EUROPEAN
COMMISSION

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SENSITIVE[*]**:** *COMP Operations*

COMMISSION DECISION

of 20.3.2020

ON THE STATE AID
SA.39078 - 2019/C (ex 2014/N)
which Denmark implemented
for Femern A/S

(Text with EEA relevance)

(Only the English version is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited[1] and having regard to their comments,

Whereas:

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 ('Planning decision')[2].

(2) Following a pre-notification phase, the Danish authorities notified, by letter dated 22 December 2014, to the Commission pursuant to Article 108(3) of the Treaty the financing model of the Fehmarn Belt Fixed Link project.

(3) On 5 June 2014, 5 September 2014, 26 November 2014, 19 January 2015, and 22 April 2015, the Commission received five complaints[3] alleging that Denmark had granted unlawful and incompatible State aid for the planning, construction and

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1 State aid – Denmark – State aid SA.39078 (2019/C) (ex 2014/N) – Financing of the Fehmarn Belt Fixed Link project – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (Text with EEA relevance), OJ C 226, 5.7.2019, p. 5.

2 Commission decision of 13.7.2009, 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.

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

operation of the Fehmarn Belt Fixed Link project in favour of Femern A/S and A/S Femern Landanlæg[4].

(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')[5]. The operative part of that decision is divided into 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) of the Treaty. 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) of the Treaty, they are compatible with the internal market pursuant to Article 107(3)(b) of the Treaty. On 16 September 2015, the Commission sent the Construction decision to the complainants.

(5) Following actions for annulment by two complainants[6], the General Court annulled the Construction decision with its judgments of 13 December 2018[7] in so far as the Commission decided not to raise any objections to the measures granted by Denmark to Femern A/S for the planning, construction and operation of the Fixed Link (the coast-to-coast infrastructure).

(6) The General Court dismissed the action as to the remainder. In particular, it rejected the arguments of the applicants concerning the Commission's conclusion 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) of the Treaty.

(7) The judgments of 13 December 2018 have been appealed by the two complainants[8].

(8) On 24 January and 22 May 2019, the Commission services had a meeting with the Danish authorities. The Commission services had telephone conferences with the Danish authorities on 12 April and 20 June 2019. The Commission services sent further information requests on 26 March, 18 April and 24 April 2019. The Danish authorities submitted additional information on 18 January, 4 February, 25 February, 28 March, 5 April, 7 May, 8 May, 16 May, 20 May, 28 May and 10 June 2019.

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

5 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.

6 Scandlines Danmark Aps and Scandlines Deutschland GmbH ('Scandlines') and Stena Line Scandinavia AB ('Stena Line').

7 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 ApS and Scandlines Deutschland GmbH v Commission,* T-630/15, ECLI:EU:T:2018:942.

8 Case C-174/19 P *Scandlines Danmark ApS and Scandlines Deutschland GmbH v Commission,* and Case C-175/19 P *Stena Line Scandinavia v Commission*. Both cases are pending.

(9) On 18 and 25 March 2019, the Commission services had a meeting with Stena Line Scandinavia AB ('Stena Line') and with Scandlines Danmark ApS and Scandlines Deutschland GmbH ('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 för Svensk Sjöfart ('FSS') respectively. The Commission received further information from interested parties on 29 January, 14 February, 18 February, 26 March, 15 April, 16 April, 24 April, 24 May, 29 May, 6 June and 7 June 2019. The Commission received a letter from Scandlines on 29 January 2019 to which it replied on 8 February 2019. The Commission received a further letter from Scandlines on 20 February 2019 to which it replied on 13 March 2019. The Commission received a letter from Stena Line on 7 February 2019 to which it replied on 28 February 2019. The Commission received a letter from NABU on 18 February 2019 to which it replied on 18 March 2019. The Commission received a letter from FSS on 19 February 2019 to which it replied on 8 March 2019. The Commission received a letter from Verband Deutscher Reeder ('VDR') on 12 March 2019 to which it replied on 21 March 2019. The Commission received a letter from Grimaldi Group on 28 March 2019 to which it replied on 16 April 2019. The Commission received a letter from Trelleborg Port on 8 April 2019 to which it replied on 9 April 2019. The Commission received a letter from Trelleborg Port on 15 April 2019 to which it replied on 2 May 2019. The Commission received a letter from Aktionsbündnis gegen eine feste Fehmarnbeltquerung e.V. on 15 April 2019 to which it replied on 2 May 2019.

(10) By letter of 14 June 2019, the Commission informed the Danish authorities that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the public financing of the Fixed Link ('Opening decision').

(11) On 5 July 2019, the Opening decision was published in the *Official Journal of the European Union*[9]. In the Opening decision, the Commission invited interested parties to submit their comments within one month.

(12) On 12 July 2019, the Commission services forwarded earlier comments from Scandlines of 7 June 2019 to the Danish authorities. On 23 July 2019, the Commission services forwarded other previous comments and observations from Scandlines of 28 January 2019 and 29 May 2019 to the Danish authorities.

(13) Through successive requests, Scandlines asked for an extension of the deadline to submit comments to the Opening decision until end of August/beginning of September. On 22 July 2019, the Commission services agreed to a 10 working days extension of the deadline to 20 August 2019, which the Commission services subsequently granted also to other interested parties.

(14) On 17 August 2019, Scandlines brought an action for the annulment of the decision to extend the time-limit for submitting their comments to 20 August 2019, and not until the end of the month as they had requested. By separate application lodged on the same day, Scandlines requested the President of the General Court to order, by way of interim measure, the Commission to suspend the formal investigation and/or

[9] Cf. footnote 1.

to prohibit the Commission from adopting a final decision, or grant any other form of appropriate interim relief.

(15) The President of the General Court dismissed the application for interim relief by order of 13 September 2019.[10] Subsequently, Scandlines withdrew the related action for annulment.[11]

(16) Eleven interested parties submitted comments. The Danish Ferry Association submitted comments on 16 August 2019. The European Community Shipowners' Associations ('ECSA') submitted comments on 19 August 2019. FSS submitted comments on 20 August 2019. Scandlines, Aktionsbündnis gegen eine feste Fehmarnbeltquerung e.V., NABU, Rederi Aktiebolaget Nordö-Link, Stena Line, Trelleborg Hamn AB, Rostock Port GmbH and VDR all submitted comments on 21 August 2019. The interested parties are involved in the shipping industry (ferry operators, ports and associations) or non-profit organisations alleging an interest in the coast-to-coast infrastructure. By letter dated 3 September 2019, the Commission services forwarded a non-confidential version of the comments of the eleven interested parties to the Danish authorities, which were given the opportunity to react. The Danish authorities submitted their observations on those comments on 4 October 2019, complementing their comments on the Opening decision of 26 August 2019.

(17) On 27 June, on 2, 5 and 9 July, on 3 October, on 4, 12, 15, 19, 22 and 25 November 2019 and then on 7 and 14 January and on 6 February 2020 the Commission services had a telephone conference with the Danish authorities. On 18 December 2019, the Commission services had a meeting in Brussels with the Danish authorities. The Commission services sent further information requests on 8, 12 and 17 July, on 3 and 12 September, on 4, 17, 18 and 24 October, on 5, 13, 25 and 27 November 2019 then on 7 and 9 January and on 3, 4, 14, 18, 19 and 28 February 2020. In 2019, the Danish authorities submitted additional information on 27 June, on 1, 4, 5, 10, 12 and 15 July, on 21 and 27 August, on 13 and 26 September, on 1, 9, 11, 23, 27 and 29 October, on 6, 7, 11, 14, 18, 22 and 25 November, and on 10 and 20 December. In 2020, the Danish authorities submitted additional information on 3, 7, 13, 15, 21 January, on 4, 6, 11, 12, 14, 20 and 21 February and on 3 March 2020. With their communication of 5 March 2020, the Danish authorities revised the initial notification.

(18) Furthermore, the Commission received additional comments from Scandlines and Stena Line which in light of the Mytilinaios Anonymos Etairia - Omilos Epicheiriseon Judgment[12] the Commission is not required to take into account since those comments were submitted out of time. The Commission received such additional comments from Scandlines on 26 October 2019 and again on 20 February

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[10] Order of the President of the General Court of 13 September 2019, *Scandlines Danmark ApS and Scandlines Deutschland GmbH* v *Commission*, T-566/19 R, EU:T:2019:605.

[11] Order of 27 November 2019, *Scandlines Danmark ApS and Scandlines Deutschland GmbH* v *Commission*, T-566/19, EU:T:2019:839.

[12] Judgment of the Court of 11 December 2019, *Mytilinaios Anonymos Etairia - Omilos Epicheiriseon v Commission*, C-332/18 P, ECLI:EU:C:2019:1065, paragraphs 126-127.

2020, which were forwarded to the Danish authorities on 4 November 2019 and on 28 February 2020, respectively. The Danish authorities submitted their observations to those comments on 6 November 2019 and on 3 March 2020, respectively. Scandlines had a telephone conference with the Commission services on 25 February 2020 and submitted additional information on 5 March 2020. The Commission received additional comments from Stena Line on 13 December 2019, which were forwarded to the Danish authorities on 23 December 2019. The Danish authorities submitted their observations to those comments on 8 January 2020.

(19) The Commission received a letter from the Danish authorities on 9 September 2019 to which it replied on 30 September 2019.

(20) By letter of 4 March 2020, the Danish authorities agreed to have the present decision adopted and notified in the English language.

Clarification as to the scope of this decision

(21) 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.

(22) By letter of 30 September 2016, the Commission services replied to that letter. It indicated that the Construction decision dealt with 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 Council Regulation (EU) 2015/1589 ('Procedural Regulation')[13], 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.

(23) On 12 December 2016, Scandlines lodged an action of annulment of the letter of 30 September 2016[14]. On the same day, they also brought an action against the Commission for failure to act on their complaint[15].

(24) On 30 July 2018, Scandlines sent a second letter of formal notice[16], 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

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13 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.

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

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

16 This letter was registered as SA.51981.

decision ('2018 decision')[17] 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) of the Treaty, in so far as it constitutes State aid not covered by the Planning decision. On 4 January 2019, Scandlines brought an action for the annulment of this decision[18].

(25) 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 inadmissible[19]. Scandlines brought an appeal against the order dismissing its action for annulment[20].

(26) In the Opening decision, the Commission withdrew the 2018 decision in so far as it relates to measures granted to Femern A/S for the planning, construction and operation of the Fixed Link. Those measures are therefore part of the assessment in this decision.

(27) As noted in the Opening decision, this procedure also covers all measures relevant to the planning phase of the project that concern the Fixed Link.

(28) This decision does not concern the measures in favour of A/S Femern Landanlæg relevant to the financing of the hinterland connections, as also clarified in the Opening decision. In addition, it does not cover other possible measures than the ones as mentioned in section 2.4 granted or allegedly granted by Denmark to Femern A/S, A/S Femern Landanlæg, Sund & Bælt Holding A/S or to any other related company.

(29) On 6 November 2017, Scandlines filed an additional complaint on alleged unlawful and incompatible aid measures used to finance Femern A/S' activities allegedly related to promotion and marketing of the Fixed Link ('promotional/marketing/information activities'). The measures referred to in that letter were included in the scope of the Opening decision and are therefore assessed in this decision.

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17 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.

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

19 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.

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

2. DETAILED DESCRIPTION OF THE PROJECT AND THE MEASURES

2.1. The Fehmarn Belt Fixed Link project

(30) The Fehmarn Belt Fixed Link project consists of a coast-to-coast infrastructure ('Fixed Link') and rail and road hinterland connections.

(31) 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.

(32) The Danish hinterland connections include the existing railway connection between Ringsted and Rødby of approximately 120 kilometres, which is owned by Banedanmark ('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 ERTMS[21] level 2. The Danish hinterland connections will also comprise the necessary environmental improvements and upgrading of the existing motorway infrastructure of Lolland, i.e. the existing E47 motorway between Rødbyhavn and Sakskøbing. Finally, the existing single-track railway section between Vordingborg and Rødby will be extended to a double-track railway section.

(33) The objective of the Fehmarn Belt Fixed Link project is to improve the conditions for transport of passengers and goods between the Nordic countries and Central Europe. The Fehmarn Belt Fixed Link project will lead to a number of other positive impacts in terms of environmental impact, 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 Fixed Link project 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 Fixed Link project was also recognised by the Commission as a priority project within the TEN-T framework. In addition, it is a "pre-identified project" mentioned as such in Annex I, part I, point 2 of Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010[22].

(34) In their reply to the Opening decision, the Danish authorities added that the formal planning of the Fehmarn Belt Fixed Link project began already in 1991 when the Danish Government entered into the Treaty with the Swedish Government about the establishment of a fixed link across Øresund ('the Øresund Fixed Link')[23]. According to Article 21 of the Danish-Swedish treaty on the Øresund Fixed Link, the Danish Government declared to be ready to work on carrying out a fixed link across the Fehmarn Belt provided that environmental and financial considerations are taken into account. In the period between 1991 and the signature between Denmark and

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21 European Rail Traffic Management System.

22 OJ L 348, 20.12.2013, p. 129.

23 Intergovernmental agreement of 23 March 1991 between the Danish and the Swedish governments.

Germany in 2008, the Danish and the German Governments carried out a number of preparatory assessments regarding a Fehmarn Belt Fixed Link project.

(35) 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 Fehmarn Belt Treaty')[24], 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.

(36) At the time of the 2014 notification, the Danish authorities estimated that the total costs for the planning and construction of the Fixed Link would correspond to DKK 54.9 billion in 2014 prices (EUR 7.4 billion[25]). The costs related to the planning and construction of the upgrading of the Danish hinterland connections corresponded to DKK 9.5 billion in 2014 prices (EUR 1.3 billion). In total this amounted to DKK 64.4 billion (EUR 8.6 billion) for the entire project (planning activities, construction costs, reserves and other works of both the Fixed Link and the hinterland connections). As a reply to the doubts raised in the Opening decision, the Danish authorities revised their notification and updated those estimated planning and construction costs of the Fixed Link. Section 5 of this decision elaborates on this update.

(37) The Commission has awarded total co-funding grants of EUR 205 million from 2007 to 2013 for the planning activities of the Fehmarn Belt Fixed Link project. The period was later extended to 2015. The project had also been included in the list of proposals selected for receiving EU financial assistance in the field of Connecting Europe Facility ('CEF') – Transport sector[26]. The Danish authorities specified that in the 2007-2015 period, the project has actually received EUR 181 million for the Fixed Link. Femern A/S has received commitments for CEF support in 2017-2020 for an amount of EUR 589 million. The Danish authorities clarified that Femern A/S has currently utilized amounts of approximately EUR 7 million.

(38) 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 Landanlæg[27], which is also a subsidiary of Sund & Bælt Holding A/S.

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

[25] Denmark conducts a fixed exchange rate policy against the euro at a central rate of DKK 746.038 per 100 EUR. This exchange rate is applied throughout the decision when calculating the approximate EUR equivalent of DKK.

[26] 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 establishing the list of proposals selected for receiving EU financial assistance under the Connecting Europe Facility (CEF) – Transport sector following a call for proposals launched on 8 February 2017 based on the Multi-Annual Work Programme.

[27] A/S Femern Landanlæg was established on 16 November 2009.

(39) Based on the Planning Act[28], the Danish Minister for Transport appointed Femern A/S as responsible for the planning of the Fehmarn Belt Fixed Link project. 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. Finally, Femern A/S is responsible for information activities, which it should conduct in cooperation with the local municipalities[29].

(40) 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 phase[30], concluding that in the planning phase Femern A/S acted as 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.

(41) On 28 April 2015, the Danish Parliament passed the bill on the construction of the Fixed Link and the hinterland connections in Denmark ('Construction Act')[31]. The Construction Act also contains the legal basis for the future operation of the Fixed Link. The Construction Act entered into force on 6 May 2015.

(42) On 6 February 2019, Femern A/S received the signed administrative German Plan Approval of the Fixed Link from the German authorities. Following the administrative German Plan Approval, on 26 March 2019 the Danish Parliament authorised Femern A/S to start the first and specified construction works for the Fixed Link on the Danish side. More specifically, Femern A/S has been asked to negotiate the necessary agreements with the contractors in order to initiate the following activities: constructing the tunnel element factory, establishing a working harbour, establishing the tunnel portal on the Danish side, establishing the camp and administration facilities, ensuring that the relevant contractor initiates the procurement of special marine equipment and minor preparatory activities.

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

29 Explanatory notes to the Planning Act, 17 December 2008.

30 Cf. footnote 2.

31 Act no. 575 of 4 May 2015.

2.2. The Fixed Link

(43) With the Construction Act, Femern A/S was appointed as the owner of the Fixed Link[32], with sole purpose to manage its construction, operation and financing[33]. In this capacity, 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.

(44) 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 those loans. Alternatively, Femern A/S may finance the project through State loans.

(45) Femern A/S will be entitled to collect toll charges from users of the Fixed Link road infrastructure. The Minister for Transport will determine the level of those fees and the principles for adjustment of those fees[34]. 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 railway fees for the use of the rail link in the Fixed Link. The Minister for Transport will also set those fees[35]. The setup chosen entails that the toll charges and railway fees will both cover the operating and maintenance costs of the Fixed Link and the Danish rail hinterland connections and the costs related to interest payments and loan instalments relevant to the debt created from the planning and construction of the Fehmarn Belt Fixed Link project.

(46) 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 Danish[36] road and rail hinterland connections

(47) A/S Femern Landanlæg has been appointed to manage the construction and operation of the Danish hinterland connections[37]. The construction and operation of the railway hinterland connections will be undertaken by Rail Net Denmark on behalf of the Danish State and financed by A/S Femern Landanlæg. Rail Net Denmark, as the Danish rail infrastructure 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 connections will be undertaken by the Danish Road Directorate on behalf of the Danish State and financed by A/S Femern Landanlæg. The hinterland road connections will be part of

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32 See Section 38 of the Construction Act.

33 See Section 1 and 5 of the Construction Act.

34 See section 42 of the Construction Act.

35 See Section 41 of the Construction Act.

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

37 See section 2 of the Construction Act. See also recital (32) above for a description of the hinterland connections.

the general Danish road infrastructure network, which is financed, operated and maintained by the Danish Road Directorate.

(48) 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. 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.

(49) A/S Femern Landanlæg and Rail Net Denmark share the ownership of the Danish rail hinterland connections[38]. Once the construction is completed, and owing to the fact that it will be technically difficult to separate the ownership of the rail installations on the Danish hinterland connections, an exchange of property will take place between Rail Net Denmark and A/S Femern Landanlæg[39].

(50) The ownership of the Danish road hinterland connections will remain with the State.

(51) 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 finance the hinterland connections using State loans.

(52) Femern A/S will pay dividends to A/S Femern Landanlæg. With those dividends, A/S Femern Landanlæg will repay its debt related to the loans necessary to fund the costs of the planning, construction, maintenance and reinvestments related to the hinterland rail connections and the costs related to the construction of the hinterland road connection.

(53) In accordance with general principles in Denmark, there will be no user fees for the use of the Danish road hinterland connections.

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

(54) The Opening decision raised doubts on the State aid character and compatibility of several notified and alleged aid measures as described below.

2.4.1. Capital injections

(55) The Danish authorities notified capital injections amounting to DKK 500 million (EUR 67.0 million) by the State-owned Sund & Bælt Holding A/S into Femern A/S that took place in 2005 and 2009. The purpose of those 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 Belt Fixed Link project[40]. As mentioned in the Opening decision, Scandlines is of the view that 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 DKK 10 million (EUR 1.3 million).

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[38] See Section 39 of the Construction Act.

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

[40] According to Section 6 of the Sund & Bælt Act.

2.4.2. State guarantees

(56) The Opening decision also covered the State guarantee model as notified by the Danish authorities. It covers State guarantees for loans or other financial instruments raised by Femern A/S on the international financial markets for the financing of the planning, construction and operation of the Fixed Link[41].

(57) According to Section 7(3) and (5) of the Planning Act, Femern A/S benefits from a State guarantee covering the obligations of Femern A/S in relation to loans and other financial instruments used to finance the preparation, investigation, planning and other necessary measures concerning the Fixed Link.

(58) According to Section 4(2) of the Construction Act, Femern A/S benefits from a State guarantee covering 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 construction and operation of the Fixed Link.

(59) Femern A/S, similar to other public undertakings that obtain loans covered by a State guarantee, will be required to pay a guarantee premium to the Danish State, as notified in 2014 amounting to 0.15% per annum on the outstanding debt covered by the guarantee.

(60) 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.

(61) The State can also decide to guarantee other financial contracts of Femern A/S used in connection with the project financing (such as swaps)[42]. The Danish authorities explained that the Danish state might provide guarantees for derivative transactions. Those guarantees enable Femern A/S to obtain cheaper rates for its derivatives since the counterparty does not face the risk that Femern A/S will default on its obligations stemming from the derivatives contract. Similarly, if Femern A/S is required posting collateral for those derivatives it can also draw on those guarantees.

(62) Finally, the guarantee covers other financial obligations assumed by Femern A/S in connection with the construction phase[43].

(63) 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.

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41 See Section 7(3)(5) of the Planning Act and Section 4(2) of the Construction Act.

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

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

(64) As mentioned in the Opening decision, the complainants argued that due to the State guarantee, Femern A/S enjoys the same credit rating as the Danish State (AAA), which allows it to obtain financial terms for its loans that are significantly better than otherwise available on the financial market. In addition, they argue that it appears from the Planning and Construction Acts that the State guarantees are unlimited in time and amount and in effect prevent the possibility of Femern A/S going bankrupt. Moreover, they fulfil none of the conditions mentioned in the Guarantee Notice[44] that could exclude the existence of State aid.

(65) The complainants also argued 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

(66) As to the notified financing model, Femern A/S is also entitled to obtain State loans as an alternative way of raising funds[45]. The Danish authorities indicated that the interest rate on State loans corresponds to the State's own loan terms[46] with an additional loan margin of, as notified in 2014, 0.15%.

(67) As mentioned in the Opening decision, the complainants argued 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 decision. According to the complainants, during the planning phase of the project, the State granted loans to Femern A/S and A/S Femern Landanlæg, which in total would amount to EUR 533 million[47]. The Danish authorities 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 (the rest concerned the hinterland connections). Femern A/S contracted State loans to cover those expenses. Those budget adjustments were approved by the Danish Parliament's Finance Committee.

(68) The complainants further argued 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.

(69) In November and December 2018, when the Construction decision was still valid, Femern A/S obtained State loans for a nominal value of DKK 7.4 billion (EUR 1.0 billion) in order to ensure the necessary funding for initiating the construction phase. Those loans have been disbursed in the period November 2018 – April 2019.

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44 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.

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

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

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

(70) The complainants also argued 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 promotional/marketing/information activities

(71) As mentioned in the Opening decision, Scandlines argued that Femern A/S had undertaken a wide range of promotional and marketing activities[48] either by itself, or through the use of contractors, consultants[49] and direct suppliers. Scandlines also indicated that, as Femern A/S for the time being has no source of income beyond EU funding, the financing of this type of activities constituted 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.

(72) In this respect, the Danish authorities had, in the context of the preliminary investigation procedure, 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, those activities form part of the public task of the State to inform its citizens and do not constitute promotional 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. The Danish authorities further detailed that for the years 2014 and 2015, the information activities were financed partly by EU funding through the Commission's TEN-T program and partly through State loans. In 2014, the activities received full EU funding (50% of the costs) and in 2015, the activities received a limited amount of EU funding. Femern A/S has not received EU funding for the information activities in 2016. Hence, in 2016, those activities – like the other activities of Femern A/S – have been financed by obtaining State loans. In 2017, Femern A/S has received EU funding from the CEF program and hence information activities were partly funded by EU and partly by State loans.

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[48] Such as operation of a press department and 2 information centers (in Rødbyhavn and in Burg on the German island of Fehmarn) and a video channel, organisation and participation in competition events, information actions, publications in media and websites, preparation and dissemination of scientific information to producers, processors and marketers, consumer targeted advertising campaigns, sponsorship of marathons and football tournaments.

[49] Eg. contract concerning "monitoring of media coverage" (2014), marketing management and consultancy services contract (2017).

2.4.4. Special tax measures

(73) The Opening decision further noted Scandlines' concern that 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

(74) 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 introduced[50] a limitation on the amounts of historical losses[51] carried forward that can be deducted in a single year. 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 7.5 million[52] (EUR 1.0 million). If a loss remains, this can only be deducted up to 60% of the positive taxable income in excess of DKK 7.5 million. 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 2015[53].

(75) The Danish authorities submitted, in the context of the preliminary investigation procedure, 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. The Danish authorities further clarified that in this period, Femern A/S used all losses incurred to reduce taxable income at group level in the same financial year. Other Danish companies within a group could have done the same according to the general tax rules.

2.4.4.2. Depreciation of assets

(76) Pursuant to sections 12 and 13 of the Sund & Bælt Act[54], 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%.

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

51 Losses incurred in previous financial years.

52 2010 values – the amount is indexed on an annual basis (with an exception for the period 2010-2013).

53 Section 9 of the Planning act was abolished by Act no 581 of 4 May 2015, which entered into force on 1 January 2016 concerning the taxation rules.

54 See Sections 13 and 14 of Act n° 588 of 24 June 2005, Lov om Sund og Bælt Holding A/S (Lov nr. 588 af 24/06/2005) ('Sund & Bælt Act').

(77) According to the Danish authorities, the special depreciation rules have also been repealed since 1 January 2016 through an amendment of the Sund & Bælt Act[55].

2.4.4.3. Joint taxation regime

(78) 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, must be taxed in accordance with the provisions on mandatory group taxation. No specific rules apply to Femern A/S in that respect.

(79) The complainants argued 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 designed to be unlimited in time and amount, and which provided an advantage to the company separate from the other State measures, which has to be assessed on its own merits.

2.4.5. Free use of state property

(80) According to Section 8 of the Fehmarn Belt Treaty, Germany and Denmark shall make available the necessary areas of land for the construction and operation of the Fehmarn Belt Fixed Link project (Section 8, subsection 1), including the necessary water areas and seabed, free of charge (Section 8, sub-section 2).

(81) 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 planning[56], as well as the construction and operation[57] of the Fixed Link.

(82) As mentioned in the Opening decision, Scandlines argued that through those 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.

(83) However, the Danish authorities submitted that 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 other toll funded transport infrastructures in Denmark (such as the Øresund Fixed Link and the Great Belt Fixed Link). 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.

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

56 See Section 16 of the Planning Act.

57 See Section 45 of the Construction Act.

2.4.6. Railway fees

(84) Femern A/S is authorised to charge the railway operators for use of the railway connection on the Fixed Link. The Ministry of Transport will set 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 Link[58].

(85) The Opening decision noted the concern of Scandlines that the State, via its own railway operator, Danske Statsbaner ('DSB')[59], will annually pay Femern A/S a share of the overall fees of DKK 350 million (EUR 46.9 million) for an undefined period of time. As it would seem that this fee would apply irrespective of the number of trains using the Fixed Link, without an adjustment mechanism and for an undefined period, the complainant indicated that this would involve an economic advantage to Femern A/S.

(86) The Danish authorities submitted that the preparatory notes to the Construction Act[60] ('preparatory notes to the Construction Act') provide that the level of the railway fees will also reflect a part of 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/EU of the European Parliament and of the Council ('Directive 2012/34/EU')[61] ensuring that overcompensation is avoided.

(87) Further, the Danish authorities expect that revenues from the railway use will account for about 15% of the total operating income, while the construction costs for the railway part of the Fixed Link account for 51%, which means that the users of the road connection will ultimately pay for a part of the railway connection.

(88) Since all railway operators using the Fixed Link are supposed to pay the railway fees, the Danish authorities indicated that 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. GROUNDS FOR INITIATING THE PROCEDURE

(89) The Commission initiated the formal investigation procedure on 14 June 2019. In the Opening decision adopted on that date, it provided its preliminary assessment of the measures and raised doubts as to their compatibility with the internal market.

(90) The Commission could not, at that stage, conclude whether Femern A/S could be considered as an undertaking. More specifically, given the particular situation in which Femern A/S operates, the argumentation submitted by the Danish authorities and the complainants and the case law mentioned, the Commission had doubts, as to

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58 See Section 41 of the Construction Act.

59 Danish State Railways.

60 Lov om anlæg og drift af en fast forbindelse over Femern Bælt med tilhørende landanlæg i Danmark (Lov nr. 575 af 4. maj 2015).

61 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.

whether Femern A/S could be considered as being engaged in an economic activity (during the planning, construction and operational phase of the project) and thus qualify as an undertaking. The Commission also had doubts on whether the promotional/marketing/information activities should be considered as a public task or as an economic activity. Furthermore, it was not in a position to conclude definitely on the existence of a selective advantage for some of the aid measures.

(91) The Commission could not conclude on whether the State guarantees and State loans should be considered as an aid scheme or whether they should be considered as individual aids, granted when the Planning and the Construction Acts entered into force, or as individual aid granted each time a financial transaction of Femern A/S is implemented by the national authorities.

(92) As to the compatibility assessment and in light of the Court judgments, the Commission took the preliminary position that the Fixed Link project constituted an important project of common European interest. However, the Commission raised questions as to whether the aid should be partly considered as operating aid. The Commission also had difficulties in establishing the necessity of the aid. Given the uncertainties around the appropriate period for the calculation of the internal rate of return ('IRR') of the project and the time that had elapsed since the 2014 notification, the Commission considered that it would need to assess in detail the benchmark weighted average cost of capital ('WACC') and project's IRR level proposed by the Danish authorities on the basis of updated and appropriate assumptions. In addition, the Commission had questions as regards the proportionality of the measures under examination given the complexity to establish the funding gap and the absence of the elements that would allow a proper quantification method of the aid involved or at least an appropriate methodology and relevant limitations. Although the Commission was not in a position to conclude on the effect on competition of the additional aid measures, it tentatively concluded that the notified aid measures should only have limited negative effect on competition and trade that cannot outweigh the obvious positive effects of the project for the Union as a whole. Finally, the Commission considered it was not in a position to decide on the specific compatibility condition relating to the conditions for the mobilisation of the State guarantees and could not conclude that Denmark complied with the transparency condition provided for in paragraph 45 of the 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 ('IPCEI Communication')[62].

4. COMMENTS FROM INTERESTED PARTIES

(93) All of the interested parties that have submitted comments to the Opening decision expressed concern over the alleged State aid to Femern A/S. The comments received from Danish Ferry Association and ECSA are general in nature.

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[62] OJ C 188, 20.6.2014, p. 4.

(94) VDR stressed in particular that Femern A/S should be considered as an undertaking, engaged in an economic activity. As Femern A/S was tasked with the construction and operation of the Fixed Link in the absence of a public procurement procedure, it receives an advantage. Furthermore, VDR doubts the existence of an incentive effect, considers that there were other less costly alternatives available, requests the Commission to limit the aid and considers that there is a high risk that the Fixed Link project will unfairly distort competition.

(95) Rostock Port first argues that all the conditions for State aid under Article 107(1) of the Treaty are met. Rostock Port further considers that the effects and impact of the project were not properly assessed and that the impact on their own activities was underestimated. The traffic forecast, in particular concerning the German hinterland connections, would be incomplete, not plausible and contradictory. In addition, the effects of border control and relocations (to the benefit of the Great Belt or Øresund links) would be ignored. Therefore, for all ports next to the Fehmarn Belt Fixed Link, on both sides of the Baltic Sea, negative effects of the project would not be valued properly.

(96) The comments from Aktionsbündnis gegen eine feste Fehmarnbeltquerung e.V., Rederi Aktiebolaget Nordö-Link, Stena Line, Trelleborg Hamn AB, FSS and Scandlines are similar to each other and they broadly reflect the overall arguments raised by Scandlines. For the ease of reading, those comments will therefore by referred to below as comments from 'Scandlines et al.'. The reply from NABU focuses on the compatibility analysis, and it is to a large extent in line with the comments from Scandlines, complemented by an environmental point of view.

4.1. Comments on the existence of aid

4.1.1. Notion of undertaking

(97) Scandlines et al. state that Femern A/S should be considered as an undertaking in the sense of Article 107(1) of the Treaty, since Femern A/S is engaged in an economic activity by offering transport services in return for remuneration. To this end, Scandlines et al. refer to the 2014 decision of the Commission as regards the financing of the construction of the Øresund Bridge ('2014 Øresund decision')[63], where the Commission found the very same activities carried out by the Øresund Bridge Consortium to constitute economic activities.

(98) Furthermore, Scandlines et al. argue that Femern A/S does not provide services connected to the exercise of public powers. According to settled case law, an activity is connected to the exercise of public powers only when the activity serves a public interest objective, which is *typically* that of a public authority[64]. This is not the case for any of the activities carried out by Femern A/S.

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[63] 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.

[64] To this end, reference is made to the Judgment of the Court of Justice of 19 January 1994, *SAT Fluggelsellschaft mbH v Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 17.

(99) Moreover, Scandlines et al. refer to the case law of the European Courts and the Commission decision-making practice, arguing that it is irrelevant whether Femern A/S can determine its own prices or is subject to state-regulated prices. Furthermore, Femern A/S retains a wide discretion to grant steep discounts with the effect that the Minister for Transport does not determine the exact consideration but only sets maximum prices.

(100) As the activities of Femern A/S are considered economic in nature, Scandlines et al. consider that in addition to the funding for planning, constructing and operating, also the funding for promotional/marketing/information activities constitutes State aid. Scandlines et al. further emphasize that Femern A/S has performed clear marketing activities, which go well beyond informing the general public about an infrastructure project.

4.1.2. Selective advantage

(101) Scandlines et al. note that according to the Commission's decision-making practice, the direct appointment of Femern A/S as the sole constructor and operator of the Fixed Link, without a tender, in itself involves an economic advantage. Scandlines et al. argue that each aid measure listed in section 2.4. of the Opening decision provides a selective advantage to Femern A/S.

(102) As regards the capital injections, State guarantees and State loans, Scandlines et al. argue that the aid element consists of the entire amount guaranteed or lent by the State, rather than the difference between the premium or interest rate paid by Femern A/S and the market conform premium or interest rate. This argument is based on the reasoning that Femern A/S would be in such a weak financial position, that no private lender of guarantor would offer any loans or guarantees. Scandlines et al. deduce this weak financial position from their interpretation of the Enquiry of commercial interest in that no market operator would grant guarantees or loans to Femern A/S. On this basis, Scandlines et al. conclude that no market rate exists and the aid element is therefore the entire guarantee and the entire loan amount.

(103) As regards the railway fees, Scandlines et al. argue that the only relevant parameter for price setting is costs, as no competitor is offering a similar service after the removal of railway tracks to the Scandlines' ferries. Since the Danish State will pay Femern A/S an annual railway fee of DKK 350 million (EUR 46.9 million) through the State-owned railway operator DSB, without any downward adjustment mechanism regarding the number of trains actually using the Fixed Link, the price is not cost based. FSS adds that the amount of DKK 350 million constitutes a specific share of the overall annual revenue generated from rail fees and that the application of this fee is not limited in time.

(104) As regards the tax measures, Scandlines et al. maintain that all measures involve an advantage. They further note that the tax measures have been applied both to planning activities and to construction works.

(105) As regards the free use of State property, Scandlines et al. argue that Femern A/S benefits from free use of water areas and part of the seabed, as explicitly provided for in the Planning and Construction Acts. They consider the claim of Denmark that in general no fees are to be paid to the Danish State by ferry operators or other ship freight companies for crossing any sea areas, as contradictory to the inclusion of the said provision in the Acts. FSS considers the fact that companies are actually not paying charges for the transit through national sea areas as irrelevant.

4.2. Comments on the classification of aid

(106) Scandlines et al. disagree with the reasoning in the Opening decision, which mentions three possible classifications of the aid related to state guarantees and loans: namely (i) an aid scheme, (ii) individual aids, granted when the Planning and Construction Acts entered into force, or (iii) individual aid granted each time a financial transaction of Femern A/S is implemented by the national authorities.

(107) Scandlines et al. argue that the aid is granted exclusively to Femern A/S for a specific project and therefore cannot be considered as a scheme but should be considered as individual aid (i.e. *ad hoc* aid).

(108) In the interpretation of Scandlines et al., the argument the Commission made in recital (132) of the Opening decision concerning the State's obligation to ensure the funding of the project was an argument in favour of the classification as an aid scheme. Scandlines et al. consider that this would contradict the Procedural Regulation and the Øresund judgment[65].

(109) Scandlines et al. conclude that, since the aid cannot be classified as an aid scheme, it must necessarily constitute a series of *ad hoc* aid, granted each time Femern A/S concludes a financial transaction for the financing of the project (i.e. option (iii)). Scandlines et al. did not put forward further arguments or evidence as to why the ad hoc aid is granted each time an individual transaction is concluded, and not at the time when the Planning or Construction Acts entered into force (i.e. option (ii)).

(110) FSS considers that the aid cannot be considered as an aid scheme but does not comment on the aid granting moment(s).

4.3. Comments on the compatibility assessment

4.3.1. Qualification of the project in the light of IPCEI rules

(111) Scandlines et al. argue that the Commission wrongly accepted that the Fehmarn Belt Fixed Link project is a project of common European interest. NABU argues that the fact that the project is designated as a TEN-T Network project (for the rail part) and is entitled to EU funding is not sufficient to demonstrate common European interest. Scandlines et al. consider that the positive socio-economic return of the Fixed Link relied upon in the Opening decision is based on inconsistent and outdated studies from 2015[66]. In particular, Scandlines et al. emphasise that the analysis relied upon in the Opening decision does not adequately take into consideration the impact of ferry competition, and consider that the traffic forecasts underlying the calculated socio-economic return are outdated. To this end, Scandlines et al. refer to new studies by PWC[67] ('PWC report') and Knud Erik Andersen ('Knud Erik Andersen study')[68] of

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65 Judgment of the General Court of 19 September 2018, *HH Ferries and Others v Commission*, Case T-68/15, ECLI:EU:T:2018:563.

66 Scandlines et al. refer to the "Original study" of 5 January 2015 and the "Updated study" of 27 March 2015 which are the cost-benefit analyses prepared by Incentive and commissioned by the Danish Ministry of Transport.

67 Scandlines et al. refer to a PWC report, dated 29 January 2019.

resp. January and August 2019. The PWC report was prepared for the German authorities in the context of issuing a German plan approval for the Fehmarn Belt Fixed Link project. It focused on the ferries' competitiveness after the opening of the Fixed Link. On the basis of the Knud Erik Andersen study, Scandlines and Stena Line argue that the costs of Scandlines are significantly overestimated in the studies from 2015 as they imply that Scandlines would have been operating at a massive loss. If the costs were properly determined, the socio-economic return of the Fehmarn Belt Fixed Link project would be negative. Additionally, Scandlines and Stena Line consider that the studies from 2015 are flawed due to increased costs of the German hinterland which further reduces the socio-economic return. NABU added that the studies do not take proper account of the impact on the environment.

(112) Scandlines et al. further argue that the actual European net benefit of the Fehmarn Belt Fixed Link is negative and that the rate of return of the Fehmarn Belt Fixed Link is clearly well below 4%, which they consider as the established minimum return for an infrastructure project to be undertaken in Denmark.

(113) FSS did not comment on this element.

(114) NABU considers that the Fehmarn Belt Fixed Link project does not deliver the benefits claimed by the Danish authorities as it does not improve traffic conditions or lead to the claimed timesavings and thus does not contribute positively to the transportation between Germany and Scandinavia.

4.3.2. The grant of operating aid

(115) In the view of Scandlines et al., operating aid is prohibited and cannot be authorised. Scandlines et al. consider that operating aid is not related to a particular project phase (such as the operating phase) but to the nature of the costs. Any aid covering operating costs constitutes operating aid. Therefore, all relevant operating costs should be excluded from the funding gap calculation. FSS adds that, in their interpretation of the Øresund judgment, any loan taken out to refinance an earlier loan automatically becomes operating costs and that therefore the aid for such refinancing is prohibited. The authorization of any aid to Femern A/S can therefore not cover costs for refinancing loans. In FSS' view, the toll prices should be cost-based and price dumping should be excluded. NABU did not comment on the operating aid element.

4.3.3. Comments about the funding gap

(116) Scandlines et al. claim that the funding gap as described in the Opening decision is flawed for three reasons: 1) it includes inflated and ineligible costs relating to (i) dividends paid to A/S Femern Landanlæg for the hinterland connections and (ii) operating costs; 2) it includes artificially low revenues by (i) excluding the TEN-T subsidies and (ii) by accepting that Femern A/S sets its tolls below costs; and 3) the lifetime of the Fixed Link project is too short. Scandlines et al. consider that all those

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[68] Knud Erik Andersen, "*Udfordringer ved samfundsokonomisk analyse af transportprojekter*", published in the electronic journal "*Artikler fra Trafikdage på Aalborg Universitet*" (Proceedings from the Annual Transport Conference at Aalborg University), ISSN 1603-9696.

elements lead to an artificially high funding gap and thus to a maximum permissible aid amount that is also too high.

(117) As regards the eligible costs, Scandlines et al. recall that the Commission previously held that, where an aided project involves both economic and non-economic activities, only costs linked to the economic activity may be included, when calculating the funding gap. On this basis, they argue that the hinterland costs and the operating costs cannot be included in the funding gap, as those costs do not form part of the Fixed Link project. Furthermore, as dividend payments are not a cost item but distribution of profits, they cannot be included in the funding gap analysis. FSS adds that the preparatory works that started in 2013 are construction costs and therefore they cannot be authorized as eligible costs for planning purposes. Furthermore, in the view of FSS, planning costs are not part of the construction costs as laid down in Table 1 of the Opening decision.

(118) As regards the revenues, Scandlines et al. claim that TEN-T subsidies are not included in the 2014 analysis of the funding gap. Including those subsidies will result in a significantly lower funding gap. In addition, revenues are artificially low due to the fact that Femern A/S' toll prices are not cost-based but based on Scandlines' ferry prices. The Commission must therefore require that during the period that Femern A/S will benefit from State aid, the prices of the Fixed Link are set at a level that reflects all its costs including serving its debt. This last element was not brought forward by FSS. As to the lifetime of the project, Scandlines et al. recall that the funding gap and IRR analysis should be based upon the lifetime of the investment and not on the repayment period of 55 years, as also confirmed by the General Court. It would appear from the website of Femern A/S that the lifetime of the tunnel is 120 years.

4.3.4. Aid amount and duration of the aid

(119) According to Scandlines et al., the amount of aid is underestimated as it only refers to the difference between the interest/premium rates paid by Femern A/S for the State loans and State guarantees and the corresponding market rates.

(120) Scandlines et al. further argue that the duration of the aid must be much shorter than 55 years. In addition, each State guarantee and State loan must be time limited. The aid for Femern A/S must expire when the revenues can cover the costs of operations and the costs related to the debt on marked-based terms. Scandlines et al. refer to the annual reports of the Great Belt and the Øresund fixed links to suggest that each individual State guarantee and State loan should be limited in duration to 4 to 5 years after the opening of the Fixed Link and that the possibility to obtain the State guarantees and State loans should also be limited to 4 to 5 years after the opening of the Fixed Link.

4.3.5. Incentive effect

(121) Scandlines et al. claim that Femern A/S initiated the construction works on the Fixed Link in 2013 although the Danish authorities committed to grant the aid at the earliest in 2015 with the adoption of the Construction Act. The aid to Femern A/S therefore would not have the required incentive effect. Scandlines et al. further criticise the Commission for finding that publicly owned companies should just be exempt from the requirement that the aid has an incentive effect and allege that this approach is an example of discrimination in favour of publicly owned companies, contrary to Article 345 of the Treaty.

4.3.6. The counterfactual scenario

(122) Scandlines et al. claim that several alternative projects did exist. Therefore, the counterfactual analysis of the Commission cannot be based on the absence of an alternative project. The fact that Femern A/S cannot decide itself on alternative projects is irrelevant. Scandlines et al. consider the reference to the 2001 Enquiry as wrong as it does not show that there are no alternative projects without aid. In addition, the study is outdated since it is 17 years old and concerns a different project. NABU further elaborated on the existence of alternative projects without aid. NABU referred to a study by Hanseatic Transport Consultancy ('HTC Report')[69] from 2019 and noted that the currently estimated traffic is way below the traffic level estimated when the Fehmarn Belt Treaty was signed in 2008. Specifically, the HTC report states that it is not possible to show where the traffic growth can be generated for an economically viable use of the Fixed Link based on the current market data. In addition, NABU referred to the HTC Report when stating that the current traffic level will not even be reached due to structural cross border traffic problems. With this in mind, NABU claims that the Commission must consider the alternative of constructing a pure rail link combined with a ferry solution. This would be the least expensive and best solution from an environmental point of view, in line with the TEN-T objective of moving traffic from road to rail. Furthermore, NABU considers that the alternative of a core-bored tunnel should be considered as an alternative for an immersed tunnel solution. In addition, the environmental impact of the chosen solution should be part of the cost-benefit calculations and alternative project analysis by the Commission.

4.3.7. Internal Rate of Return and Weighted Average Cost of Capital

(123) Scandlines et al. consider the IRR and WACC calculations to be wrong. The IRR should be calculated over the lifetime of the project, not over 55 years, and non-eligible costs should be excluded. The WACC of 11% is too high. According to Scandlines et al., the WACC should range between 5.68% and 6.71%. Scandlines et al. provided two studies further documenting their view on the WACC calculation, on the one hand a study dating from February 2018 and on the other hand references from Damodaran from 2014.

4.3.8. Prevention of undue distortion of competition and balancing test

(124) Scandlines et al. claim that the Commission should assess how serious the distortion of competition is. This analysis should go further than establishing the fact that the aid distorts competition as this is already inherent in the qualification as State aid. From the socio-economic report and the 2014 traffic forecast, it appears that Femern A/S would be likely to hold significant market power and even have a monopoly. In addition, Femern A/S is likely to abuse its market power. According to Scandlines, the refusal of the Danish government to support an application for EU

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[69] Hanseatic Transport Consultancy (HTC), *"Bedarfsbezogene Verkehrsmarktuntersuchungen im Kontext der geplanten Festen Fehmarnbeltquerung (FFBQ)"*, 17 June 2019. The report is commissioned by NABU.

funding by Scandlines[70] and an alleged use of State aid to downgrade the access roads to the harbour in Puttgarden means that the aid to Femern A/S unduly distorts competition. Scandlines et al. further claim that there is a risk of overcapacity and that the socio-economic return when the ferry service continues will be lower than the Danish threshold of 4%.

(125) NABU added that the impact on the environment should be part of the balancing test. The negative effects of the aid should not be limited to the distortion of competition.

4.3.9. Mobilisation conditions of the State guarantees

(126) By reference to the Guarantee Notice, Scandlines et al. reminded the Commission that it is not entitled to authorize aid in the form of State guarantees unless the Commission knows beforehand what the conditions are for triggering those guarantees. FSS requires that the Danish authorities make a commitment that the conditions for the mobilisation of State guarantees will comply with the requirements of the Guarantee Notice.

5. COMMENTS FROM DENMARK

(127) This section includes the comments of the Danish authorities to the Opening decision and the comments of the Danish authorities on the submissions of the interested parties which were submitted to the Danish authorities in a non-confidential format.

(128) Overall, the Danish authorities do not agree with what is argued by the interested parties. They provided further information and counter-arguments which are summarized below.

5.1. Supplementary comments to the description of the Fehmarn Belt Fixed Link project and the financing measures

(129) The Danish authorities provided factual clarifications to the descriptive part in the Opening decision. They also specified that what was labelled as 'construction costs' in Table 1 of the Opening decision includes the planning costs.

(130) Furthermore, the Danish authorities provided clarifications on the capital injection measure. In 2005, Femern A/S was established pursuant to Section 6 of the Sund & Bælt Act. At the time of incorporation, the registered share capital of Femern Bælt A/S (now Femern A/S) was DKK 10 million (EUR 1.3 million). The registered share capital was paid at a premium of DKK 40 million (EUR 5.4 million), totalling DKK 50 million (EUR 6.7 million). The capital contribution was made by Sund & Bælt Holding A/S in accordance with Section 6 of the Sund & Bælt Holding A/S Act. On 24 July 2009, the registered share capital of Femern Bælt A/S was increased from DKK 10 million to DKK 500 million (EUR 67.0 million) by a cash capital injection of DKK 460 million (EUR 61.7 million) made by Sund & Bælt Holding A/S to Femern Bælt A/S and a "scrip issue" (in Danish: "Fondsemission") of

[70] Scandlines refers to its application for CEF funding to support its 2019-2020 technical feasibility studies on the possibility to enable the harbours in Rødby and Puttgarden to handle 'zero emission freight ferries' ("Capacity upgrade for Sustainable Traffic Machines – Preparing for zero emission operation").

DKK 30 million (EUR 4.0 million). The scrip issue constitutes a conversion of Femern A/S's equity reserves into share capital and thus entails an increase of the capital but not a capital injection. The cash capital contribution was made pursuant to Section 7(2) of the Planning Act. Thus, the total amount of capital injected in Femern A/S is DKK 510 million (EUR 68.4 million), DKK 500 million of which has been injected (and registered) as share capital. No capital injections have been made since 2009.

(131) On the guarantees, the Danish authorities provided further background as to the meaning of Section 4(4) of the Construction Act. According to this provision, the State guarantee also covers other financial obligations incurred by Femern A/S in connection with the construction of the Fixed Link. The Danish authorities explained that this provision means that for example arbitration cases concerning works in connection with the construction of the Fixed Link are covered by the government's guarantee. This provision does not extend to the operations phase. It functions like a guarantee that the constructors will be paid in case of a failure by Femern A/S to pay. Given that the construction costs are already covered by State loans or loans with a State guarantee, it does not provide an additional advantage to Femern A/S.

(132) The Danish authorities further provided the Commission with an overview of the financing measures already in place.

(133) On 19 November 2018, the Minister for Transport authorised Femern A/S, for the first time, to obtain State loans with a view to finance construction costs. Such loans were subsequently entered into in November and December 2018.

5.2. Comments on the existence of aid

(134) The Danish authorities raised two main arguments to support their overall view that the public financing of the Fixed Link does not fall within the scope of Article 107(1) of the Treaty.

(135) Specifically, the Danish authorities maintain that 1) the planning, construction and operation of the Fixed Link are not 'economic activities', but an exercise of public authority; 2) the positive and negative economic effects, which the Fixed Link may produce on adjacent markets and in the EU in general, are not a 'distortion of competition'.

(136) The Danish authorities further consider that, in any event, Femern A/S does not carry out an economic activity before it starts operating as it does not offer any services on the market.

5.2.1. Femern A/S exercises public power

(137) In the view of the Danish authorities, the planning, construction and operation of the Fixed Link are classic examples of an exercise of public planning power, which are not, and ought not to be, covered by Article 107(1) of the Treaty. Consequently, the State measures, including notably the State guarantee and State loans granted in favour of Femern A/S fall outside the scope of EU competition policy.

(138) Contrary to the methodology used by the Commission in the Opening decision, the Danish authorities submit that an overall assessment – in light of the nature, aim and applicable rules – of Femern A/S' activities should lead to the conclusion that Femern A/S exercises public power – or at least that Femern A/S exercises public power until it starts operation.

(139) The Danish authorities argue that the aim of connecting the Danish and German State-owned road and rail infrastructures is much wider than other public investments in, for example, the utility sector. Similarly, the nature of Femern A/S and its activities are also fundamentally different from, for example, ferry operators and ferry activities, as Femern A/S is created with the sole purpose to implement the Danish State's decisions regarding the construction of a particular infrastructure (the Fixed Link). Femern A/S is thus a Special Purpose Vehicle ('SPV') which is not subject to a profit maximisation standard and not allowed to carry out unrelated activities according the applicable rules.

(140) According to the Danish authorities, an appreciation of those wider policy considerations underlying the setting up of Femern A/S supports the notion that Femern A/S does not carry out economic activities but rather exercises public power.

(141) The fact that a user fee is charged does not, in itself, change the nature of that activity as it must be examined whether the charging of a fee can be separated from the exercise of public authority. It is only where those two activities can be separated that the charging of a fee in exchange for a service will be considered an economic activity[71].

(142) According to the Danish authorities, it is clear that the collection of charges by Femern A/S, which according to law are determined by the Minister for Transport, cannot be separated from the exercise of activities connected to public authority, such as providing access to and maintaining State owned general road and rail infrastructure. Thus, all activities by Femern A/S should be seen together as an exercise of public authority.

(143) The Danish authorities also clarify that the Minister for Transport has not yet decided how the user fees will be established or what the level of those fees should be. The fees referred to in the Opening decision and in the comments of the interested parties is simply a reflection of budgetary assumptions. It is further noted, that the main aim and function of the user fees is to balance public budgets.

(144) In the event that the Commission cannot accept that all Femern A/S' activities should be considered together as an exercise of public power, the Danish authorities submit that only the operation can reasonably be considered an economic activity. In the view of the Danish authorities, the rationale in the Leipzig-Halle Judgment[72] does not apply in this case, inter alia because it concerned the capacity increase of an already existing economic activity in a liberalised market.

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[71] The Danish authorities refer to the Judgment of 19 January 1994, *SAT Fluggesellschaft v Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 28, to the Judgment of 18 March 1997, *Diego Calí and Figli Srl v. Servizi Ecologici Porto di Genova SpA,* C-343/95, ECLI:EU:C:1997:160, paragraph 24 and more generally to 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, paragraph 15.

[72] 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.

(145) The Danish authorities further request the Commission to carefully assess when the period of potential economic activities would start and they refer to case law arguing that whenever it is possible to separate activities, each of those activities should be subjected to a separate State aid analysis.

(146) In addition, they argue that it makes little sense to assume that when the Construction Act entered into force and authorised Femern A/S to construct and operate the Fixed Link, all financing support granted to Femern A/S prior to that date became State aid *retroactively*.

(147) The Danish authorities further rejected the argument of Scandlines et al. that the leeway for Femern A/S to offer certain discounts demonstrates that the Minister does not fix the exact level of the user fees. The Danish authorities argue that Femern A/S has no freedom to set the fees as it wishes, but only a limited freedom to adjust certain fees downwards to the extent that this does not affect the level of the fees significantly. They further note that Femern A/S' freedom to amend and introduce new discount schemes is also limited by the Eurovignette directive[73].

5.2.2. Femern A/S' information activities

(148) In the Danish authorities' view, there is no doubt that Femern A/S' information activities are a public task and not an economic activity. One of the tasks imposed on Femern A/S in the Planning Act is 'information activities' which should be conducted in cooperation with local municipalities. This is a task that no private commercial infrastructure operator has. It is an inseparable part of the public tasks connected with the planning and construction of public infrastructure projects that affect the local community. Furthermore, the Danish authorities note that if those information activities are not considered as a public task, they should be considered as inextricably linked to the realisation of the project and therefore eligible under the IPCEI Communication.

5.2.3. Femern A/S' activities do not distort competition

(149) In the view of the Danish authorities, the Commission must carry out a specific assessment of whether competition is distorted or not. This assessment should include a thorough analysis of the organisation of the State road infrastructure in Denmark to enable a determination of whether State roads are in a real competitive relationship with other modes of transport such as ferries, airlines, train operators etc.

(150) The Danish authorities do not consider the Fixed Link to be in direct competition with, for example, ferries, in the same way as railway infrastructure is not in direct competition with roads, busses or airports. The Danish authorities specifically refer to paragraph 220 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 ('Notice on the notion of State aid')[74] and the Infrastructure Analytical Grid for Roads, Bridges,

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[73] 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, article 7b.

[74] 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 C262, 19.7.2016, p. 1.

Tunnels and Inland Waterways[75]. They further note that the Fixed Link is available to all users on non-discriminatory terms and that it is not constructed to favour a specific undertaking or sector.

(151) On this basis, the Danish authorities submit that any possible economic effects, which Femern A/S' activities may have on other commercial operators cannot be considered a distortion of competition in the sense of Article 107(1) of the Treaty. It is especially clear, that Femern A/S does not distort any competition on any market while it plans and constructs the Fixed Link.

(152) Finally, the Danish authorities note on this point that the case for Femern A/S is very different from the factual circumstances relating to the construction of an additional runway in the Leipzig-Halle Airport[76], as Femern A/S does not supply services on a market until the infrastructure is open for traffic. Leipzig-Halle Airport competed on the regional airport market against other airports to attract customers and when a need to expand arose, it received State aid to construct new infrastructure.

5.3. Comments on the classification of aid

(153) The Danish authorities consider that Femern A/S obtained a legal right to finance its activities by the adoption of the Construction Act on 4 May 2015, as the act clearly assumes that Femern A/S will finance its debt obligations with State guaranteed loans and State loans. Therefore, the aid was granted at this point in time. However, they note that the State guarantees and the State loans could not be used and thus could not produce any economic advantage for Femern A/S before the Minister for Transport instructed Femern A/S to do so.

(154) Thus, the Danish authorities disagree with Scandlines et al., who argue that the aid related to State guarantees and State loans constitute a series of ad hoc grants. However, the Danish authorities note that, even if the aid were to be considered as a series of ad hoc grants, nothing prevents the Commission from carrying out a compatibility assessment and approving all those future grants at once and on an ex-ante basis. The Danish authorities also submitted more detailed information on the absence of discretion of the Minister of Finance as to the specific loan agreements.

(155) They further note that the position of Scandlines et al. appears to entail that Femern A/S should instead at the outset take up one big loan with a State guarantee up to the maximum permitted limit. According to the Danish authorities, this would not be a suitable way to minimise the aid and thus would be contrary to the general requirements of the Commission's compatibility assessments such as provided by paragraph 28 of the IPCEI Communication.

(156) The Danish authorities further consider that the standstill obligation has been respected. They consider that the legal basis of all activities carried out prior to the entry into force of the Construction Act has been Section 2 of the Planning Act. Since the adoption of the Planning Act, the Danish Parliament's Finance Committee has subsequently granted its consent to increase the budget for the planning phase

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[75] https://ec.europa.eu/competition/state_aid/modernisation/grid_roads_en.pdf

[76] Cf. footnote 72.

three times. Each time, the consent related to specific planning activities covered by section 2 of the Planning Act (the so-called 'preparatory works').

(157) When the Construction Act was adopted, the Minister for Transport instructed Femern A/S not to initiate the construction phase and thus not to sign construction contracts before being authorized to do so by the Minister. In November and December 2018, Femern A/S raised State loans to ensure the necessary funding for initiating the construction phase. However the Danish authorities explained that it was only on 26 March 2019 that Femern A/S was authorized to start the first and specified construction works concerning the Fixed Link. Femern A/S has not yet started any of these works.

5.4. Comments on the alleged aid measures

5.4.1. Railway fees

(158) The Danish authorities maintain that the railway fees do not entail State aid to Femern A/S, and thus they reject the arguments put forward by Scandlines et al. The railway fees constitute a future source of income for Femern A/S, which – as the road tolls – will be regulated by the Minister for Transport. Specifically, the Minister sets out rules regarding the level and principles for the regulation of the fees that users of the Fixed Link (i.e. railway operators) will be charged. These fees will be determined in accordance with Directive 2012/34/EU establishing a single European railway area. The Danish authorities stress that the railway fees for Femern A/S will be collected on behalf of Femern A/S by Rail Net Denmark[77] and not – as assumed in the Opening Decision – by Femern A/S itself. Rail Net Denmark collects those fees on the entire Danish State-owned railway infrastructure. Therefore, it has been considered most expedient to ask Rail Net Denmark to do the same on the Fixed Link. The funds are directly transferred to Femern A/S and Rail Net Denmark cannot dispose of the funds for its own purposes. The fees collected for using the Fixed Link and transferred to Femern A/S will be documented in the annual State budgets. The fees collected by Rail Net Denmark are a payment for a service and not a levy/charge. Rail Net Denmark is as the Danish Railway infrastructure manager responsible for all costs related to the operation of the Danish railway infrastructure.

5.4.2. Tax measures

(159) The Danish authorities note that Femern A/S has not at any time used the previously applicable rules regarding depreciation of assets and carry forward of losses. Thus, regardless of whether the rules may potentially have granted Femern A/S a selective advantage, no such advantage actually occurred in the relevant period.

5.4.3. Free use of the seabed

(160) In its remarks to the comments of the interested parties, the Danish authorities explain that the Construction Act simply clarifies, for the avoidance of doubt, that

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[77] According to Regulation no 1276 of 20 November 2015 regarding Rail Net Denmark's tasks and powers (Bekendtgørelse om Banedanmarks opgaver og beføjelser (BEK nr. 1276 af 20/11/2015)), Rail Net Denmark is responsible for collecting railway fees from operators on the Danish railway infrastructure.

Femern A/S should not pay a fee for its use of the seabed. They reiterate that these provisions do not treat Femern A/S differently from entities in a comparable legal and factual situation.

5.5. Comments on the compatibility assessment

5.5.1. Project of common European interest

(161) The Danish authorities consider that the new studies submitted by Scandlines and Stena Line are irrelevant and, in any event, incorrect. In relation to the Knud Erik Andersen study, they note that the author is a known opponent to the Fehmarn Belt Fixed Link project, and that the study is based upon wrong calculation assumptions in relation to traffic forecast and construction costs. The Danish authorities further reject the argument put forward by Scandlines and Stena Line that the 2015 studies have inflated Scandlines' costs to the extent that it results in an assumption that Scandlines operates with a massive loss. The Danish authorities consider this an incorrect and distorted presentation of the calculations in the 'Original study' from 2015 because the study is based on the assumption that the revenues of the ferries are higher than operating costs (the difference between revenues and costs is estimated at around 15% of the costs). In addition, the Danish authorities argue that the studies do not become flawed because sub-components or circumstances change, and they note that new calculations of socio-economic effects are not necessary each time a sub-component changes. As such, the Danish authorities also reject that the 2015 studies are flawed due to increased costs of the German hinterland.

(162) The Danish authorities further argue that socio-economic calculations are always included in the political decision making for large infrastructure projects. However, there is no requirement of a socio-economic return of 4% as claimed in the report and by the interested parties. The Danish authorities also indicated that the Fehmarn Belt Fixed Link project has been considered as a priority cross-border TEN-T project in its entirety and not only for what concerns the rail part. As to the traffic forecast, the Danish authorities submitted an additional report by Intraplan / TSS Trimode commenting on the HTC Report. Overall, the conclusion by Intraplan / TSS Trimode is that the HTC report is flawed and misleading and does not question the traffic forecast for the Fehmarn Belt Fixed Link specifically. Furthermore, the Danish authorities refer to a report published by the Danish Road Directorate[78] which shows that road traffic to and from Denmark is increasing significantly. Specifically, the report shows that truck traffic has increased by 38% from 2010 to 2018 across the borders between Denmark and Germany, on the Øresund Fixed Link and on the ferry routes across Øresund and Fehmarn Belt, which further contradicts the HTC Report.

5.5.2. No operating aid will be granted

(163) In the Danish authorities view, operating aid is aid relating to the operating of the infrastructure. All expenses incurred in the construction phase, including expenses concerning the day-to-day administration of the construction project are considered as construction costs. Femern A/S will not need to obtain loans from the State or

[78] Vejdirektoratet, "*Oversigt over tilstand og udvikling*", rapport 597, August 2019.

loans with a State guarantee to finance its day-to-day operations in the operations phase.

5.5.3. Funding gap

(164) The Danish authorities provided updated assumptions for the calculation of the funding gap and the aid element (or gross grant equivalent). As a starting point, the assumptions are based on the latest fully revised financial analysis of the project: 'Financial analysis of the Fehmarn Belt Fixed Link including Danish landworks'[79], of February 2016 ('2016 financial analysis').

(165) In the preparatory notes to the Construction Act, it was clearly mentioned that there would be a fresh assessment of the total finances of the project. A process to reduce construction costs had to be initiated before the construction contracts could be signed. On 28 April 2015, the Minister of Finance instructed Femern A/S not to sign the project's major construction contracts before a renewed assessment of the overall finances had been performed. According to the 2016 financial analysis, a major element contributing to a reduction in the construction costs was the extension of the construction period from 6.5 years as assumed in the 2014 financial analysis to 8.5 years in the 2016 financial analysis. The 2016 financial analysis states that, as a result of the tender process, based on this extended construction period of 8.5 years, Femern A/S received the contractors'[80] final and binding bids. Femern A/S also analysed the other parameters of the financial calculations which led to a number of updated assumptions compared to the analysis that formed the basis for the Construction Act. The updates relevant to the Fixed Link in the 2016 financial analysis concern notably: updated construction budget, updated estimate of costs for operation, maintenance and reinvestment, revision of timetable, adjusted traffic revenue due to revised timetable, update of EU funding, update of some technical assumptions. In addition, to ensure that the Commission's assessment is based on the most accurate and updated financial assumptions, the Danish authorities did some further adjustments to the 2016 financial analysis, as detailed below. Where appropriate, the Danish authorities also included actual figures such as for the loans already raised or relating to inflation. The below recitals contain further details as to the assumptions of the funding gap model.

(166) The construction costs in the 2014 notification amounted to DKK 54.9 billion (EUR 7.4 billion) in fixed 2014 prices. This amount corresponds to the construction costs mentioned in the 2015 Construction Act: DKK 55.1 billion (EUR 7.4 billion) in fixed 2015 prices. Femern A/S received bids in September 2015. Consequently, Femern A/S prepared an update of the construction budget and the forecast of planning and construction costs for the Fixed Link was reduced to DKK 52.6 billion (EUR 7.1 billion) in 2015 prices or DKK 62.2 billion (EUR 8.3 billion) in nominal prices. This includes a reserve requirement of DKK 7.3 billion (EUR 1.0 billion) in 2015 prices. The reserve has been calculated based on Femern A/S' risk register and reflects costs the project most likely will incur. A 'P-value' of P80 was used. As the

[79] Femern A/S - Finansiel analyse af Femern Bælt-forbindelsen inkl. danske landanlæg, februar 2016.

[80] Bidding contractors stipulated in the Construction Act.

Danish authorities explained, this means that there is an 80% probability that the reserve budget will be sufficient to cover the identified risks. Ernst & Young has performed an external quality assurance of reserves and risks associated with the Fixed Link.

(167) The financial calculations assume that the Fixed Link will receive EU funding corresponding to 10% of the construction costs throughout the construction period, which is the same level as was assumed in the 2016 financial analysis. The funding relating to the planning phase has also been taken into account in the financial model.

(168) The traffic forecast had been prepared by the German consultancy firms Intraplan and BVU and crosschecked with other models such as the Trans Tools model of the European Commission. The traffic forecast was presented in November 2014. As stated in the 2016 financial analysis, COWI consultancy group performed an external quality assurance of the forecast and concluded that the assumptions are reasonable and in line with professional traffic forecasting practice. The basic assumption in the 2014 traffic forecast is that the existing parallel ferry service would not continue when the Fixed Link opens. At the same time, the 2014 traffic forecast includes a separate analysis of a scenario, with continued (parallel) 1-hour ferry service. Since 2014, Scandlines repeatedly confirmed its intention to continue operating after the opening of the Fixed Link. The Danish authorities therefore considered in the financial funding gap calculation model a 1-hour ferry service between Rødby and Puttgarden. The Danish authorities explained that this is in line with the PWC study prepared for the German authorities in the context of the German plan approval process for the Fixed Link, as provided by Scandlines et al. in an annex to their comments to the Opening decision. Furthermore, the study "Forretningsanalyse af færgefarten Rødby-Puttgarden" of 24 January 2016 prepared by consultants from KPMG on behalf of the Danish Ministry of Transport confirmed that the ferry service can continue with a very small marginal return. The effect of the 1-hour continued ferry service on the traffic volumes, already estimated in the 2014 traffic forecast, is a reduction of 14% in the volume of cars in the first year after opening of the Fixed Link, decreasing to a 12% reduction 13 years after the opening. For lorry traffic, the share using the parallel ferry service was estimated at 15%. A second update after the 2016 financial analysis concerns the effect of the toll reduction on the Great Belt Link by 25% with full effect as from 1 January 2023. This slightly reduces the traffic volumes on the Fixed Link.

(169) As to the rates for the road traffic, the Danish Minister for Transport will determine the final rates just before opening of the Fixed Link. The Danish authorities explained that the road traffic prices are an extrapolation of 2007 ferry prices, when the Rødby-Puttgarden ferry route was still a legal monopoly owned by the Danish and the German states. The Danish authorities explained that the ferry prices were considered as a reasonable and transparent benchmark – also taking into account what future users of the Fixed Link would be willing to pay without jeopardizing the broader aims of the Fixed Link. The assumed and average rate for passenger cars is DKK 494 (EUR 66.2) and for lorries DKK 2 092 (EUR 280.4) in 2015 prices.

(170) In the funding gap calculation model, railway revenues are estimated at around DKK 400 million (EUR 53.6 million) per year (2015 prices). The fees will be determined in accordance with Directive 2012/34/EU. The Danish authorities provided a report from Consultancy TetraPlan "Analysis of Rail Infrastructure Payment on the Fehmarn Belt Fixed Link" from March 2003 and its update from 2008. The 2003 document contains a technical analysis on the railway's ability to

pay for the using of a Fixed Link. The purpose of the analysis was to substantiate whether the estimated payment for using the rail track could be expected to materialise. The TetraPlan analyses assume that the total railway fee for trains going from/to Hamburg via the Fehmarn Belt Fixed Link should equal the total railway fee for trains going via the Great Belt fixed link.

(171) The costs for operation, maintenance and reinvestment of the Fixed Link correspond to DKK 468 million (EUR 62.7 million) per year (in 2015 prices). This estimation is in line with the 2016 financial analysis, as the Danish authorities did not consider it necessary to adjust these figures. The Danish authorities evaluated the effect of the reduced traffic volume on the costs for operation, maintenance and reinvestment. They concluded that the reduced traffic volume only has a minor impact on the operating and maintenance costs and does not have any noticeable effect on the State aid calculations and the guarantee period.

(172) To compute the funding gap, the different cash flows (for example, construction costs, operating results) need to be discounted for which the Danish authorities used the WACC as appropriate discount rate. In reply to the concern expressed by the Commission in the course of the formal investigation procedure that the nominal average risk-free interest rate of 5%, as an important component of the WACC, might be too high under the current market circumstances, the Danish authorities proposed to use an average risk-free rate of 3.5% per year. This would be based on the Ministry of Finance's updated official projection for 2025 of the Danish economy, including public finances[81]. In the Danish authorities' view, the assumption based on the Ministry of Finance's projection is the most objective prediction of future interest rate levels available in Denmark and is therefore a credible benchmark to use. This also takes into account that Femern A/S cannot in practice obtain loans covering its entire financing need all at once and thus that the current market interest rate cannot be used over a long-term period where Femern A/S takes up debt and refinances frequently.

(173) In reply to the concern expressed by the Commission that also an average risk-free rate of 3.5 % per year might be too high, the Danish authorities explained that, due to the urgent need for a State aid decision, the Danish authorities are willing to use a risk-free rate of 1.5% for the purpose of determining the funding gap if the Commission were to consider this necessary for the aid to be compatible with the internal market.

(174) Accordingly, the Danish authorities provided two funding gap calculation models. One was based on an average risk-free rate of 3.5% (time varying starting from low levels and increasing over time) ('first funding gap calculation model') and another one assumed, as an alternative model, a risk-free rate of 1.5% ('alternative funding gap calculation model').

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[81] https://www.fm.dk/publikationer/2019/opdateret-2025-forloeb-okt-2019. According to the report, the interest rate for the 10-year government bond is expected to be -0.1% per year in 2019, 1.6% per year in 2025 and 4.5% per year in 2040. This corresponds to a fixed nominal rate of approximately 3.5% per year.

(175) The resulting WACC figure is therefore dependent upon the applicable model. The calculations based on the Ministry of Finance's projection result in a WACC ranging between 4.2 – 8.3% in the first funding gap calculation model, while the calculations based on a risk-free rate of 1.5% (in the alternative funding gap calculation model) result in a fixed WACC of 5.59%. The Danish authorities explained that the WACC level was estimated in terms of what a typical investor would require for a project with comparable risk characteristics. They provided full details on how this WACC was established.

(176) The Danish authorities calculated the funding gap model on the basis of an operational period of 40 years. They did not include dividend payments relating to the hinterland.

5.5.4. Aid amount and duration

(177) In order to address the doubts raised in the Opening decision, the Danish authorities revised the notification and limited the use of State guarantees and State loans. The State guarantees and State loans will be limited to the financing needed for the costs incurred during the planning and construction phase. Femern A/S will terminate all loans with a State guarantee and repay all State loans at the latest 16 years after start of operations of the Fixed Link ('maximum guaranteed period'). Start of operations of the Fixed Link is the point in time where the Fixed Link opens for road and rail traffic. Femern A/S will not be able to raise loans with a State guarantee and State loans, which, together, exceed a maximum amount of DKK 69.3 billion (EUR 9.3 billion) ('maximum guaranteed amount'). The maximum amount is the expected total net construction debt for Femern A/S, including accrued interest costs during the planning and construction phase. To this amount, a liquidity reserve of DKK 2.0 billion (EUR 0.27 billion) and a "construction cost buffer" of DKK 2.5 billion (EUR 0.34 billion) has been added (2015 prices). The liquidity reserve was added to cover the risk of short-term fluctuations in project payments. The Danish authorities explained that an additional construction cost buffer is needed because, if construction costs were higher than expected (expected construction costs were calculated with a risk probability of 80%), Femern A/S would not be able – still in construction phase – to obtain loans on the market. The buffer corresponds to an increase in the risk probability to 99%. The Danish authorities however committed to a recalculation mechanism which adjusts the maximum guaranteed amount and the maximum guaranteed period downward if the actual costs incurred in construction mean that the construction cost buffer is not needed thus ensuring that the total aid amount does not exceed the funding gap. The Danish authorities committed to performing this recalculation at the latest five years after start of operations.

(178) Femern A/S is obliged to pay a premium in connection with the State guarantees and State loans. As stated in the preparatory notes to the Construction Act (section 11.1), this fee amounts to 0.15%. This corresponds to the premium to be paid by Femern A/S as to the first funding gap calculation model of the revised notification. In the alternative funding gap calculation model, this premium is higher and amounts to 2%.

(179) Furthermore, Femern A/S will not use State loans and loans with a State guarantee to finance its dividend payment obligation to its owner A/S Femern Landanlæg. Thus, it is only when Femern A/S' debt is fully repaid and its possibility of adopting new State loans and use State guarantees to finance future debt is terminated, that Femern A/S may start paying dividends to A/S Femern Landanlæg.

(180) In addition, the Danish authorities informed the Commission that Femern A/S' swap/derivatives contracts will be carried out on market terms. Therefore, Femern A/S will pay a market premium on the notional of the individual transactions to the Danish State for the State guarantee and for the collateral Femern A/S may need to post when entering into swap/derivative transactions.

(181) The Danish authorities further submitted that, as the maximum guaranteed amount is limited to the planning and construction costs (with related financial costs), they consider that operating aid is excluded. In order to further demonstrate this, the Danish authorities will ensure that Femern A/S annually reports an account of its cash flows.

5.5.5. Incentive effect

(182) In their comments to the arguments of Scandlines et al., the Danish authorities consider that the Commission's approach on the formal incentive effect, which was accepted by the General Court in the judgments of 13 December 2018, does not discriminate against private undertakings and does not violate the basic requirement that State aid should have incentive effect. They further argued that an incentive effect may be demonstrated in various ways[82]. Requiring a public SPV to apply to the Member State for aid would be highly artificial. This is because the SPV necessarily cannot initiate the project without aid as it has no other income. This is different from the logic requirement for private undertakings to submit an aid application. Femern A/S would not be in a situation comparable to a private undertaking applying for aid for a specific infrastructure project. The Commission's examination of the incentive effect therefore does not discriminate between public and private undertakings. In any event, it would follow from settled Commission practice that aid can have incentive effect if a project cannot be continued/completed without the aid, irrespective of the application being submitted subsequent to the initiation of a project[83].

5.5.6. The counterfactual scenario

(183) In the view of the Danish authorities, it makes little sense to consider a counterfactual scenario for a general transport infrastructure such as the Fixed Link, as it is decided by two States for broader public purposes and will be implemented by a public SPV established by law with no other activities or interests. As such, any counterfactual scenario for this SPV would be fully speculative. The counterfactual scenario therefore exists in the absence of an alternative project.

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82 Judgment of the General Court 20 September 2011, T-394/08, T-408/08, T-453/08 og T-454/08, *Regione autonoma della Sardegna and others v Commission*, ECLI:EU:T:2011:493, paragraph 226, as upheld by Judgment of the Court of Justice of 13 June 2013, C-630/11 P to C-633/11 P, *HGA and others v Commission*, ECLI:EU:C:2013:387, paragraph 108-109, and Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 78.

83 Commission Decision of 1 April 2009, N 356/2008 State Aid no. N 602/2004 – Denmark, Support to environmentally friendly electricity production, and Commission Decisions of 13 December 2013, SA.36893, Reset of Greek Motorway Concession Projects - Central Motorway (E65), paragraph 99 and 102 and SA.36877, Reset of Greek Motorway Concession Projects - Aegean Motorway, paragraph 74.

5.5.7. Competition will not be unduly distorted

(184) In their comments to the arguments of Scandlines et al., the Danish authorities refer to the General Court's judgments of 13 December 2018. They also argue that the Fixed Link is liable to create new competition rather than restricting it, that the potential abuse of market dominance is only hypothetical, that it is the Danish / German State that decides on removing rail access and on the capacity of the Fixed Link and that it is the Danish Minister for Transport that decides on the tariffs. On the refusal of the Danish Government to support an application for CEF support by Scandlines, the Danish authorities clarified that the Ministry of Transport could not support a project that aimed to explore the potential for significant new investments in ferry operations across the Fehmarn Belt since this was not in line with the transport policy based on annex 1 of the CEF regulation. The Danish authorities further noted that the rejection of Scandlines' application by the CEF Committee on 27 September 2019 was also based on reasons unrelated to the Danish authorities' refusal to co-sign the application. Finally, the Danish authorities reject the allegation that State aid granted to Femern A/S can be used to finance, and hence downgrade, the access to Puttgarden, which they consider to be German hinterland connections. This is because Germany has the sole responsibility for upgrading and financing the hinterland connections to the Fixed Link.

5.5.8. Conditions for mobilisation of State guarantees

(185) The Danish authorities provided minimum conditions for mobilisation.

5.5.9. Transparency

(186) The Danish authorities committed to comply with the transparency obligation of paragraph 45 of the IPCEI Communication.

6. ASSESSMENT OF THE MEASURE/AID

6.1. Existence of State aid

(187) By virtue of Article 107(1) of the Treaty, 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.

6.1.1. Notion of undertaking

(188) 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 financed[84]. Any activity consisting in offering goods and/or services in a given market is an economic activity[85].

(189) In the Aéroports de Paris judgment[86], the General Court ruled that the operation of an airport had to be regarded as an economic activity. More recently, the Leipzig/Halle judgments[87] concluded that if 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[88,89] as confirmed more recently in the Belgian ports judgment[90].

(190) The Commission already stated in the Opening decision that it could be considered *prima facie* that Femern A/S is engaged in an economic activity and should be considered as an undertaking. The Danish authorities however are of the view that an overall assessment – in light of the nature, aim and applicable rules – of Femern A/S' activities should lead to the conclusion that Femern A/S exercises public power. It is true that Article 107(1) of the Treaty does not apply where the State acts 'by exercising public power'[91] or where public entities act in their capacity as public authorities[92]. An entity may be deemed to act by exercising public power where the activity in question forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which is it subject[93]. The Danish authorities submitted in this respect that the *aims* of the Fixed Link are much wider than just providing a public service such as utilities, postal operators and providers of public transport do. This is because, in the opinion of the Danish authorities, the Fixed Link would create the necessary conditions for a more intensive cultural and economic cooperation to the benefit of the European Union,

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84 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.

85 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.

86 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.

87 Cf. footnote 72.

88 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.

89 See also paragraph 202 of the Commission Notice on the notion of State aid.

90 Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17 ECLI:EU:T:2019:652, paragraph 107.

91 Judgment of the Court of Justice of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283, paragraphs 7 and 8.

92 Judgment of the Court of Justice of 4 May 1988, *Bodson*, 30/87, ECLI:EU:C:1988:225, paragraph 18.

93 See, in particular, Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30 and Judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 and 23.

the two States and the regions bordering the Fehmarn Belt. The *nature* of the planning, construction and operation of the Fixed Link is in the Danish authorities' view also clearly connected to the exercise of public power as it is Denmark's implementation of an intergovernmental agreement and of a major public planning decision taken by the Danish Sate. The nature of the activities is, in the view of the Danish authorities, more comparable to the activities of international and national transport authorities (such as Eurocontrol or the Danish road or rail authorities) than it is to the activities of a private transport operator. The Danish authorities consider also that Femern A/S is subject to specific *rules*, for example not subject to a profit maximisation standard. As an SPV, there is also no risk that its financing could be used to cross-subsidize activities not related to the specific activities Femern A/S is established to fulfil.

(191) The Commission considers in this respect that an overall assessment is necessary and, to qualify as acting by exercising public power, Femern A/S' activity should be connected with the essential functions of the State by its nature, its aim *and* the rules to which it is subject. The Commission does not agree with the reasoning of the Danish authorities that its preliminary analysis in recitals (85) to (88) of the Opening decision is erroneous. The arguments of the Danish authorities concerning the aim, nature and rules are not sufficient to invalidate that analysis and to conclude that Femern A/S acts by exercising public power.

(192) According to settled case-law, the qualification of economic activity should be based upon factual elements, namely the provision of goods or services on a given market. Femern A/S, as the owner and operator of the Fixed Link, provides a transport service for remuneration to citizens and undertakings. Femern A/S will charge a fee (toll) from the users of the road section of the Fixed Link for crossing the Fehmarn Belt strait. In addition, the railway companies will pay fees for access to the railway infrastructure on the Fixed Link. Femern A/S' revenues from road and rail are meant to finance the total cost of planning, construction and operation of the Fixed Link, but also, once the State guaranteed loans and State loans are reimbursed, the costs of the construction of the hinterland connections, through the distribution of dividends to the parent company.

(193) There is a market for crossing the Fehmarn Belt strait, in particular because the service is already provided for remuneration by the existing ferry operator, which is a private undertaking clearly operating under market conditions. Hence the transport services provided by Femern A/S will be in competition with the transport services provided by ferry operators. Moreover, the Fixed Link will also compete with other transport links that constitute an alternative for crossing the Fehmarn Belt strait. Consequently, Femern A/S will be providing services on a market.

(194) It should be noted that Femern A/ S has not been granted specific public powers but will construct and operate the infrastructure as an economic operator. The construction and commercial exploitation of large infrastructure projects does not, in itself, constitute an exercise of public powers, and the construction and operation of the Fixed Link is governed by an economic logic, given that it is financed to a very

large extent by users' fees.[94] Indeed, the activities of Femern A/S are very different from what in the past has been held to be part of public power activities, such as the army or the police, air navigation safety and control, maritime traffic control and safety, anti-pollution surveillance, organisation, financing and enforcement of prison sentences, development and revitalisation of public land by public authorities and the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data[95].

(195) The fact that Femern A/S does not pursue profit maximization is not decisive, either. According to settled case law, the application of the State aid rules does not depend on whether the entity is set up to generate profits.[96]

(196) In any event, as evidenced by the 2014 Øresund decision, where the owner/operator was found to be engaged in an economic activity, it is clear that the Danish authorities have decided to introduce a market mechanism. As the Øresund bridge/tunnel, the Fixed Link will also be operated as a commercially exploited, toll-funded infrastructure. This goes against the argumentation that the activity would be an exercise of public power.

(197) It is true that, according to the Construction Act, the fees for the use of the Fixed Link are not set by Femern A/S but directly by the State through the Minister for Transport. However, it follows from Section 42(3) of the Construction Act that, regardless of subsection 2, Femern A/S can, within some limits, amend existing discount schemes or introduce new discounts. In addition, according to Article 6(2) of the Fehmarn Belt Treaty, Femern A/S is required to operate according to general business principles[97]. The Commission consequently finds that Femern A/S has a certain margin to decide its own pricing. In any event, for the purposes of

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94 Judgment of the Court of Justice of 29 October 1980, *Van Landewyck*, Joined Cases 209/78 to 215/78 and 218/78, ECLI:EU:C:1980:248, paragraph 88; Judgment of the Court of Justice of 16 November 1995, *FFSA and Others*, C-244/94, ECLI:EU:C:1995:392, paragraph 21; Judgment of the Court of Justice of 1 July 2008, *MOTOE*, C-49/07, ECLI:EU:C:2008:376, paragraphs 27 and 28.

95 Commission Decision of 7 December 2011 on State aid SA.32820 (2011/NN) — United Kingdom – Aid to Forensic Science Services, OJ C 29, 2.2.2012, p. 4, paragraph 8; Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 27; Judgment of the Court of Justice of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07 P, ECLI:EU:C:2009:191, paragraph 71; Commission Decision of 16 October 2002 on State aid N 438/02 — Belgium — Aid to port authorities, OJ C 284, 21.11.2002, p. 2; Judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraph 22; Commission Decision of 19 July 2006 on State aid N 140/06 — Lithuania — Allotment of subsidies to the State Enterprises at the Correction Houses, OJ C 244, 11.10.2006, p. 12; Commission Decision of 27 March 2014 on State aid SA.36346 — Germany — GRW land development scheme for industrial and commercial use, OJ C 141, 9.5.2014, p. 1; Judgment of the Court of Justice of 12 July 2012, Compass-Datenbank GmbH, C-138/11, ECLI:EU:C:2012:449, paragraph 40.

96 See, for instance, judgment of the Court of Justice of19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, ECLI:EU:C:2012:821, paragraph 50, and judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze*, C-222/04, ECLI:EU:C:2006:8, paragraphs 122 and 123.

97 Article 6 (2) states the following: "*The company shall be established in accordance with Danish law. The activities of the company shall be carried out in accordance with general business principles and in accordance with international obligations including the obligations according to Community law*."

determining whether an undertaking performs an economic activity, it is not decisive whether that undertaking determines its prices or is subject to State-regulated prices[98]. The case law indicates that the ability of an entity to influence the price of its services is merely one of several aspects that must be considered[99]. Indeed, an activity is economic if it consists in offering goods or services on a given market (such as through the commercial exploitation of infrastructure). As the Court has recently confirmed, the fact that a service may be provided without a view to a profit (as could be the case, for example, because of its State-defined pricing policies) does not prevent the entity that carries out those operations from being considered an undertaking if that offer exists in competition with other undertakings that seek to make a profit[100].

(198) Therefore, the Commission concludes that the operation of the Fixed Link constitutes an economic activity. It follows from the Leipzig Halle judgment[101] that the construction of the infrastructure operated by Femern A/S also constitutes an economic activity, and thus its support measures may involve State aid. Thus, Femern A/S has to be considered as an undertaking for the purposes of Article 107(1) of the Treaty with respect to those activities.

(199) As the Commission could, in the Opening decision, not establish the nature of the main activity of Femern A/S, it was not in a position either to come to a final conclusion on the so-called promotional/marketing/information activities in which Femern A/S has been engaged.

(200) As the Danish authorities consider the activities of Femern A/S related to the planning and construction of the Fixed Link as an exercise of public power, they also consider the promotional/marketing/information activities as an exercise of public power. Public authorities are often required to communicate and inform about their activities and projects and such information activities should in their view not be categorized as marketing as suggested by Scandlines et al. The Danish authorities also argue that a close dialogue with affected groups in Germany and Denmark and cooperation with NGOs and local authorities in Denmark and Germany are vital to the realisation of the Fehmarn Belt Fixed Link project.

(201) The Commission considers that the promotional/marketing/information activities clearly contributed to the planning, construction and operation of the Fixed Link as both the activity descriptions by Scandlines et al. and by the Danish authorities seem

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98 Judgment of 12 July 2012, *Compass-Datenbank GmbH v Republik Österreich* C-138/11, ECLI:EU:C:2012:449, paragraph 38, with further references.

99 Judgment of 19 January 1994, *SAT Fluggesellschaft v Eurocontrol*, C-364/92, EU:C:1994:7; judgment of 18 March 1997, *Calì & Figli v Servizi Ecologici Porto di Genova*, C-343/95, EU:C:1997:160; judgment of 12 July 2012, *Compass-Datenbank*, C-138/11, EU:C:2012:449. Judgment of the General Court of 20 September 2019 - *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17 ECLI:EU:T:2019:652.

100 Judgment of the Court of Justice of 6 November 2018 C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v Commission*, ECLI:EU:C:2018:873, paragraph 104. Judgment of the Court of Justice of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, ECLI:EU:2017:496 ,C-74/16 paragraph 47 and 48.

101 Cf. footnote 72.

to confirm. Marketing activities, as in the interpretation of Scandlines et al., would clearly contribute to the economic activity of Femern A/S. However, even if the promotional/marketing/information activities should be considered as information activities, as in the interpretation of the Danish authorities, those activities would also contribute to the economic activity of Femern A/S. As Scandlines et al. also submitted, it is not unusual that companies are required to inform the public about their activities. Those information obligations are not, in general, considered to constitute an exercise of public powers. The Commission considers that in this sense it is not relevant whether the activities are categorized as information, promotion or marketing activities. What matters for the State aid qualification is that those activities are contributing to the economic activity. The Commission therefore also considers the promotional/marketing/information activities as economic activities.

6.1.2. State resources and imputability to the State

(202) With regard to the State origin of the advantages resulting from the application of the measures, the concept of aid is broader than that of subsidy. This is 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 effect[102].

(203) Capital injections not in line with market conditions embrace a positive benefit. A measure by which the public authorities grant certain undertakings favourable tax treatment, although not involving a positive transfer of funds, places beneficiaries in a more favourable financial situation than other taxpayers and constitutes a transfer of State resources[103]. Furthermore, 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 to be considered as transfer of State resources[104]. 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 to occur where the State does not charge the amount it would

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102 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.

103 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. Judgment of the Court of Justice - 9 October 2014, *Ministerio de Defensa and Navantia,* ECLI:EU:C:2014:2262.

104 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.

normally charge for the granting of access to the public domain or natural resources, such as the seabed and the water areas.

(204) As the above measures (capital injection, tax measures, State loans and State guarantees and free use of seabed) were granted by Denmark, they are by definition imputable to that State.

(205) As regards the railway fees, they constitute a future source of income for Femern A/S, which – as the road tolls – will be determined by the Minister for Transport. The fees and tolls constitute remuneration for the use of the Fixed Link. The fact that one of the railway operators is the Danish State owned railway operator, DSB, is not sufficient to conclude that the railway fees paid to Femern A/S via Rail Net Denmark by that operator involve State resources, because all railway operators using the Fixed Link are charged on an objective and non-discriminatory basis[105]. Furthermore, Rail Net Denmark is not appointed to collect/distribute State aid. Rather, the funds are directly transferred to Femern A/S. The Commission concludes on this basis that the railway fees does not constitute an intervention by the State or through State resources.

6.1.3. Selective advantage

(206) According to 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 intervention[106]. It is only the effect of the measure on the undertaking that is relevant and not the cause or the objective of the State intervention[107]. 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.

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

(207) The capital injections granted by Sund & Bælt Holding A/S can be considered as entailing an advantage in favour of Femern A/S. Considering the uncertainties around the profitability and the high risks of the project, it is likely that a private operator would not have been prompted to inject 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 guarantee[108], or in the absence of the State loan. In the case at

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105 Judgment of the Court of Justice of 13 September 2017, *ENEA*, C-329/15, ECLI:EU:C:2017:671, paragraphs 23 to 37.

106 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.

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

108 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.

stake, Femern A/S is required to pay an annual premium on the outstanding debt covered by a State guarantee and on the outstanding amount of State loans to the Danish State. This premium, even if it amounted to 2%[109] following the alternative funding gap calculation model, is not contested to be below market terms, in particular given the risks of the project. 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 for loans and State loans without requiring the payment of a premium on market terms or the payment of the market interest rate, the Danish State conferred an advantage on Femern A/S. With regard to the promotional/marketing/information activities, the Commission notes that they are financed with State loans for planning activities and not by extra State loans dedicated to those activities.

(208) As said advantages concern specifically Femern A/S, they are de jure selective. Therefore, the capital injections, the State guarantees for loans and the State loans constitute selective advantages in favour of Femern A/S within the meaning of Article 107(1) of the Treaty.

6.1.3.2. State guarantees for derivative transactions

(209) The Planning and Construction Acts also provide for the possibility of State guarantees for the derivative transactions. Femern A/S has not yet entered into any such transactions. With regard to the guarantees on future derivative transactions, the Danish authorities will require the payment of a premium, which they consider to be on market terms.

(210) Section 3.1 of the Guarantee Notice provides that, if an individual guarantee or a guarantee scheme entered into by the State does not bring any advantage to an undertaking, it will not constitute State aid. Points 3.2 to 3.5 of the Guarantee Notice set out a number of sufficient conditions for the absence of aid. According to point 3.6 of the Guarantee Notice, "*a failure to comply with any one of the conditions set out in points 3.2 to 3.5 does not mean that the guarantee or guarantee scheme is automatically regarded as State aid*." It follows from section 1 of the Guarantee Notice that the provisions are designed to be directly applicable, although not exclusively, to guarantees linked to a specific transaction such as a loan. The Commission considers that guarantees on derivative contracts cannot be directly compared to guarantees on a loan and that a case specific analysis is appropriate for this type of derivatives guarantees as provided for in section 1.4 of the Guarantee Notice.

(211) A guarantee for a derivative contract is different from a guarantee for a loan. A derivative is a two-way obligation that has a market value of zero at the time of concluding the contract. As time passes, the market value can change in favour of one party (and to the detriment of the other party), depending on changes in interest rates for example. Femern A/S' derivatives trading is governed by a general

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[109] This premium was initially established at 0.15% and is the premium corresponding to the first funding gap calculation model. The alternative funding gap calculation model includes a premium of 2%.

agreement with each financial counterparty (the so-called 'ISDA' agreement) which also includes a Credit Support Annex ('CSA'). Under the two-way CSA agreement, each party is obliged to post collateral equal to the net negative market value of the total derivative portfolio between the two parties. The liquidity provided by Femern A/S for posting collateral cannot be used for any other purposes. The administration of collateral is carried out in a closed system with separate accounts. A State guarantee on a derivative contract is a guarantee for Femern A/S' payment obligations under the derivative agreement and for Femern A/S' ability to provide liquidity to be used for posting collateral to the counterparty, covering a potential negative market value of the transaction.

(212) The pricing of a derivative transaction is determined by the credit and funding risks associated with those potential changes in market value. Without a guarantee and a two-way collateral agreement, the bank as counterparty will add those risk elements to the price. The Danish authorities explained that those risk add-ons are much lower than the risk-premium of a loan with the same principal amount.

(213) The Danish authorities informed the Commission that Femern A/S will pay a market-conform fee for every State guarantee linked to a derivative transaction. The market-conform fee will be determined as follows. Femern A/S will collect two binding quotes from at least two different private banks before entering into a new derivative transaction. The banks will issue a binding quote for two types of transactions: a) the derivative transaction with the support of a State guarantee and a two-way CSA-agreement and b) the same transaction without these support elements. The quotes will be based on the bank's specific assessment of Femern A/S' financial position. Femern A/S can then choose between the two types of transactions. If Femern A/S chooses transaction a), Femern A/S will pay the difference between the quote for transaction a) and the quote for transaction b) as a premium to the Danish State. The premium will be expressed as a percentage of the principal amount of the transaction, to be paid on a yearly basis during the full lifetime of the transaction.

(214) The Commission considers that, based upon that methodology of comparing two binding quotes and the payment of the resulting difference as a premium to the Danish State, the State does not provide any advantage to Femern A/S by guaranteeing the derivative transactions. This measure consequently does not entail State aid. It is therefore not necessary to examine the extent to which the measure is liable to distort competition or to affect trade between Member States.

6.1.3.3. Railway fees

(215) In the previous section, the Commission concluded that the charging of railway fees does not constitute use of State resources imputable to the State granted to Femern A/S. For the sake of completeness and because it was left open in the Opening decision, the Commission further analysed whether Femern A/S benefits from a selective advantage regarding the railway fees.

(216) The Danish authorities explained that the infrastructure charges constitute user fees, i.e. payment for a service and not a levy/charge. The claim of Scandlines that the

State, via its own railway operator DSB, will annually pay Femern A/S a share of the overall fees irrespective of the number of trains using the Fixed Link, without an adjustment mechanism and for an undefined period, is not correct. The Danish authorities confirmed that the fees will be determined in accordance with Directive 2012/34/EU[110] and will apply to any railway operator using the Fixed Link. The railway fees are to be paid to Femern A/S via Rail Net Denmark who will collect the fees.

(217) The Commission observes that the railway fees constitute consideration for the services provided by Femern A/S to railway operators. Taking into account the clarifications as set out in recital (87) of this decision, there is no reason to assume that railway revenues would be too high.

(218) Therefore, as regards the railway fees, the Commission concludes that Femern A/S does not benefit from a selective advantage.

6.1.3.4. The special tax measures

(219) For a tax measure to fall within the scope of Article 107(1) of the Treaty, it has to be established that it favours *certain undertakings or the production of certain goods* over others which are in a legal and factual situation that is comparable, in light of the objective pursued by the scheme[111]. However, when Member States adopt ad hoc measures benefiting specific entities, the identification of an advantage in principle allows presuming its selective nature[112]. This is because it is normally easy to conclude that such measures have a selective character as they reserve favourable treatment for one or few undertakings[113].

(220) 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 those circumstances, Femern A/S should be considered to be the direct beneficiary of the tax measures.

(221) The Commission has assessed the measures of fiscal loss carry forward and of specific depreciation rules under the standard three-step analysis established by the EU Courts[114]. 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

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110 Cf. footnote 61.

111 Judgment of the General Court of 22 January 2013, *Salzgitter v Commission*, T-308/00, ECLI:EU:T:2004:199, paragraph 79, and the case law cited therein.

112 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.

113 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,

114 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.

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 Member State to demonstrate that the differentiated tax treatment derives directly from the basic or guiding principles of that system[115].

Fiscal loss carry forward

(222) The Commission concluded already in the Opening decision that the special rules on carrying forward the losses that Femern A/S enjoyed in the period 2013 until 2015 differentiated between economic operators that appear *prima facie* to be in a comparable factual and legal situation in 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. 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 system[116]. However, following the Opening decision, the Danish authorities have not submitted any such justification in light of the objective pursued by the general system.

(223) The Danish authorities consider that the measure at stake concerns the planning phase of the project and that in any case the measure never materialised in practice since Femern A/S did not have any profits during that period. Femern A/S has not carried forward losses from previous years. No deductions of losses carried forward from previous years have therefore been made when calculating the taxable income of the group in 2013-2015 when the special rules were in effect. All losses incurred by Femern A/S were used to reduce taxable income at group level in the same financial year. Other Danish companies within a group could have done the same according to the general rules.

(224) Thus, although Femern A/S was concerned by the special rules in the years 2013-2015, the company's financial position in those years was such that these rules never actually applied to Femern A/S. Consequently, the Commission concludes that, as the potential loss carry forward never materialised and cannot materialise in the future, the special rules on the carry forward of losses did not and cannot confer an economic advantage to Femern A/S[117].

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115 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.

116 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-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.

117 Judgment of the Court of Justice of 19 September 2018, *Commission v France and IFP Énergies nouvelles*, C-438/16, ECLI:EU:C: 2018:737, paragraphs 117-118.

Depreciation of assets

(225) The Commission already concluded in the Opening decision that the depreciation rules applicable to Femern A/S were *prima facie* selective. The Danish authorities have not submitted a justification in light of the objective pursued by the general system.

(226) The Danish authorities consider that the measure at stake concerns the planning phase of the project and that, even though the special depreciation rules were in place between 2009 and 2015, Femern A/S could not benefit from those special rules as the facilities were not available for use and no depreciation actually occurred. Femern A/S is from 1 January 2016 subject to ordinary Danish tax law, including the rules on depreciation of assets applicable to all Danish companies.

(227) Thus, Femern A/S could have enjoyed a selective advantage for the years 2009-2015. However, the Commission concludes that, as the advantage never materialised and cannot materialise in the future, the special depreciation rate applicable to Femern A/S did not and cannot confer an economic advantage to Femern A/S[118].

Joint taxation regime

(228) 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 applicable to all Danish undertakings within a group and not specifically to Femern A/S, no selective advantage can be considered to have been conferred to Femern A/S[119]. Thus, the Commission concludes that Femern A/S does not benefit from an additional selective advantage through its participation in the joint taxation regime.

6.1.3.5. Free use of State property

(229) 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 would apply 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, according to those authorities, ports do not pay fees for using the seabed.

(230) In their comments to the Opening decision, Scandlines et al. argue that because Femern A/S' free use of the seabed is explicitly provided for in the Construction Act, this indicates that Femern A/S would otherwise have had to pay a fee according to the normal (reference) system.

(231) Article 8(2) of the Fehmarn Belt Treaty and Section 45 of the Construction Act clarify that Femern A/S should not pay a fee for its use of the seabed. The Danish authorities explained that the reason for this provision is only for the avoidance of

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118 Ibid.

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

doubt. According to the Danish authorities, the imposition of an obligation to pay a fee to the Danish authorities in exchange for a certain service requires, under Danish law, a legal basis. As outlined in recital (229) of this decision, there is no such legal basis and there is no indication that Denmark charges other infrastructure operators for the use of the seabed and water areas. Thus, the Commission considers that, even if Section 45 of the Construction Act had not existed, the Danish authorities could not charge a fee for Femern A/S' use of the seabed in absence of a specific legal basis. At the same time, the explicit provision by those acts of the free use of the water areas and seabed does not indicate that Femern A/S would otherwise have had to pay a fee in the normal (reference) system.

(232) In these circumstances, and in the absence of a general legal framework providing for the payment of a fee for the use of seabed and water areas and in the absence of any factual evidence that such fees would have been paid in the past, the Commission has no reason to consider that such general system exists. The Commission therefore concludes that Femern A/S does not benefit from a selective advantage in this respect.

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

(233) Aid granted by a Member State that strengthens the position of an undertaking as compared to other undertakings competing in intra-Union trade must be regarded as affected by the aid[120]. A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to its competitors.

(234) The Commission already tentatively concluded in the Opening decision that, 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, the grant of a selective advantage may strengthen its position as compared to other undertakings active on that market, such as, in particular, ferry operators and port operators.

(235) However, in their comments to the Opening decision, the Danish authorities consider that the Fixed Link is not in direct competition with, for example, ferries, in the same way as railway infrastructure is not in direct competition with roads, busses or airports. In this respect, they refer to point 220 of the Notice on the notion of State aid. It is the opinion of the Danish authorities that the public financing of the Fixed Link project does not distort competition.

(236) The Commission does not agree with the reasoning of the Danish authorities. It considers that the measures which confer a selective advantage on Femern A/S strengthen the position of that undertaking compared with other undertakings competing in trade between Member States. In particular, it cannot be denied that Femern A/S will compete in trade between Member States with undertakings providing alternative transport services.

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120 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.

(237) First, the 2016 financial analysis prepared by Femern A/S acknowledges that "The Fehmarn Belt Fixed Link is expected to absorb some of the transit traffic between Scandinavia/eastern Denmark and Germany, which currently transits via the Great Belt Bridge, together with some of the traffic on the ferries in the western Baltic Sea, because some of the travellers will find it more attractive to use the fixed link". The General Court, in its judgments of 13 December 2018, also stated that Femern A/S' position would be strengthened to the detriment of ferries: "It is reasonable to conclude that a project involving the construction of infrastructure that will provide an alternative to existing modes of transport entails the risk that the latter will disappear and, as that project provides a solution which, on the whole, has positive results […]."[121].

(238) Secondly, the Commission remarks that, when quoting paragraph 220 of the Notice on notion of State aid to support that competition is not distorted by public financing of roads, even toll-roads, (and bridges by association), such as the Fixed Link under certain listed conditions, the Danish authorities omitted to mention the linked footnote 327 which clearly states "*An atypical situation in which State aid cannot be excluded would, for example, be a bridge or tunnel between two Member States, offering a largely substitutable service to the service offered by commercial ferry operators or the construction of a toll-road in direct competition with another toll-road (for example two toll-roads running in parallel to each other, thereby offering largely substitutable services).*"

(239) Finally, the Commission notes that, regarding Øresund Fixed Link, which is an infrastructure with very similar activities, objectives and financing to the Fixed Link in the Fehmarn Belt, the Commission considered in its 2014 Øresund decision that competition would be distorted on the market for transport services crossing the Øresund strait as "*the Consortium competes with operators of the other modes of transport, for example ferry services*"[122].

(240) Therefore, for all the reasons mentioned above, the Commission considers that the measures entailing a selective advantage may be considered as affecting intra-Union trade and are liable to distort competition.

6.1.5. Conclusion on the existence of aid

(241) On the basis of this assessment, the Commission concludes that the capital injections, the State guarantees for loans and the State loans constitute State aid within the meaning of Article 107(1) of the Treaty. Concerning the alleged measures consisting of the depreciation of assets, the fiscal loss carry forward, the joint taxation regime, the railway fees and the use of State property (free of charge), the Commission concludes that they do not constitute State aid in favour of Femern A/S in the sense

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[121] 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, paragraph 227 and Judgment of the General Court of 13 December 2018, *Scandlines Danmark ApS and Scandlines Deutschland GmbH v Commission,* T-630/15, ECLI:EU:T:2018:942, paragraph 256.

[122] Commission decision of 15.10.2014 – State aids SA.36558 (2014/NN) and SA.38371 (2014/NN) – Denmark – State aid SA.36662 (2014/NN) – Sweden – Aid granted to Øresundsbro Konsortiet, OJ C418, 21.11.2014, p.8.

of Article 107(1) of the Treaty. In addition, the Commission considers that, in view of the revised notification, the guarantees for the derivatives do not constitute State aid.

6.2. Classification of the measures as individual aid or scheme

(242) In recital (133) of the Opening decision, the Commission raised the question whether the State guarantees and the State loans should be considered and categorized as an aid scheme, as individual aid granted when the Planning and the Construction Acts entered into force, or as individual aid granted each time a financial transaction of Femern A/S is implemented by the national authorities.

(243) To determine whether the measures qualify as aid schemes or individual aid measures, the Commission has to examine the nature of the measures in light of the definitions set out in the Procedural Regulation.

(244) 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".

(245) The Commission considered already in recital (129) of the Opening decision that the first situation included in the definition of an aid scheme cannot be considered applicable to the measures under examination as the measures are not aimed at "*undertakings defined within the act in a general and abstract manner*" but granted specifically to Femern A/S.

(246) Both the Danish authorities and Scandlines et al. argued that the second situation envisaged in the definition is not applicable in this case since the aid granted to Femern A/S is linked to a specific project, the Fixed Link. Since the aid granted under the capital injections, the State guarantees and the State loans is exclusively related to the financing of the planning and construction of the Fixed Link, to the exclusion of other projects or activities, the Commission finds that the aid is indeed linked to a specific project. In addition, based upon the revised notification following the Opening decision (and referred to in recital (177) of this decision), the aid cannot be considered as awarded for an indefinite period of time and/or for an indefinite amount.

(247) Consequently, the Commission concludes that the State guarantees and the State loans cannot be considered as an aid scheme within the meaning of Article 1(d) of the Procedural Regulation. They must therefore be qualified as individual aid.

(248) It remains to be determined whether the State guarantees and the State loans involve one or several individual aid measure(s) linked to the Planning and Construction

Acts or a series of individual aids granted each time a financial transaction of Femern A/S is implemented by the Danish authorities.

(249) Based on the case law of the Union courts[123], as reflected in several Commission guidelines and regulations[124], it is well established that the aid granting date refers to the date when the legal right to receive the aid is conferred on the beneficiary under the applicable national regime.

(250) The national legal basis for the financing of Femern A/S consists of the Planning Act of 15 April 2009, which entered into force on 17 April 2009 and the Construction Act of 4 May 2015, which entered into force on 6 May 2015.

(251) Section 7 of the Planning Act and Section 4 of the Construction Act provide the legal bases for the financing of the activities covered by those acts. The Danish authorities explained that both sections are essentially identical. Section 4 of the Construction Act specifies that Femern A/S may raise loans and use other financial instruments to finance and refinance planning, construction and operation and other necessary measures and that those loans are specified by the Minister of Finance (subsection 1); that the Minister of Finance is authorised to issue a Treasury guarantee for those obligations (subsection 2); that the Minister of Finance is authorised to meet those financing needs by granting government relending (i.e. State loans) (subsection 3); that the Danish central government guarantees the other financial commitments of Femern A/S related to the construction of the project (subsection 4). Section 7 of the Planning Act is drafted in a comparable manner.

(252) The Commission notes that the language of those sections 4 and 7 in itself is not straightforward with regard to Femern A/S' legal right to those forms of financing and the related discretion of the Minister of Finance to approve or refuse providing State loans or State guarantees to Femern A/S.

(253) The Danish authorities provided further clarifications based on the preparatory notes to the Construction Act which they consider as authoritative interpretation sources for Section 4 of the Construction Act. In relation to subsection 1, the preparatory notes clarify that the loans must be raised as specified by the Minister of Finance in order to achieve the best possible terms. The Danish authorities further explained that, according to this provision, the Minister of Finance has the competence to issue binding guidelines to Femern A/S about how it should obtain loans, which instruments should be used and which requirements should be imposed. Regarding subsection 2 and 3, the preparatory notes specify "*The organisational form chosen is not intended to limit the State's responsibility for the construction work in question. Consequently, the Act specifies that the State guarantees the companies' obligations concerning loans and other financial instruments that are used to finance and refinance the preparation, construction, operation and implementation of other*

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[123] Judgment of the General Court of 25 January 2018, *BSCA v Commission*, T-818/14, ECLI:EU:T:2018:33 paragraph 72 and case-law cited therein.

[124] Such as Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1, Article 2 (28).

necessary measures in connection with the establishment of the construction project. The guarantee from the State means that Femern A/S and A/S Femern Landanlæg will be able to raise loans on terms equivalent to those granted to the State" (Chapter 10). Chapter 12 of those preparatory notes specifies "*In addition to the part that is financed by EU subsidies, the construction costs for the construction project will be financed by raising loans in the international capital markets with guarantees issued by the Danish State or via State re-lending. The interest and instalments on the loans will be paid through user charges on the coast-to-coast project and Banedanmark's payment to the companies for use of the railway. The Danish State will guarantee the loans raised and the other financial obligations of the companies during the construction phase."* It follows that the Construction Act contains a clear commitment by the State to finance the construction costs by State loans (or "State re-lending" as referred above) and/or State guarantees. The Minister of Finance only has authorisation to decide on the mix of State loans versus State guarantees.

(254) The Danish authorities provided further clarifications on the implementation of those State loans and State guarantees pursuant to the Construction Act (and by analogy the Planning Act). Clarification was also provided on the specific role of the Minister of Finance who has only limited discretion power in that implementation.

(255) In Denmark, the government debt is managed by the 'Government Debt Management Office' at Nationalbanken (the Danish Central Bank) on behalf of the Ministry of Finance. The "*Agreement on the division of work in the area of government debt between the Danish Central Bank and the Ministry of Finance*"[125] specifies the distribution of responsibilities. According to section 6 of this agreement, Nationalbanken issues State guarantees on behalf of the Minister of Finance and issues State loans on behalf of the Government to companies that have statutory access to raise loans with a State guarantee or State loans. The Ministry of Finance notifies Nationalbanken before the initiation of new legislation or amendments to existing legislation, etc. regarding companies' access to State loans and/or State guarantees that are or will be managed by Nationalbanken. The Ministry of Finance informs Nationalbanken when this substantive legal basis can be applied.

(256) On 29 May 2017, Femern A/S entered into an agreement with Nationalbanken, the Ministry of Finance and the Ministry of Transport that specifies the modalities under which the financing will be granted. The agreement is a standard agreement prepared by Nationalbanken, similar to the ones entered into as regards other State controlled companies. It sets out certain high-level terms, including that it is Femern A/S' responsibility to ensure that the loans obtained correspond to its financing needs and that the loans do not exceed any applicable restrictions in terms of loan amount. Femern A/S should also ensure that transactions under State guarantee are based upon sufficient legal basis for the government to issue guarantees. It results from this agreement that Nationalbanken does not monitor this for each request for a new State loan or State guarantee. Furthermore, Femern A/S is required – at the request of Nationalbanken – to submit a plan concerning expected financing needs. It follows

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[125] Danmarks Nationalbank – Aftale mellem Finansministeriet og Danmarks Nationalbank om arbejdsfordelingen på statsgældsområdet.

from the agreement that any request to obtain a new loan that generally corresponds to the plan will be accepted by Nationalbanken, unless (1) the loan is considered not to comply with the monetary policy, (2) it is not possible for Nationalbanken to obtain satisfactory pricing in the market due to extraordinary financial market circumstances or illiquidity or (3) the request substantially deviates from the plan provided. The specific terms and conditions for State loans and State guaranteed loans are subject to Nationalbanken's standard Guidelines for Financial Transactions. Thus, the Minister of Finance does not, either in theory or in practice, approve or reject individual loans that Femern A/S takes out. However, Nationalbanken regularly monitors that loans for which Femern A/S requests a State guarantee fall within the scope of the guidance from the Ministry of Finance and the Guidelines for Financial Transactions. Neither Nationalbanken nor the Ministry of Finance have ever rejected any specific loan documents for which for example A/S Storebælt or A/S Øresund have requested a State guarantee.

(257) On this basis, the Commission finds that the entry into force of the Construction Act conferred on Femern A/S the legal right to finance the planning and construction of the Fixed Link by way of State guaranteed loans or State loans. As such, the entry into force of the Construction Act involved the grant of individual aid to Femern A/S.

(258) The Danish authorities also confirmed that subsection 4 of Section 4 of the Construction Act[126] entails that the Danish central government is providing, without any further implementing measures, a guarantee that the contractors of Femern A/S will be paid by the Danish State in the case of failure of Femern A/S to pay[127]. Therefore, as soon as Femern A/S signs a construction contract with one of the contractors, the Danish State is liable for the entire financial obligation resulting from that contract. This guarantee was also effective as from the passing of the Construction Act, meaning that, from that day, the Danish State was effectively

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126 The preparatory notes to the Construction Act specify that "*In pursuance of subsection 4, the central government guarantees, without any specific notification in each case, Femern A/S' and A/S Femern Landanlæg's financial obligations that are not guaranteed in subsection 2. In pursuance of this provision, the government guarantee is limited to obligations that the two specified companies have assumed in relation to the construction of the construction project, but will also apply to obligations in connection with the construction of the construction project that the companies have assumed before the structures are taken into use but where the companies' obligations only cease after the time at which they are taken into use. The provision means that, for example, arbitration cases concerning works in connection with the construction project that are carried out up to the time when the fixed link is taken into use are covered by the central government's liability, even if the arbitration cases are only concluded or initiated after it has been taken into use. However, obligations for, for example, repair, operation and maintenance of the fixed link and any new works that are carried out after it has been taken into use will not be covered by the central government's liability in pursuance of subsection 4. Equally, financial obligations that the companies have assumed in the construction phase but are not linked to the actual construction of the construction project will not be covered by the central government's liability".*

127 This guarantee does only apply to the construction costs of the project. Any obligations related to repair, operation and maintenance of the Fixed Link or any new works carried out after the Link has been taken into use are strictly excluded.

liable, without any further implementing measures, for any costs resulting from the activities of Femern A/S under the Construction Act.

(259) The Commission concludes that the Danish authorities granted several individual aids to Femern A/S. First, a capital injection was granted in 2005 at the time of incorporation. Then, an individual aid was granted on the date of entry into force of the Planning Act on 17 April 2009 for the financing of the preparatory, investigation, design and other necessary actions concerning the Fixed Link. This aid consisted of a combination of the following instruments: a capital injection, State guarantees and State loans. The initial budget was set at DKK 1 210 million (EUR 162.2 million) (2008 prices). Additional aid was granted resp. on 3 June 2010, 23 June 2011 and in March 2013 when the initial budget of the Planning Act was increased to resp. DKK 1 881 million (EUR 252.1 million), DKK 2 812 million (EUR 376.9 million) and DKK 3 992 million (EUR 535.1 million) (all in 2008 prices). On the date of entry into force of the Construction Act on 6 May 2015 a further individual aid was granted for the planning, construction, operation and other necessary measures in relation to the construction and operation of the Fixed Link, and consisting of a combination of State loans and State guarantees.

6.3. Legality of the aid

(260) Article 108(3) of the Treaty requires Member States to inform the Commission, in sufficient time to enable it to submit its comments, of any plans to grant aid. In addition, the standstill obligation in that same Article prevents a Member State from putting its proposed measure into effect before the Commission has adopted a final decision.

(261) On 16 March 2009, the Danish authorities notified State aid to finance a budget of DKK 1 445 million (EUR 193.7 million) for the financing of the planning phase pursuant to Article 108(3) of the Treaty for reasons of legal certainty. DKK 1 210 million (EUR 162.2 million) concerned the Fixed Link while DKK 185 million (EUR 24.8 million) concerned the hinterland connections. On 13 July 2009, in its Planning decision, the Commission decided not to raise objections to the financing of the planning phase, concluding that in the planning phase Femern A/S acted as 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 with the internal market.

(262) As noted in recital (259) of this decision, the budget for the planning of the Fixed Link had been adjusted on several occasions, respectively in June 2010, in June 2011 and in March 2013 up to a total of DKK 3 992 million (EUR 535.1 million) (2008 prices). Those budget adjustments were approved by the Danish Parliament's Finance Committee. The consent related each time to specific planning activities covered by section 2 of the Planning Act. The Commission considers that the Danish authorities decided on those budget increases in light of the Planning decision and therefore relying on the presumption that no State aid would be granted to Femern A/S with those budget increases or in any event if it were aid, it was compatible. On the basis of those budget approvals, Femern A/S has taken on specific State loans. The Danish authorities confirmed that each of those State loans have a maturity date on which the loan is due. The Danish authorities further

specified that the actual planning costs have been financed on an ongoing basis in light of near term cost projections and granting of EU TEN-T/CEF support.

(263) The Commission considers that the Danish authorities could reasonably presume that providing State guarantees and State loans for a planning budget of DKK 3 992 million was covered by the Planning decision. Indeed, in the Planning decision, the Commission found that Femern Belt A/S acted as a public authority insofar as its involvement in the Planning phase was concerned, and that the public funding granted to it for those purposes does not constitute State aid. If Femern Belt A/S were to be chosen to be in charge of the subsequent phases of the project and to carry out the linked commercial activities, the public financing of the planning phase might be classified as compatible State aid. It is true that the Planning decision did not specifically consider State loans but only State guarantees and a capital injection. However, the Planning Act (as notified to the Commission) explicitly provides for the possibility of State loans and gives the Minister of Finance the discretion to decide upon the optimal mix to finance the preparation, investigation, design activities and other necessary actions concerning the Fixed Link. The Commission further notes that the Planning decision – in its complementary compatibility analysis – was not conditional on a maximum aid amount or aid intensity.

(264) On 28 November 2014, the Danish Minister for Transport sent the "*draft bill on construction of the Fehmarn Belt fixed link and the hinterland connections in Denmark*" for public consultation. According to that envisaged Construction Act, Femern A/S would also be appointed to carry out the construction, operation and financing of the Fixed Link. The Danish authorities consequently notified the financing model of the Fehmarn Belt Fixed Link project to the Commission on 22 December 2014. The Commission concludes therefore that the Danish authorities respected their obligation to inform the Commission, in sufficient time to enable it to submit its comments, of their plans to grant aid for the planning, construction and operation of the Fixed Link.

(265) As Femern A/S obtained advance State loans for construction activities on 21 November and 5 December 2018 for a total amount of DKK 7.4 billion (EUR 1.0 billion), as DKK 1.85 billion (EUR 0.2 billion) of this amount was paid out in 2018 and the remainder in the period February-April 2019 and as on 26 March 2019, the Minister for Transport instructed Femern A/S to commence a package of construction works, the Commission concludes that at least part of the aid granted on the basis of the Construction Act was put into effect illegally.

6.4. Compatibility assessment

(266) The Danish authorities argue that if the Commission were to consider the support measures to constitute State aid, it should assess their compatibility on the basis of Article 107(3)(b) of the Treaty which allows aid to promote the execution of an important project of common European interest.

(267) According to Article 107(3)(b) of the Treaty, aid to promote the execution of an important project of common European interest may be considered compatible with the internal market. The Commission sets out the principles under which it will assess the public financing of such projects in its Communication on 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 ('IPCEI Communication')[128].

(268) 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.

6.4.1. Important project of common European interest

(269) In order to qualify for aid on the basis of Article 107(3)(b) of the Treaty, an important project of common European interest should possess the following features:

- it must be a single project which is clearly defined in respect of its objectives as well as the terms of its implementation, including its participants and its funding[129];
- it must be of common European interest[130];
- it must be important quantitatively or qualitatively[131].

6.4.1.1. The project must be clearly defined in respect of its objectives as well as the terms of its implementation.

(270) The Commission noted already in the Opening decision that the project in this case can be defined as the planning, construction and operation of the Fixed Link. Article 2 of the Fehmarn Belt 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 Fehmarn Belt Treaty provides a clear description of the project in respect of its objectives and the terms of its implementation, including its participants 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 concludes that the project can be considered as a clearly defined project.

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128 OJ C 188, 20.6.2014, p. 4.
129 IPCEI Communication, paragraph 12.
130 IPCEI Communication, paragraph 14.
131 IPCEI Communication, paragraph 24.

6.4.1.2. The project must be of common European interest

(271) The Commission considers that the project is of a common European interest in the sense of Article 107(3)(b) of the Treaty as it contributes in a concrete, clear and identifiable manner to one or more Union objectives and has a significant impact on the competitiveness of the Union as well as on sustainable growth and value creation in a wide part of the Union. The Commission has also recognised the common European interest of the project in its Planning decision and more recently in the Opening decision.

(272) The project represents an important contribution to the Union's objectives, by being of major importance for the Trans-European Transport (TEN-T) and Energy networks[132]. The project will contribute to the development of the Trans-European transport network and is considered a priority TEN-T project and is of great importance for the transport strategy of the Union[133]. It constitutes a missing link on the Scandinavian-Mediterranean TEN-T core network corridor, identified as such in the third workplan of the European coordinator[134]. 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. This is a strong indication of the common European interest of the project.

(273) The project involves two Member States, Denmark and Germany. Notwithstanding this, the benefits go beyond those two Member States as they extend to a wide part of the Union[135]. Indeed, the objective of the Fehmarn Belt Fixed Link project is to improve the conditions for transport of passengers and goods between the Nordic countries and Central Europe. By closing the missing link on the Scandinavian Mediterranean corridor[136], the project is expected to bring benefits for all countries along the corridor from Finland to Malta (in accordance with Article 44(2) of Regulation EU N° 1315/2013[137]).

(274) Those clearly defined benefits of the Fehmarn Belt Fixed Link project have been further specified in a cost-benefit analysis prepared for the Danish Ministry of Transport[138] are not limited to the undertakings or to the sector concerned with the project[139]. The cost-benefit analysis shows that the Fehmarn Belt Fixed Link project

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132 IPCEI Communication, paragraph 15.

133 IPCEI Communication, paragraph 23.

134 https://ec.europa.eu/transport/sites/transport/files/work_plan_wpiii.pdf, p. 35.

135 IPCEI Communication, paragraph 16.

136 The Scandinavian-Mediterranean Corridor represents a crucial north-south axis for the European economy. The corridor stretches from Finland and Sweden in the North, to the island of Malta in the South, taking in Denmark, Northern, Central and Southern Germany, the industrial heartlands of Northern Italy and the southern Italian ports. The most significant projects on the corridor are the Fehmarn Belt Fixed Link and Brenner Base tunnel, including their access routes, see https://ec.europa.eu/transport/themes/infrastructure/scandinavian-mediterranean_en.

137 Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, OJ L 348 of 20.12.2013, p. 1.

138 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.

139 IPCEI Communication, paragraph 17.

will have wide benefits for Europe, despite of significant investment costs. The cost-benefit analysis was prepared by the consultancy *Incentive*, with an original version of the study dating 5 January 2015 and an updated version dating 27 March 2015. The original version was updated with new construction estimates. The main benefits identified in the analysis consist in time savings and increased flexibility when crossing the Fehmarn Belt, improving the functioning of the internal market and strengthening the economic and social cohesion between the Nordic countries and Central Europe.

(275) Moreover, the cost-benefit analysis also quantifies the net benefits, taking into account direct and indirect effects. Indirect effects include for example environmental and climate impact and a correction for the earnings of the ferries. According to the updated study, the Fehmarn Belt Fixed Link project will return a net benefit and produce a socio-economic return of 4.7%[140] when the costs and benefits of all countries are included in the analysis. The original study also performed a number of sensitivity analyses. It measured, in the interest of prudence, the impact on competition from ferries operating at reduced frequency. Under that scenario, the socio-economic return was estimated at 4.1% (compared to an overall socio-economic return of 5.0% in the original study).

(276) The Commission considers that, even if the updated sensitivity analysis results in a return of 3.8% in case of continued ferry service, as Scandlines et al. argue, the positive socio-economic study still confirms the benefits of the project.

(277) The Commission considers that the updated studies of 2019 as provided by Scandlines and Stena Line do not change its qualification of the project as having clearly defined benefits. The Incentive studies are based upon plausible assumptions. The new Knud Erik Andersen study of 2019, provided by Scandlines and Stena Line does not alter this assessment. In the view of Scandlines and Stena Line, the Incentive studies would have assumed that Scandlines is operating at a massive loss. The Commission does not consider this as a credible argument since it is clear that the socio-economic return was in fact corrected for lost earnings on ferries in the Incentive studies. Specifically, the original study by Incentive assumed that the revenues exceeded costs by around 15%. In addition, the study included two sensitivity analyses with up to a 30% difference between revenues and costs which still resulted in a positive socio-economic return of 4.6% (compared to a socio-economic return of 5.0% in base case scenario). Scandlines and Stena Line also highlight an increase in estimated construction costs for the German hinterland. The Commission notes that this element can also not undermine the plausibility of the Incentive studies, which were based upon a reasonable estimate of full construction costs (the German hinterland only being a minor part of total costs) including a reasonable reserve amount.

(278) Paragraph 18 of the IPCEI communication requires the project to be co-financed by the beneficiary. As the project will be funded in large part by Femern A/S, on

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[140] Recital 144 of the Opening decision erroneously mentioned that the sensitivity analyses were performed in the context of the updated study.

account of the fact that tolls and fees will be charged to users of the Fixed Link, the Commission finds that this criterion is respected.

(279) The public funding of the Fixed Link does not relate to environmentally harmful subsidies, therefore it is not in conflict with the principle of phasing out such subsidies, as required by paragraph 19 of the IPCEI communication.

(280) The project has received EU funding for planning activities, as detailed in recital (37) of this decision and it has received a commitment for further CEF support. This is as such recognized by the IPCEI Communication as a positive indicator of the common European interest.

(281) All those elements contribute to the Commission's conclusion that the project represents an important and concrete contribution to the achievement of the Union's transport policy objectives and broader Union objectives in particular the strengthening of economic and social cohesion. As such, the Commission considers that the project is of common European interest.

6.4.1.3. The project must be important quantitatively or qualitatively

(282) The project is a major European transport infrastructure project. Its important character has already been recognised by the Commission in its Planning decision.

(283) On the basis of the update provided by the Danish authorities, the total costs for planning and construction costs of the Fixed Link are estimated at DKK 52.6 billion (EUR 7.1 billion) and the costs related to the planning and construction of the upgrading of the Danish hinterland connections are estimated at DKK 9.5 billion (EUR 1.3 billion), i.e. DKK 62.1 billion (EUR 8.3 billion) in fixed 2015 prices for the entire project. In addition to this, the Fehmarn Belt Fixed Link project also involves significant costs related to the construction of the German hinterland connections, which is the responsibility of German authorities[141].

(284) Moreover, the project is realised as part of the 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.

(285) The Commission therefore considers that the project is particularly large in size and scope. The relatively long construction period and the high investment amount also imply a very considerable level of financial risk[142]. As such, the Commission considers that the project is quantitatively and qualitatively important.

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141 These costs are not related to the current case.

142 IPCEI Communication, paragraph 24.

(286) On this basis, the Commission concludes that the project meets all of the eligibility criteria set out in Section 3 of the IPCEI Communication[143].

6.4.2. Nature of the aid under assessment

(287) The measures as notified in 2014 that were assessed in the Construction decision covered the planning, construction and operation of the Fixed Link, until the full repayment of the debt. In its judgments of 13 December 2018, the General Court stated that as the aid at issue covered the operating costs of the Fixed Link, it could not be ruled out that the aid to some extent might constitute operating aid, which, if present, should have been specifically assessed by the Commission.

(288) The Commission therefore, in section 5.3.2. of the Opening decision, raised the question whether the aid measures should be classified as investment aid or operating aid, or as a combination of both. In particular, it was unclear at that stage to what extent the measures that would be implemented during the operational phase of the project would 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 project, and/or (iii) the payment of the dividends to the parent company, or (iv) all of the above.

(289) According to Scandlines et al., operating aid is linked to the nature of the costs and is not linked to a particular phase (such as the operating phase) of the project. Any aid covering operating costs constitutes operating aid in their view, irrespective of the phase in which the costs occur. As operating costs are included in the funding gap analysis, Scandlines at al. consider that by definition operating aid is present. Furthermore, for Scandlines et al., such operating aid is prohibited.

(290) It is necessary to determine first whether the measures involve operating aid. If they do, it needs to be analysed whether such potential operating aid can be declared compatible with the internal market, and on what basis.

(291) According to settled-case law, operating aid is defined as aid that is intended to release an undertaking from costs that it would normally have had to bear in its day-to-day management or ordinary activities[144]. The Court of Justice further distinguished investment aid and operating aid by linking the objective of investment aid to the existence of a specific investment[145].

(292) When considering the cited definition of operating aid together with the measures as notified by the Danish authorities in 2014, it seems that Femern A/S could potentially benefit from operating aid. Considering the Planning and Construction Acts, it is clear from resp. sections 7 and 4 that Femern A/S would have the

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143 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.

144 See, for instance, judgment of the Court of Justice of 19 September 2000, *Germany v Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 30 and case-law cited therein, and judgment of the Court of Justice of 24 November 2011, *Italy* v *Commission*, C-458/09 P, ECLI:EU:C:2011:769, paragraph 63.

145 Judgment of the Court of Justice of 24 November 2011, *Italy* v *Commission*, C-458/09 P, ECLI:EU:C:2011:769, paragraph 64.

possibility to raise State loans and benefit from State guarantees on its loans to finance and refinance planning, construction, *operation* and other necessary measures in relation to the construction and *operation* of the Fixed Link. The Construction Act did not exclude that Femern A/S would be released from costs it would normally have to bear in its day-to-day management of the Fixed Link. Since the above cited definition of operating aid clearly refers to the 'day-to-day management' and 'ordinary activities', and implicitly refers to a 'continuous nature' (as opposed to ad hoc nature for investment aid), the Commission considers that this potential operating aid can only be present once the Fixed Link is operational.

(293) However, as a reply to the doubts raised in the Opening decision and as outlined in recital (177), the Danish authorities revised the 2014 notification in order to further limit the State aid and to limit the provision of State guarantees and State loans to the financing needed for the costs incurred during the planning and construction phase, and therefore to the planning and construction costs of the Fixed Link. The maximum amount of debt that can be secured by State guarantees or taken up by means of State loans has been limited to the planning and construction cost, including the financial costs related to those planning and construction costs.

(294) On the basis of the revised notification, the Commission concludes that the aid under consideration concerns investment aid as the objective of the aid is clearly to make possible the planning and construction of the Fixed Link, and not to release Femern A/S from costs that it would normally have had to bear in its day-to-day management or ordinary activities. The fact that Femern A/S refinances frequently the loans taken up to cover the planning and construction costs, and not through for instance a single massive loan, is only a matter of the *form and type of* the financial structure of the project. It does not mean that State guarantees for refinanced loans relating to planning and construction costs involves operating aid. In addition, as the Commission demonstrates below in the compatibility analysis and assessment of the funding gap, the aid amount is substantially lower than the construction costs of the Fixed Link.

(295) Although the Construction Act seemed to allow for operating aid, the Commission considers that this could only confer a potential advantage on Femern A/S once operational. On the basis of the revised notification, the potential for future operating aid has been removed.

(296) Furthermore, the Danish authorities will ensure that Femern A/S annually reports an account of its cash flows with the purpose of demonstrating that the operation of the Fixed Link is not subsidized.

6.4.3. Necessity of the aid

(297) 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."

(298) Footnote 2 of paragraph 28 of the IPCEI Communication also contains a formal incentive effect requirement providing 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."

(299) Concerning the formal incentive effect requirement, the Commission already noted in the Opening decision 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 is clear from the analysis of the substantive incentive effect (see recital (302) and following) that without aid, Femern A/S was not in a position to conduct the project. In those circumstances, and taking into account that the aid in this case relates to a single project decided by Denmark and Germany that will be implemented by State owned specific purpose entities, the formal incentive effect requirement as set out in the IPCEI Communication cannot be considered to be a prerequisite for demonstrating that the aid had an incentive effect. The Fixed Link project is very different from, for instance, projects that may be supported under a regional aid scheme, as those projects are decided upon by the companies themselves and the incentive behind their investment decision has to be verified by the granting authorities prior to the granting. The Commission considers that the aid application in this case can be considered as inherent in the establishment of Femern A/S. The fact that Femern A/S did not submit a specific aid application to the Danish authorities does therefore not demonstrate the lack of incentive effect[146].

(300) Scandlines et al. further argued that what matters is whether Femern A/S acted (by constructing) before the aid was granted or in other words, whether Femern A/S actually started construction before receiving a commitment to have the aid. In the opinion of Scandlines et al., "*Femern A/S started construction works in 2013, although the Danish authorities committed to grant the aid, at the earliest in 2015 with the Construction Act*". According to Scandlines et al. those works cannot be considered as planning activities. Moreover, and considering that aid for construction activities was not granted yet, the formal incentive effect would be violated. In addition, Scandlines argued in its submission of October 2019 that Femern A/S has also breached the incentive effect requirement by carrying out construction works after the annulment of the Construction decision. The Commission notes that the formal incentive effect requirement, in general, does not compare the date of start of works to the date of aid granting (as Scandlines et al. seem to argue), but compares the date of start of works to the date of aid application. In any event, as the Danish authorities explained, the so-called *preparatory works*, which are part of a program under which the Danish authorities decided to initiate certain preparations at an earlier stage than originally envisaged, were based upon several approvals of the Danish Parliament of an adjustment of the planning budget. The Commission considers therefore that it cannot be argued that Femern A/S, as a specific purpose entity and given its articles of association, proceeded to those works without relying on the fact that those works would be State subsidized.

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[146] Judgment of the General Court of 13 December 2018, *Scandlines Danmark ApS and Scandlines Deutschland GmbH* v *Commission*, T-630/15, ECLI: EU:T:2018:942, paragraph 192.

(301) Scandlines et al. further argued that the Commission, in paragraph 163 of the Opening decision, was wrong in referring to the standstill obligation. The Commission agrees that the standstill obligation and the formal incentive effect requirement are two different concepts. Indeed, aid that has been granted in violation of the standstill obligation may still have an incentive effect.

(302) The Commission's position that the absence of an aid application is not decisive for the assessment of the incentive effect of the aid in this case is without prejudice to the requirement that the aid must not subsidise the costs that a project would anyhow incur (the substantive incentive effect, as provided for in paragraph 28 of the IPCEI Communication). The Commission considers that the reference by Scandlines et al. to Article 345 of the Treaty in that there would be a discrimination in favour of publicly owned companies is therefore not relevant. As explained, the Commission considers that the substantive incentive effect test of paragraph 28 of the IPCEI Communication is fully applicable but that given the specific circumstances as referred to in recital (299) of this decision, the aid can be considered as inherent in the establishment of Femern A/S within the context of the project. It should therefore be demonstrated that without the aid the Fixed Link would not be realised or at least not in the same scope.

(303) Paragraph 29 of the IPCEI Communication requires the Member State to provide the Commission with adequate information concerning the aided project. A comprehensive description of the counterfactual scenario corresponding to the situation where no aid is awarded by any Member State is also required.

(304) As already noted in the Opening decision, the Danish authorities 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.

(305) Although paragraph 29 of the IPCEI Communication clearly provides that the counterfactual scenario may consist in the absence of an alternative project, Scandlines et al. argued that the Commission should verify whether an alternative project exists without aid. Since the cost-benefit assessment from 2000[147] lists several alternatives and since the cost-benefit ratio of the immersed tunnel solution was considerably lower than the other alternatives, the Commission should not, in the view of Scandlines et al., neglect those alternatives in its assessment of the necessity of the aid. They further consider the fact that the Danish Parliament has sole decision-making as regards the project's scope as irrelevant and the 2001 Enquiry of Commercial Interest as outdated.

(306) The scope of the 2000 cost-benefit report was the economic and financial evaluation of a Fixed Link across the Fehmarn Belt comprising the assessment of different technical solutions for a Fixed Link in comparison with the continued existence of the current ferry system. The Commission acknowledges that the 2000 cost-benefit

147 *Economic Evaluation of an improved Ferry System across the Fehmarn Belt*, prepared by PLANCO Consulting GmbH for the Danish and German Ministries of Transport, dated May 2000.

report concludes that the relative efficiency of the alternative of an improved ferry system was considerably higher. However, at the same time, the report concludes that the absolute magnitude of net benefits gained by the Fixed Link solution cannot be achieved by an improved ferry system (the highest contribution to those benefits coming from reduced travel times and savings in transport cost). Consequently, an improved ferry system was not an alternative with the same scope and achieving comparable expected benefits as the Fixed Link project that should be considered as a counterfactual scenario. As to the other scenarios, the 2000 cost-benefit report did not make a ranking or spell out a clear preference, and it can in any event not be concluded from the report that alternative scenarios would exist where, without aid, a Fixed Link solution could be realised with a comparable scope or achieving comparable expected benefits. The Commission therefore considers that it can rely on the Enquiry of Commercial Interest, as launched in 2001, to establish the scenario where the Fixed Link would get no public support.

(307) As already noted in the Opening decision, the aim of that Enquiry was 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 States[148]. The Enquiry aroused substantial interest: approximately 100 individual companies responded of which 31[149] 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 connected with 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, those 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 in the meantime, the Danish authorities submitted an analysis at the time of the notification[150] showing that the results of the Enquiry were still valid.

(308) On this basis, the Commission considers that first, no rational private investor would engage in the financing of such a project under normal market conditions and second, that the Fixed Link could only be completed with substantial public support. The fact that the final technical solution has changed since the 2001 Enquiry does not

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

149 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.

150 The Danish State Guarantee Model Working Principles and Experience with Largescale Infrastructure Projects, September 2014 and The Fixed Link's internal rate of return and intensity of government subsidies.

change this conclusion and nothing suggests that a counterfactual scenario without aid had become viable in the meantime. 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, without the aid, the project would not be realised. The counterfactual scenario thus consists in the absence of an alternative project. In the absence of an alternative project, 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.

(309) To this end, in the context of the 2014 notification, the Danish authorities already 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*. The Danish authorities have provided an updated analysis reflecting current market conditions and reflecting the project specific risk.

(310) As outlined in recital (175), the benchmark WACC is dependent upon the risk-free rate. In the alternative model, the WACC is lower and has been estimated by the Danish authorities to be 5.59%.

(311) The Danish authorities compared this cost of capital requirement of the industry with the internal rate of return that would be achieved with the Fixed Link project in the absence of aid. As the Danish authorities provided updated financial data as a reply to the doubts raised in the Opening Decision on the proportionality of the aid, the Commission refers to section 0 of this decision for a detailed assessment of the assumptions of the models.

(312) The results of those updated calculations show that the project's IRR, without any State aid, would amount to 3.9%, considering an economic lifetime of the investment of 40 years. This IRR is considerably below the cost of capital of 5.59% required by the market that was calculated in the alternative funding gap model. By consequence, it is also lower that the cost of capital required by the market established under the first funding gap calculation model, which assumes a higher average WACC. This analysis confirms the conclusions of the 2001 Enquiry of Commercial Interest as to the necessity of State aid. In addition, at the request of the Commission, the Danish authorities conducted several sensitivity analyses on the basis of the updated financial model. It appears that the IRR remains below the cost of capital required by the market even if, as suggested by the complainant, a very long lifetime is considered (in the simulation, the model extended until year 2100).

(313) On the basis of the above elements, the Commission concludes that the aid does not subsidise the costs of a project that would, in any case, have been incurred by Femern A/S on the assumption that the project would have been undertaken in the absence of the aid in question. The aid is therefore necessary for the construction of the said infrastructure.

6.4.4. Proportionality of the aid

(314) 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 and construction of the Fixed Link could be achieved with less aid, then the aid would not be considered proportionate[151].

(315) According to paragraph 31 of the IPCEI Communication, "[t]he maximum aid level will be determined with regard to the identified funding gap in relation to the eligible costs. 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. The eligible costs are those laid down in Annex […]".

(316) In order to address the doubts raised in the Opening decision, the Danish authorities provided an update of the funding gap analysis and limited the aid so that it does not exceed the funding gap.

(317) It therefore needs to be assessed whether the underlying assumptions of the Fixed Link funding gap model submitted by the Danish authorities are appropriate in view of the nature, scope and risks of the project.

(318) In this context, the Commission notes that the aid amount is directly linked to the underlying assumptions of the funding gap model, not only as a consequence of the limitation of the aid amount to the funding gap level but also due to the fact that the level of the debt, and thus the level of the aid amount, depends on factors such as the overall construction cost and the interest rate assumed. The Commission therefore finds it appropriate, given the revised notification including an update of the funding gap analysis, that the model is also based upon the most recent underlying data. The Commission accepts in this respect the methodology of the Danish authorities to use the latest fully revised financial analysis of the project, the 2016 financial analysis, as a starting point and to update that analysis with further relevant developments.

(319) The Danish authorities restricted the funding gap model to the financing model of the Fixed Link and excluded all construction costs related to the hinterland connections from the analysis. As it appears from subsection 2 of section 5 of the Construction Act that A/S Femern Landanlæg pays all expenses for planning, construction, operation and other necessary measures related to the construction and operation of the hinterland connections, the Commission is of the view that the Danish authorities took a correct approach in excluding those hinterland costs from the funding gap analysis for Femern A/S. The Danish authorities further proposed not to take into account the dividend payments Femern A/S might incur in favour of A/S Femern Landanlæg. Those dividend payments therefore do not appear as a cost item in the model. The Danish authorities also revised the 2014 notification as they committed

[151] IPCEI Communication, paragraph 28.

to ensure that Femern A/S will only start paying dividends to A/S Femern Landanlæg after Femern A/S' State subsidized debt is fully repaid.

(320) The Danish authorities explained that the eligible costs are restricted to the construction costs budget. This construction costs budget includes the planning costs as well as the costs for the promotional/marketing/information activities. The Commission considers, since the timing of those information/promotional activities occurred about 10 years before the planned operational date, since there is clearly an information obligation imposed by the Danish State and since information activities were part of the Planning Act, that those costs are linked to the realisation of the project and therefore eligible for aid under the IPCEI Communication. The planning and construction cost budget amounts to DKK 62.2 billion (EUR 8.3 billion) (in nominal prices) which the Commission considers as an appropriate estimate. The budget includes a reserve requirement which is set so that there is a probability of 80% that the budget including the reserve will be sufficient to complete the project despite any cost overruns. It reflects costs that the project will most likely incur. In addition, for the purpose of the calculation of the maximum funding gap, the Danish authorities added a construction buffer of DKK 3 billion (EUR 0.4 billion) (in nominal prices) to the construction costs. The buffer corresponds to an increase in the reserve requirement from 80% to 99%. This means that, not only in 80% but in 99% of future cost realisations, the budget including the reserve of DKK 7.3 billion (EUR 1.0 billion) as well as the buffer of DKK 3 billion (EUR 0.4 billion) will be sufficient to complete the project. However, this also means that there is a probability that the actual construction costs will not be that high and that the construction costs assumed for the purpose of determining the funding gap may therefore be overestimated by this construction cost buffer.

(321) The Danish authorities updated the initial assumption on EU funding in its 2016 financial analysis to 10%. This assumption is lower than the initial assumption of 18%, which formed the basis of the Construction Act (equivalent to EU support of about DKK 7.5 billion or EUR 1.0 billion). The Danish authorities explained that in 2015, the EU granted EUR 589 million for the funding period 2016-2019 which is equivalent to approximately DKK 4.4 billion (in current prices). At the same time, there were uncertainties regarding the total funding that was to be allocated to Femern A/S, including uncertainties regarding the timing of commencement of the construction period. For those reasons, the EU support assumption was changed to 10% in the 2016 financial analysis. However, the Commission notes that the assumption in the 2016 financial analysis was stated as cautious. The Danish authorities explained that, due to a delay in the German plan approval of more than one year and subsequent litigation before the German Federal Administrative Court, Femern A/S will not be able to use the full amount of EU grants even with a prolongation of the period of support by two years until the end of 2022 in the most optimistic scenario. Furthermore, the Danish authorities explained that they expect the general EU budget to be reduced in the financial perspectives 2021-2027 (due to Brexit) and at the same time the number of applications for EU support to infrastructure projects to be increased. Therefore, the assumption of 10% EU funding should be considered as a realistic assumption. In the funding gap calculations, the total EU funding amounts to 12% of planning and construction costs (in NPV terms) which, on the basis of the above explanations, the Commission considers as a reasonable assumption.

(322) As to the revenues, nothing that has emerged in the formal investigation gives the Commission reason to put into question the road traffic forecast as it has been developed in 2014, crosschecked and subjected to external quality assurance. In addition, the Commission considers it as reasonable that the 2014 road traffic forecast was updated with the effect of the Great Belt toll reduction. For what concerns the assumption of the continued ferry service in the traffic figures, the Commission notes that this assumption is not in accordance with the baseline scenario of the cost-benefit analysis as developed in 2015. However, as the Danish authorities submitted, the risk that the ferry service would continue was already clearly identified at that point in time as the traffic analysis includes a specific sensitivity analysis on that element. Since then, Scandlines repeatedly confirmed, including in its reply to the Opening decision, its intention to maintain ferry operations with a frequency even exceeding a 1-hour service. The studies completed by consultants of PWC and KPMG referred to by the Danish authorities (see recital (168) of this decision) also seem to confirm the feasibility of a continued service. In view of all this, the Commission considers that a reasonable investor would assume a continued ferry service in its financial analysis and considers the assumption of a 1-hour ferry service to be appropriate.

(323) As to the assumed prices, the Commission does not share the view of Scandlines et al. that price setting would be too low because "*Femern A/S sets its tolls below costs*". The Commission observes that the expected operating revenues largely exceed operating costs over the entire operational period. It cannot be a requirement that prices are to compensate for the full costs (including construction costs) of the project. If it were possible to set prices at a level that compensates for all construction and operating costs, no funding gap would be present and no State aid would be needed. The Commission, however, considers that prices assumed in the funding gap model cannot be artificially low with the sole purpose of inflating the funding gap. The Construction Act refers back to the Planning Act, assuming that the price level for road traffic was expected to be at the level of the ferry prices for Rødby-Puttgarden in 2007, adjusted by the general increase in prices up to the time of opening. This same price level was the basis for the traffic projections and was considered as a realistic assumption by the respective studies. The traffic forecast uses a flat, technical average price for both passenger cars and lorries. It further appears from the 2016 financial analysis that, if a differentiated price structure were introduced, the effect on the overall revenues would be relatively limited. Based on the above, the Commission considers the assumed road traffic revenues to be plausible and appropriate.

(324) The Commission further considers the basis for the calculation of the railway revenues as explained in recital (170) as reasonable.

(325) The 2016 financial analysis incorporates a thorough review of the costs for operation, maintenance and reinvestment of the Fixed Link, leading to a serious reduction in those costs. Those new assumptions have also been included in the updated funding gap model. In the view of Scandlines et al., operating costs must be excluded from the funding gap calculation. This is based on their view that all aid covering operating costs is operating aid, which in their view cannot be allowed. The Commission already elaborated in part 6.4.2 of this decision on what constitutes operating aid. The question whether operating costs can be included in a funding gap calculation is however a different issue.

(326) The Commission notes that paragraph 31 of the IPCEI Communication refers to the difference between positive and negative cash flows when defining the funding gap. It is in fact inherent in the logic of investment decision-making to compare, ex ante, investment costs against future operating revenues and costs. Investors typically do not take a positive investment decision as long as this comparison results in a gap or a negative net present value. Consequently, the expected operating costs and revenues are an integral part of the funding gap analysis. This is also confirmed by the compatibility criteria in the General Block Exemption Regulation[152]. Although they are not directly applicable to the case at hand, they illustrate how the Commission applies the funding gap principle in its State aid practice. Article 53, paragraph 6 and Article 55, paragraph 10 of that Regulation which concerns aid for culture and heritage conservation and aid for sport and multifunctional recreational infrastructure respectively state that "*for investment aid* […]*, the aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment. The operating profit shall be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism.*" 'Operating profit' is defined in Article 2 paragraph 39 of the General Block Exemption Regulation as "*the difference between the discounted revenues and the discounted operating costs over the relevant lifetime of the investment, where this difference is positive. The operating costs include costs such as personnel costs, materials, contracted services, communications, energy, maintenance, rent, administration* […]*".*

(327) The Danish authorities used the expected economic lifetime of the Fixed Link in the funding gap analysis. They considered the expected economic lifetime of the investment to be 40 years as this is the timespan an investor would normally consider when deciding on large-scale infrastructure investments like the Fixed Link. The reference period taken into consideration as from the moment of the Construction Act is therefore 53 years and 50 years as from the assumed start of the construction phase. It is true that according to Femern A/S's website, the lifetime of the project is said to be 120 years. However, the more distant the cash flows, the larger the impact of the discounting will be. The Commission believes that, due to the high degree of uncertainty surrounding any financial forecast over such a very long period of time, it is very unlikely that any reasonable investor would have accepted to make an investment whose profitability prospects can be realised only over such a very long time period. The Commission considers an operational period of 40 years as a reasonable assumption for the calculation of the funding gap of the Fixed Link. This period is substantially longer than the reference periods of 25 to 30 years used in the Commission's decisional practice of recent years in for example the ports and the airports sector. Furthermore, this period is also longer than the standard benchmark of 25 to 30 years used as a reference period in the roads/railroads sector, proposed in

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[152] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

the Annex I to Commission Delegated Regulation (EU) No 480/2014[153]. That Regulation is not applicable to the case at hand but Annex I provides an indication of internationally accepted practice. The Commission therefore considers a reference period of 49 years from the assumed start of the construction phase as reasonable.

(328) To compute the funding gap, an appropriate discount rate has to be used to discount the future cash flows. The Danish authorities used the WACC as discount rate. The WACC is the weighted average of cost of debt ('Kd') and cost of equity ('Ke') for a company. The weights used are the proportion of Equity ('E') and of Debt ('D') in the capital structure of the company (E+D). The WACC is computed as follows: WACC=Kd*D/(E+D)(1-t)+Ke*E/(E+D). The estimates for the cost of debt and cost of equity are obtained on the basis of standard approaches according to the following formulas: Kd = risk-free rate + risk premium on debt, and Ke = risk-free rate + levered beta * risk premium on equity + project specific risk premium. The tax rate is denoted by 't'.

(329) The Danish authorities have estimated the WACC a typical investor would require for a project with comparable risk characteristics. The figures used for the risk premium on equity, risk premium on debt and unlevered beta were updated to the latest information available.

(330) The risk premium on debt was estimated at 1.5% and is close to the premium a BBB rated investor would need to pay. Denmark establishes this rating by estimating the expected interest coverage ratio for Femern A/S as well as by collecting a representative sample of S&P, Moody's and Fitch ratings for toll road and construction companies. The Commission considers this a reasonable assumption for the transportation infrastructure business. The risk premium on debt for BBB rated issuers was estimated using Reuters data on BBB rated EUR denominated bonds as well as information on US bonds.[154] The estimate is also in the range of the Damodaran data provided by Scandlines et al. but seems to be lower than the estimate in the 2018 study provided by Scandlines. However, this study did not contain further argumentation related to the basis of the estimate.

(331) The risk premium on equity was estimated by the Danish authorities at 6% based upon an external survey conducted by Pablo Fernandez et al.[155] This estimate is very

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153 Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund, OJ L 138, 13.5.2014, p.5.

154 Aswath Damodaran data archive "Ratings, Spreads and Interest Coverage Ratios" 1/2019.

155 Pablo Fernandez et al. 2019: "Market Risk Premium and Risk-Free Rate used for 69 countries in 2019: a survey". Between February and March 2019, the researchers conducted a survey in which they contacted finance and economics professors as well as analysts and managers of companies. Based on 1 836 responses, they provide descriptive statistics of risk-free rates and market risk premiums for 69 countries.

close (5.8%) to the one suggested by Scandlines et al. and virtually identical (5.96%) to the one found in the data archive by Damodaran.[156]

(332) Denmark used an asset beta of 0.5 determined using data for companies in the toll road and construction business collected from Bloomberg. Together with a tax rate of 22% and a capital structure of 50% debt and 50% equity, Denmark determined the levered beta applying widely accepted standard formulas. The debt to equity ratio has been determined using the same Bloomberg sample of construction and toll road companies. The 2018 study submitted by Scandlines et al. relies on an unlevered beta of between 0.46 and 0.63. When assessing these assumptions, the Commission finds that the asset beta of 0.5 used by Denmark is in line with industry averages for 40 European transportation companies (unlevered beta 0.52, unlevered beta corrected for cash 0.6) and more conservative than 147 European engineering/construction companies (unlevered beta 0.66, unlevered beta corrected for cash 0.78). These transport companies have debt to equity ratios of 98.00% (transportation) and 92.39% (engineering/construction).[157] A debt to equity ratio of 100% means the company has as much debt as equity, therefore the portion of debt and equity is 50%. Thus, the Commission considers that the assumption of 50% debt and 50% equity as the financing structure of a typical company is reasonable. The tax rate of 22% corresponds to the corporate tax rate applicable to Denmark (following article 17 of Danish Corporation Tax Act).

(333) Furthermore, Denmark adds a project specific risk premium of 2%. The project specific risk premium is justified with reference to the significant uncertainties in the project, for example uncertainties related to the final German plan approval, which could cause a significant delay and additional costs, but also other microeconomic and macroeconomic risks relating to the project and not taken into account in the budget assumptions. The value of 2% is conservative when compared to what the 2018 study submitted by Scandlines et al. suggested. However the project specific risk premium should be evaluated together with the construction cost buffer used in the State aid model which already takes into account the risk of a cost overrun in the construction phase. On this basis the Commission considers the use of a project specific risk premium of 2% as reasonable.

(334) The Commission considers that the components of the WACC as outlined in the above recitals are reasonable in view of the size, the risks, the timing and the type of activity of the project.

(335) The last component of the WACC that requires consideration is the risk-free rate. In the 2014 notification, the risk-free rate was set at 5% (in nominal terms). In their revised notification, the Danish authorities originally proposed to base the risk-free rate on the Ministry of Finance's updated official projection for 2025 of the Danish economy (including public finances)[158]. According to that projection, the interest rate for the 10-year government bond is expected to be -0.1% per year in 2019, 1.6% in 2025 and 4.5% in 2040. This corresponds to a fixed nominal rate of approximately

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156 Aswath Damodaran data archive "Risk Premiums for Other Markets" 1/2019.

157 Aswath Damodaran data archive "Levered and Unlevered Betas by Industry" January 2019.

158 https://www.fm.dk/publikationer/2019/opdateret-2025-forloeb-okt-2019.

3.5% over the full period of the financial model. The Danish authorities considered this assumption as the most objective prediction of future interest rate levels available in Denmark and therefore consider this as a credible benchmark. They further argued that Femern A/S can in practice not obtain loans or State loans covering its entire financing need all at once and therefore the current market interest rate cannot be used over a long-term period where Femern A/S takes up debt and refinances frequently.

(336) The Commission considers, however, that although the level of interest rates is subject to uncertainty and the project faces a relatively long construction period, this risk-free rate appears to be high in light of current market conditions. Current market data show that current yields are very low for Danish government bonds[159].

(337) To address those concerns, the Danish authorities provided, as part of the revised notification, an alternative model in which they used an assumption of 1.5% for the nominal risk-free rate (as average over the full period of the model). The assumption is based upon the cited research conducted by Pablo Fernandez et al[160]. For Denmark the survey consists of 135 answers, showing an average risk-free rate of 1.2% per year in 2019. The results of the previous years were respectively 1.6% for 2018, 1.6% for 2017 and 1.3% for 2015 (2016 not being available in the study). The Danish authorities further argued that this survey does not specify the investment-horizon that the respondents should apply in answering the question on the risk-free rate, only that the survey is focusing on an investment in a well-diversified equity portfolio. From this, the Danish authorities argued that it is most likely that the answers are based on a maturity of 5 to 10 years. The Danish authorities therefore consider an add-on of +0.5% to the rate retrieved from the survey reflecting the approximate yield difference for long-term (30-year) bonds. The add-on is estimated on available data from the German government bond. The Danish authorities claim that the maturity-adjusted average is 1.7% and using 1.5% is therefore a conservative assumption.

(338) In light of the current market conditions, the relatively long construction period and in particular the overall time span of the financial model (until 2068 and therefore more than 30 years), the Commission considers the assumption of 1.5% in the alternative model as reasonable and justified. In addition, Scandlines et al. provided two different studies on the estimation of the WACC. The Danish risk-free rate assumption of 1.5% is in line with the estimation of 1.6% in the most recent study (February 2018 but based upon 2014 data) and substantially lower than the figure of 3.04% presented in the previous study of early 2014).

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159 Danmarks Nationalbank provides yields of current and past sales of government bonds.

160 Pablo Fernandez et al. 2019: "Market Risk Premium and Risk-Free Rate used for 69 countries in 2019: a survey". Between February and March 2019, the researchers conducted a survey in which they contacted finance and economics professors as well as analysts and managers of companies. Based on 1 836 responses, they provide descriptive statistics of risk-free rates and market risk premiums for 69 countries.

(339) On this basis, the WACC amounts to 5.59%. That is at the lower end of the range of 5.68% to 6.71% as suggested by Scandlines et al.[161]

(340) The Commission is of the view that a proportionality analysis including a funding gap model and an aid amount, taking a risk-free rate of 3.5% as a basis, is not based upon reasonable assumptions in light of the current and expected market circumstances.[162] It is therefore only on the basis of the alternative funding gap calculation model as provided by the Danish authorities in the updated notification that the aid can be found to be proportionate.

(341) It results from the alternative funding gap calculation model that the funding gap for the Fixed Link amounts to DKK 12 046 million (EUR 1 615 million). A comparison between the funding gap and the eligible costs gives a funding gap ratio of 27.3%.

(342) The gross grant equivalent of the aid includes the aid resulting from the capital injections, the State guarantees and the State loans. The methodology the Danish authorities used to calculate the aid element of the guarantees follows a similar approach as set out in section 4.2 of the Guarantee Notice, which provides that, in case no market price is available, "*the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate the company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums have been taken into account"*. In their calculation of the aid amount, the Danish authorities did not make a distinction between the value of State aid associated with the State loans and the value of State aid associated with the State guarantees. It also follows from the Construction Act that both are interchangeable and the Minister of Finance has discretion in deciding on the optimal mix of both instruments. The annual premium which Femern A/S has to pay to the State on the outstanding guaranteed debt is equal to the premium on the outstanding State debt. The aid elements resulting from the State guarantees and the State loans were therefore calculated in the same manner. The Danish authorities determined the yearly aid element by taking the difference between the WACC that a market investor would be expected to require (5.59%) and the risk-free rate (1.5%) adjusted for the premium that Femern is required to pay to the Danish State, multiplied by the sum of outstanding guaranteed debt and outstanding State debt.

(343) The Commission considers it appropriate that, in this case, the aid element corresponds to the difference between the risk-free rate (adjusted for the premium) and the WACC. Thanks to the State guarantees and State loans, Femern is expected to pay the same rate as the Danish State, which equals the Danish risk-free rate. Therefore, Femern A/S' expected actual financing cost is the risk-free rate, adjusted by the premium. Without any aid, Femern is expected to pay the WACC which

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161 Applying the formulas above, the cost of equity equals 1.5% + 0.89 * 6% + 2% = 8.84% while the cost of debt corresponds to 1.5% + 1.5% = 3%. Weighing both components gives the WACC = 50% * 8.84% + 50% * 3% * (1-22%) = 5.59%.

162 Using the proposed time-varying risk-free rate assumption (with an average of 3.5%) leads to WACC figures between 4% and 8.3%.

corresponds to the weighted average between the cost of equity and the cost of debt. In turn, taking the difference between the two rates captures the overall advantage.

(344) Typically, the cost of equity is higher than the cost of debt and a project/company is financed by a mix of debt and equity. It could be considered as an additional advantage for Femern to be able to finance its project almost entirely with debt without any substantial need for equity. Relying on the cost of debt only would underestimate the aid. The Commission thus considers that the benefit of (almost) only debt financing is taken into account in the aid element on the State loans and State guarantees by using the WACC as a reference instead of the cost of debt.

(345) Furthermore the Commission considers that subsection 4 of section 4 of the Construction act, stipulating that the Danish government guarantees the other financial commitments of Femern A/S related to the construction of the project, does not involve additional aid since, as the construction costs are already covered by State loans and loans with State guarantees, it does not provide an additional advantage to Femern A/S.

(346) Scandlines et al. are of the view that the aid element equals the full amounts effectively covered by the State loans and loans with State guarantees. The Commission notes that this determination of the aid element in a guarantee is provided for in the Guarantee Notice only in exceptional circumstances and where a guarantee is provided for companies in difficulty where the likelihood that the borrower will not be able to repay the loan becomes particularly high. The Commission considers that such exceptional circumstances are not present in this case.

(347) The net debt is the effective debt of Femern A/S. The effective debt reflects the accumulated amount of money spent by the company to cover planning, construction, interest payments, own costs etc. reduced by the paid-in equity and the received EU support. The net debt builds up during the construction phase is expected to reach its maximum the first year of operation. In the operational phase, the net debt will gradually decrease with the free cash flow of the project. This net debt is covered by State loans and loans with a State guarantee for a certain number of years.

(348) Since the IPCEI Communication requires that aid in the form of guarantees is limited in time, and aid in the form of loans is subject to repayment periods, the Danish authorities ensured, in the alternative model, that Femern A/S will not adopt State loans and State guarantees, which, together, exceed an amount of DKK 69.3 billion (EUR 9.3 billion) (nominal). This amount is referred to by the Danish authorities as the ‘maximum guaranteed amount’. Those State loans and State guarantees are strictly limited to the financing needed for the costs incurred during the planning and construction phase. It is the sum of the maximum net debt required to finance the net construction costs (i.e. net of the EU funding), as described above, and a liquidity reserve. The liquidity reserve is the short-term liquidity, held by the company normally as bank deposits or short-term investments. The Danish authorities explained that the purpose of this liquidity reserve is to have a buffer for unplanned liquidity needs, such as payment to contractors and to allow borrowing to be executed well before the actual need for the liquidity. An example is the refinancing of an existing loan which normally takes place some weeks before the maturity of that loan in order to reduce the risk of unforeseen adverse market conditions.

(349) In the alternative funding gap calculation model, the Danish authorities will limit the period within which the Minister of Finance can issue State guarantees and State loans in favour of Femern A/S. They will also ensure that Femern A/S will have terminated all loans with a State guarantee and repaid all State loans at the latest 16 years after start of operations. This means that all State guarantees and State loans are time-limited. The Danish authorities in any event ensure that the guaranteed period will not exceed the actual debt repayment period. If the actual debt repayment period is shorter than 16 years, no further guarantees will be provided after the actual debt is repaid.

(350) The resulting aid, in present value using the WACC as a discount rate[163], is equal to the funding gap of DKK 12 046 million (EUR 1 615 million). This includes the capital injections and the State aid associated with State guaranteed loans and State loans. The calculation of the aid amount in the alternative model is based upon an increase of the premium from 0.15% to 2%. For the loans already taken up, the aid alternative funding gap calculation model takes into account that the premium was limited to 0.15%.

(351) It could therefore be considered - in principle - that the aid is proportionate. However, and as already highlighted above, the Commission is concerned that this funding gap might be overestimated due to the inclusion of a P99 reserve budget in the eligible cost base (see recital (320)). The Danish authorities therefore, in the alternative model, combine the ex-ante calculation of the funding gap (with the related maximum guaranteed amount and maximum guaranteed period) with a recalculation of this funding gap at the latest five years after start of operations if it appears that the "construction cost buffer" of DKK 2.5 billion (EUR 0.3 billion) was not needed. The Danish authorities will recalculate the funding gap, the maximum guaranteed amount and the maximum guaranteed period. They will then reduce the maximum guaranteed amount and the maximum guaranteed period if the updated funding gap is smaller than anticipated thereby ensuring that the net present value of the total aid amount does not exceed the funding gap. The Danish authorities provided a simulation in which the construction cost buffer would not be needed at all. In that case the maximum debt would be reduced to DKK 66.1 billion (EUR 8.9 billion) and the maximum guarantee period would be limited to 11 years after start of operations. In any event, the Danish authorities will ensure that the State guarantees and the State loans are strictly limited to the financing needed for the actual costs incurred during planning and construction phase. The timing of the recalculation therefore does not allow for costs related to the operational period to be

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163 The Guarantee Notice, in section 4.1., provides that the resulting yearly cash grant equivalents should be discounted to their present value using the reference rate. The Communication from the Commission on the revision of the method for setting the reference and discount rates, OJ C 14, 19.1.2008, p.6, specifies that reference and discount rates are applied as a proxy for the market rate. The Communication uses the 1-year IBOR as a calculation basis and clarifies that the margin depends upon the rating of the undertaking and the collateral but also upon the credit history. At the same time, the Communication provides that the Commission can use shorter or longer maturities adapted to certain cases. Given the long term nature of the project and the fact that the yearly cash grant equivalents themselves are based upon the difference between the WACC and the risk-free rate, the Commission considers it appropriate that in this case also the WACC should be used as a discount rate.

State subsidized. It only grants a temporary time buffer to account for any financing, still related to the construction phase, but only occurring shortly after the end of the construction phase. The Danish authorities will submit this updated calculation to the Commission.

(352) The maximum guaranteed period and guaranteed amount therefore directly result from the funding gap calculation. The lower the funding gap, the lower the guaranteed period and/or guaranteed amount and the sooner Femern A/S will have to borrow on the open market without the support of State guarantees or State loans. The Commission considers it more appropriate to link the limitation of guaranteed period and guaranteed amount to the limits of the funding gap than to an amount of annual cash flow, as Scandlines et al. suggested. The annual cash flow is in practice always fluctuating, due to for example replacement investments and cyclical maintenance, so in any event [a kind of] net present value calculation would be required. In addition, the aid measure consists of a multitude of loans, all with individual repayment periods, within the limits of the overall maximum guaranteed period. It is therefore possible that at a certain point in time State loans and State guarantees will coexist with market conform borrowing. In any event, the Commission does not consider aid in excess of the funding gap as proportionate.

(353) Furthermore, the Commission considers that the choice of State guarantees and State loans as main instruments is a positive indicator as regards both the proportionality and the appropriateness of the aid and preferred over the granting of a lump sum amount 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*". The Commission considers that 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 Danish authorities also revised the 2014 notification and will report annually on the developments in the repayment of Femern A/S' debt.

(354) Based on the above, and taking into account the alternative funding gap calculation model of the revised notification in addition to the Planning and Construction Acts, the Commission concludes that the State guarantees and State loans can be considered to be limited in time and amount. Furthermore, the Commission concludes, again based upon the alternative funding gap model in the revised notification, that the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable.

6.4.5. Prevention of undue distortion of competition and balancing test

(355) According to paragraph 40 of the IPCEI Communication, "the Member State should provide evidence that the proposed aid measure constitutes the appropriate policy instrument to address the objective of the project. An aid measure will not be considered appropriate if other less distortive policy instruments or other less distortive types of aid instruments make it possible to achieve the same result".

(356) The Danish authorities 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. Following the revised notification, the State guarantees and the State loans are strictly limited to the financing needed for the costs incurred during planning and construction phase.

There is no risk that the guarantee/loans can be used to subsidise other non-eligible costs and activities. The Commission therefore considers that the chosen financial support mechanism is the appropriate policy instrument.

(357) According to paragraph 41 of the IPCEI Communication, "aid can be declared compatible if the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member States are limited and outweighed by the positive effects in terms of contribution to the objective of the common European interest". Paragraph 42 provides that, in assessing the negative effects of the aid measure, the Commission will focus its analysis on the foreseeable impact the aid may have on competition between undertakings in the product markets concerned, including up- or downstream markets, and on the risk of overcapacity. Paragraph 43 of the Communication 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".

(358) It follows that for the purposes of preventing undue distortion competition and the balancing test, the Commission should focus its assessment of the negative effects of the aid on the distortions of competition and impact on trade between Member States.

(359) 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. Those expected benefits have been recognised at European level by including the Fehmarn Belt Fixed Link project in the list of TEN-T priority projects. In this context, the Fehmarn Belt Fixed Link project 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. As recognised by the CEF programme, the Fixed Link will enhance the accessibility to the railway transport leading to a transfer of freight and passengers from road to rail.

(360) 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. As recognised and taken into account in the socio-economic studies, the presence of the Fixed Link entails the risk that the ferry operations on the Rødby – Puttgarden route will even disappear once the Fixed Link is operational. The Commission considers the power of Femern A/S to influence the operations of the ferry services as rather limited since the State aid is limited to the financing needed for the costs incurred during planning and construction phase with the funding gap as upper limit. In addition, it is the Danish Minister for Transport that will determine the tolls and railway charges to be collected from the users of the road and the rail connection of the Fixed Link. Even if Femern A/S has some influence on the price level by applying discount schemes, it is bound by the need to ensure its revenue level as the State aid has been limited to finance part of the planning & construction of the Fixed Link, up to the limit of the funding gap. In other words, Femern A/S will have to ensure that its revenues are large enough to pay back its loans for the full planning and construction costs and to pay for its operating costs. The Commission therefore considers that the main impact on the ferry operations is created by the mere decision to construct the Fixed Link,

providing an alternative to existing modes of transports. The choice for this infrastructure and its technical solution is a choice made by the public authorities. It is therefore also not for the Commission to assess whether the Puttgarden access plans will, if at all part of the Fixed Link, be "downgraded", as alleged by Scandlines. Also the decision of the Danish authorities not to support the Scandlines project proposal should be considered in the wider mobility plan and mobility choices and is therefore not relevant in the balancing assessment. The effects on the ferry operations and related markets are therefore inherent in this type of projects, through which the States seek to offer a quicker and more convenient alternative to ferry services. The Commission also refers to the remark of the Danish authorities that the planning of the rail lines on the Danish side and the prioritising of the road on the German side are public authority tasks – decided by the Danish State and the German State respectively and not Femern A/S.

(361) Scandlines et al. further argued that the Fixed Link would develop much additional capacity to an already saturated market. The Commission observes that the creation of an alternative to the existing services that is different from and considered superior by the Danish authorities cannot be equated to adding capacity to a saturated market.

(362) Regarding the risk of dominance and the general impact on competition, it cannot be excluded that Femern A/S would acquire a dominant position as regards certain transport services on the Fehmarn Belt. It should be noted, however, that, according to settled case law[164], the existence of a dominant position in itself is not contrary to EU law. In fact, Scandlines currently has a de facto monopoly on the route between Rødby and Puttgarden. Assuming that, as Scandlines claims, ferries will continue to operate after the opening of the Fixed Link, the Fixed Link will actually break this monopoly and create a more competitive market.

(363) The Commission further notes that the Fixed Link will not create any risk of market foreclosure, including up- or downstream markets, as it will be open to all users on an equal and non-discriminatory basis. The pricing structure will be non-discriminatory and transparent and, with regard to heavy goods vehicles, in line with the applicable rules of the Eurovignette Directive[165]. Moreover, according to information submitted by the Danish authorities, the railway charges will be determined in accordance with the applicable EU legislation[166]. It is expected that the user tolls on the road link will correspond to the price charged by the ferry operator, as assumed in the 2016 financial model.

(364) Therefore, as also confirmed by the General Court in its judgments of 13 December 2018, while 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

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164 Judgment of the Court of Justice of 9 November 1983, *Michelin v Commission*, Case 322/81, EU:C:1983:313, paragraph 57; judgment of the Court of Justice of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 24.

165 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.

166 Directive 2012/34/EU.

disappear, it is clear that the Fixed Link provides a solution which, on balance, has positive results. It is not for the Commission to call into question the choice made by the Danish authorities.

(365) Taking into account the foregoing, the Commission considers that the aid, as further limited and reduced in the revised notification in response to the doubts raised in the Opening decision, only has limited negative effect on competition and trade that are outweighed by the positive effects in terms of contribution to the objective of common European interest.

(366) It follows from the wording of the IPCEI Communication that there is no need to take into account possible negative elements unrelated to distortions of competition and impact on trade between Member States, or to make a specific environmental assessment in the context of the balancing test as suggested by NABU. The General Court confirmed that "*although protection of the environment must be integrated into the definition and implementation of EU policies, particularly those that have the aim of establishing the internal market, it does not constitute, per se, one of the components of that internal market […]. Consequently, when identifying the negative effects of the measures at issue, the Commission is not obliged to take into account the extent to which the measures at issue are possibly detrimental to the implementation of* [the] *principle* [of protection of the environment].[167]

(367) In any event, the environmental impact of the project has been duly considered and mitigated by the national authorities and was found, in accordance with applicable Union and international law, not to preclude the project. In the decision making process on the Fixed Link, the Danish authorities duly considered the environmental impact of the project. The comprehensive and thorough environmental impact assessment that was carried out on the Danish side is described in detail in the preparatory notes to the Construction Act. It is clearly specified in those preparatory notes but also in the Fehmarn Belt Treaty, and therefore applicable both in Denmark and in Germany, that the requirements under EU and national law must be the basis for the preparation, construction and operation of the Fixed Link across the Fehmarn Belt. On the basis of the Planning Act, the Minister for Transport was authorized after negotiations with the Minister for Environment, to prepare the Environmental Impact Assessment ('EIA') reports for the construction project, including consultation and other necessary environmental assessment of the construction project. The Ministry of Environment, relevant authorities, companies and municipalities were involved and the EIA reports etc. were prepared in compliance with the EIA Directive.

(368) It follows that the basis for the project has always been that it should be prepared, constructed and operated so that harmful effects on nature and the environment are prevented and considerable adverse impacts, especially regarding the European Natura 2000 Network, are countered adequately. The Commission therefore

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[167] Judgment of the General Court of 12 July 2018, *Republic of Austria v Commission*, T-356/15, ECLI:EU:T:2018:439, paragraph 516 and the Castelnou judgment cited therein: Judgment of the General Court of 3 December 2014, *Castelnou Energía v Commission*, T-57/11, ECLI:EU:T:2014:1021, paragraphs 189 to 191.

considers that, even if the environmental aspects had to be taken into account for the purposes of the balancing test, there is no indication that the alleged negative effects of the Fixed Link on the environment would be of such a magnitude that they are liable to change the outcome of the balancing test.

(369) The Commission concludes that the negative effects of the aid measure in terms of distortion of competition and impact on trade between Member States are limited and outweighed by the positive effects in terms of contribution to the objective of the common European interest.

6.4.6. Specific compatibility condition as regards the State guarantees – Mobilisation conditions

(370) According to section 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."

(371) According to Section 4(2) of the Construction Act, the Minister of Finance is authorized to provide State guarantees that cover Femern A/S' obligations in relation to loans and other financial instruments for the financing of the Fixed Link. The conditions for the mobilisation of this type of guarantee are not regulated in the Construction Act itself. As a response to the doubts raised in the Opening decision, the Danish authorities revised the 2014 notification in order to ensure that all[168] those State guarantees in favour of Femern A/S will have the following minimum conditions for mobilisation:

(a) Femern A/S has failed to duly pay on the ordinary due date a sum payable under the guaranteed agreement;

(b) the lender must give written notice to the guarantor as set out in the relevant guarantee;

(c) such notice is not to be given until all applicable remedy periods under the guaranteed agreement have expired;

(d) the lender is not entitled to grant Femern A/S an extension of time for fulfilling its obligation under the guaranteed agreement;

(e) the guarantor shall have at least four banking days from receipt of such notice to pay the amount due under the guaranteed agreement.

(372) As already noted in paragraph 203 of the Opening decision, and with regard to the State guarantee covering non-financial obligations foreseen in Section 4(4) of the Construction Act, the Danish authorities submitted that the conditions for mobilising

[168] Also the existing guarantees have comparable minimum conditions for mobilisation.

this type of guarantee are based on an interpretation of the guarantee in light of the general principles of Danish law. The Danish authorities provided further clarifications on this issue. The Danish law on guarantees distinguishes between '*simpel kaution*' and '*selvskyldnerkaution*'. A '*simpel kaution*' means that the guaranteed party must show to the guarantor that the debtor is unable to pay his obligations. Normally this requires either (i) that it has been established during an execution (i.e. an attempt to execute a claim against the principal's assets) that the principal is unable to pay his obligations as they fall due; or (ii) that the principal is subject to bankruptcy or similar insolvency proceedings. A '*selvskyldnerkaution*' means that the guaranteed party can ask the guarantor to pay if the principal has failed to make payment in due time. According to Danish jurisprudence on guarantees, a guarantee is normally interpreted as a '*simpel kaution'* unless there is a clear basis for interpreting the guarantee as a '*selvskyldnerkaution*'. Thus, unless the guarantee is clearly described as a '*selvskyldnerkaution*', the guaranteed party will have to show to the guarantor that the principal is unable to pay his obligations as they fall due. As regards the provision in Section 4(4), this entails that, since it is not provided in the Construction and Operation Act that the conditions for mobilisation of the guarantee in a specific case will be determined in, for example, ministerial orders or in specific contracts covering each case, the State guarantee in Section 4(4) will be considered – by default – to be a "*simple kaution*". Therefore, the guaranteed party will have to show that Femern A/S is unable to pay its obligations as they fall due (as described above) before the guarantee can be mobilised. On this basis, the Commission considers that the mobilisation of this type of guarantee is contractually linked to specific conditions.

(373) Although the Commission was not informed of the exact mobilisation conditions at the time of granting the aid, it considers that it can accept the guarantees in the light of section 5.3 of the Guarantee Notice.

6.4.7. Transparency

(374) According to paragraph 45 of the IPCEI Communication Member States shall ensure the publication, on a comprehensive website, at national or regional level, of at least the following information: the text of the aid measure and its implementing provisions, or a link to it; the identity of the granting authority or authorities; the identity of the individual beneficiary, the form and amount of the aid, the date of granting, the type of undertaking (SME/large undertaking); the region in which the beneficiary is located (at NUTS level II); and the principal economic sector in which the beneficiary undertaking has its activities (at NACE group level). The Danish authorities have committed to comply with this requirement.

6.4.8. Reporting obligation

(375) According to point 49 of the IPCEI Communication "*the execution of the project must be subject to regular reporting*". In this respect the Danish authorities have committed to submitting annual reports including figures on the evolution of the debt. Therefore, the Commission concludes that this condition is complied with.

7. CONCLUSION

(376) The Commission concludes that the capital injections, the State guarantees for the loans financing the planning and construction costs and the State loans financing the planning and construction costs constitute State aid within the meaning of Article 107(1) of the Treaty. The Commission concludes that the measures consisting of the

depreciation of assets, the fiscal loss carry forward, the joint taxation regime, the railway fees and the use of State property free of charge, do not constitute State aid in favour of Femern A/S in the sense of Article 107(1) of the Treaty. The Commission concludes that, in view of the revised notification, the guarantees for the derivatives do not constitute State aid in favour of Femern A/S in the sense of Article 107(1) of the Treaty.

(377) The Commission concludes that the notified measures in favour of Femern A/S, consisting of a capital injection of DKK 510 million (EUR 68.4 million) and a combination of State loans and State guarantees for loans up to an amount of DKK 69.3 billion (EUR 9.3 billion), to be terminated at the latest 16 years after start of operations, fulfil the conditions laid down in the IPCEI Communication and can therefore be considered compatible with the internal market in accordance with Article 107(3)(b) of the Treaty. The annual premium on the State guaranteed debt and the State loans that Femern A/S is obliged to pay to the Danish State is increased from 0.15% to 2%. The Danish authorities have undertaken to submit to the Commission, at the latest five years after the start of operations of the Fixed Link (currently expected to start in 2033), an update of the alternative funding gap calculation model (based on an average risk-free rate assumption of 1.5%). In that update, the construction cost buffer will be lowered if it appears that the actual construction costs are lower than estimated. The maximum guaranteed amount and the maximum guaranteed period will be lowered accordingly, ensuring that the gross grant equivalent of the aid does not exceed the updated funding gap.

(378) The Danish authorities agreed exceptionally to waive the rights deriving from Article 342 of the Treaty in conjunction with Article 3 of the Council Regulation 1/1958[169] and to have the decision adopted and notified pursuant to Article 297 of the Treaty in the English language.

HAS ADOPTED THIS DECISION:

Article 1

The measures consisting of the depreciation of assets, the fiscal loss carry forward, the joint taxation regime, the railway fees, the use of State property, free of charge, and the State guarantees for the derivatives do not constitute State aid in favour of Femern A/S in the sense of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

The measures consisting of capital injections and a combination of State loans and State guarantees in favour of Femern A/S, which Denmark at least partially put into effect unlawfully, constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union. Following the modification of those measures as set out

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[169] EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 06.10.1958 p. 385.

in the revised notification, they are compatible with the internal market on the basis of Article 107(3)(b) of the Treaty on the Functioning of the European Union.

Article 3

This Decision is addressed to the Kingdom of Denmark.

If the decision contains confidential information that 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 the decision. Your request specifying the relevant information should be sent electronically to the following address:

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

Done at Brussels, 20.3.2020

For the Commission

Margrethe VESTAGER
Executive Vice-President

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION