in law.

324 The Commission, supported by the Kingdom of Denmark, contends that those arguments are ineffective. The Commission states that recital 138 of the contested decision concludes clearly that the measures at issue are compatible with the internal market and that that conclusion is not dependent on whether the Consortium, and the Kingdom of Denmark and the Kingdom of Sweden, can rely on legitimate expectations. The Commission claims that, since its conclusion, in recital 153 of the contested decision, that the aid granted to the Consortium was compatible with the internal market was correct, it would serve no purpose to decide on the duration of those legitimate expectations.

325 In this case, recital 138 of the contested decision reads as follows:

‘Therefore, the Commission considers that the measures under scrutiny are compatible with the internal market under Article 107(3)(b) [TFEU]. In any case, even supposing that the aid measures at stake were incompatible with the internal market, they would not be recovered by the Member States concerned, for the reasons set out in the next section.’

326 The next section is headed ‘Legitimate expectations’ and comprises recitals 140 to 153 of the contested decision. In recital 153 of the contested decision, the Commission concluded that ‘[the Kingdom of Denmark and the Kingdom of Sweden and] the Consortium could have legitimate expectations that [the Commission] would not call into question the State guarantees and the tax measures on the basis of State aid rules [and that it was] not necessary to determine whether these legitimate expectations extend[ed] beyond the date of the General Court’s judgment in *Aéroports de Paris* to the present date or even to the moment in the future when the Consortium [would] have repaid all its debts, since the Commission consider[ed] that the State guarantees and the fiscal benefits [were], in any event, compatible with the internal market’.

327 The Court must hold that the Commission’s reasoning with respect to the period after the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), as expressed in the last sentence, beginning ‘in any case’, of recital 138 (and not in the first sentence as claimed by the Commission), and in recital 153 of the contested decision, is plainly circular and is tantamount to the Commission making no final decision, with respect to that period, on the application of the principle of protection of legitimate expectations ‘even supposing that the aid measures at stake were incompatible with the internal market’.

328 However, a ruling on whether the arguments raised in this case are effective is not necessary, since it is sufficient to state that, given that recital 153 of the contested decision (see paragraph 326 above) is based on the finding that the aid granted to the Consortium was compatible, a finding that has to be annulled in so far as it is made in the contested decision, having regard to paragraphs 217 and 220 above, there is no longer any need to give a ruling on those arguments.

Costs

329 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 essentially unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicants:

330 In addition, under Article 138(1) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls the decision C(2014) 7358 final of the European Commission of 15 October 2014 in so far as it decided not to raise any objection with respect to the tax aid relating to depreciation of assets and the carrying forward of losses granted to Øresundsbros Konsortiet by the Kingdom of Denmark and with respect to guarantees granted to Øresundsbros Konsortiet by the Kingdom of Denmark and the Kingdom of Sweden.**
2. **Dismisses the action as to the remainder.**
3. **Orders the Commission to bear its own costs and to pay those incurred by HH Ferries I/S, HH Ferries Helsingør ApS and HH Ferries Helsingborg AB.**
4. **Orders the Kingdom of Denmark and the Kingdom of Sweden to bear their own costs.**

Berardis

Spielmann

Csehi

Delivered in open court in Luxembourg on 19 September 2018.

E. Coulon

G. Berardis

Registrar

President

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⁴ Language of the case: English.

1 This judgment is published in extract form.