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**Subject: State Aid SA.39078 (2019/C) (ex 2014/N) – Denmark
Financing of the Fehmarn Belt Fixed Link project**

Sir,

The Commission wishes to inform Denmark that, having examined the information supplied by your authorities and following the judgments of the General Court of 13 December 2018 in Case T-630/15 *Scandlines Denmark and Scandlines Deutschland v Commission*¹ and Case T-631/15 *Stena Line Scandinavia v Commission*², it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. PROCEDURE

- (1) On 13 July 2009, the Commission approved aid for the financing of the planning phase of the Fehmarn Belt Fixed Link project (“Fehmarn Belt”)³.
- (2) Following a prenotification phase, by letter dated 22 December 2014, the Danish authorities notified to the Commission pursuant to Article 108(3) of the Treaty the financing model of the Fehmarn Belt. On 13 February 2015, the Commission services sent a request for information to Denmark, which replied on 24 and 27 February, as well as 11 March 2015. The Commission services sent another

¹ Judgment of the General Court of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland GmbH v Commission*, T-630/15, ECLI:EU:T:2018:942.

² Judgment of the General Court of 13 December 2018, *Stena Line Scandinavia AB and Others v Commission*, T-631/15, ECLI:EU:T:2018:944

³ Commission decision of 17.03.2009, State aid N 157/2009 – Denmark – Financing of the planning phase of the Fehmarn Belt fixed link, OJ C 202, 27.8.2009, p. 1.

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request for information on 25 March 2015 and Denmark replied on 8 April 2015. On 13 April 2015 and 8 May 2015 the Commission services sent additional requests for information to Denmark. The latter submitted additional information on 19 and 27 May 2015, as well as on 8 July 2015.

- (3) On 5 June 2014, 5 September 2014, 26 November 2014, 19 January 2015, and 22 April 2015, the Commission received five complaints⁴ alleging that Denmark had granted unlawful and incompatible State aid for the planning, construction and operation of the Fehmarn Belt in favour of Femern A/S and A/S Femern Landanlæg⁵. Non-confidential versions of the complaints were received on 23 July 2014, 22 December 2014, 18 February 2015 and 30 April 2015 respectively. The Commission services sent requests for information to Denmark on 25 July 2014, 19 September 2014, 8 January 2015, 13 February 2015, 2 and 25 March 2015, 13 April 2015 and 8 May 2015. Denmark submitted additional information on 3 September 2014, 16 October 2014, 20, 24 and 27 February 2015, 11 March 2015, 8 and 21 April 2015. The Commission received additional information from the complainants on 25 September 2014, 4 February 2015, 22 May 2015 and 13 July 2015.
- (4) On 23 July 2015, the Commission decided not to raise objections to the measures granted by Denmark to A/S Femern Landanlæg and Femern A/S (“Construction Decision”)⁶. The operative part of that decision is divided in two parts. In the first part, the Commission concluded that the measures granted to A/S Femern Landanlæg for the planning, construction and operation of the road and rail hinterland connections in Denmark do not constitute State aid within the meaning of Article 107(1) TFEU. In the second part, the Commission concluded that, even if the measures granted to Femern A/S for the planning, construction and operation of the Fixed Link did constitute State aid within the meaning of Article 107(1) TFEU, they are compatible with the internal market pursuant to Article 107(3)(b) TFEU. On 16 September 2015, the Commission sent the Construction Decision to the complainants.
- (5) Following actions for annulment by two complainants⁷, the General Court annulled the Construction Decision⁸ in so far as the Commission decided not raise any objections to the measures granted by Denmark to Femern A/S for the planning, construction and operation of the Link.
- (6) The General Court dismissed the action as to the remainder. In particular, it rejected the arguments of the applicant concerning the Commission’s conclusion that the measures granted to A/S Femern Landanlæg for the planning,

⁴ By Scandlines Danmark ApS and Scandlines Deutschland GmbH (“Scandlines”), 3i Investment Plc, TT Line, Stena Line Scandinavia AB (“Stena Line”) and Trelleborgs Hamn AB.

⁵ These complaints were registered by the Commission services under the numbers SA.38915 and SA.41640.

⁶ Commission decision of 23.07.2015 in Case SA. 39078 (2014/N) – Denmark – *Financing of the Fehmarn Belt Fixed Link project*, OJ C 325, 2.10.2015, p. 1.

⁷ Scandlines and Stena Line.

⁸ Judgment of the General Court of 13 December 2018, *Stena Line Scandinavia AB and Others v Commission*, T-631/15, ECLI:EU:T:2018:944 and Judgment of the General Court of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland GmbH v Commission*, T-630/15, ECLI:EU:T:2018:942.

construction and operation of the road and rail hinterland connections in Denmark do not constitute State aid within the meaning of Article 107(1) TFEU.

- (7) The judgment of 13 December 2018 has been appealed by two of the complainants⁹.

Procedure on alleged additional measures

- (8) On 2 August 2016, Scandlines sent a letter of formal notice to the Commission, asking it to take steps in respect of certain alleged aid measures in favour of Femern A/S, which, in their view, had not been addressed by the Commission in its Construction Decision, even though those measures had been referred to in their complaint.
- (9) By letter of 30 September 2016, the Commission services replied to that letter. It indicated that the Construction Decision dealt with the two alleged aid measures, namely non-commercial railway fees and the free use of State property during the construction phase of the project. As to the other alleged aid measures, the Commission considered, pursuant to Article 24(2) of the Procedural Regulation¹⁰, that the facts and points of law put forward by Scandlines did not provide sufficient grounds to show, on the basis of a *prima facie* investigation, the existence of unlawful aid. It therefore invited Scandlines to submit any comments it might have within a period of one month. The Commission received those comments on 30 October 2016.
- (10) On 12 December 2016, Scandlines lodged an action of annulment of the letter of 30 September 2016¹¹. On the same day, they also brought an action against the Commission for failure to act on their complaint¹².
- (11) On 30 July 2018, Scandlines sent a second letter of formal notice¹³, inviting the Commission to define its position on the other alleged aid measures following its comments of 30 September 2016. On 28 September 2018, the Commission adopted a decision (“2018 Decision”) confirming that the State guarantees in favour of A/S Femern Landanlæg and the State loans in favour of Femern A/S and A/S Femern Landanlæg, as well as the alleged unlawful aid granted in excess of the Planning Decision and in the form of tax advantages, did not constitute unlawful State aid. In the same decision, the Commission concluded that the alleged unlawful aid to Femern A/S in the form of capital injection, is compatible with the internal market under Article 107(3)(b) TFEU, in so far as it constitutes

⁹ Case C-174/19 P *Scandlines Danmark and Scandlines Deutschland v Commission*, and Case C-175/19 P *Stena Line Scandinavia v Commission*,.

¹⁰ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9.

¹¹ Case T-890/16, *Scandlines Danmark ApS and Scandlines Deutschland GmbH v Commission*, ECLI:EU:T:2018:1004.

¹² Case T-891/16, *Scandlines Danmark ApS and Scandlines Deutschland GmbH v Commission*, ECLI:EU:T:2018:1003 .

¹³ This letter was registered as SA. 51981.

State aid not covered by the Planning Decision¹⁴. On 4 January 2019 Scandlines brought an action for the annulment of this decision¹⁵.

- (12) By orders of 13 December 2018, the General Court declared both the action for the annulment of the Commission's letter of 30 September 2016 and the action for failure to act inadmissible¹⁶. Scandlines brought an appeal against the order dismissing its action for annulment¹⁷.

Additional complaint on aid measures allegedly not included in the Construction Decision

- (13) On 6 November 2017, Scandlines filed an additional complaint on alleged unlawful and incompatible aid measures used to finance the Femern A/S information/promotion activities. Scandlines sent the non-confidential version of the complaint on 15 December 2017 and submitted additional information on 21 December 2017¹⁸. The Commission services forwarded the complaint to Denmark on 4 January 2018. Following two requests for a delay extension that the Commission services accepted, Denmark submitted its reply on 15 March 2018. On 4 April 2018, the Commission services sent the non-confidential version of the Danish reply to Scandlines. The latter submitted additional comments on 22 May 2018. Following a meeting between the Commission services and Scandlines on 28 June 2018, the latter submitted additional information on 28 September 2018.

Most recent procedural steps

- (14) On 24 January 2019, the Commission services had a meeting with the Danish authorities. On 18 and 25 March 2019, the Commission services had a meeting with Stena Line and Scandlines respectively. On 4 April and 13 May 2019 the Commission services had a meeting with the Naturschutzbund Deutschland e.V. (NABU) and the Association of Swedish Ship-owners (Föreningen Svensk Sjöfart - FSS) respectively.
- (15) By letter of 29 April 2019, the Danish authorities agreed to have the present decision adopted and notified in the English language.

¹⁴ Commission decision of 28 September 2018 on State aid SA. 51981 (2018/FC) – Denmark – Complaint about alleged unlawful aid to Femern A/S and Femern Landanlæg A/S, OJ C 406, 9.11.2018, p. 1. Scandlines

¹⁵ Case T-7/19, *Scandlines Danmark and Scandlines Deutschland v Commission*, pending.

¹⁶ Orders of the General Court of 13 December 2018, *Scandlines Danmark ApS and Scandlines Deutschland GmbH v Commission*, T-890/16, ECLI:EU:T:2018:1004 and T-891/16, ECLI:EU:T:2018:1003.

¹⁷ Case C-173/19 P, *Scandlines Danmark and Scandlines Deutschland v Commission*, pending.

¹⁸ This complaint was registered by the Commission under case SA. 49589 (2017/FC).

2. DESCRIPTION OF PROJECT AND THE MEASURES

2.1. The Fehmarn Belt

- (16) The Fehmarn Belt consists of a coast-to-coast infrastructure (“Fixed Link”) and rail and road hinterland connections.
- (17) The Fixed Link will be constructed as an immersed tunnel between Rødby on the island of Lolland in Denmark and Puttgarden in Germany. It will be approximately 19 kilometres long and will consist of an electrified, double-track railway and a four-lane motorway with emergency lanes.
- (18) The Danish hinterland connections include the existing railway connection between Ringsted and Rødby of approximately 120 kilometres, which is owned by Rail Net Denmark, the State rail infrastructure manager. The whole railway section from Ringsted to Rødby will be electrified and equipped with new signalling systems according to ERTMS¹⁹ level 2. The Danish hinterland connections will also comprise the necessary environmental improvements and upgrading of the existing motorway infrastructure of Looland, i.e. the existing E47 motorway between Rødbyhavn and Sakskøbing.
- (19) The objective of the Fehmarn Belt is to improve the conditions for transport of passengers and goods between the Nordic countries and Central Europe. The Fehmarn Belt will lead to a number of other positive impacts in terms of employment, regional development, improvement of trading conditions and a general strengthening of the transport sector. In combination with the Øresund Fixed Link between Denmark and Sweden, which has been in operation since July 2000, the Fehmarn Belt will thus bring about a considerable improvement on one of the most important land based transport corridors connecting Scandinavia with Central Europe. The Fehmarn Belt was also recognised by the Commission as a priority project within the TEN-T framework.
- (20) According to Article 1 of the “Treaty between the Kingdom of Denmark and the Federal Republic of Germany on the Fixed Link across the Fehmarn Belt”(“the Treaty”)²⁰, Denmark has the sole responsibility and bears the full risk for the financing of the Fixed Link across the Fehmarn Belt strait, as well as for the upgrading of the Danish hinterland connections. Germany is responsible for the financing and upgrading of the German hinterland connections.
- (21) On the basis of the information submitted in the context of the 2014 notification, the Danish authorities estimate that the total costs for the planning and construction of the Fixed Link correspond to DKK 54.9 billion (approximately EUR 7.4 billion). The costs related to the planning and construction of the upgrading of the Danish hinterland connections correspond to DKK 9.5 billion (approximately EUR 1.3 billion). In total this amounts to DKK 64.4 billion (approximately EUR 8.7 billion) in 2014 prices for the entire project (planning activities, construction costs, reserves and other works of both the Fixed Link and the hinterland connections), as presented in Table 1.

¹⁹ European Rail Traffic Management System.

²⁰ The Treaty was signed on 3 September 2008 and ratified by Denmark and Germany in 2009.

Table 1: Construction costs²¹, February 2015

Costs	DKK billion	EUR billion
Fixed Link		
Construction costs	49.4	6.6
Reserve for contractor risk	1.8	0.2
Extra reserves (16.4 per cent)	3.7	0.5
Total construction costs	54.9	7.4
Hinterland connections		
Construction costs	7.3	1
Reserves (30 per cent)	2.2	0.3
Total construction costs	9.5	1.3
TOTAL	64.4	8.7

- (22) The Commission has awarded total co-funding grants of EUR 205 million from 2007 to 2015 for the planning activities of the Fehmarn Belt. The latter has also been included in the list of proposals selected for receiving EU financial assistance in the field of Connecting Europe Facility (CEF) – Transport sector²².
- (23) In September 2005, the state-owned company Sund & Bælt Holding A/S established the company Femern A/S as a wholly owned subsidiary. Femern A/S subsequently became a subsidiary of A/S Femern Landanlæg²³ which is also a subsidiary of Sund & Bælt Holding A/S.
- (24) On the basis of the Planning Act²⁴, the Danish Minister for Transport appointed Femern A/S as responsible for the planning of the Danish part of the Fehmarn Belt. Consequently, Femern A/S has carried out various studies and preparations for its construction, in particular analyses and evaluations regarding environmental, technical and safety aspects and preparations for the tender processes for the completion of the project. Femern A/S also carried out the necessary investigations and preparatory activities regarding the establishment of the future construction site in Rødbyhavn.
- (25) The financing of the planning phase was notified to the Commission pursuant to Article 108(3) of the Treaty on 16 March 2009 for reasons of legal certainty. On 13 July 2009 the Commission decided not to raise objections to the financing of the planning phase²⁵, concluding that in the planning phase Femern A/S acted as

²¹ These project costs have been calculated on the basis of the priced offers received from bidders of the four principal civil works contracts on 22 December 2014 increased by reserve budget.

²² See Commission Implementing Decisions C(2015) 5274 of 31 July 2015 establishing a list of proposals selected for receiving EU financial assistance in the field of Connecting Europe Facility (CEF)-Transport sector following the calls for proposals launched on 11 September 2014 based on the Multi-Annual work Programme, and C(2017)8803 of 5 January 2018 following a call for proposals launched on 8 February 2017 based on the Multi-Annual Work Programme.

²³ A/S Femern Landanlæg was established on 16 November 2009.

²⁴ The Danish bill on the planning of a Fixed Link across the Fehmarn Belt and the Danish hinterland connections (Act no. 285 of 15 April 2009).

²⁵ See Commission decision of 13 July 2009 in case N157/2009 *Financing of the planning phase of the Fehmarn Belt fixed link*, OJ C 202, 27.8.2009, p. 2.

a public authority and that any support therefore fell outside the scope of Article 107(1) of the Treaty. Nevertheless, as the Commission could not exclude that the public support for the planning phase might include State aid in favour of the future operator of the Fixed Link, it also assessed the compatibility of the notified measures and concluded that they could be considered compatible.

- (26) On 28 April 2015, the Danish Parliament passed the bill on the construction of the Fixed Link and the hinterland connections in Denmark (hereinafter "Construction Act")²⁶. The Construction Act entered into force on 5 May 2015.

2.2. The Fixed Link

- (27) Femern A/S was appointed as the owner of the Fixed Link²⁷, with sole purpose to manage its construction, operation and financing²⁸. In this context, it will also be the infrastructure manager of the rail link in the Fixed Link. The Construction Act allows Femern A/S to obtain loans and to use other financial instruments for purposes related to the planning, construction and operation of the Fixed Link.
- (28) Femern A/S may finance the Fixed Link with loans obtained on the international financial market. The Danish Government may provide a State guarantee for these loans. Alternatively, Femern A/S may finance the financing needs to the project through State loans.
- (29) Femern A/S will be entitled to collect toll charges from users of the Fixed Link road infrastructure. The Minister of Transport will determine the level of these fees and the principles for adjustment of these fees²⁹. Femern A/S may change existing general discount schemes and introduce new discount schemes only to the extent that this does not affect materially the level of payment determined by the Minister for Transport. It will also be entitled to collect railway fees for the use of the rail link in the Fixed Link; the Minister of Transport will also set these fees³⁰. The setup chosen entails that the toll charges and railway fees will both cover the operating and maintenance costs of the Fixed Link and then the costs related to interest payments and loan instalments relevant to the debt created from the planning and construction of the Fehmarn Belt.
- (30) The conduct of the construction works of the Fixed Link are open to all potential undertakings on equal and non-discriminatory terms since Femern A/S has applied public procurement procedures in accordance with public procurement law for the attribution of all construction contracts.

2.3. The Danish³¹ road and rail hinterland connections

- (31) A/S Femern Landanlæg has been appointed to manage the construction and operation of the Danish hinterland connections³². The construction and ordinary

²⁶ Act no. 575 of 4/05/2015.

²⁷ See Section 38 of the Construction Act.

²⁸ See Section 1 of the Construction Act.

²⁹ See section 42 of the Construction Act.

³⁰ See Section 41 of the Construction Act.

³¹ The German hinterland connections have not been the subject of this case.

operation of the railway hinterland connections will be undertaken on behalf of A/S Femern Landanlæg by Rail Net Denmark. Rail Net Denmark, as the Danish railway manager, is responsible for all costs related to the operation of the Danish railway infrastructure, including the hinterland rail connections. The construction of the necessary upgrading of the road hinterland connection will be undertaken by the Danish Road Directorate on behalf of the Danish State and financed by A/S Femern Landanlæg. The hinterland road connection will be part of the general Danish road infrastructure network, which is financed, operated and maintained by the Danish Road Directorate.

- (32) The existing double tracked railway from Ringsted to Vordingborg and the existing single-track railway from Vordingborg to Rødby, including the new signalling system installed on this section, are owned by Rail Net Denmark, the Danish railway infrastructure manager. A/S Femern Landanlæg will own the new track section from Vordingborg to Rødby, including the new signalling system installed on the new track, and the installations for electrification of the whole section from Ringsted to Rødby.
- (33) A/S Femern Landanlæg and the State, through Rail Net Denmark, share the ownership of the Danish rail hinterland connections³³. Once the construction of the Fehmarn Belt is completed, since it will be technically difficult to separate the ownership of the rail installations, the State will decide that an exchange of property will take place between the Rail Net Denmark and A/S Femern Landanlæg³⁴.
- (34) The ownership of the Danish road hinterland connections will remain with the State.
- (35) A/S Femern Landanlæg may finance the hinterland connections with loans obtained on the international financial market. The Danish Government may provide a State guarantee for these loans. Alternatively, A/S Femern Landanlæg may use government relending from the central bank of Denmark.
- (36) The information provided in the 2014 notification is that Femern A/S will pay dividends to A/S Femern Landanlæg. With these dividends A/S Femern Landanlæg will repay its debt related to the loans necessary to fund the costs of the construction, maintenance and reinvestments related to the hinterland rail connections and the costs related to the construction of the hinterland road connection.
- (37) In accordance with general principles in Denmark, there will be no user fees for the use of the Danish road hinterland connection.

³² See section 2 of the Construction Act.

³³ See Section 39 of the Construction act.

³⁴ Based on the value of Rail Net Denmark's assets and A/S Femern Landanlæg's assets.

2.4. The measures granted or allegedly granted to Femern A/S

2.4.1. Capital injections

- (38) Denmark notified capital injections amounting to DKK 500 million³⁵ (EUR 67 million) by the State-owned Sund & Bælt Holding A/S into Femern A/S that took place in 2005 and 2009. The purpose of these capital injections was to set up Femern A/S to carry out the Danish part of the preparatory work and studies related to the Fehmarn Belt³⁶. According to Scandlines, Sund & Bælt Holding A/S proceeded to additional capital injections for the same period, possibly exceeding the amount authorised by the Construction Decision with at least EUR 1.3 million.

2.4.2. State guarantees

- (39) Denmark also notified the State guarantee model it would use in order to allow Femern A/S to raise State guaranteed loans or other financial instruments on the international financial markets for the financing of the planning, construction and operation of the Fixed Link³⁷.
- (40) On the basis of the information submitted in the context of the 2014 notification, Femern A/S, as other public undertakings that obtain loans covered by a State guarantee will be required to pay a guarantee premium to the Danish State of 0.15 % per annum of the outstanding debt covered by the guarantee.
- (41) The State guarantee covers the obligations of Femern A/S in relation to loans and other financial instruments used to finance and refinance the planning, construction, operation and other necessary arrangements for the purpose of planning, construction and operation of the Fixed Link. The State also guarantees other financial contracts of Femern A/S used in connection with the project financing (such as swaps)³⁸. Finally, the guarantee covers other financial obligations assumed by Femern A/S in connection with the construction phase³⁹.
- (42) The State guarantee can only be used to cover loans that Femern A/S obtains in order to finance the Fixed Link. As a special purpose company, Femern A/S cannot obtain loans for or engage in any other activity than the financing, planning, construction and operation of the Fixed Link.
- (43) According to the complainants, due to the State guarantee, Femern A/S enjoys the same credit rating as the Danish State (AAA) and which allows it to obtain financial terms for its loans which are significantly better than otherwise available on the financial market. In addition, the State guarantees appear to be unlimited in time and amount and appear in effect to prevent the possibility of Femern A/S

³⁵ According to information however submitted by Denmark under the case SA. 51981, the total amount of the capital injections was DKK 510 million (EUR 68.3 million).

³⁶ According to Section 6 of the Sund & Bælt Act.

³⁷ See Section 7(3)(5) of the Planning Act (Law no 285 of 15 April 2009) and Section 4(2) of the Construction Act (Law no 575 of 4 May 2015).

³⁸ Section 4(2) in combination with Section 1 of the Construction Act.

³⁹ Section 4(4) in combination with Section 1 of the Construction Act.

going bankrupt. Moreover, they fulfil none of the conditions mentioned in the Guarantee Notice⁴⁰ that could exclude the existence of State aid.

- (44) The complainants also argue that every time Femern A/S enters into a new financial agreement, a new guarantee is granted, involving a new *ad hoc* aid measure.

2.4.3. State loans

- (45) As an alternative way of raising funds, Femern A/S is also entitled to obtain State loans⁴¹. Denmark indicates that the interest rate on the on-lending loans corresponds to the State's own loan terms⁴² with an additional loan margin of 0.15%.
- (46) The complainants argue that the Planning Decision did not authorise State aid in the form of State loans. According to them, the Minister of Finance proceeded to the grant of State loans and granted this form of aid for a much higher amount than authorised by the Planning Decision⁴³. According to the complainants, during the planning phase of the project, the State granted loans to Femern A/S and A/S Femern Landanlaeg, which in total would amount to EUR 533 million⁴⁴. Denmark submitted that the initial planning budget of EUR 194 million was increased in 2010, 2011 and 2013 to a total budget of EUR 684 million (2008 prices), out of which EUR 534 million concerned the planning phase of the Fixed Link. Femern A/S contracted State loans to cover these expenses.
- (47) In November and December 2018, when the Construction Decision was still valid, Femern A/S raised State loans of an amount of DKK 7.4 billion (EUR 1 billion).
- (48) The complainants further argue that the State loans as intended have no fixed repayment period and are, therefore, unlimited in time. In the absence of such a period, Femern A/S can continuously delay the repayment of the initial loans by successively obtaining new loans to refinance the initial ones. The complainants also argue that every time Femern A/S raises a new State loan, a new measure is granted, involving a new *ad hoc* aid measure.

Loans for information-promotional activities

- (49) Scandlines argues that Femern A/S has undertaken a wide range of promotion and marketing activities⁴⁵ either by itself, or through the use of contractors,

⁴⁰ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008, p. 10–22.

⁴¹ See Section 7(4) of the Planning Act and Section 4(3) of the Construction Act.

⁴² Fixed on the day when the loans are obtained and is fixed by the market conditions applicable on that moment.

⁴³ DKK 4 billion (i.e. EUR 533 million) instead of DKK 1445 million (EUR 194 million).

⁴⁴ According to Scandlines, the initial amount of EUR 187 million was increased 4 times up to 2013.

⁴⁵ Such as operation of a press department and 2 information centers and a video channel, organisation and participation in competition events, information actions on the use of Fehmarn Belt, publications in media and websites, preparation and dissemination of scientific information to producers,

consultants⁴⁶ and direct suppliers. Scandlines also indicates that, as Femern A/S for the time being has no source of income beyond EU funding, the financing of this type of activities constitutes State aid, which would be unlawful and incompatible. Alternatively the alleged aid in question should be considered as misuse of the aid authorised under the Planning Decision.

- (50) In this respect, Denmark submitted that Femern A/S's information activities fall within the scope of its tasks as defined in the legal framework regulating its activities as a publicly owned company, on behalf of the Ministry of Transport. When the State implements such big infrastructure projects, the relevant public entities have the obligation to inform the public in the broadest manner, so that the citizens know what the infrastructure project is about, how long the construction phase will last, as well as the benefits that will derive from the State's decision to construct this infrastructure. Thus, in their view, these activities form part of the public task of the State to inform its citizens and do not constitute promotion and marketing activities, as at this stage the operation of the Fixed Link lies in a distant future. Therefore, their financing would not constitute State aid. Finally, they submitted that part of these activities would be financed by the TEN-T/CEF program and part has been financed through loans Femern A/S has undertaken.

2.4.4. Special tax measures

- (51) According to Scandlines, Femern A/S is subject to a special tax regime under the Danish tax law, which was originally introduced by the Planning Act.

2.4.4.1 Loss carry forward

- (52) Section 9 of the Planning Act allowed Femern A/S to carry forward losses year on year without any restrictions. At the outset this was consistent with the rules that apply to undertakings in general in Denmark. However, on 1 January 2013, Danish tax law introduced⁴⁷ a limitation on the amounts of historical losses⁴⁸ carried forward that can be deducted in a single year into the Danish tax law. According to this provision, although the right to carry forward losses was not limited in time, the amount of losses that may be carried forward and deducted from profits of subsequent years is limited annually to DKK 7 500 000⁴⁹ (approximately EUR 1 006 000). If a loss remains, this can only be deducted up to 60% of the positive taxable income in excess of DKK 7 500 000. However, by virtue of the special provisions of the Planning Act, this limitation did not apply to Femern A/S, which retained the right to unlimited carry-forward of historical losses. This right was abolished at the end of 2015⁵⁰.

processors and marketers, consumer targeted advertising campaigns, sponsorship of marathons and football tournaments.

⁴⁶ eg. contract concerning "monitoring of media coverage" (2014), marketing management and consultancy services contract (2017).

⁴⁷ See section 12, subsection 2 of Act No 591 of 18 June 2012 amending Danish act on Corporation tax.

⁴⁸ Losses incurred in previous financial years.

⁴⁹ 2012 values – the amount is indexed on an annual basis.

⁵⁰ Section 9 of the Planning act was abolished by Act no 581 of 4 May 2015.

- (53) Denmark submitted that during the period 2013-2015, Femern A/S had no actual financial advantage, as in practice such measure could only be used in later phases of the project, i.e. when the project would generate taxable profit.

2.4.4.2 Depreciation of assets

- (54) Pursuant to sections 12 and 13 of the Sund & Bælt Act⁵¹, the annual depreciation rate for the assets of the companies belonging to Sund & Bælt, such as Femern A/S, was set at 6% of the initial acquisition costs. The total construction costs of the Fixed Link could be considered as initial acquisition costs. This means that a single general rule on depreciation would be applied to all assets of Femern A/S. The 6% depreciation rate for Femern A/S would apply until the income year in which the total sum of the depreciation exceeds 60% of the initial acquisition costs (i.e. a 10-year period), as from which point the annual depreciation rate would be reduced to 2%.
- (55) According to Denmark, the special depreciation rules have also been repealed since 1 January 2016 through an amendment of the Sund & Bælt Act⁵².

2.4.4.3 Joint Taxation regime

- (56) Femern A/S is subject to mandatory joint taxation with Sund & Bælt Holding, in accordance with the general joint taxation regime applicable to all Danish undertakings within a group. According to article 31 of the Danish Act on Corporation Tax a "group", all companies of which, are established in Denmark, has to be taxed in accordance with the provisions on mandatory group taxation. No specific rules apply to Femern A/S in that respect.
- (57) The complainants argue that the above tax measures in favour of Femern A/S constitute incompatible State aid, which, up to the point the relevant provisions were repealed, was foreseen to be unlimited in time and amount, and which provided an advantage to the company separate from the other State measures and that has to be assessed on its own merits.

2.4.5. Free use of state property

- (58) The Danish State will make available to Femern A/S free of charge the water areas and the seabed, which are necessary for the preparation, examination and planning⁵³, as well as the construction and operation⁵⁴ of the Fixed Link.
- (59) Scandlines argues that through these provisions, Femern A/S benefits from a financial advantage as, in their absence, it should normally pay a market fee for the use of the water areas and the seabed.
- (60) However, the Danish authorities submit that there is no general rule or principle in Danish law requiring companies in a similar factual and legal situation as

⁵¹ See Sections 13 and 14 of Act n° 588 of 24 June 2005 ("Sund & Bælt Act").

⁵² Amendment introduced in Act no 581 of 4 May 2015.

⁵³ See Section 16 of the Planning Act.

⁵⁴ See Section 45 of the Construction Act.

Femern A/S to pay fees to the State for making use of seabed and water areas. Hence, the same free access principle applies to other toll funded transport infrastructures in Denmark. Similarly, though not in a directly comparable situation, no fees are paid to the Danish State by ferry operators or other ship freight companies for crossing any sea areas under Danish jurisdiction. In addition, the harbours pay no fees for using the seabed.

2.4.6. Railway fees

- (61) Femern A/S is authorised to charge the railway operators for using the railway connection on the Fixed Link. The Ministry of Transport will set out the level and principles for the regulation of railway companies' payment to Femern A/S for the use of the rail line of the Fixed Link⁵⁵.
- (62) According to Scandlines, it appears that the State, via its own railway operator, Danske Statsbaner (DSB)⁵⁶, will annually pay Femern A/S a share of the overall fees of DKK 350 million (EUR 47 million) for an undefined period of time. As it would seem that this fee will apply irrespective of the number of trains using the Fixed Link, without an adjustment mechanism and for an undefined period, it would seem that it involves an economic advantage to Femern A/S.
- (63) The Danish authorities submitted that the preparatory works of the Construction Act provide that the level of the railway fees will reflect inter alia the construction costs of the Fixed Link on a long term basis and not only costs directly incurred by the operation of the rail link. Moreover, they will be determined in accordance with Directive 2012/34/EU⁵⁷, ensuring that overcompensation is avoided. Moreover, while it is estimated that approximately 50% of the costs of the Fixed Link are related to the railway part, the railway fees are expected to finance only approximately 20% of the total project costs, which means that the users of the road will ultimately finance approximately 80% of the total costs. Finally Denmark indicates that the fees are to be paid directly to Femern A/S by any railway operator using the Fixed Link. Hence, the charging of railway fees would not constitute use of State resources granted to Femern A/S, as the transfer of funds from railway operators to Femern A/S would have no impact on the State budget.

3. SUMMARY OF THE ARGUMENTATION SUBMITTED BY THE COMPLAINANTS AND DENMARK IN THE PROCEDURE LEADING TO THE CONSTRUCTION DECISION

3.1. Summary of the main argumentation submitted by the complainants

3.1.1. As regards the (non) economic nature of the Femern A/S's activity

- (64) The complainants argue that according to the European Court's case law and the Commission decision-making practice, the construction and operation of the Fixed Link by Femern A/S, by charging tolls, constitute economic activities. They refer to the decision that the Commission has taken in 2014 as regards the

⁵⁵ See Section 41 of the Construction Act.

⁵⁶ Danish State Railways.

⁵⁷ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ L 343, 14.12.2012, p. 32.

financing of the construction of the Øresund bridge⁵⁸, where the Commission concluded that the construction and operation, by charging tolls, of this infrastructure constitutes an economic activity. Moreover, the Fixed Link will generate tolls that will be used for the payment of dividends to the State, through its subsidiaries, as has also been the case for the Great Belt project and the Oresund bridge project.

- (65) According to settled case law, the concept of “economic activity”, within the meaning of competition rules, is defined as “any activity consisting in offering goods and services on a given market”. Femern A/S will offer transport infrastructure services between Denmark and Germany and gateway into those Member States in return for a fee exploiting its infrastructure. Femern A/S will clearly compete with the ferries operators⁵⁹ and other infrastructure operators, such as ports, as well as the Great Belt, which constitutes an alternative route the potential customers may choose to reach Copenhagen⁶⁰. Thus, it conducts an economic activity in a market.

3.1.2. As regards the State guarantees and loans

- (66) According to the complainants, due to the State guarantees Femern A/S can obtain loans on very favourable terms, as it enjoys the same credit rating as the Danish State (AAA). On this basis, it may obtain financial terms for its loans that are significantly better than those that would otherwise be available on the financial markets. In this way, Femern A/S may never go bankrupt. Femern A/S pays a fixed guarantee premium to the State for the guarantees and a fixed interest rate for the State loans, which do are de facto below market conditions. In addition, the possibility to get State guarantees, but also State loans appears to be unlimited in time and amount. Moreover, the guarantees fulfil none of the conditions mentioned in the Guarantee Notice⁶¹ as indications of conditions that could exclude the existence of State aid.
- (67) The complainants also argue that every time Femern A/S enters into a new loan agreement, a new guarantee is granted, involving a new *ad hoc* aid measure.

3.1.3. As regards the compatibility of the alleged aid measures

- (68) As regards the compatibility of all the alleged aid measures, the complainants argue that although indeed the project can be considered important at EU level, the aid measures are not necessary and proportionate to the objective pursued, as they are unlimited in time and amount and allow Femern A/S to extend artificially the amortisation period of the investment and to exercise predatory pricing, thus harming the ferries’ operations.

⁵⁸ Commission decision of 15.10.2014, in case SA. 36558 (2014/NN) and SA. 38371(2014/NN) – Denmark, SA. 36662 (2014/NN) – Sweden, *Aid granted to Øresundsbro Konsortiet*, OJ C 437, 5.12.2014, p. 1.

⁵⁹ Scandlines, Stena, TT-Line.

⁶⁰ To this end, Scandlines refers to the Fehmarn Belt Forecast 2014 – Update of the FTC-Study of 2002 – Treatment of Great Belt in the Forecast (Passenger traffic) for Femern A/S 2015.

⁶¹ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008, p. 10–22.

- (69) In their opinion, none of the aid measures in favour of Femern A/S cannot be considered compatible with the internal market, as the criteria of the Commission Communication on State aid for important projects of common European interest (“IPCEI Communication”)⁶² are not complied with. In particular:
- i. the aid lacks incentive effect, as Femern A/S started works⁶³ before the aid was even granted;
 - ii. it has not been sufficiently demonstrated that the Fixed Link and hinterland connections qualify as an Important Project of Common European Interest, given that these projects are based on flawed supporting documentation; eg. the forecasted traffic volumes are unrealistic and too high, while certain costs⁶⁴ have not been taken into account and result in an overestimation of revenues and a misinterpretation of the benefits of the project;
 - iii. the aid is not proportional as it is unlimited in time⁶⁵ and amount and has not been benchmarked against other counterfactuals;
 - iv. the aid unduly distorts competition, as it enables the aid beneficiary to price its services below costs and use the aid to subsidize the consequential loss of revenue and thereby undermine and squeeze out competing infrastructure operators.

3.2. Summary of the main argumentation submitted by Denmark

3.2.1. As regards the (non) economic nature of Femern A/S’s activity

- (70) Denmark argues that Femern A/S is a special purpose company established with the sole purpose to implement the State’s decisions regarding the construction of a particular infrastructure. Thus, it does not conduct an economic activity, but exercises public planning authority on behalf of the State. To this end, it refers to EU Courts’ case law⁶⁶, to argue that it is irrelevant that Femern A/S has been established as a company or whether it charges user fees in order to finance the construction and operation of the Fixed Link. The idea of subjecting the operation of the tunnel to State aid control solely because Femern A/S charges a fee is contrary to the functional nature of the notion of “economic activity”. If the State decided to directly finance the project without charging any fees, there would be no State aid, although the effect would be the same; charging a fee to the users is much less distortive for the ferry services.

⁶² Communication from the Commission — Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20.6.2014, p. 4.

⁶³ “Advance Activities” authorised by the Danish Parliament in March 2013.

⁶⁴ The omitted costs include costs of construction works which allegedly had started before the notification of the aid (approximately EUR 94 million), as well as costs incurred during the planning of the Fixed Link (DKK 4 billion, or approximately 536 million).

⁶⁵ According to Scandlines, the duration of the aid should be limited to 20 years starting from 2013, when the construction of the Fixed Link allegedly started and in any case, it should not be linked to a loan repayment period, as this would always be a moving target.

⁶⁶ Judgments of the Court of Justice of 12 July 2012, *Compass-Datenbank GmbH*, C-138/11, ECLI:EU:C:2012:449, and Judgment of the Court of Justice of 18 March 1997, *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, C-343/95, ECLI:EU:C:1997:160.

- (71) The purpose of the Fixed Link is clearly and exclusively a public policy aim, and not the commercial exploitation of the infrastructure. Moreover, the existence of the project presupposes the consent of two sovereign States to establish a link between their territories, which is an act of public authority that could never be undertaken by private entities. Thus, it differs from the construction of the southern runway in the Leipzig-Halle Airport⁶⁷, which had a predominantly commercial purpose. Moreover, by contrast to the Oresund Consortium, it is the Minister of transport and not Femern A/S that sets the prices. Femern A/S is more comparable to a public entity, which has to balance its budgets and pay its debts, rather than to an undertaking, which maximises its profits. Therefore, Femern A/S's activities and financing model are comparable to those of public authorities, which charge a cost-based fee for providing specific public goods or services to their users, rather than to those of undertakings. Moreover, the role of Femern A/S as operator of the link cannot be considered as liberalised, as it is specifically and exclusively appointed by the State. In addition, it performs its duties in a ring-fenced economic circuit and there is no risk that its financing activities could be used to subsidise other activities not relating to its public tasks.

3.2.2. As regards the compatibility of the alleged aid measures

- (72) Concerning possible compatibility of the measures, insofar as these would constitute State aid, Denmark argues that they may be considered compatible with the internal market on the basis of Article 107(3)(b) TFEU, based on the criteria of the IPCEI Communication⁶⁸.
- (73) First, the Fehmarn Belt is a specific, precise and clearly defined project, which is important in terms of amount and involves two countries. Moreover, it is of common European interest, as it contributes to the development of the TEN-T network and is as such a priority project, as it is a key element in the completion of the main north-south route connection between the Nordic countries and Central Europe. The measures are necessary, as no private investor would have been able to enter into such a large-scale project, given that the expected Weighted Average Cost of Capital ('WACC') a private investor would require significantly exceeds the project's internal rate of return. Moreover, the measures are proportionate as the funding gap is higher than the estimated aid amount and all contracts with contractors would be awarded in accordance with public procurement rules. Finally, the Fehmarn Belt's estimated positive effects demonstrate that the measures have a limited negative effect on competition and trade.

⁶⁷ Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others v Commission*, Joined cases T-443/08 and T-455/08, ECLI:EU:T:2011:117; upheld on appeal in Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, C-288/11 P, ECLI:EU:C:2012:821.

⁶⁸ Communication from the Commission — Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20.6.2014, p. 4.

4. SCOPE OF THIS DECISION AND RELATION TO THE PLANNING AND 2018 DECISIONS

- (74) This decision does not concern the measures in favour of A/S Femern Landanlæg relevant to the financing of the hinterland connections. The Commission found in its Construction Decision that those measures did not constitute State aid within the meaning of Article 107(1) TFEU and the General Court rejected the actions for annulment brought by the complainants as regards these measures, thereby confirming the Commission's assessment in this respect.
- (75) Therefore, this decision covers the measures granted or allegedly granted to Femern A/S in relation to the planning, construction and operation of the Fixed Link, namely the measures detailed above in section 2.4 of this decision.
- (76) This decision does not cover other possible measures granted by Denmark to Femern A/S, A/S Femern Landanlæg, Sund & Bælt Holding A/S or to any other related company.
- (77) In the Planning Decision, the Commission considered that in principle the activities of Femern A/S during the planning phase of the project did not constitute economic activities, but activities related to the exercise of public powers on behalf of the State. However, the Commission considered also that in case Femern A/S was chosen to operate the infrastructure, the existence of State aid could not be excluded. Given that in 2015 the State assigned to Femern A/S also the operation of the Fixed Link, the Construction act included also the task of Femern A/S as regards the planning of the Fehmarn Belt, which was part of the 2014 notification. By its Construction Decision, the Commission consequently approved possible aid in favour of Femern A/S for the financing of the planning, construction and operation phase of the Fixed Link, including costs of the planning phase that may have exceeded the estimated amount mentioned in the Planning Decision, as the Construction Decision took into account all the costs incurred and estimated relevant to the planning phase. Therefore, possible aid granted for a planning budget higher than the one mentioned in the Planning Decision, does not constitute misuse of aid⁶⁹, in the sense of Article 1(g) of the Procedural Regulation⁷⁰, but possible aid⁷¹, which was approved by the Construction Decision.
- (78) The Commission takes the same approach in this decision. Consequently, the formal investigation will also cover all measures relevant to the planning phase of the project that concern the Fixed Link.
- (79) The Commission notes further that the 2018 Decision is based to a large extent on the findings made in and the reasoning of the Construction Decision. In view of its partial annulment by the General Court, it is appropriate to revoke the 2018 Decision in so far as it relates to measures granted to Femern A/S for the

⁶⁹ "Misuse of aid" means aid used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of Regulation (EC) No 659/1999 or Article 4(3) or Article 9(3) or (4) of Council Regulation (EU) 2015/1589.

⁷⁰ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9.

⁷¹ The Construction decision did not conclude on the aid character of the measures assessed; see recital 81 of the decision.

planning, construction and operation of the Fixed Link, to allow for a comprehensive analysis of all measures.

5. ASSESSMENT

5.1. Existence of State aid

- (80) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

5.1.1. Notion of undertaking

- (81) The Commission notes that the State aid rules only apply where the recipient of an aid is an 'undertaking'. According to settled case law, an undertaking is an entity engaging in an economic activity regardless of its legal status and the way in which it is financed⁷². Any activity consisting in offering goods and/or services in a given market is an economic activity⁷³.
- (82) In the *Aéroports de Paris* judgment⁷⁴, the General Court ruled that the operation of an airport had to be seen as an economic activity. More recently, the *Leipzig/Halle* judgments⁷⁵ concluded that as long as an airport runway will be used for economic activities, its construction also constitutes an economic activity and thus its funding may fall within the ambit of State aid rules. While these cases relate specifically to airports, the principles developed by the Union Courts are also applicable to the construction of other infrastructures that are indissociably linked to an economic activity^{76,77}.
- (83) In light of this case law, Femern A/S, as the owner and operator of the Fixed Link, provides a transport service against remuneration to citizens and

⁷² Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined cases C-180/98 to C-184/98, ECLI:EU:C:2000:428.

⁷³ Judgment of the Court of Justice of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283, paragraph 7; judgment of the Court of Justice of 18 June 1998, *Commission v Italian Republic*, C-35/96 ECLI:EU:C:1998:303, paragraph 36; judgment of the Court of Justice of 12 September 2000, *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joint Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428

⁷⁴ Judgment of the General Court of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 125, confirmed by the Court of Justice in its Judgment of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, ECLI:EU:C:2002:617.

⁷⁵ Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others v Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117; upheld on appeal in Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, C-288/11 P, ECLI:EU:C:2012:821.

⁷⁶ Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 40; Judgment of the General Court of 15 March 2018, *Naviera Armas v Commission*, T-108/16, ECLI:EU:T:2018:145, paragraph 78.

⁷⁷ See also paragraph 202 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946, OJ C 262, 19.7.2016, p. 1–50.

undertakings using the Fixed Link. It charges a consideration (toll) from the users of the road section of the Fixed Link for crossing the Fehmarn Belt strait. In addition, the railway companies pay fees for access to the railway infrastructure on the Fixed Link. The revenues from road and rail collected by Femern A/S are meant to finance the total cost of planning, construction and operation of the Fixed Link, but also, according to the 2014 notification, the costs of the construction of the hinterland connections, through the distribution of dividends to the parent company.

- (84) Thus on the basis of the above case law, it could be considered *prima facie* that Femern A/S is engaged in an economic activity and should be considered as an undertaking. Concerning Denmark's arguments in this respect, the Commission has conducted the following preliminary analysis.
- (85) First, the fact that the project seeks to achieve public policy objectives does not exclude, on a standalone basis, that Femern A/S can be considered as an undertaking. The provision of, for instance, gas, electricity, public transport, and mail services can also seek to achieve public policy objectives, yet the entities providing such goods or services can undoubtedly be undertakings in sense of Article 107(1) TFEU. It is mainly activities which fall within the exercise of public powers that are not of an economic nature, and not activities that may achieve public policy objectives in general.
- (86) Second, it is inherent in the nature of cross-border transport that the consent of at least two sovereign states is required. International air transport, for instance, can only be carried out with the permission of the states concerned. The same applies to the construction of cross-border transport infrastructure. The fact that the grant of permits to provide international transport services or to construct infrastructure to provide such services is an exercise of public powers, does not render the transport services themselves or the construction of the necessary infrastructure an exercise of public powers.
- (87) Third, the fact that an activity has been planned by a State does not in itself make it non-economic. It is also immaterial that Denmark has directly charged Femern A/S with the planning, construction, and operation of the Fixed Link, without tendering out a concession contract. According to settled case-law, the decisive question is whether Femern A/S provides goods or services on a market.
- (88) Fourth, while the fact that Femern A/S cannot enter other markets may be relevant in determining whether public support it receives is liable to affect trade between Member States or distorts competition, it is not relevant for determining whether it carries out an economic activity.
- (89) The above arguments are consequently not sufficient to conclude that Femern A/S would not be an undertaking within the meaning of Article 107(1) TFEU.
- (90) However, the Commission notes the specific arrangements under the Construction Act, according to which the fees for the use of the Fixed Link are not set by Femern A/S but directly by the State through the Minister of Transport.
- (91) This is a specific feature of the Fehmarn Belt, which normally does not apply to undertakings operating on a market. Indeed, whilst regulated price structures may

and do exist for certain products or services, the situation may be different where the State by law solely and directly determines the exact consideration to be paid for the use of a particular infrastructure⁷⁸.

- (92) The EU Courts have in the past held that a public entity (which also fulfils supervisory duties of a public nature) performs an economic activity when it provides services against a fee at a rate which it is free to set, and where the entity itself determines the conditions at which the services are provided.⁷⁹ Conversely, the EU Courts have found that the fact that a service provided by a public entity and connected to the exercise by it of public powers is provided in return for remuneration laid down by law and not determined, directly or indirectly, by that entity, is not alone sufficient for the activity to be classified as an economic activity.⁸⁰
- (93) This case law suggests that when an entity provides goods or services against remuneration and its activity is connected to the exercise of public powers, the ability it has to freely set the level of this consideration (and thus compete, based on price, with rivaling providers) may be material in determining whether it is acting as an undertaking within the meaning of Article 107(1) of the TFEU.
- (94) While it is not obvious from information provided until now that Femern A/S exercises an activity connected to the exercise of public powers, it follows from the case law that, were this to be the case, the mere fact that it charges a fee for the provision of goods or services does not necessarily suffice to conclude that this provision is an economic activity in situations where the level of the consideration is set directly by public authorities.
- (95) On the other hand, the services provided by Femern A/S compete with services provided by private operators, in particular ferry operators, and the financial analysis provided in the context of the 2014 notification, assumes that tolls are set by reference to the ferry prices. This seems to indicate that Femern A/S commercially exploits the Fixed Link by providing services on a market, and could hence be engaged in an economic activity.
- (96) Given the particular situation in which Femern A/S operates, the argumentation submitted by Denmark and the complainants, and the case law mentioned in recitals 92 and 93 above, the Commission has doubts, at this stage, as to whether Femern A/S can be considered as being engaged in an economic activity (during the planning, construction and operational phase of the project) and thus as an undertaking in the sense of State aid rules.
- (97) As regards the alleged promotional activities in which Femern A/S has been engaged, in the absence of a final conclusion on whether Femern A/S main

⁷⁸ See, by contrast, the Commission's analysis in its decision on the Øresund Bridge (see footnote 58), where the Commission noted that the Consortium was free to set its prices and determine its commercial policy

⁷⁹ Judgment of the General Court of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, paragraphs 120-121, confirmed by the Court of Justice in its Judgment of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, ECLI:EU:C:2002:617

⁸⁰ Judgment of the Court of Justice of 12 July 2012, *Compass-Datenbank GmbH v Republik Österreich*, C-138/ ECLI:EU:C:2012:449, paragraph 38, with further references.

activity is economic, the Commission at this stage, is not in a position to draw a final conclusion either. Anyhow, the Commission considers that the State's obligation to inform the public on the implementation of a new important infrastructure project could be considered as a public task and not as an economic activity. However, at this stage, Denmark has not provided detailed information on the specific information actions and the corresponding amounts involved, in order to allow the Commission to complete its analysis in this respect.

- (98) In order to provisionally conclude whether the measures granted to Femern A/S might constitute State aid it is necessary to assess the other criteria set out in Article 107(1) TFEU.

5.1.2. State resources and imputability to the State

- (99) With regard to the State origin of the advantages resulting from the application of the measures, it should be recalled that the concept of aid is broader than that of subsidy, because it embraces not only positive benefits, such as subsidies and capital injections, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect⁸¹.
- (100) A measure by which the public authorities grant certain undertakings an exemption from a reduction or a deferral of payment of the tax normally due, although not involving a transfer of State resources, places beneficiaries in a more favourable financial situation than other taxpayers and constitutes State aid within the meaning of Article 107(1) TFEU⁸². The creation of a risk of imposing an additional burden on the State in the future, by constituting a guarantee or by granting loans on terms that do not correspond to the ones of the market, is sufficient for the purposes of Article 107(1) TFEU⁸³. The same is true, for instance, when guarantees are granted by a Member State without requiring the payment of a premium on market terms from the beneficiary of the guarantee. Moreover, a transfer of state resources may be considered present, if the State does not charge the amount it would normally charge under its general system for access to public domain or natural resources, such as the seabed and the water areas. Finally, if the State through its own railway operator paid railway fees that exceed the fees that a market economy operator would have paid, it can be considered as foregoing State resources.

⁸¹ See *inter alia* judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten*, C-143/99, ECLI:EU:C:2001:598, paragraph 38; judgment of the Court of Justice of 15 July 2004, *Spain v Commission*, C-501/00, ECLI:EU:C:2004:438, paragraph 90, and the case law cited therein; Judgment of the Court of Justice of 15 December 2005, *Italy v Commission*, C-66/02 ECLI:EU:C:2005:768, paragraph 77; Judgment of the Court of Justice of 10 January 2006, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze*, C-222/04, ECLI:EU:C:2006:8, paragraph 131, and the case law cited therein.

⁸² See, for example, Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 14.

⁸³ Judgment of the Court of Justice of 1 December 1998, *Ecotrade Srl v Altiforni e Ferriere di Servola SpA (AFS)*, C-200/97, ECLI:EU:C:1998:579, paragraph 41; Judgment of the Court of Justice of 19 March 2013, *Bouygues and Bouygues Télécom v Commission and Others*, Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraphs 137, 138 and 139.

- (101) As the above measures, apart the railway fees, were granted by the State itself, they are by definition imputable to it. As regards the railway fees in particular, as the Minister of transport determines the fees that DSB will have to pay, they may be considered as imputable to the State.
- (102) As a consequence, the measures mentioned in section 2.4 of this decision, granted by Denmark in favour of Femern A/S can, in case their features are confirmed, be considered as involving State resources and are imputable to the State.

5.1.3. Selective advantage

- (103) According to constant case law, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions, i.e. in the absence of State intervention⁸⁴. Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention⁸⁵. To assess this, the financial situation of the undertaking following the measure should be compared with the financial situation if the measure had not been introduced.

5.1.3.1. The capital injections, the State guarantees and the State loans

- (104) The capital injections to which Sund & Baelte Holding A/S proceeded can be considered as entailing an advantage in favour of Femern A/S, as, given the uncertainties around the profitability and the high risks of the project, no market economic operator would have injected capital into Femern A/S, in the absence of some type of State support. Moreover, a public guarantee or a State loan granted with preferential terms, may grant the borrower an advantage, by enabling it to borrow at an interest rate and cost that would not have been obtainable on the market without the guarantee⁸⁶, or in the absence of the State loan. Moreover, a State guarantee covering Femern A/S's liabilities deriving from its contractual relations, diminishes its risks relevant to normal contractual obligations that any private operator would have under normal market conditions. In this case, by providing the State guarantees and State loans without requiring the payment of a premium on market terms, or the payment of the market interest rate, the State conferred an advantage to Femern A/S.
- (105) As said advantages concern specifically Femern A/S, they are de jure selective. Therefore, the State guarantees and the loans constitute selective advantages in favour of Femern A/S within the meaning of Article 107 (1) TFEU.

⁸⁴ See Judgment of the Court of Justice of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, C-39/94 ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96 ECLI:EU:C:1999:210, paragraph 41.

⁸⁵ Judgment of the Court of Justice of 2 July 1974, *Italy v Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 13.

⁸⁶ Judgment of the Court of Justice of 8 December 2011, *Residex Capital v Gemeente Rotterdam*, C-275/10, ECLI:EU:C:2011:814, paragraph 39.

5.1.3.2. *Railway fees*

- (106) In case the railway fees paid by the State owned railway operator are higher than the market price that should normally be charged to other railway operators for passing through the Fixed Link, Femern A/S would indeed benefit from a selective advantage. On the other hand, if all users of the Fixed Link pay the same fees, the mere fact that some of those users are State-owned seems insufficient to conclude that Femern A/S benefits from a selective advantage.
- (107) However, in the absence of evidence on the way the railway fees will be charged, the Commission, at this stage, is not in a position to conclude on the existence of a selective advantage as regards this alleged measure.

5.1.3.3. *The special tax measures*

- (108) For a tax measure to fall within the scope of Article 107(1) TFEU, it has to be established whether under a particular statutory scheme a state measure is such as to favour "certain undertakings or the production of certain goods" over others, which are in a legal and factual situation that is comparable, in the light of the objective pursued by that scheme⁸⁷. However, when Member States adopt ad hoc measures benefiting specific entities, the identification of an advantage in principle allows to presume its selective nature⁸⁸, as it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or few undertakings⁸⁹. In this case, the special tax regime on depreciation and on loss carry forward reduces Femern A/S's tax liability as compared to what it would have been in the absence of those measures and thereby confers an economic advantage to it.. In these circumstances, Femern A/S appears to be the direct beneficiary of the tax measures.
- (109) Nevertheless, for reasons of completeness, the Commission will assess the measures of fiscal loss carry forward and of specific depreciation rules under the standard three-step analysis established by the EU Courts⁹⁰. First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objective intrinsic to the system, are in a comparable factual and legal situation. If the measure constitutes a derogation from the system of reference and thus is prima facie selective, it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the system. In this context, it is for the

⁸⁷ Judgment of the General Court *Salzgitter v Commission*, T-308/00, ECLI:EU:T:2004:199, paragraph 79, and the case law cited therein.

⁸⁸ Judgment of the General Court of 13 December 2017, *Hellenic Republic v. Commission*, T-314/15, ECLI:EU:T:2017:903, paragraphs 78 and 79.

⁸⁹ Judgment of the Court of Justice of 4 June 2015, *Commission v MOL*, C-15/14 P, ECLI:EU:C:2015:362, paragraphs 60 et seq.; Opinion of Advocate General Mengozzi of 27 June 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:442, paragraph 52,

⁹⁰ Judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 62; Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, ECLI:EU:C:2001:598.

Member State to demonstrate that the differentiated tax treatment derives directly from the basic or guiding principles of that system⁹¹.

a) *Fiscal loss carry forward*

- (110) The Commission notes that as regards the fiscal loss carry forward measure in favour of Femern A/S, the system of reference is the normal Danish tax rules on loss carry forward that apply in principle to all undertakings in Denmark, as laid down in the Danish Tax Assessment Act. Up to 2013, under the general rule for loss carry forward, all companies, including Femern A/S, could carry forward their losses without any time limitation⁹². Thus, from 2009 until the end of 2012, Femern A/S did not benefit from any derogation from the general tax system.
- (111) Since 1 January 2013, the general loss carry forward framework was amended⁹³. However, Femern A/S was excluded from the limitation introduced on the amounts of yearly reduction, and consequently placed in a more favourable position than other undertakings.
- (112) The Commission therefore concludes that the special rules on the carry forward of losses that Femern A/S enjoyed in the period 2013 until 2015, when the relevant provision was abolished, differentiated between economic operators that appear *prima facie* to be in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned. The rules applicable to Femern A/S during this period were thus *prima facie* selective.
- (113) A measure, which is *prima facie* selective, may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the system of reference or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system⁹⁴. On the contrary, external policy objectives, which are not inherent to the general tax system cannot be relied upon for that purpose⁹⁵. It is up to the Member State concerned to demonstrate that a measure, which is at first sight selective, is justified by the nature or general scheme of its tax system⁹⁶.

⁹¹ Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 49 et seq.; Judgment of the Court of Justice of 29 April 2004, *GIL Insurance*, C-308/01, ECLI:EU: C:2004:252.

⁹² See Danish Act no. 313 of 21 May 2002.

⁹³ See recital 52 of this decision.

⁹⁴ Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, , paragraph 69.

⁹⁵ Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU: C:2011:550, paragraphs 69 and 70; Judgment of the Court of Justice of 6 September 2006, *Portugal v Commission*, C-88/03, ECLI:EU: C:2006:511, paragraph 81; Judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands*, C-279/08 P, ECLI:EU: C:2011:551; Judgment of the Court of Justice of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, ECLI:EU:C:2008:757; Judgment of the Court of Justice of 18 July 2013, *P Oy*, C-6/12, ECLI:EU:C:2013:525, paragraphs 27 et seq.

⁹⁶ Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 146; Judgment of the Court of Justice of 29 April 2004, *Netherlands v Commission*, C-

(114) The Danish authorities consider that the measure at stake concerns the planning phase of the project, during which Femern A/S was not conducting economic activities and that in any case the measure never materialised in practice, since Femern A/S did not have any profits during that period. Therefore, they have not submitted any justification in light of the objective pursued by the general system. Thus, at this stage, the Commission draws the preliminary conclusion that Femern A/S may have enjoyed a selective advantage for the years 2013-2015, although it did not materialise it in practice.

b) Depreciation of assets

(115) Concerning the measure relevant to depreciation of assets, the Commission considers that the general system of reference corresponds to the Danish depreciation system applicable in principle to all companies in Denmark, as laid down in the Danish Depreciation Act⁹⁷.

(116) With regard to these rules, the depreciation rate applicable to buildings and installations of all Danish companies has been set at a rate lower than the one applicable for Femern A/S's assets (4% against 6% for Femern A/S). Moreover, Femern A/S has the right to depreciate at a maximum rate of 6% the entirety of its assets until the income year in which the total sum of the depreciation has surpassed 60% (i.e. a 10 year period), from which point an annual depreciation rate of 2% applies.

(117) The Commission observes that the depreciation rate applicable to Femern A/S until the end of 2015, when it was abolished, derogated from the common depreciation regime applicable to all other undertakings in Denmark that were *prima facie* in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned. The rules applicable to Femern A/S were therefore *prima facie* selective.

(118) As mentioned above, the Danish authorities consider that the measure at stake concerns the planning phase of the project, during which Femern A/S was not conducting economic activities and that in any case the measure never materialised in practice. They have not submitted a justification in light of the objective pursued by the general system. Thus, at this stage, the Commission draws the preliminary conclusion that Femern A/S may have enjoyed a selective advantage for the years 2009-2015, although it did not materialise it in practice.

c) Joint taxation regime

(119) The system of reference for the joint taxation regime consists in the provisions on mandatory taxation in the Danish Company Tax Act. Since the joint taxation regime is mandatorily applicable to all Danish undertakings within a group and not specifically to Femern A/S, no selective advantage can be considered as

159/01, ECLI:EU:C:2004:246, paragraph 43; Judgment of the Court of Justice of 6 September 2006, *Portugal v Commission*, C-88/03, ECLI:EU:C:2006:511.

⁹⁷ Consolidated Act No 1191 on Depreciation Allowance of 11 October 2007.

conferred to Femern A/S⁹⁸. Thus the Commission concludes at this stage, that Femern A/S does not benefit from an additional selective advantage through its participation in the joint taxation regime.

5.1.3.4. Free use of State property

- (120) According to the Danish authorities, there is no general rule or principle in Danish law requiring companies in a similar factual and legal situation as Femern A/S to pay fees to the State for making use of seabed and water areas. Hence the same free access principle applies to all Fixed Link infrastructures. Similarly, no fees are paid by ferry operators or other ship freight companies to the Danish State for crossing sea areas under Danish jurisdiction. In addition, ports do not pay fees for using the seabed.
- (121) As the complainants did not establish the existence of a general legal framework providing for the payment of a fee for the use of seabed and water areas, the Commission at this stage has no reason to consider that such general system exists and that, consequently, Femern A/S benefits from a selective advantage in this respect.

5.1.4. Distortion of competition and effect on trade between Member States

- (122) When aid granted by a Member State strengthens the position of an undertaking as compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by the aid⁹⁹.
- (123) To the extent that Femern A/S has to be considered as an undertaking active on the market for transport services to cross the Fehmarn Belt strait, it is clear that the grant of a selective advantage may strengthen its position with respect to other undertakings active on that market, such as, in particular, ferry operators and port operators.
- (124) Thus, the measures in question, to the extent that they entail a selective advantage in favour of an undertaking, may be considered as affecting intra-Union trade.
- (125) Similarly, to the extent that the measures are liable to improve Femern A/S's competitive position, the Commission considers that that the measures are liable to distort competition.

5.1.5. Conclusion on the existence of aid

- (126) On the basis of this assessment, the Commission provisionally concludes that the measures at issue might constitute State aid within the meaning of Article 107(1) TFEU. In particular, if Femern A/S must be considered as an undertaking in the sense of State aid rules, the capital injections, the State guarantees, the State loans, the railway fees, the depreciation of assets, and the fiscal loss carry forward

⁹⁸ See also judgment of the General Court of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland v Commission*, T-630/15, ECLI:EU:T:2018:942, paragraphs 278 to 282.

⁹⁹ Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 66; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77; Judgment of the General Court of 4 April 2001, *Friulia Venezia Giulia*, T-288/97, ECLI:EU:T:2001:115, paragraph 41.

may constitute State aid in favour of Femern A/S. Concerning the alleged measure consisting of the use of State property, free of charge, the Commission's preliminary view is that it does not constitute State aid in favour of Femern A/S. As regards the alleged measure consisting of Joint taxation regime, the Commission concludes at this stage that it does not constitute State aid in the sense of Article 107(1) TFEU.

5.2. Classification of the measures as individual aid or scheme

- (127) To determine whether the measures qualify as aid schemes or individual aid measures, the Commission has to examine the nature of the measures in the light of the definitions set out in the Procedural Regulation¹⁰⁰.
- (128) According to Article 1(d) of the Procedural Regulation, “*“aid scheme” means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and 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*”. In contrast, individual aid is defined in Article 1(e) of the same Regulation as “*aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme*”.
- (129) The Commission considers that the first situation included in the definition of an aid scheme cannot be considered applicable to the measures under examination, as they are not aimed at “*undertakings defined within the act in a general and abstract manner*” but are aimed specifically at Femern A/S. Thus, the assessment as regards the aid scheme nature of the measures has to be conducted in light of the second situation envisaged by the definition.
- (130) In this respect, it could be argued that each time a new financial transaction (loan, credit facility) is implemented, an individual aid is granted to Femern A/S. On the other hand, it could also be argued that the State guarantees and loans do not constitute an aid scheme, as each time the Danish authorities approve a specific financial transaction of Femern A/S they are merely taking a measure necessary to implement the obligation of the State to guarantee the financing of the Fixed Link through guarantees and/or loans.
- (131) As to the question whether the State guarantees and State loans involve aid for an indefinite period of time or an indefinite amount, the Commission notes that at this stage, they seem to be open-ended. This being said, according to the information submitted by Denmark in the context of the 2014 notification, the period during which both the State guarantees and State loans may be granted has been limited to 55 years after the operation of the Fixed Link starts.
- (132) Moreover, the argument that individual aid is granted each time Femern A/S concludes a financial transaction for the financing of the Fixed Link, has to be balanced out against the effect of the implementation of the State's obligation to ensure the funding of the project, as set out in the Treaty, the Construction act and

¹⁰⁰ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9.

the Danish national law. It consequently seems difficult to consider each individual financial transaction in isolation from the general commitment of Denmark to guarantee the financial obligations of Femern A/S.

- (133) Consequently, at this stage, the Commission has doubts whether the State guarantees and loans should be considered as an aid scheme or whether they should be considered as individual aids, granted when the Planning and the Construction Act entered into force, or as individual aid granted each time a financial transaction of Femern A/S is implemented by the national authorities.
- (134) As regards the tax measures, the use of State property, free of charge, and the railway fees, their definition in the relevant legal acts, seems to be open-ended in terms of amount and duration, but specifically related to Femern A/S's activity with respect to Fixed Link. As these measures seem to be granted within the same purpose and scope as the State guarantees and loans, the Commission's considerations mentioned above as regards their preliminary qualification as individual aids or scheme are also to be applied as regards the tax measures.
- (135) Finally, as the capital injections were specifically related to the setting up of Femern A/S in view of the planning phase of the project, the Commission concludes that they constitute individual aids, as they are not open ended and they only refer to a specific purpose, company and project.

5.3. Compatibility assessment

- (136) Denmark argues that should the Commission consider the support measures to constitute State aid, it should assess their compatibility on the basis of Article 107(3)(b) TFEU, which allows aid to promote the execution of an Important Project of Common European Interest.
- (137) According to Article 107(3)(b) TFEU, aid to promote the execution of an important project of common European interest may be considered compatible with the internal market. The Commission Communication – criteria for the analysis of the compatibility with the internal market of State aid for important projects of common European interest (“IPCEI Communication”)¹⁰¹, sets out the principles according to which the Commission assesses the public financing of such projects.
- (138) According to paragraph 51 of the IPCEI Communication, *“the Commission will apply the principles set out in this communication to all notified aid projects in respect of which it is called upon to take a decision after the communication has been published in the Official Journal of the European Union, even where the projects were notified prior to its publication.”* Consequently, the principles set out in the IPCEI Communication should be applied in this case.

5.3.1. Important project of common European interest

- (139) Any project supported with aid on the basis of Article 107(3)(b) TFEU should possess the following features:

¹⁰¹ Communication for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188 of 20 June 2014, p. 4.

- it must be specific, precise and clearly defined;
- it must be “of common European interest”;
- it must be important both quantitatively and qualitatively.

5.3.1.1. The project must be specific, precise and clearly defined

(140) The project in this case can be defined as the planning, construction and operation of the Fixed Link. This project can be considered a *sui generis* project. Article 2 of the Treaty specifies that the Fixed Link across the Fehmarn Belt strait shall be constructed between Puttgarden and Rødbyhavn as a combined rail and road link consisting of an electrified, double-track railway and a four-lane road link with the technical quality of a motorway. More generally, the Treaty provides a clear description of the project, its implementation and funding. In addition, the Construction Act and its annexes provide a detailed technical description of the project, including geographical location, design, construction, financing and operation. Therefore, the Commission considers that the project can *prima facie* be considered as a specific, precise and clearly defined project.

5.3.1.2. The project must be of common European interest

- (141) The Commission considers that the project can also be considered of a common European interest in the sense of Article 103(3)(b) TFEU, as it contributes in a concrete, clear and identifiable manner to one or more Union objectives and has a significant impact on competitiveness of the Union, sustainable growth and value creation in a wide part of the Union.
- (142) The Commission notes that the common European interest of the project has already been recognised in its Planning Decision¹⁰².
- (143) The project will contribute to the development of the trans-European transport network (TEN-T) and is, as such, considered a priority TEN-T project (no. 20). This is a strong indication of the common European interest of the project. Accordingly, the project will contribute to an improvement of the connection between the Nordic countries and Central Europe as well as greater flexibility and time savings for road and railway traffic. In addition, the project is a key element in the completion of the main North-South route connection between the Nordic countries and Central Europe.
- (144) The project involves two Member States, i.e. Denmark and Germany, and the benefits go beyond those two Member States, as they extend to a wide part of the Union. The benefits of the project were clearly defined and quantified in a cost benefit study prepared for the Danish Ministry of Transport¹⁰³. The cost benefit analysis shows that the project will have wide benefits for Europe. Despite significant investment costs, the Fixed Link will return a net benefit and produce an economic return of 4.7 %. The updated study of 27 March 2015 measured, in the interest of prudence, the impact on competition from ferries operating at

¹⁰² See Commission decision of 13 July 2009 in case N159/2009 *Financing of the planning phase of the Fehmarn Belt fixed link*, OJ C 202, 27.8.2009, p. 2, recital 40.

¹⁰³ A study prepared for the Danish Ministry of Transport by Incentive, of 5 January 2015, as revised and updated by a study of 27 March 2015.

reduced frequency. Under that scenario, the socio-economic return was estimated at 4.1 %, which is still a clear indication of the beneficial character of the project for Europe. Moreover, the project will be funded in large part by Femern A/S, on account of the fact that tolls and fees will be charged to users of the Fixed Link.

- (145) In addition, the project received EU funding of EUR 205 million from 2007 to 2015 to the planning activities. Moreover, the project has been included in the list of proposals selected for receiving EU financial assistance in the field of Connecting Europe Facility (CEF) – Transport sector¹⁰⁴.
- (146) The project therefore represents an important and concrete contribution to the achievement of the Union’s transport policy objectives and broader Union objectives, such as the smooth functioning of the internal market and the strengthening of economic and social cohesion.

5.3.1.3 The project must be important quantitatively as well as qualitatively

- (147) The project is a major European transport infrastructure project. Its important character has already been recognised by the Commission in its Planning Decision¹⁰⁵.
- (148) On the basis of the 2014 notification, the total costs for planning and construction costs of the Fixed Link were estimated at DKK 54.9 billion (EUR 7.4 billion EUR) and the costs related to the planning and construction of the upgrading of the Danish hinterland connections were estimated at DKK 9.5 billion (EUR 1.3 billion), i.e. DKK 64.4 billion (EUR 8.7 billion) in fixed 2014 prices for the entire project. In addition to this, the project also involves significant costs related to the construction of the German hinterland connections that are the responsibility of German authorities¹⁰⁶.
- (149) Moreover, the project is realised in cooperation between Germany and Denmark and it has already been endorsed at Union level as the Fixed Link forms an integral part of the Trans-European transport network. Once the Fixed Link is completed it will significantly improve the conditions for passenger and freight traffic between the Nordic countries and Central Europe, helping to relieve congestion on the Great Belt route across Denmark, in particular on the rail network.
- (150) The Commission therefore considers that the project is quantitatively and qualitatively important, and to the benefit of a large part of the Union.

¹⁰⁴ See Commission Implementing Decisions C(2015) 5274 of 31 July 2015 establishing a list of proposals selected for receiving EU financial assistance in the field of Connecting Europe Facility (CEF)-Transport sector following the calls for proposals launched on 11 September 2014 based on the Multi-Annual work Programme, and C(2017)8803 of 5 January 2018 following a call for proposals launched on 8 February 2017 based on the Multi-Annual Work Programme.

¹⁰⁵ See Commission decision of 13 July 2009 in case N159/2009 *Financing of the planning phase of the Fehmarn Belt fixed link*, OJ C 202, 27.8.2007, p. 2, recital 42.

¹⁰⁶ These costs are not related to the current case.

- (151) Taking into account the above, the Commission concludes that the project meets all the criteria set out in the IPCEI Communication, for a project that may be promoted with aid based on Article 107(3)(b) TFEU¹⁰⁷.

5.3.2. Type of aid measures under assessment

- (152) As the measures under examination have been granted by Denmark in view of the substantial financing needs of the project highlighted above, the Commission considers it appropriate to assess to which extent this financing relates to the planning, construction and operation phases of the project. This is necessary, in order to establish firstly whether the public financing measures involve investment aid only, or both investment and operating aid. The Commission also aims at better understanding by means of information provided in the context of the formal investigation procedure, the necessity and proportionality of the aid measures at stake.
- (153) According to the Treaty, Denmark is responsible for financing, constructing and operating a user-financed coast-to-coast infrastructure and the Danish hinterland connections. According to the Planning Act and the Construction Act, Femern A/S may benefit from State guarantees and State loans to cover its financing needs as regards the planning, construction and operation of the Fixed Link. Moreover, the measures in the form of capital injections and special tax treatment seem to concern only the planning phase of the project, while the alleged measure relevant to the gratuitous use of State property may concern all phases of the project. As regards the railway fees, de facto they only concern the operation phase of the project. Therefore, at this stage it cannot be excluded that some of the measures may also cover operating costs of Femern A/S. On the other hand, according to both the Treaty and the two Acts, the costs of project design and other preparations for the project, as well as its construction, operation and maintenance shall be covered entirely by Femern A/S by toll charges and railway fees levied on the users. Moreover, according to Section 42 subsection 3 of the Construction Act, when Femern A/S applies discount schemes, it has to do so without materially affecting the level of revenues of the Fixed Link. In the Commission's preliminary view, these elements could possibly imply that Femern A/S is not meant to operate the Fixed Link with operating aid.
- (154) This being said, although Denmark argues that the main function of the State guarantees and State loans is to cover the financing needs of the construction and not the subsequent operation, the data submitted in the context of the 2014 notification may not be conclusive. In particular, the data provided at the time, do not demonstrate to which extent the measures that will still be implemented during the operation phase of the project cover financing needs related to: (i) the repayment of the debt created during the planning and construction phase of the project, and/or (ii) the payment of operating costs during the operational phase of the project¹⁰⁸, and/or (iii) the payment of the dividends to the parent company,

¹⁰⁷ The General Court has also confirmed the analysis of the Commission in this respect; see judgment of the General Court of 13 December 2018, *Scandlines v European Commission*, T-630/15, ECLI:EU:T:2018:942, paragraphs 144-181.

¹⁰⁸ According to (f) of the Annex of the IPCEI Communication, personnel and administrative costs (including overheads) incurred during the construction of the infrastructure, are eligible costs that may be covered with investment aid.

which relate to the construction costs of the hinterland connections that Femern A/S has the obligation to cover through its operating income, or (iv) all of the above.

- (155) In addition, the information at the Commission's disposal does not allow it to conclude on the exact nature and extent of the measures that would seem to concern the planning phase of the project. Although the Commission has authorised potential planning aid under its Planning Decision, up to the moment when the operation was assigned to Femern A/S, it could reasonably be considered that all measures relevant to the planning phase did not constitute State aid¹⁰⁹. However, should the Commission in its final decision conclude that Femern A/S's operation of the Fixed Link constitutes an economic activity, then all measures of the planning phase of the Fixed Link¹¹⁰ would most likely also be considered as State aid and would have to be assessed along the measures relevant to the construction and operation phase.
- (156) The Commission also deems it necessary to look into these parameters in the light of the typical financial and economic setup of such large scale projects. In particular, the Commission intends to clarify doubts as regards the issue whether it is not inherent in the logic of such infrastructure projects to compare ex ante upfront investment costs against future operating costs and income in a funding gap type of analysis. Indeed in such scenario, it may not be straightforward or useful to allocate traditional financial transactions exclusively to investment and/or operating costs. In this respect, the Commission also takes note of the fact that, most prominently in its judgment of 12 July 2018 on the Hinkley Point project¹¹¹, the General Court underlined that operating aid is intended to maintain the status quo or to release an undertaking from costs which it would normally have to bear in its' day-to-day management of normal activities. That Court noted that measures which could be considered as necessary to realizing a large-scale project such as the Hinkley Point generation plant could not be regarded as maintaining the status quo, and thus they would not constitute operating aid¹¹².
- (157) It can also be noted that the potential grant of a capital injection at the time of construction of the Fixed Link of an amount that would correspond to the expected benefit of the State guarantees and loans would confer, in economic terms, a comparable benefit upon Femern A/S as those guarantees and loans. To the extent that such a capital injection could be considered as investment aid, it does not seem straightforward to consider that the State guarantees and loans would necessarily involve operating aid merely because they also apply during the period that the Fixed Link is operational.

¹⁰⁹ See in this respect recitals 32 and 33 of the Planning Decision.

¹¹⁰ As the funding of the hinterland connections does not constitute State aid, only the measures relevant specifically to the planning of the Fixed Link would have to be assessed by the Commission in its final decision.

¹¹¹ Judgment of the General Court of 12 July 2018, *Austria v Commission*, Case T-356/15, ECLI:EU:T:2018:439, paragraph 580.

¹¹² See in particular paragraphs 577 to 586 of the judgment.

- (158) In view of the absence, at this stage, of indications allowing to conclude on these issues, the Commission considers it appropriate further examine the nature of the aid measures concerned.

5.3.3. *Necessity of the aid*

- (159) According to paragraph 28 of the IPCEI Communication, the aid must not subsidise the costs of a project that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity. Without the aid the project's realisation should be impossible, or it should be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits.
- (160) Footnote 2 of paragraph 28 of the IPCEI Communication provides that: *'The aid application must precede the start of the works, which is either the start of construction works on the investment or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever is the first in time. Buying of land and preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works...'*
- (161) The complainants argue that construction works started before an aid application had been made and that Denmark did not respect the standstill obligation, as Femern A/S has allegedly started works already in 2013, i.e. before the adoption of the Construction Decision, which authorised the aid.
- (162) The Commission notes that it is clear that Femern A/S was established for the sole purpose of planning, constructing and operating the Fixed Link. It is required by its articles of association to do so. Moreover, it cannot be disputed that Femern A/S was not in a position to start the works on the project without the aid Denmark intended to grant. In those circumstances, and taking into account the *sui generis* nature of infrastructure projects decided by the States and implemented by State owned specific purpose entities, the formal incentive effect requirement set out in the IPCEI Communication may not be considered as a reasonable prerequisite for demonstrating that the aid had an incentive effect. This is because this type of projects are different from projects relevant to productive investments that may for instance receive regional aid¹¹³, as those projects are decided by the companies themselves and the incentive behind their investment decision has to be verified by the granting authorities prior to the granting.
- (163) Moreover, the Commission notes that, on the basis of the information provided by Denmark in the context of the 2014 notification, the Planning Act had assigned to Femern A/S the specific task of planning and preparation of the Fehmarn Belt. Following the Planning Decision, Femern A/S proceeded to several activities to fulfil this task. Within this context, the Danish Parliament approved several times an adjustment of the planning budget. On the basis of the said information the last increase took place in 2013, time at which Scandlines argues that the works on the project started. This adjustment concerned, according to Denmark,

¹¹³ See in this respect judgment of the General Court of 13 December 2018, *Scandlines Denmark and Scandlines Germany v Commission*, T-630/15, ECLI:EU:T:2018:942, paragraph 192.

preparatory works as regards the Fehmarn Belt. In this respect, the Commission notes that according to standard practice, as regards the notion of “start of works” in the sense of State aid rules, buying of land preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works¹¹⁴. Moreover, it is only following the entry into force of the Construction Act that Femern A/S could under Danish national law, proceed to construction works on the Fixed Link. Finally Denmark had committed to respect the standstill obligation in the context of the 2014 notification. On this basis, the Commission’s preliminary view is that Femern A/S could not possibly start works before the Construction Act entered into force and did not do so until the Construction Decision approving the aid was adopted. Therefore, the Commission preliminarily considers at this stage that the incentive effect requirement¹¹⁵ has been complied with.

- (164) According to point 29 of the IPCEI Communication, the Member State should provide the Commission with adequate information concerning the aided project as well as a comprehensive description of the counterfactual scenario, which corresponds to the situation where no aid is awarded by any Member State. In this respect, in the context of the 2014 notification, Denmark submitted that no credible counterfactual or realistic description of an alternative project exists. The Danish Parliament has sole decision-making authority as regards the project’s scope and its means of financing. Hence, Femern A/S and A/S Femern Landanlæg have no power to decide to carry out an alternative project of a different scale.
- (165) However, Denmark provided information regarding a scenario where Femern A/S would get no public support. The analysis conducted in the preliminary phases shows that the Fehmarn Belt could only be realised with substantial public support.
- (166) In this respect, Denmark submitted the Enquiry of Commercial Interest, launched in 2001 with the aim to investigate: (i) the private sector's willingness and ability to design, plan, construct, finance and operate a fixed link across the Fehmarn Belt, (ii) the financial and associated technical solutions for the project, (iii) the organisational framework for private investors' involvement in the project, and (iv) the distribution of risks involved in the project between the private sector and the Member States¹¹⁶. The Enquiry aroused substantial interest: approximately 100 individual companies responded of which 31¹¹⁷ responded to a questionnaire and 20 were invited for interviews. The Enquiry concluded that the private sector would be interested in participating in the design, financing, construction and operation of the Fixed Link if the States provided any type of support, well in excess of the envisaged TEN-support and/or State guarantees. Private investors would require a high internal rate of return to compensate the substantial risks

¹¹⁴ See footnote 2 of paragraph 28 of the IPCEI Communication.

¹¹⁵ As interpreted by the General Court in its judgment of 13 December 2018, *Scandlines v European Commission*, T-630/15, ECLI:EU:T:2018:942, paragraphs 188 to 193.

¹¹⁶ The results from the Enquiry of Commercial Interest were published in the report: “Fehmarnbelt, An infrastructure Investment, Finance and Organisation, June 2002”.

¹¹⁷ The participants included consortia consisting of contractors, operators and banks on the one hand and individual companies, mainly banks, engineering companies and insurers, on the other.

connected to such a project as the Fixed Link. Likewise, lenders would require a high interest rate and a high debt coverage ratio in order to overcome the perceived risks. Together, these requirements from the investors and the lenders would lead to such high costs of capital that the project would not be feasible without substantial public support. To substantiate that this conclusion has not changed since, Denmark submitted an analysis at the time of the notification showing that the results of the Enquiry were still valid.

- (167) On this basis, the Commission considers *prima facie* that first, no rational private investor would engage in the financing of such a project under normal market conditions and second, the Fehmarn Belt could only be completed with substantial public support. Moreover, it would be difficult, if not impossible, for any such investor to assume the obligation to fund through its revenues the debt relevant to the hinterland connections. In addition, the provision of EU financial assistance under the CEF would be a complementary strong indication of the necessity of public funding for the realisation of the project. Hence, it can *prima facie* be considered that without the aid, the project would not be realised.
- (168) On the basis of the above, in the Commission's preliminary view, the counterfactual in this case would consist in the absence of an alternative project¹¹⁸. According to point 30 of the IPCEI Communication, "*in the absence of an alternative project, the Commission will verify that the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable, e.g. by making it possible to achieve an internal rate of return (IRR) corresponding to the sector or firm specific benchmark or hurdle rate*".
- (169) Consequently, aid must be considered as necessary if, for example, it can be demonstrated that the project's IRR is below the normal rate of return required by investors engaging in similar investment projects or if the IRR is insufficient to cover the cost of capital required by the market, i.e. a benchmark WACC of the market.
- (170) To this end, in the context of the 2014 notification, Denmark explained that Femern A/S did not have "investment projects of a similar kind" or "cost of capital" as a whole that could be used to calculate whether the aid amount exceeds the level necessary for the project to be sufficiently profitable. Therefore, it was necessary to compare the project's IRR with the cost of capital requirements generally seen in "the industry concerned". An estimate of the required cost of capital by the "industry concerned" was submitted by using comparable industry sectors in Europe with similar risk characteristics as a proxy, such as European toll roads and engineering companies with similar activities. However in their analysis, these industry sectors would not bare the significant additional risk the Fehmern Belt phased during the planning phase.¹¹⁹
- (171) The calculations submitted on this basis, showed that the project's IRR on a debt-free basis would be 4.2% over an expected repayment period of 55 years (i.e. where Femern A/S' total debt is zero after 55 years), while the benchmark

¹¹⁸ See paragraph 29 of the IPCEI Communication.

¹¹⁹ During the planning phase the risks for the project would be significantly higher than the risks of the selected European industry companies, which were at the operation phase.

WACC was estimated at 11%. Hence, Denmark argued that the WACC expected to be required by a private investor would significantly exceed the project's IRR.

- (172) According to last indent of paragraph 30 of the IPCEI Communication, for the purposes of calculation of the IRR of the project *relevant expected costs and benefits must be considered over the lifetime of the project*. However, the calculations provided by Denmark are based on a period, which does not correspond to the lifetime of the project, but to a repayment period of Femern A/S' debt¹²⁰ without any plausible justification of this choice, as it acknowledged that both the lifetime period and the 55-year repayment period render the financial parameters uncertain. The Commission notes that the 55-year repayment period would seem arbitrary, as it may vary depending on subjective factors, including the type of aid and the arrangements for repayment negotiated between the beneficiary and its lenders¹²¹. According to Femern A/S's website, the lifetime of the Fixed Link seems to correspond to 120 years. The Commission notes however that calculations based on such a long period could potentially result in less realistic assumptions and estimates concerning all the financial parameters of the project. At the same time, an infrastructure that operates for 120 years would normally request extensive reinvestments, which would indicate that the real lifetime of the project would reasonably be lower. This being said, should Denmark consider that the real lifetime of the project is shorter, or that another time-period would render the estimates more realistic, it should indicate that and provide credible appropriate analysis and justifications.
- (173) In any case, given the uncertainties around the appropriate period for the calculation of the IRR of the project and the time that has elapsed since the 2014 notification, the Commission would need to assess in detail the benchmark WACC and project's IRR levels proposed by Denmark on the basis of updated and appropriate assumptions.
- (174) It is the Commission's preliminary view that certain of the above elements¹²² may constitute strong indications of the necessity of the aid as regards the construction of the said infrastructure. However, given the considerations above including the uncertain calculation of the IRR and WACC, the Commission cannot conclude at this stage on the necessity of the measures.
- (175) Moreover, in case the aid measures would also cover operating costs during the operational phase of the Fixed Link, Denmark has not demonstrated, at this stage, whether such aid would be necessary to attain the objective of common European interest pursued.
- (176) In view of the above, the Commission will further examine the necessity of the aid measures for the planning, construction and operating phase of the project, on the basis of the extended information it will receive from Denmark and all interested parties in the course of the formal investigation procedure.

¹²⁰ Including the payment of dividends for the hinterland connections.

¹²¹ See in this respect judgment of the General Court of 13 December 2018, *Scandlines v European Commission*, T-630/15, ECLI:EU:T:2018:942, paragraph 213.

¹²² See recitals 163 to 163 of this decision.

5.3.4. Proportionality of the aid

- (177) The principle of proportionality requires that the aid measures do not exceed what is appropriate in order to attain their objectives. Thus, if the planning, construction and operation of the Fixed Link could be achieved with less aid, then the aid would not be considered proportionate.
- (178) According to paragraph 31 of the IPCEI Communication, “*the maximum aid level will be determined with regard to the identified funding gap in relation to the eligible costs*¹²³. *If justified by the funding gap analysis, the aid intensity could reach up to 100 % of the eligible costs. The funding gap refers to the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value on the basis of an appropriate discount factor reflecting the rate of return necessary for the beneficiary to carry out the project notably in view of the risks involved*”.
- (179) With regard to aid in the form of guarantees, the proportionality of such aid traditionally requires the guarantee to be linked to specific financial transaction, for a fixed maximum amount and limited in time¹²⁴. Further, footnote 2 of paragraph 36 of the IPCEI Communication, states that “*aid in the form of guarantees must be limited in time, and aid in the form of loans must be subject to repayment periods*”. Moreover, possible aid measures in the form of special tax treatment, gratuitous use of State property and undue railway fees should, in principle, be limited to an amount proportionate to the objective pursued.
- (180) In the context of the 2014 notification, Denmark argued that, as pointed out in paragraph 36 of the IPCEI Communication, “*where lack of finance is the underlying problem, Member States should normally resort to aid in the form of liquidity support, such as loans or guarantees*”. In its view, the Danish financing model is in line with this principle. A guarantee measure is an effective instrument to ensure that Femern A/S is not overcompensated as it merely enables Femern A/S to keep its capital costs at an appropriate level in order to make the project feasible by closing the funding gap. The guarantee would cover Femern A/S debt only until it would be fully repaid and it could be used to subsidise other activities. Finally, Denmark committed to limit the guarantee and State loans to 55 years after the opening of the Fixed Link and re-notify any public financing measures that would be deemed necessary after that period to ensure the sustainability of the Fehmern Belt. It also committed to report annually on the developments in the repayment of Femern A/S’ debt. Moreover, the guarantee would be terminated earlier, if the project debt would be repaid before the end of this period. Thus, in its opinion, the State guarantees and State loans were limited in scope and time.

¹²³ The eligible costs are those laid down in the Annex of the IPCEI Communication.

¹²⁴ See footnote 2, in paragraph 36 of the IPCEI Communication ‘*Aid in the form of guarantees must be limited in time, and aid in the form of loans must be subject to repayment periods*’ and point (b) of the third subparagraph of Section 4.1 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees Guarantee Notice, OJ C 155, 20.6.2008, p. 10 stating: “*When calculating the aid element in a guarantee, the Commission will devote special attention to the following elements: [...] (b) whether the extent of each guarantee can be properly measured when it is granted. This means that the guarantees must be linked to a specific financial transaction, for a fixed maximum amount and limited in time. In this connection the Commission considers in principle that unlimited guarantees are incompatible with Article 87 of the Treaty*”.

- (181) In the context of the 2014 notification, Denmark provided a funding gap analysis. On the basis of this analysis, the funding gap was calculated as the discounted difference between the positive and negative cash flows over the same repayment period. These cash flows included the net financial burden imposed on Femern A/S related to the financing of the hinterland connections and including net operating costs for the 55-year operating period. This would amount to DKK 23.1 billion (EUR 3.1 billion). The net present value of the eligible investment costs would then amount to DKK 42.1 billion (EUR 5.6 billion)¹²⁵. On the basis of these estimates, the project's funding gap ratio would therefore be 54.9 %.
- (182) The then estimated aid element corresponding to the measures in the form of guarantees or State loans as well as the capital injection would amount to DKK 21.3 billion (EUR 2.8 billion) which would lead to aid intensity of 50.8 %; i.e. below the project's funding gap ratio.
- (183) The Commission considers that the choice of State guarantees and State loans as main aid instruments is a positive indicator as regards the appropriateness and proportionality of the aid. However, it is not sufficient in and of itself to conclude that the measures in favour of Femern A/S are proportionate to the objective pursued.
- (184) Moreover, in the Commission's preliminary view, the uncertainties relevant to the 55-year repayment period analysed above¹²⁶, also concern the submitted funding gap analysis by Denmark.
- (185) Furthermore, the Commission considers, at this stage, that the time limitation to which Denmark committed in essence does not contain precise indications concerning the duration and end dates of the State guarantees and loans. At this stage, it remains uncertain when the Fixed Link will start operation. In addition, the full repayment of Femern A/S's debt is uncertain. Thus, the end date of the limitation period is in essence uncertain. Moreover, the said commitment would have as a consequence that the end dates of the aid measures could be extended well beyond 55 years, as all guarantees and State loans still valid at that date would remain so until they would naturally expire, i.e. when the underlying debts would have been repaid, which could be long after that date¹²⁷. Furthermore, Femern A/S' total debt relevant to the costs of the planning, construction and, if necessary, operation of the Fixed Link has not been clearly determined. Thus, in the Commission's preliminary view, the long and indeterminate repayment period for a debt that would seem only partially determined, raises questions about the proportionality of the measures at stake.
- (186) Furthermore, Denmark has included the costs of the hinterland connections as eligible costs for the calculation of the repayment period and the funding gap. In

¹²⁵ The eligible costs would amount to DKK 58.8 billion in 2014 prices, which at net present value corresponds to DKK 42.1 billion. The cost of the planning and construction of the Fixed Link would amount to DKK 54.9 billion in fixed 2014 prices (based on priced offers received from the bidders of the four principal civil works contracts on 22 December 2014 including a reserve of DKK 3.7 billion and calculated without CEF financial assistance).

¹²⁶ See recital 172 of this decision.

¹²⁷ See in this respect judgment of the General Court of 13 December 2018, *Scandlines v European Commission*, T-630/15, ECLI:EU:T:2018:942, paragraphs 230 and 233.

the Commission's preliminary view, as Femern A/S is under the obligation to pay dividends to A/S Femern Landanlaeg to enable the latter to pay its relevant debt, these costs could, in principle, be taken into account when examining whether the aid granted to Femern A/S is compatible¹²⁸. However, at this stage it is not clear whether these costs should be taken into account as eligible constructions costs or as liabilities of Femern A/S, which enter into the financial analysis at a later stage of the operation.

- (187) Moreover, should all the other measures mentioned in Section 2.3 of this decision constitute State aid, at this stage, the corresponding aid amounts have not been included in the calculations.
- (188) Finally, should the aid measures also cover operating costs during the operational phase of the Fixed Link, Denmark has not demonstrated, at this stage, whether such aid would also be proportional to attain the objective of common European interest pursued.
- (189) Taking into account the above analysis, the Commission at this stage, does not have sufficient elements to establish the length of the reasonable duration of the investment's lifetime, the appropriate repayment period and/or the maximum debt amount to conclude on the proportionality of the aid. Moreover, given the above uncertainties, as well as the time that has elapsed since the 2014 notification and the additional possible aid measures that are now included in the formal investigation, at this stage, the Commission does not have all the elements to determine the limits on amount and duration of all the aid measures combined which would be considered as appropriate in terms of proportionality.
- (190) In the absence of the elements, which would allow a proper quantification method of the aid involved or at least an appropriate methodology and relevant limitations, the Commission has doubts as regards the proportionality of the measures under examination.

5.3.5. Prevention of undue distortion of competition and balancing test

- (191) According to point 40 of the Communication, "*the Member State should provide evidence that the proposed aid measure constitutes the appropriate policy instrument to address the objective of the project*".
- (192) In the context of the 2014 notification, Denmark submitted that since the underlying problem for the project was lack of access to finance, aid in the form of liquidity support, such as loans or guarantees constitutes the appropriate policy instrument. The Danish financing model is an effective instrument to implement the project and ensure that Femern A/S would not be overcompensated as the measures (State guarantee, State loans and capital injection) merely enable Femern A/S to keep its capital costs at an appropriate level in order to make the project feasible by covering the funding gap. In addition, as the guarantee/loans only cover debt related to the planning, construction and operation of the Fixed Link, there may be no risk that the guarantee/loans can be used to subsidise other

¹²⁸ See in this respect judgment of the General Court of 13 December 2018, *Scandlines v European Commission*, T-630/15, ECLI:EU:T:2018:942, paragraph 237.

non-eligible costs and activities. Therefore, the Commission considers that the chosen financial support mechanism is appropriate.

- (193) According to paragraph 41 of the IPCEI Communication aid can be declared compatible “*if the negative effects of the aid in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of the common European interest*”. Paragraph 43 of the Communication sets out that “*the Commission will assess the risk of market foreclosure and dominance... projects involving the construction of an infrastructure must ensure open and non-discriminatory access to the infrastructure and non-discriminatory pricing*”.
- (194) As explained in recitals 141 to 144 of this decision, the Fixed Link is part of a wider plan to promote mobility, further integration and cultural exchange of people living on both sides of the Fixed Link, and to improve the connection between the Nordic countries and central Europe for passengers as well as road and railway freight. These expected benefits have been recognised at European level by including the Fehmarn Belt in the list of TEN-T priority projects. In this context the Fehmarn Belt will also generate positive effects on a number of economic sectors in the region, such as gas stations, retail, restaurants, hotels, amusement parks and rail and bus and transport.
- (195) However, the opening of the Fixed Link will have a negative impact on ferry operators serving the Rødby - Puttgarden route as well as other ferry routes in the region. Decreased ferry operations may also have a negative impact on the ports used by those ferries in terms of traffic volumes and revenues. This being said, these effects are inherent in this type of projects, through which the States seek to offer a quicker and more convenient alternative to ferry services.
- (196) The Commission notes further that the Fixed Link will be open to all users on equal and non-discriminatory basis. The Danish Minister for Transport will determine the tolls and railway charges to be collected from the users of the road and the rail connection of the Fixed Link. The pricing structure will be non-discriminatory and transparent and, as regards heavy goods vehicles, in line with the applicable rules of the Eurovignette Directive¹²⁹. Moreover, according to information submitted by Denmark, the railway charges will be determined in accordance with the applicable EU legislation¹³⁰. It is expected that the user tolls on the road link will correspond to the price charged by the ferry operator.
- (197) Moreover, the cost benefit analysis of the Fixed Link submitted by Denmark in the context of the 2014 notification, clearly shows that the expected socio economic outcome of the Fehmarn Belt in the long-run is positive, regardless of

¹²⁹ Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, OJ L 187, 20.7.1999, p. 42, as amended by Directive 2006/38/EC of the European Parliament and of the Council of 17 May 2006, OJ L 157, 9.6.2006, p. 8, and Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011, OJ L 269, 14.10.2011, p. 1.

¹³⁰ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ L 343, 14.12.2012, p. 32.

the fact whether the ferry service continues or is terminated¹³¹. The study tallies to the extent possible all possible gains and costs of the Fixed Link in comparison with a situation involving continued ferry operation. Despite the significant investment costs in the Fixed Link and related hinterland connections, the project will return a net benefit and produce an economic return of 4.1 % for Europe¹³². The net benefit reflects mainly time savings and greater flexibility in departure times for the various travellers using the Fixed Link.

- (198) Therefore, as also confirmed by the General Court¹³³, it is reasonable to conclude that a project involving the construction of infrastructure that will provide an alternative to existing modes of transport entails the risk that the latter will have to significantly reduce their activities or even disappear. Nevertheless, the Commission considers that Fehmarn Belt is clearly, on balance, beneficial and thus it is not in a position to call into question the choice made by the Danish authorities.
- (199) Taking into account the above, the notified measures should only have limited negative effect on competition and trade that cannot outweigh the obvious positive effects for the Union as a whole. Should the additional measures mentioned in Section 2.4 of this decision be considered as State aid, at this stage the Commission is not in a position to conclude on their effect on competition. This being said, as the corresponding aid amount would be minimal as compared to the aid amount of the State guarantees and loans, their effect would be also minimal. In addition, as in their absence Femern A/S financing needs would increase by the relevant corresponding amount, in practice their potential existence would only mitigate to a certain extent the debt that has to be covered by State guarantees and/or loans.

5.3.6. Specific compatibility condition as regards the State guarantees - Mobilisation conditions

- (200) According to paragraph 5.3 of the Guarantee Notice, “*The Commission will accept guarantees only if their mobilisation is contractually linked to specific conditions, which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure. These conditions will have to be agreed between the parties when the guarantee is initially granted. In the event that a Member State wants to mobilise the guarantee under conditions other than those initially agreed to at the granting stage, then the Commission will regard the mobilisation of the guarantee as creating new aid which has to be notified under Article 88(3) of the Treaty.*”
- (201) According to Section 4(2) of the Construction Act the Minister for Finance is authorized to provide State guarantees that cover Femern A/S’ obligations in

¹³¹ A cost-benefit analysis of the Fehmarn Belt Fixed Link, a study prepared for the Ministry of Transport by Incentive, 5 January 2015. Updated study prepared for the Danish Ministry of Transport by Incentive, 27 March 2015.

¹³² Taking into account all benefits and costs for Denmark alone, the Fixed Link and the associated hinterland connections in Denmark will generate a net social benefit of DKK 28 billion over 50 years. This equates to an economic return of 4.7 per cent.

¹³³ See in this respect judgment of the General Court of 13 December 2018, *Scandlines v European Commission*, T-630/15, ECLI:EU:T:2018:942, paragraph 256.

relation to loans and other financial instruments which it would obtain in order to finance the planning, construction and operation of the Fixed Link. The conditions for the mobilisation of this type of guarantee are not regulated in the Construction Act itself. In the context of the 2014 notification, Denmark submitted that those conditions would be determined by the Minister for Finance before Femern A/S could obtain loans and other financial instruments for the financing of the planning, construction and operation of the Fixed Link. Hence, the conditions for mobilising the State guarantee issued towards Femern A/S would form part of the loan agreements, which the companies would enter into with financial institutions.

- (202) However, Denmark did not submit to the Commission the precise conditions that the Danish Minister for Finance may have determined. In the absence of this information, the Commission is not in a position at this stage to decide on this compatibility condition as regards this type of guarantee.
- (203) With regard to the State guarantee covering non-financial obligations foreseen in Section 4(4) of the Construction Act, in the context of the 2014 notification, Denmark submitted that the conditions for mobilising this type of guarantee would be based on an interpretation of the guarantee in light of the general principles of Danish law of obligations. According to the information submitted, these principles would entail that Femern A/S must be declared bankrupt before this type of guarantee can be mobilised. On this basis, the Commission considers that the mobilisation of this type of guarantee is contractually linked to specific conditions. Therefore, should the other compatibility conditions be met, this type of guarantee could be considered compatible with the internal market¹³⁴.
- (204) On the basis of the above, the Commission will reach a final conclusion as regards this specific compatibility condition as regards the guarantee for the financial transactions of Femern A/S, on the basis it will receive in the context of the formal investigation procedure.

5.3.7. Transparency

- (205) According to paragraph 45 of the IPCEI Communication Member States shall ensure the publication of information on a comprehensive website, at national and regional level information relevant to the aid measure(s). At this stage, the Commission does not dispose the relevant information, in order to be able to conclude that Denmark complies with this condition.

5.3.8. Reporting obligation

- (206) According to point 49 of the IPCEI Communication “*the execution of the project must be subject to regular reporting*”. In this respect Denmark has committed to submit annual reports regarding the developments of repayment of Femern A/S' debt. Therefore, the Commission can preliminary conclude that this condition is complied with.

¹³⁴ See also in this respect judgment of the General Court of 13 December 2018, Scandlines v European Commission, T-630/15, ECLI:EU:T:2018:942, paragraphs 274-275.

6. CONCLUSION

In the light of the foregoing considerations, the Commission, first, withdraws Decision C(2018) 6268 final of 28 September 2018 in Case SA.51981 (2018/FC) – Denmark – Complaint about alleged unlawful aid to Femern A/S and A/S Femern Landanlaeg in so far as it relates to alleged unlawful aid granted to Femern A/S (this concerns the measures granted to Femern A/S that are considered in Sections 4.2, 4.3, 4.4, and 4.5 of that decision).

Second, the Commission needs to examine further, in particular, whether Fehmern A/S is engaged in an economic activity, whether the other conditions of Article 107(1) TFEU are met with regard to the measures granted or allegedly granted to Fehmern A/S described in Section 2.4 above, whether possible aid measures constitute individual aid or a scheme and whether those measures can be declared compatible with the internal market. In view of the doubts raised as to the compatibility with the internal market of those measures, the Commission decides to initiate proceedings pursuant to Article 108(2) TFEU.

Therefore, the Commission requires Denmark, within one month of receipt of this letter, to provide all documents, updated and complete information and data needed for the further assessment of the economic or non-economic character of the activity of Femern A/S and the extent to which the other conditions of Article 107(1) TFEU are met in relation to all of the measures, as well as the compatibility with the internal market of those measures. Otherwise the Commission will adopt a decision on the basis of the information in its possession. It requests your authorities to forward a copy of this letter to the recipient of the aid immediately.

The Commission warns Denmark that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER