Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

19 September 2018*

(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 Helsingor 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,

* Language of the case: English.

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 Helsingor 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 Helsingor 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).

[*omissis*]

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

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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

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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.

[*omissis*]

(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.

[*omissis*]

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.

[*omissis*]

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.

[*omissis*]

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.

[*omissis*]

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.

[*omissis*]

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.

[*omissis*]

(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.

[*omissis*]

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.

[*omissis*]

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

[*omissis*]

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.

[*omissis*]

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.

[*omissis*]

(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.

[*omissis*]

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 Øresundsbro Konsortiet by the Kingdom of Denmark and with respect to guarantees granted to Øresundsbro 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 Helsingor 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
Registrar

Berardis
President