Modtaget den : 29/02/2024

ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

28 February 2024 *

(State aid – Public financing of the Fehmarn Belt fixed rail-road link – Aid granted by Denmark to Femern – Decision declaring the aid compatible with the internal market – Individual aid – Important project of common European interest – Necessity of the aid – Proportionality – Weighing the beneficial effects of the aid against its adverse effects on trading conditions and on the maintenance of undistorted competition – Communication on the criteria for the analysis of the compatibility with the internal market of State aid to promote the implementation of important projects of common European interest)

In Case T-390/20,

Scandlines Danmark ApS, established in Copenhagen (Denmark),

Scandlines Deutschland GmbH, established in Hamburg (Germany),

represented by L. Sandberg-Mørch, lawyer,

applicants,

supported by

European Community Shipowners' Associations (ECSA), established in Brussels (Belgium), represented by L. Sandberg-Mørch and M. Honoré, lawyers,

by

Danish Ferry Association, established in Copenhagen, represented by L. Sandberg-Mørch and M. Honoré, lawyers,

by

* Language of the case: English.

Naturschutzbund Deutschland eV (NABU), established in Stuttgart (Germany), represented by T. Hohmuth and R. Weyland, lawyers,

by

Verband Deutscher Reeder eV, established in Hamburg, represented by L. Sandberg-Mørch and M. Honoré, lawyers,

by

Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV, established in Fehmarn (Germany), represented by L. Sandberg-Mørch and W. Mecklenburg, lawyers,

by

Föreningen Svensk Sjöfart (FSS), established in Gothenburg (Sweden), represented by L. Sandberg-Mørch and M. Honoré, lawyers,

by

Rederi AB Nordö-Link, established in Malmö (Sweden), represented by L. Sandberg-Mørch and P. Werner, lawyers,

and by

Trelleborg Hamn AB, established in Trelleborg (Sweden), represented by L. Sandberg-Mørch and I. Ioannidis, lawyers,

interveners,

v

European Commission, represented by S. Noë, acting as Agent,

defendant,

supported by

Kingdom of Denmark, represented by M. Søndahl Wolff, acting as Agent, and by R. Holdgaard, lawyer,

intervener,

THE GENERAL COURT (First Chamber, Extended Composition),

composed of S. Papasavvas, President, D. Spielmann, M. Brkan (Rapporteur), I. Gâlea and T. Tóth, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure,

further to the hearing on 24 January 2023,

gives the following

Judgment

1 By their action based on Article 263 TFEU, the applicants, Scandlines Danmark ApS and Scandlines Deutschland GmbH, seek annulment of Commission Decision C(2020) 1683 final of 20 March 2020 on the State aid SA.39078 – 2019/C (ex 2014/N) which Denmark implemented for Femern A/S (OJ 2020 L 339, p. 1) ('the contested decision').

I. Background to the dispute

A. The Fehmarn Belt Fixed Link project

2 The Fehmarn Belt Fixed Link project between Denmark and Germany was approved by the treaty between the Kingdom of Denmark and the Federal Republic of Germany concerning the Fehmarn Belt fixed link signed on 3 September 2008 and ratified in 2009 ('the Fehmarn Belt Treaty').

3 The project consists of, on the one hand, a rail and road tunnel ('the Fixed Link'), and, on the other, road hinterland connections in Denmark ('the road connections') and rail hinterland connections in Denmark ('the rail connections') (together, 'the rail and road hinterland connections').

4 The Fixed Link takes the form of an immersed tunnel under the Baltic Sea 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 railway line and a motorway. The rail connections will include the expansion and upgrade of the existing rail link between Ringsted (Denmark) and Rødby, covering approximately 120 kilometres, which is owned by Banedanmark, the Danish State public rail infrastructure manager.

5 The project was preceded by a planning phase. The European Commission was given notification of the financing of that phase, as regards the Fixed Link and the rail and road hinterland connections. By its decision of 13 July 2009 in Case N 157/09 – Financing of the planning phase of the Fehmarn Belt fixed link referred to in the *Official Journal of the European Union* (OJ 2009 C 202, p. 2) ('the Planning Decision'), the Commission concluded, first, that the measures relating to the financing of the planning of the project may not constitute State aid in so far as Femern had acted as a public authority, and, second, that, even if those measures were likely to benefit the future operator of the Fixed Link, they were in

any event compatible with the internal market. It therefore decided not to raise any objections within the meaning of Article 4(2) and (3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [93 EC] (OJ 1999 L 83, p. 1).

6 Following an update of the amounts which had been assessed initially, the total costs for the planning and construction of the Fixed Link were estimated at 52.6 billion Danish kroner (DKK) (approximately EUR 7.1 billion) and the costs related to the planning and construction of the upgrading of the road and rail hinterland connections were estimated at DKK 9.5 billion (approximately EUR 1.3 billion), giving an estimated total cost of DKK 62.1 billion (approximately EUR 8.4 billion) for the project.

7 Pursuant to Article 6 of the Fehmarn Belt Treaty and the Lov nr 575 om anlæg og drift af en fast forbindelse over Femern Bælt med tilhørende landanlæg i Danmark (Law No 575 on the construction and operation of the Fehmarn Belt Fixed Link and Danish hinterland connections) of 4 May 2015 (‘the 2015 Construction Law’), two public undertakings were entrusted with the execution of the project.

8 The first, Femern, established in 2005, is responsible for the financing, construction and operation of the Fixed Link. The second, Femern Landanlæg A/S, established in 2009, was appointed to manage the construction and operation of the Danish hinterland connections. Femern Landanlæg is a subsidiary of Sund & Bælt Holding A/S, which is owned by the Danish State. Femern became a subsidiary of Femern Landanlæg following the latter’s establishment.

9 The works relating to the construction of the Fixed Link are carried out by Femern under construction contracts subject to public procurement procedures.

10 The construction of the necessary upgrading of the road connections is undertaken by the Danish Highways Directorate on behalf of the Danish State, and is financed by Femern Landanlæg. The road connections will be part of the general Danish road infrastructure network, which is financed, operated and maintained by the Danish Highways Directorate. The construction and operation of the rail connections is carried out by Banedanmark on behalf of the Danish State and is financed by Femern Landanlæg.

11 The project is financed by Femern and Femern Landanlæg through capital injections, State-guaranteed loans and loans from the Danish authorities. As from the entry into service of the Fixed Link, Femern will receive the charges paid by users of the Fixed Link in order to discharge its debt and will pay dividends to Femern Landanlæg which the latter will use to discharge its own debt. Femern Landanlæg will also receive 80% of the fees paid by the railway operators for use of the rail connections, charged by Banedanmark, as ownership of those connections will be shared by it and Banedanmark.

B. Events prior to the dispute

12 During 2014 and 2015, the Commission received five complaints, the first of which was lodged on 5 June 2014, claiming that the Kingdom of Denmark had granted unlawful State aid that was incompatible with the internal market to Femern and Femern Landanlæg.

13 During that same period, the Commission's departments sent several requests for information to the Danish authorities, which replied and provided further information on a number of occasions.

14 By letter of 22 December 2014, in accordance with Article 108(3) TFEU, the Danish authorities notified the Commission of the financing model for the Fehmarn Belt Fixed Link project.

15 On 23 July 2015, the Commission adopted Decision C(2015) 5023 final on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt Fixed Link project, referred to in the Official Journal of 2 October 2015 (OJ 2015 C 325, p. 5; 'the Construction Decision'), by which it decided not to raise objections to the measures notified by the Danish authorities. In that decision, the Commission had concluded, inter alia, that, even if the measures granted to Femern for the planning, construction and operation of the Fixed Link did constitute State aid within the meaning of Article 107(1) TFEU, they were compatible with the internal market pursuant to Article 107(3)(b) TFEU. More specifically, the Commission had taken the view that the measures granted to Femern were compatible with Article 107(3)(b) TFEU and with its Communication of 20 June 2014 on the criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ 2014 C 188, p. 4; 'the IPCEI Communication'), as well as with its Notice on the application of Articles [107] and [108 TFEU] to State aid in the form of guarantees (OJ 2008 C 155, p. 10; 'the Guarantee Notice').

16 By judgments of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), and of 13 December 2018, *Stena Line Scandinavia* v *Commission* (T-631/15, not published, EU:T:2018:944), the Court partially annulled the Construction Decision.

17 As regards the public financing granted to Femern for the planning, construction and operation of the Fixed Link, the Court upheld the applicants' actions, finding that the Commission had failed to fulfil its obligation under Article 108(3) TFEU to initiate the formal investigation procedure in light of the existence of serious difficulties.

18 In particular, as regards the necessity of the aid, the Court found that, while it could not be ruled out that, in principle, aid was necessary for the realisation of such a large project, the Commission's examination of the necessity of the aid in the Construction Decision was, at the very least, insufficient and imprecise,

which, first, indicated that there were serious difficulties, which should have prompted the Commission to initiate the formal investigation procedure, and second, meant that it was not possible to examine whether the Commission had made a manifest error of assessment.

19 In respect of the proportionality of the aid granted to Femern, as regards the Commission's analysis in the Construction Decision, the Court found, in particular, that the calculation of the repayment period for the aid and the eligible costs was at the very least insufficient and imprecise, or even contradictory, so the serious difficulties encountered by the Commission should have prompted it to initiate the formal investigation procedure.

20 The Court also held that the Commission had erred in law and had made a manifest error of assessment, in so far as, contrary to what is provided for in point 5.3 of the Guarantee Notice, the conditions for the mobilisation of the guarantees were not determined when the guarantees were initially granted.

C. Administrative procedure

21 Following the delivery of the judgments of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), and of 13 December 2018, *Stena Line Scandinavia* v *Commission* (T-631/15, not published, EU:T:2018:944), upheld by the Court of Justice by the judgment of 6 October 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (C-174/19 P and C-175/19 P, EU:C:2021:801), the Commission, by letter of 14 June 2019, informed the Danish authorities of its decision to initiate the formal investigation procedure, laid down in Article 108(2) TFEU, in respect of the measures granted to Femern for the financing of the Fixed Link ('the Opening Decision'). The Opening Decision was published in the Official Journal of 5 July 2019 (OJ 2019 C 226, p. 5).

D. Contested decision

22 On 20 March 2020, the Commission adopted the contested decision.

23 The contested decision covers the measures granted to Femern for the planning, construction and operation of the Fixed Link. By contrast, unlike the Construction Decision, the contested decision does not concern the measures granted to Femern Landanlæg as regards the financing of the road and rail hinterland connections.

24 According to Article 2 of the contested decision, the measures consisting of capital injections and a combination of State loans and State guarantees in favour of Femern, which Denmark at least partially put into effect unlawfully, constitute State aid within the meaning of Article 107(1) TFEU.

25 Following the modification of those measures, as set out in the revised notification which followed the Opening Decision, those measures are compatible with the internal market on the basis of Article 107(3)(b) TFEU.

E. Forms of order sought

26 The applicants, supported by European Community Shipowners' Associations (ECSA), Danish Ferry Association ('DFA'), Naturschutzbund Deutschland eV (NABU), Rederi AB Nordö-Link, Trelleborg Hamn AB, Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV ('Aktionsbündnis'), Föreningen Svensk Sjöfart (FSS) and Verband Deutscher Reeder eV ('VDR'), claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

27 The Commission, supported by the Kingdom of Denmark, contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

II. Law

28 In support of their action, the applicants raise two pleas in law, alleging, first, that the Commission incorrectly classified the measures at issue as one single ad hoc aid and, second, infringement of Article 107(3)(b) TFEU.

A. The first plea in law, alleging that the Commission incorrectly classified the measures at issue as one single ad hoc aid

29 The applicants, supported by Trelleborg Hamn, VDR, Aktionsbündnis and NABU, complain that the Commission failed to examine separately the compatibility of each State loan and each State guarantee granted by the Danish authorities on the basis of the Lov nr 285 om projektering af fast forbindelse over Femern Bælt med tilhørende landanlæg i Danmark (Law No 285 on the planning of the Fehmarn Belt Fixed Link and Danish hinterland connections) of 15 April 2009 ('the 2009 Planning Law'), and subsequently on the basis of the 2015 Construction Law. In addition, the applicants consider that each grant of State guarantees or State loans under the 2009 Planning Law or the 2015 Construction Law constitutes one single ad hoc aid which should have been notified separately to the Commission.

30 According to the applicants, Trelleborg Hamn, VDR, Aktionsbündnis and NABU, it is only in case of an aid scheme that the Commission may carry out a brief examination consisting of analysing the underlying framework on the basis of

which individual aid is granted. Otherwise, according to the applicants, the cumulative effect of each of the grants could not be brought to light. Similarly, the applicants and those interveners consider that the statutory right to finance the entire costs of the planning and construction of the Fixed Link from the entry into force of the 2015 Construction Law is irrelevant on the ground that neither Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9) nor the case-law permits a distinction to be drawn according to the point at which individual grants are made.

31 The Commission, supported by the Kingdom of Denmark, disputes those arguments.

32 As a preliminary point, it should be noted, as the main parties submit, that the measures granted to Femern do not fall within the concept of an ‘aid scheme’ within the meaning of Article 1(d) of Regulation 2015/1589.

33 It follows that, as is apparent from recital 247 of the contested decision, the measures at issue in the present case are individual aid within the meaning of Article 1(e) of Regulation 2015/1589.

34 In that regard, the parties disagree on what the concept of ‘individual aid’ covers and disagree on the consequences which flow from that concept as regards the Commission’s examination of the compatibility of the measures at issue with the internal market and as regards the obligation to notify those measures.

35 In the present case, as is apparent from recital 259 of the contested decision, the Commission found that Femern had been granted three successive individual aids to carry out the Fixed Link project. The first individual aid took the form of a capital injection when the company was set up in 2005. The second individual aid consisted of a capital injection, State guarantees and State loans following the entry into force, on 17 April 2009, of the 2009 Planning Law. The third individual aid consisted of a combination of State loans and State guarantees granted following the entry into force, on 6 May 2015, of the 2015 Construction Law. According to the Commission, each State loan or each State guarantee granted to Femern on the basis of the 2009 Planning Law and then on the basis of the 2015 Construction Law corresponds to a tranche released under an authorised measure for the implementation of aid, so that it is not necessary to notify each of the tranches for the purposes of a separate examination of its compatibility with the internal market.

36 In that regard, it should be noted that, in the present case, the Commission’s authorisation relates not only to all the financing granted to Femern until the adoption, on 20 March 2020, of the contested decision, but also to the financing to be granted after that date, within the limits laid down by that decision.

37 In the first place, it is necessary to ascertain whether, as the applicants, Trelleborg Hamn, VDR, Aktionsbündnis and NABU submit, the Commission was wrong to

conclude, in recital 259 of the contested decision, that Femern received three individual aids, within the meaning of Article 1(e) of Regulation 2015/1589, in order to finance the planning and construction of the Fixed Link project.

38 In that regard, the applicants and the interveners referred to in paragraph 37 above claim that each grant of a new State loan or of a new State guarantee constitutes separate individual aid within the meaning of Article 1(e) of Regulation 2015/1589. Thus, between 2010 and 2019, Femern received no fewer than 15 individual aids within the meaning of that provision.

39 In the present case, in so far as the State loans and State guarantees granted to Femern under the 2009 Planning Law and then under the 2015 Construction Law are not granted through a single payment, but in successive tranches paid according to the progress of the project, the Commission considered, in recital 248 of the contested decision, that it was necessary to determine whether Femern received one or several individual aids linked to the 2009 Planning Law and the 2015 Construction Law or a series of individual aids granted each time a financial transaction of Femern was implemented by the Danish authorities. In order to do so, as is apparent from recitals 249 to 251 of the contested decision, the Commission took the view that it was necessary to ascertain whether Femern had obtained the legal right to receive individual aid under the 2009 Planning Law, followed by another individual aid under the 2015 Construction Law.

40 In that regard, it should be noted that it cannot be excluded that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another (judgment of 19 March 2013, *Bouygues and Others* v *Commission and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 103 and 104). Furthermore, the fact that a measure is paid in successive tranches does not change the nature of the aid as a single package (see, to that effect, judgment of 6 October 1999, *Salomon* v *Commission*, T-123/97, EU:T:1999:245, paragraph 75).

41 In the present case, it should be noted, first, that it is not disputed that the financing provided for by the 2009 Planning Law was intended to enable Femern to finance the planning costs of the Fixed Link project. Thus, the purpose of the financing provided for by that law was to finance specific costs of a specific project, namely those relating to the planning of the Fixed Link project, and were therefore so closely linked to each other that they were inseparable from one another. It follows that the Commission did not make an incorrect legal classification in finding that all the financing granted on the basis of the 2009 Planning Law came under the same individual aid within the meaning of Article 1(e) of Regulation 2015/1589, even if that aid had been paid in several tranches.

42 Second, it is also not disputed that the State loans and State guarantees provided for by the 2015 Construction Law are intended to enable Femern, as is apparent from recital 251 of the contested decision, to refinance the planning costs and to finance the construction costs of the Fixed Link. The purpose of those State loans and those State guarantees, provided for in Section 4 of that law, is to finance specific costs of a specific project, namely the costs of the construction of the Fixed Link and the costs relating to the refinancing of the planning costs, and therefore are so closely linked to each other that they are inseparable from one another. It follows that the Commission also did not make an incorrect legal classification in finding that the State loans and the State guarantees granted pursuant to the 2015 Construction Law come under the same individual aid within the meaning of Article 1(e) of Regulation 2015/1589, even if that aid is paid in several tranches, including after the adoption of the contested decision.

43 The considerations set out in paragraphs 41 and 42 above are not called into question by the argument that, in essence, Femern does not have a legal right to receive aid on the basis of the 2009 Planning Law or the 2015 Construction Law on the ground that the Danish authorities have, for the grant of funding, a discretion which is not limited to a technical application. It must be noted that that argument is based on the relevant criteria for the identification of an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589.

44 As noted in paragraph 39 above, for the purposes of identifying individual aid within the meaning of Article 1(e) of Regulation 2015/1589, the Commission did not use the concept of an 'aid scheme' within the meaning of Article 1(d) of that regulation, but relied on the criterion of the beneficiary's legal right to receive aid under the national legislation.

45 In that regard, it must be noted that, according to the case-law, State aid must be regarded as being 'granted', within the meaning of Article 107(1) TFEU, on the date on which the right to receive it is conferred on the beneficiary under the applicable national legislation (see judgment of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 115 and the case-law cited).

46 In the present case, it is apparent from recitals 251 to 256 of the contested decision that, on the basis of the wording of Section 4 of the 2015 Construction Law, which is drafted in terms that are similar to those of Section 7 of the 2009 Planning Law, the explanations provided by the Danish authorities and the preparatory notes relating to the 2015 Construction Law, the Commission considered that the Danish Minister for Finance had a limited discretion which was not capable of calling into question Femern's legal right to receive the State loans and State guarantees granted to it under those laws. Thus, in recital 257 of the contested decision, the Commission concluded that Femern had obtained the legal right to finance the planning and construction of the Fixed Link from the entry into force of the 2015 Construction Law, with the result that that entity was granted individual aid. It must be noted that, even though it is not expressly stated

in recital 257 of the contested decision, the Commission implicitly reached the same conclusion as regards the 2009 Planning Law. The Commission reasoned by analogy, which has not been challenged by the applicants, between the 2015 Construction Law and the 2009 Planning Law, with the result that the conclusion reached in respect of the former can be extended to the latter.

47 It is true that, as the applicants, Trelleborg Hamn, VDR, Aktionsbündnis and NABU state, in the context of the implementation of the State guarantees and State loans which Femern received under the 2015 Construction Law and the 2009 Planning Law, the Danish Minister for Finance has discretion to define guidelines and to issue binding directives on how Femern is to obtain the loans, the instruments that are necessary and the requirements to be imposed. Furthermore, it is also true that, in certain specific circumstances, the Danmarks nationalbank (National Bank of Denmark) might not grant a loan application.

48 It must be stated, however, that the applicants, Trelleborg Hamn, VDR, Aktionsbündnis and NABU have not in any way substantiated the reasons why it must be inferred that the Danish Minister for Finance or the National Bank of Denmark could call into question, as such, the legal right to receive State loans or State guarantees.

49 In that regard, it must be noted that, as is apparent from recitals 253 and 254 of the contested decision, the discretion of the Danish Minister for Finance is limited and concerns only practical and technical conditions and rules intended to ensure the sound management of public resources. The same finding must be made as regards the role of the National Bank of Denmark in granting financing to Femern. The grounds for a refusal to grant such financing are limited and also concern the sound management of public resources. The exercise of powers intended to ensure the proper management of public resources cannot call into question, as such, Femern's right to receive the State loans and the State guarantees granted to it by the Danish Parliament.

50 The argument put forward by Trelleborg Hamn, VDR, Aktionsbündnis and NABU that, in essence, the 2015 Construction Law cannot constitute the basis for Femern's legal right to receive aid on the ground that, as regards the grant of financing, the conditions laid down by that law and by the Construction Decision differ from those laid down in the contested decision cannot succeed. Contrary to what is claimed by those interveners, it must be noted that, as regards Femern's financing, Section 4 of the 2015 Construction Law provides for that entity's right to receive State loans and State guarantees for the refinancing of the planning and for the financing of the construction and operation of the Fixed Link. By contrast, that law does not lay down limits or conditions governing the payment of the various tranches of the aid, which were set out in the alternative financing model provided by the Danish authorities during the formal investigation procedure in the context of which it was provided, inter alia, that the State loans and the State guarantees may not be used to cover the operating costs of the Fixed Link. It must be held that the fact that the limits laid down in the Construction Decision differ

from those set out in the contested decision at the end of the formal investigation procedure is irrelevant for calling into question whether Femern has a legal right to receive aid. A distinction must be drawn between, on the one hand, the recipient's legal right to receive aid for a specific project resulting from a commitment by the national authorities and, on the other hand, the limits or conditions which govern the implementation of that aid and which are capable of being defined or adjusted in the light of any observations made by the Commission during the formal investigation procedure.

51 Accordingly, the Commission did not make an error of assessment in concluding, in recital 259 of the contested decision, that Femern had obtained three separate individual aids, namely a first individual aid granted in 2005, a second individual aid granted in 2009 with the adoption of the 2009 Planning Law and a third individual aid granted in 2015 with the adoption of the 2015 Construction Law.

52 In the second place, it is necessary to ascertain whether the Commission made an error of assessment in examining jointly the compatibility of the three individual aids identified in recital 259 of the contested decision.

53 In the present case, as regards the capital injections, the Commission assessed them, in recital 377 of the contested decision, at DKK 510 million (EUR 68.4 million). As regards the combination of State loans and State guarantees, it is apparent from recital 348 of the contested decision that, in accordance with the alternative financing model provided by the Danish authorities during the formal investigation procedure, Femern cannot receive State loans and guarantees which, taken together, would exceed a maximum guaranteed amount of DKK 69.3 billion (EUR 9.3 billion), and, in recital 349 of the contested decision, that Femern will have to have terminated all loans with a State guarantee and have repaid all State loans at the latest 16 years after the start of operation of the link.

54 It should be noted that it is not disputed that the three individual aids identified by the Commission in recital 259 of the contested decision were granted to Femern in order to finance the planning and construction of the Fixed Link. Consequently, since those three individual aids granted to Femern are intended to finance the planning and construction of one and the same project, the Commission could legitimately examine the compatibility of those aids with the internal market by taking into account all the financing that that entity might receive in order to finance the planning and construction of the Fixed Link project.

55 Contrary to what the applicants submit, a joint examination of all the financing that may be granted to Femern on the basis of the individual aids identified in recital 259 of the contested decision does not prevent the cumulative effect of those aids from being taken into account. On the contrary, in order to assess the cumulative effect of the financing granted by a Member State to an undertaking in order to carry out a particular project, it is precisely by taking into account all the financing classified as State aid within the meaning of Article 107(1) TFEU that

the Commission is in a position to assess the effect of that financing on competition in the context of the examination of one of the derogations provided for in Article 107(3) TFEU. That is all the more so in a situation such as that in the present case, where what is at issue is an investment in a transport infrastructure considered to be an important project of common European interest within the meaning of Article 107(3)(b) TFEU, the implementation of which involves the payment of public financing over a long period.

56 For a project on a scale such as that of the Fixed Link, a joint examination of all the financing which Femern might receive in order to carry out the project is the only way of assessing the compatibility of the aid with the internal market in the light of the criteria set out in the IPCEI Communication. In particular, as will be examined in the context of the second complaint in the third part of the second plea, in accordance with paragraph 31 of the IPCEI Communication, the maximum level of aid granted for a project is defined by reference to the identified funding gap in relation to the eligible costs. In that regard, as is apparent from recitals 166 and 320 of the contested decision, in the alternative financing model submitted during the formal investigation procedure, the Danish authorities included in the eligible costs of the project not only the construction costs but also the planning costs of the Fixed Link.

57 Thus, since it was necessary for the Commission to examine the compatibility of all the financing which Femern may receive for the Fixed Link project, it is necessary to reject the arguments of the applicants, Trelleborg Hamn, VDR, Aktionsbündnis and NABU, whereby they claim, in essence, that the Commission infringed Article 1(e) of Regulation 2015/1589 in that, on that ground, it carried out a brief examination of the individual aids granted to Femern.

58 As regards the argument of Trelleborg Hamn, VDR, Aktionsbündnis and NABU that, in essence, since the delivery of the judgment of 19 September 2018, *HH Ferries and Others* v *Commission* (T-68/15, EU:T:2018:563), the Commission is required to carry out a separate examination of each State loan and each State guarantee in favour of Femern, it must be held that that judgment cannot be interpreted as requiring the Commission to carry out such a separate examination of each financing granted to that entity. In that judgment, the Court had found only that the Commission experienced, during the preliminary examination phase in respect of the measures at issue in the case which led to that judgment, serious difficulties with respect to the classification of the State guarantees as an aid scheme, finding, inter alia, an error in so far as it had been found that those guarantees were not linked to a specific project within the meaning of Article 1(d) of Regulation No 659/1999 (paragraph 80 of that judgment). However, it cannot be inferred, from that, that there is any general obligation on the Commission to examine separately each State guarantee granted to the same beneficiary for the same project. It follows that the Commission cannot be criticised for not having verified, for each of the 15 loans relied on by the applicants in their reply, the criterion that the application for aid must be made prior to the start of the work for the purposes of determining the incentive effect of the aid.

59 The argument of the applicants, Trelleborg Hamn, VDR, Aktionsbündnis and NABU that, in essence, the joint examination of the compatibility of all the financing granted to Femern is contrary to decision-making practice cannot succeed. According to settled case-law, the Commission's decision-making practice in other cases cannot affect the validity of a contested decision, which can be assessed only in the light of the objective rules of the Treaty (judgments of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 21, and of 24 September 2019, *Fortischem* v *Commission*, T-121/15, EU:T:2019:684, paragraph 249).

60 Nor can the Court accept the argument that the Commission did not clearly define the amount of authorised aid. In recital 350 of the contested decision, the Commission concluded that the aid amount was DKK 12.046 billion (EUR 1.615 billion), which includes capital injections and the State aid associated with State-guaranteed loans and State loans, and that, first, the calculation of the aid amount in the alternative model is based on an increase of the premium from 0.15% to 2% and, second, for loans already taken up, the aid alternative funding gap calculation model takes into account that the premium was limited to 0.15%.

61 Accordingly, the arguments alleging that the Commission made an error of assessment by jointly examining the three individual aids granted to Femern to finance the planning and construction of the Fixed Link must be rejected as unfounded.

62 In the third place, it is necessary to reject the line of argument that, in essence, each State loan and each State guarantee granted to Femern under the 2009 Planning Law and the 2015 Construction Law should have been notified separately by the Danish authorities.

63 As follows from paragraphs 41 and 42 above, the Commission was entitled to consider, first, that all the financing granted under the 2009 Planning Law constituted individual aid within the meaning of Article 1(e) of Regulation 2015/1589 and, second, that all the State loans and State guarantees which Femern may receive under the 2015 Construction Law also fall within the scope of individual aid within the meaning of that provision. Thus, since each grant of a State loan or a State guarantee does not constitute, contrary to what the applicants, Trelleborg Hamn, VDR, Aktionsbündnis and NABU claim, new separate individual aid, the Commission was not under an obligation to require the Danish authorities to notify it of each financial transaction carried out in favour of Femern on the basis of the 2009 Planning Law and then the 2015 Construction Law.

64 Furthermore, as regards the State loans and State guarantees granted to Femern on the basis of the 2015 Construction Law after the adoption of the contested decision, only those which exceed the limits laid down in the contested decision should be notified to the Commission, in so far as they are not covered by the declaration of compatibility of the contested decision (see, to that effect and by

analogy, judgment of 12 July 2018, *Austria* v *Commission*, T-356/15, EU:T:2018:439, paragraph 266).

65 In the fourth place, as regards the alleged infringement, relied on by the applicants, of Article 107(1) TFEU resulting from an infringement of Regulation 2015/1589, it is sufficient to note that the applicants are wrong to claim that that regulation was adopted in order to implement Article 107 TFEU. That regulation does not concern the substantive provisions relating to State aid, laid down in Article 107 TFEU, but concerns the detailed rules for the application of the provisions relating to the procedure for reviewing such aid, laid down in Article 108 TFEU. Accordingly, the alleged infringement of Article 107(1) TFEU, relied on by the applicants, must be rejected.

66 Lastly, by an argument set out for the first time in their reply, the applicants submit, in essence, that the Commission cannot consider, on the one hand, that all the State guarantees and State loans were granted following the entry into force of the 2015 Construction Law and, on the other hand, that only two of the loans granted by the Danish authorities on the basis of that law were regarded as unlawful aid. It must be stated that the application does not contain any complaint challenging the findings and conclusions as to the lawfulness of the aid. In addition, the applicants have not explained why all the aid that may be paid on the basis of the 2015 Construction Law should be regarded as unlawful, with the result that their arguments must be rejected as being insufficiently substantiated. In any event, the question of whether part of the financing was paid prematurely in breach of Article 108(3) TFEU has no bearing on whether the 2015 Construction Law grants Femern a legal right to receive aid.

67 It follows from the foregoing considerations that the first plea in law must be rejected in its entirety.

B. The second plea in law, alleging infringement of Article 107(3)(b) TFEU

68 The second plea consists, in essence, of four parts, first, alleging that the Commission incorrectly classified the project as a project of common European interest, second, alleging that the Commission wrongly concluded that the aid was necessary, third, alleging that the Commission wrongly concluded that the aid was proportionate and, fourth, challenging the analysis of the avoidance of undue distortions of competition and the balancing test.

69 As a preliminary point, it must be noted that the application of Article 107(3)(b) TFEU confers on the Commission a discretion, the exercise of which involves economic and social assessments. It follows that a judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (see, to that effect, judgments of 22 December 2008, *Régie Networks*, C-333/07,

EU:C:2008:764, paragraph 78, and of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, T-630/15, not published, EU:T:2018:942, paragraph 141).

70 As regards the assessment by the EU Courts as to whether there is a manifest error of assessment, it must be stated that, in order to establish that the Commission made a manifest error in assessing complex facts such as to justify the annulment of the contested act, the evidence adduced by the applicant must be sufficient to make the factual assessments made in the act implausible (see, to that effect, judgments of 12 December 1996, *AIUFFASS and AKT* v *Commission*, T-380/94, EU:T:1996:195, paragraph 59, and of 19 September 2019, *FIH Holding and FIH* v *Commission*, T-386/14 RENV, not published, EU:T:2019:623, paragraph 69).

71 It is in the light of those preliminary considerations that the four parts of the second plea must be examined.

1. The first part, alleging that the Commission incorrectly classified the project as a project of common European interest

72 By the first part of the second plea, the applicants, supported by NABU, Aktionsbündnis, ECSA and Rederi Nordö-Link, put forward three complaints to challenge the classification as a project of common European interest. The first complaint alleges that studies carried out by the consultancy firm Incentive on behalf of the Danish Government ('the Incentive studies') do not reveal a positive socioeconomic return, the second alleges that the Commission relied on outdated and inconsistent data in order to establish a positive socioeconomic return, and the third alleges that the project is not co-financed by the beneficiary.

73 Furthermore, at the hearing, NABU raised for the first time a complaint alleging breach of the principle of the phasing out of environmentally harmful subsidies laid down in paragraph 19 of the IPCEI Communication.

74 Before examining the first two complaints, which it is appropriate to deal with together, the Court considers it appropriate initially to rule, first, on the admissibility of the new complaint raised by NABU at the hearing and, second, on the merits of the third complaint alleging that the project is not co-financed by Femern.

(a) Admissibility of the new complaint alleging breach of the principle of the phasing out of environmentally harmful subsidies

75 As regards the complaint raised for the first time at the hearing by NABU and described in paragraph 73 above, it should be noted that, according to settled case-law, first, although the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of Article 53 of that statute, and Article 142(3) of the Rules of Procedure of the General Court do not preclude an intervener from using arguments different from

those used by the party it is supporting, that is nevertheless on condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (judgments of 8 June 1995, *Siemens* v *Commission*, T-459/93, EU:T:1995:100, paragraph 21, and of 29 November 2016, *T & L Sugars and Sidul Açúcares* v *Commission*, T-279/11, not published, EU:T:2016:683, paragraph 31).

76 Second, in accordance with Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure. However, a plea which constitutes an amplification of a plea previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible. The same applies to a complaint made in support of a plea in law. To be regarded as an amplification of a plea or a head of claim previously advanced, a new line of argumentation must, in relation to the pleas or heads of claim initially set out in the application, present a sufficiently close connection with the pleas or heads of claim initially put forward in order to be considered as forming part of the normal evolution of debate in proceedings before the Court (see, to that effect, judgments of 16 November 2011, *Groupe Gascogne* v *Commission*, T-72/06, not published, EU:T:2011:671, paragraphs 23 and 27; of 22 April 2016, *Italy and Eurallumina* v *Commission*, T-60/06 RENV II and T-62/06 RENV II, EU:T:2016:233, paragraphs 45 and 46; and of 20 November 2017, *Petrov and Others* v *Parliament*, T-452/15, EU:T:2017:822, paragraph 46).

77 It must be stated that the application does not contain any complaint or argument seeking to claim, expressly or by implication, that the criterion laid down in paragraph 19 of the IPCEI Communication is not satisfied.

78 Thus, even if, as NABU argued at the hearing, the arguments set out in its statement in intervention in order to challenge the necessity of the aid, alleging that the Fixed Link would have harmful effects on the environment, were intended, in essence, to argue that the grant of aid to Femern contravenes the principle of the phasing out of environmentally harmful subsidies laid down in paragraph 19 of the IPCEI Communication, it must be held that those arguments support a complaint which was not raised in the application and must therefore be rejected as inadmissible.

79 In any event, it must be held that those arguments are not supported by any evidence, with the result that that new complaint must, in any case, be rejected.

(b) The third complaint, alleging that the project is not co-financed by Femern

80 The applicants, NABU, Aktionsbündnis and ECSA submit that, by taking the view that the project is financed by Femern with future revenues from the fees collected from the users of the Fixed Link, the Commission disregarded the

requirement, laid down in paragraph 18 of the IPCEI Communication, that the project be co-financed by the beneficiary of the aid. According to the applicants, the co-financing requirement requires that the beneficiary of the aid make an upfront contribution to the project so that it assumes a share of the risk.

81 The Commission, supported by the Kingdom of Denmark, disputes that line of argument.

82 It should be noted that paragraph 18 of the IPCEI Communication requires that the project include co-financing by the beneficiary. In that regard, it must be held that that condition is satisfied, in particular where, as in the present case, the project is funded in large part by the beneficiaries of the measures, on account of the fact that tolls and fees will be charged to users of the fixed link (see, to that effect, judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, T-630/15, not published, EU:T:2018:942, paragraph 180).

83 Contrary to what is claimed by the applicants, NABU, Aktionsbündnis and ECSA, the co-financing requirement laid down in paragraph 18 of the IPCEI Communication cannot be interpreted as requiring the beneficiary of the aid necessarily to contribute upfront to the financing of the project. Unlike the conditions governing the contribution by beneficiaries of restructuring aid, laid down in points 62 to 64 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1), the requirement for co-financing of the project by the beneficiary of the aid, set out in paragraph 18 of the IPCEI Communication, is not accompanied by any particular condition. In that regard, as the Commission is fully entitled to submit, it must be stated that the conditions governing the contribution by beneficiaries of restructuring aid differ from the co-financing requirement laid down in the IPCEI Communication.

84 Therefore, Femern cannot be required to contribute upfront to the financing of the project. It follows that, by finding in recital 278 of the contested decision that the project at issue is co-financed by the beneficiary of the aid, the Commission did not disregard the requirement that the project be co-financed by the beneficiary of the aid, laid down in paragraph 18 of the IPCEI Communication.

85 Accordingly, the complaint alleging that the project is not co-financed by Femern must be rejected as unfounded.

(c) The first and second complaints, alleging that there is no positive socioeconomic return

86 In the first place, as regards the first complaint alleging that there is no positive socioeconomic return, the applicants, NABU, Aktionsbündnis, ECSA and Rederi Nordö-Link submit that the Commission made manifest errors of assessment in

the examination of the socioeconomic return of the Fixed Link on the basis of the Incentive studies.

87 In the second place, by their second complaint, the applicants, NABU, Aktionsbündnis, ECSA and Rederi Nordö-Link submit that the Commission made a manifest error of assessment on the ground that, in order to find that there was a positive socioeconomic return, it relied on data which were outdated and inconsistent with those used in the context of the analysis of the proportionality of the aid in order to calculate the funding gap.

88 The Commission contends that the findings in the contested decision which are not disputed by the applicants are sufficient to establish that the Fixed Link project can be regarded as a project of common European interest in accordance with the criteria laid down in the IPCEI Communication, with the result that the first and second complaints are ineffective.

89 In that regard, it should be noted that, by their first and second complaints, the applicants, supported by NABU, Aktionsbündnis, ECSA and Rederi Nordö-Link, submit, first, that the Fixed Link project does not offer a positive socioeconomic return and, second, that the data used to calculate that return are outdated and inconsistent with the data used to examine the proportionality of the aid. Thus, by those two complaints, the applicants merely dispute the Commission's findings in recitals 275 to 277 of the contested decision.

90 It is necessary to ascertain whether, as the Commission submits, the first and second complaints are ineffective on the ground that it was entitled to consider that the Fixed Link project constituted a project of common European interest without relying on the results of the Incentive studies.

91 In that regard, it must be noted that the concept of 'common European interest' laid down in Article 107(3)(b) TFEU must be interpreted strictly and that a project may be so classified only if it forms part of a transnational European programme jointly supported by a number of Member State governments or arises from concerted action by a number of Member States to combat a common threat (see, to that effect, judgments of 6 October 2009, *Germany* v *Commission*, T-21/06, not published, EU:T:2009:387, paragraph 70, and of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, T-630/15, not published, EU:T:2018:942, paragraph 170).

92 The concept of 'common European interest' was clarified in the IPCEI Communication. In particular, first of all, paragraph 3.2.1 of that communication sets out 'general cumulative criteria' to be satisfied in order for a project to fall within the derogation provided for in Article 107(3)(b) TFEU. According to paragraph 14 of the IPCEI Communication, the project must contribute 'in a concrete, clear and identifiable manner to one or more Union objectives and must have a significant impact on competitiveness of the Union, sustainable growth, addressing societal challenges or value creation across the Union'. Paragraphs 15

to 19 of that communication set out the criteria to be met in order for those requirements to be satisfied. In that regard, paragraph 15 of the IPCEI Communication states that, in order to be regarded as representing an important contribution to the European Union's objectives, the project must, inter alia, be of major importance for the Trans-European transport and energy networks. Paragraph 16 of the IPCEI Communication states, first, that the project must normally involve more than one Member State and its benefits must not be confined to the financing Member States, but extend to a wide part of the European Union and, second, that the benefits of the project must be clearly defined in a concrete and identifiable manner. Furthermore, according to paragraph 17 of that communication, those benefits must not be limited to the undertakings or to the sector concerned but must be of wider relevance and application to the European economy or society through positive spillover effects (such as having systemic effects on multiple levels of the value chain, or up- or downstream markets, or having alternative uses in other sectors or modal shifts) which are clearly defined in a concrete and identifiable manner. Moreover, in accordance with paragraph 18 of the IPCEI Communication, the project must involve co-financing by the beneficiary and, according to paragraph 19 thereof, it must respect the principle of the phasing out of environmentally harmful subsidies.

93 Next, for the purposes of the classification as a project of common European interest, paragraph 3.2.2 of the IPCEI Communication sets out general positive indicators justifying a more favourable approach by the Commission. Those indicators include, in paragraph 20(f) of that communication, co-financing of the project by an EU fund.

94 Lastly, paragraph 3.2.3 of the IPCEI Communication sets out specific criteria, including that laid down in paragraph 23 of that communication, according to which environmental, energy or transport projects must either be of great importance for the environmental, energy or transport strategy of the European Union or contribute significantly to the internal market, including, but not limited to, those specific sectors.

95 In the present case, first, in recital 272 of the contested decision, the Commission stated that the Fixed Link project was of major importance for the Trans-European Transport (TEN-T) network and that it would contribute to the development of the TEN-T. Since the applicants have not disputed that assessment and there is nothing to call it into question, the Commission was therefore entitled to consider that that criterion referred to in paragraph 15 of the IPCEI Communication was satisfied. In addition, since it is a priority European transport network project, the particular criterion referred to in paragraph 23 of that communication, according to which transport projects must be of great importance for the European Union's transport strategy, is also satisfied.

96 Second, it must be held that the criteria laid down in paragraph 16 of the IPCEI Communication are also satisfied. On the one hand, in recital 272 of the contested

decision, the Commission stated, without it being disputed, that the Fixed Link would contribute to an improvement of the connection between the Nordic countries and central Europe as well as to greater flexibility and time savings for road and railway traffic, with the result that the Commission was entitled to take the view that the benefits generated by the project were defined in a concrete and identifiable manner. On the other hand, in recital 273 of the contested decision, the Commission rightly stated that the project involved the Kingdom of Denmark and the Federal Republic of Germany and that its benefits went beyond those two countries since the benefits extended to all the countries crossed by the Scandinavian-Mediterranean corridor from Finland to the island of Malta.

97 Third, since the Commission found, without it being called into question, in recital 273 of the contested decision, that the Fixed Link project was aimed at improving the conditions for transport not only of passengers but also of goods between the Nordic countries and central Europe and that the project would close the missing link on the Scandinavian-Mediterranean corridor, which, according to footnote 135, is 'a crucial north-south axis for the European economy', it must be held that the criterion laid down in paragraph 17 of the IPCEI Communication is also satisfied on that basis. In view of the fact that the benefits of the Fixed Link project contribute to improving the conditions for transport of both passengers and goods on an important European economy axis, the Commission was entitled to take the view that the benefits of the Fixed Link are not limited to the undertaking concerned, namely Femern, or to the sector concerned, namely transport services, for the crossing of the Fehmarn Belt. Furthermore, the Commission was also entitled to consider that the benefits of the project were of wider relevance and application in the European economy or society in the form of positive impacts clearly defined in a concrete and identifiable manner, namely, as is already apparent, in essence, from recitals 272 and 273 of the contested decision, an improvement in the functioning of the internal market and a strengthening of economic and social cohesion. It must be stated that the applicants, NABU, Aktionsbündnis, ECSA and Rederi Nordö-Link do not dispute those benefits which are generated by the Fixed Link and identified by the Commission in recital 281 of the contested decision.

98 Fourth, as follows from paragraphs 82 to 84 above, the Commission was entitled to consider that the Fixed Link was co-financed by Femern, with the result that the criterion laid down in paragraph 18 of the IPCEI Communication is satisfied.

99 Fifth, as regards the criterion laid down in paragraph 19 of the IPCEI Communication, the application does not contain, as has already been pointed out, any complaint challenging the finding in recital 279 of the contested decision that the Fixed Link does not relate to environmentally harmful subsidies and does not conflict with the principle of the phasing out of such subsidies, with the result that that criterion can be considered to be satisfied.

100 Sixth, it should be noted that, in recital 280 of the contested decision, the Commission stated that the Fixed Link project had, without this being challenged,

received EU funding for planning activities and a commitment for further support under the Connecting Europe Facility (CEF). In accordance with paragraph 20(f) of the IPCEI Communication, obtaining such EU funding is a positive indicator justifying a more favourable approach.

101 It follows from the foregoing considerations that the general criteria laid down in paragraphs 14 to 19 of the IPCEI Communication were met without it being necessary to rely on the results of the Incentive studies disputed by the applicants, NABU, Aktionsbündnis, ECSA and Rederi Nordö-Link. Furthermore, since the Commission also relied on one of the general positive indicators referred to in paragraph 20 of that communication, it was entitled to conclude, in recital 281 of the contested decision, that the Fixed Link project represented an important and concrete contribution to the achievement of the European Union's transport policy objectives and broader EU objectives, in particular the strengthening of economic and social cohesion, with the result that that project is of common European interest.

102 As regards the argument of the applicants, NABU, Aktionsbündnis, ECSA and Rederi Nordö-Link that the Commission could not reach the conclusion that the Fixed Link project was of common European interest within the meaning of the IPCEI Communication without relying on the Incentive studies, it must be noted that, first, it is apparent from recital 274 of the contested decision that the benefits of the Fixed Link project, which were already clearly defined in recitals 272 and 273 of that decision, 'have been further specified' in the Incentive studies. Second, as regards the quantification of the benefits carried out in recitals 275 to 277 of the contested decision, as the Commission rightly submits, it must be noted that neither Article 107(3)(b) TFEU nor the IPCEI Communication requires that the benefits of a project be quantified in the context of a socioeconomic analysis of the costs and benefits for the purposes of classifying a project as a project of common European interest. Therefore, as the Commission stated in its rejoinder, it must be held that the results of the Incentive studies were mentioned in recitals 275 to 277 of the contested decision as additional information that was useful, but not essential, for the purposes of classifying the Fixed Link project as a project of common European interest.

103 It follows that the first and second complaints, by which the applicants, NABU, Aktionsbündnis, ECSA and Rederi Nordö-Link merely challenge the quantification of the benefits of the Fixed Link, are directed against grounds which are included in the contested decision for the sake of completeness.

104 Consequently, those complaints must be rejected as ineffective.

105 The first part of the second plea must therefore be rejected in its entirety.

2. The second part, alleging that the Commission was wrong to conclude that the aid was necessary

106 By the second part, the applicants raise three complaints, first, alleging that the aid had no incentive effect, second, alleging that the Commission was wrong to find that the counterfactual scenario consisted in the absence of an alternative project and, third, challenging the periods used for the purposes of calculating the internal rate of return (‘the IRR’).

(a) The first complaint, alleging that the aid had no incentive effect

107 The applicants, supported by DFA, ECSA, Trelleborg Hamn and Rederi Nordö-Link, submit that the Commission was wrong to find that the aid had an incentive effect.

108 The Commission, supported by the Kingdom of Denmark, disputes those arguments.

109 In that regard, it must be noted that Article 107(3)(b) TFEU provides, inter alia, that aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market.

110 Within the discretion conferred on it by Article 107(3)(b) TFEU, the Commission is entitled to refuse the grant of aid where that aid does not induce the recipient undertakings to adopt conduct likely to assist attainment of one of the objectives referred to in that provision (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 49 and the case-law cited).

111 Such aid must thus be necessary for the attainment of the objectives specified in that provision, with the result that, without it, market forces alone would not succeed in getting the recipient undertakings to adopt conduct likely to assist attainment of those objectives. Aid which improves the financial situation of the recipient undertaking without being necessary for the attainment of the objectives specified in Article 107(3) TFEU cannot be considered compatible with the internal market (see, by analogy, judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 104 and the case-law cited).

112 Thus, in the context of Article 107(3)(b) TFEU, in order to be compatible with the internal market, the planned aid must have an incentive effect and thus be necessary for the execution of an important project of common European interest. To that end, it must be demonstrated that, in the absence of the planned aid, the investment intended to implement such a project would not take place. If, on the other hand, it appears that that investment would take place even without the planned aid, the conclusion must be that the aid serves merely to improve the financial situation of the recipient undertakings, without, however, meeting the requirement in Article 107(3)(b) TFEU that it is necessary for the execution of an

important project of common European interest (see, to that effect and by analogy, judgments of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 105; of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 182; and of 12 September 2019, *Achemos Grupė and Achema* v *Commission*, T-417/16, not published, EU:T:2019:597, paragraph 84).

113 Lastly, it must be noted that, in accordance with the case-law, a finding that an aid measure is not necessary can arise in particular from the fact that the aid project has already been started, or even completed, by the undertaking concerned prior to the application for aid being submitted to the competent authorities. In such a case, the aid concerned cannot operate as an incentive (judgments of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 69, and of 12 September 2019, *Achemos Grupė and Achema* v *Commission*, T-417/16, not published, EU:T:2019:597, paragraph 85).

114 It is in the light of those considerations that the arguments raised by the applicants, DFA, ECSA, Trelleborg Hamn and Rederi Nordö-Link must be examined.

115 As a preliminary point, it must be noted that, in the contested decision and in the parties' pleadings, the concepts of 'formal incentive effect' and 'substantive incentive effect' are used. For the sake of clarity and terminological precision, for the purposes of the present judgment, first, the concept of 'formal incentive effect' must be understood as being the criterion that 'the aid application must precede the start of the work' (see, to that effect, judgments of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 106, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 64). Second, the requirement of a 'substantive incentive effect' must be understood as being the condition of 'the incentive effect of the aid' referred to in the case-law cited in paragraph 112 above, namely the incentive for the beneficiary to adopt conduct likely to contribute to the attainment of the objectives of Article 107(3)(b) TFEU.

116 In the IPCEI Communication, the requirement that aid must satisfy the condition of having an incentive effect is set out in paragraph 28, and footnote 24 to that paragraph repeats the criterion that the application must be made beforehand, namely 'the aid application must precede the [start] of the works'.

117 It is necessary to ascertain whether, as the applicants, Trelleborg Hamn and ECSA claim, the Commission committed a manifest error of assessment in finding that, in the circumstances of the present case, the aid application was inherent in the establishment of Femern.

118 In the present case, in recitals 299 and 302 of the contested decision, the Commission considered that satisfaction of the criterion that the aid application must be submitted beforehand, as defined in the IPCEI Communication, was not a

necessary prerequisite on the ground that the incentive effect condition was satisfied by the demonstration that the project at issue could not be completed without aid. According to the Commission, a distinction must be drawn between an undertaking such as Femern which receives aid in order to carry out the link project defined by the public authorities and the other undertakings that may decide on the projects in which they wish to invest. Thus, in view of the particular features of the present case, the Commission took the view that, even in the absence of an aid application formally submitted by Femern to the Danish authorities, the criterion that the aid application must be submitted beforehand was satisfied on the ground that such an application could be regarded as inherent in the establishment of that entity.

119 It should be noted that Femern is a specific-purpose company that was created by the public authorities to carry out a particular project to the exclusion of any other activity. As the Kingdom of Denmark has submitted, such an entity does not receive operating income until the end of construction works. Therefore, until the Fixed Link is brought into operation, Femern is dependent on the financing granted by the public authorities, in particular to carry out the construction of the infrastructure. Such a situation is not comparable with those of private or public undertakings that may determine the projects in which they wish to invest and finance them, at least in part, using income generated by their other activities.

120 In addition, in the present case, it must be noted that, on 22 December 2014, the Kingdom of Denmark notified all the financing which that entity had received since its creation in 2005 in order for that financing's compatibility with the internal market to be assessed by the Commission on the basis of Article 107(3)(b) TFEU and the criteria set out in the IPCEI Communication. In that regard, it must be noted that, on the basis of Paragraph 6 of the lov nr 588 om Sund og Bælt Holding A/S (Law No 588 on Sund & Baelt Holding A/S) of 24 June 2005, Femern, formerly Femern Bælt A/S, was established in order to carry out the tasks relating to the planning of the Fixed Link, to the exclusion of all other activities. For its establishment, that entity received a capital injection in 2005. Next, after the signature of the Fehmarn Belt Treaty, on the basis of the 2009 Planning Law, Femern received an additional capital injection as well as State loans and State guarantees. By its decision of 13 July 2009 in Case N 157/2009, the Commission found, primarily, that the financing granted to Femern did not constitute State aid within the meaning of Article 107(1) TFEU and, as a precautionary measure, if that entity were to be required to operate the Fixed Link economically, that that funding would constitute aid compatible with the internal market on the basis of Article 107(3)(b) TFEU. It must be noted that that decision has not been challenged.

121 Thus, since the Commission was entitled to examine jointly the compatibility of all the financing necessary for the completion of the Fixed Link project since the establishment of Femern (see paragraphs 53 to 61 above) and in so far as that undertaking will not receive operating revenue until the Fixed Link becomes operational, it cannot be required that the criterion that the aid application must be

submitted beforehand be verified for each of the three individual aids granted to Femern to carry out the Fixed Link project. Furthermore, in the present case, the Commission was entitled to consider that the aid application was inherent in the establishment of Femern.

122 In order to challenge that conclusion, in the first place, the applicants, Trelleborg Hamn, DFA, ECSA and Rederi Nordö-Link submit, in essence, that, at the time of its creation, Femern was responsible only for the planning of the Fixed Link and that it was only subsequently that Femern became responsible for the construction and operation of that infrastructure.

123 In that regard, as the Commission rightly submits, since Femern was set up in order to carry out the Fixed Link project, the fact that its activities have evolved since its establishment is irrelevant for the purposes of calling into question the fact that the aid application may be regarded as being inherent in its establishment.

124 The entire project was entrusted by the public authorities to the same specific-purpose company that is not authorised to carry out activities other than those relating to that project.

125 In respect of the works regarded by the applicants, Trelleborg Hamn and ECSA as construction works carried out in 2013 and 2014, as the Commission observed in recital 300 of the contested decision, those works were covered by increases in the planning budget granted by the Danish Parliament’s Finance Committee on 3 June 2010, 23 June 2011 and in March 2013. It is apparent from the elements in the file, in particular from the application for budget appropriations No 97 of 13 March 2013 annexed to the statement in intervention of the Kingdom of Denmark, that the works carried out from September 2013 had been the subject of a prior financial assessment by Femern, on the basis of which the Danish Minister for Transport had requested the approval of the Danish Parliament’s Finance Committee for an increase in the planning budget. It must also be noted that the financing model for the Fixed Link notified by the Danish authorities on 22 December 2014, which included, as is apparent from recital 36 of the contested decision, an estimate of the total cost of the planning and construction of the Fixed Link, had been preceded by a financial analysis carried out by Femern in November 2014. Similarly, it must be noted that the funding gap calculated in the contested decision in the context of the examination of the proportionality of the aid is based on an updated financial analysis also carried out by Femern.

126 Thus, since Femern, as a specific-purpose company, is dependent on public financing in order to carry out the tasks entrusted to it, even if, as the applicants submit, the Commission should have examined separately whether the criterion that the aid application must be submitted beforehand had been satisfied because of the evolution of Femern’s activities, it would have been possible for the Commission to find that the works undertaken, whether classified as ‘construction works’ or as ‘preparatory work’, had been carried out following an application in the form of an assessment of Femern’s financing needs.

127 Contrary to what the applicants submit, it is clear from the wording of footnote 24 to paragraph 28 of the IPCEI Communication that it is sufficient for the aid application to precede the start of the works. Therefore, the beneficiary of the aid is not required to wait for the approval of that application or for the grant of the aid before commencing the work. That requirement of the IPCEI Communication is not comparable to that of other guidelines, interpreted in the judgments of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172), and of 13 September 2013, *Fri-El Acerra* v *Commission* (T-551/10, not published, EU:T:2013:430), relied on by the applicants, which expressly required written confirmation from the national competent authorities.

128 Furthermore, as the Commission is fully entitled to submit, the question of whether the criterion that the aid application must be submitted beforehand is satisfied bears no relation to the question of whether the aid was paid unlawfully in breach of Article 108(3) TFEU or to the question of whether the financing was granted to Femern in breach of the Planning Decision.

129 In the second place, the applicants, DFA and Trelleborg Hamn submit that the possibility of recognising that the aid application may be regarded as inherent in the establishment of Femern constitutes discrimination in favour of public undertakings that is prohibited by Article 345 TFEU, which amounts, in essence, to relying on a breach of the principle of equal treatment.

130 In that regard, it should be noted that, according to the case-law, the general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. Moreover, the burden of proving the comparability of situations lies with the person pleading it (see, to that effect, judgments of 8 April 2014, *ABN Amro Group* v *Commission*, T-319/11, EU:T:2014:186, paragraphs 110 and 114, and of 21 December 2021, *Gmina Kosakowo* v *Commission*, T-209/15, not published, EU:T:2021:926, paragraph 152).

131 According to the applicants, DFA and Trelleborg Hamn, since a private undertaking cannot be a specific-purpose company owned by the State, the finding that the aid application is inherent in the establishment of Femern on the ground that it is a specific-purpose company owned by the State constitutes discrimination in favour of public undertakings.

132 In that regard, as the Commission and the Kingdom of Denmark rightly submit, it must be held that specific-purpose entities created by public authorities in order to carry out a project in the public interest are not in a situation that is comparable with the specific-purpose entities created by private undertakings. Whereas specific-purpose entities owned by private persons may be established without public financing capable of being classified as State aid, in certain cases the establishment of a specific-purpose entity by the public authorities involves the payment of public financing, which must be classified as aid where it is not

granted under market conditions. It follows that, as the Commission and the Kingdom of Denmark have argued, it would be artificial to require the public authorities to establish a specific-purpose entity and for the latter formally to submit an application for aid in order for it to be established.

133 Consequently, since the situations are not comparable, there cannot be a difference in treatment constituting a breach of the principle of equal treatment.

134 As regards the arguments of the applicants, DFA, Trelleborg Hamn and Rederi Nordö-Link alleging that there was a disregard of the Commission's decision-making practice, it should be noted that, according to the case-law, it is in the light of Article 107(3)(b) TFEU – and not of the Commission's previous practice – that it must be assessed whether or not aid satisfies the conditions laid down by that provision for its application (see, by analogy, judgments of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraph 38, and of 22 September 2020, *Austria* v *Commission*, C-594/18 P, EU:C:2020:742, paragraph 25). Moreover, an examination of the decisions relied on does not reveal any established practice on the part of the Commission as regards the criterion of the prior submission of the aid application being applied to specific-purpose entities owned by private persons. The arguments based on those decisions must therefore be rejected.

135 In the third place, since, in the particular circumstances of the present case, satisfaction of the criterion that the aid application must be submitted beforehand could validly be established upon the finding that the aid application was inherent in the establishment of Femern, the applicants' argument, to the effect that recognition of the possibility that an aid application is inherent in the establishment of an entity such as Femern would mean that the incentive effect condition laid down in paragraph 28 of the IPCEI Communication would never be applied to large infrastructure projects carried out by ad hoc entities entrusted with their construction, must be rejected as ineffective.

136 Furthermore, in so far as, by the argument referring to the receipt of EU financing under the TEN-T programme, the applicants seek to argue that obtaining such financing proves that aid was not necessary in order to complete the work carried out in 2013 and 2014, it must be held that such an argument is irrelevant in the context of the application of the criterion that the aid application must be submitted beforehand. In any event, it must be stated that such an argument, which forms part of the assessment of the incentive effect condition, tends more to support the finding that such a project cannot be carried out without aid.

137 It therefore follows from the foregoing that, in the absence of discrimination, the Commission did not err in law and did not make a manifest error of assessment in concluding that the aid had an incentive effect.

138 Accordingly, the first complaint, alleging that the aid had no incentive effect, must be rejected.

(b) The second complaint, alleging that the Commission was wrong to find that the counterfactual scenario consisted in the absence of an alternative project

139 The applicants, FSS, Aktionsbündnis, NABU and VDR submit that the Commission erred in law and made a manifest error of assessment in finding that the counterfactual scenario consisted in the absence of an alternative project.

140 The Commission, supported by the Kingdom of Denmark, rejects that line of argument.

141 In that regard, it must be noted that, for the purposes of the assessment of the necessity of the aid, paragraph 29 of the IPCEI Communication provides that the Member State must provide the Commission with adequate information concerning the aided project as well as a comprehensive description of the counterfactual scenario which corresponds to the situation where no aid is awarded by any Member State, and the counterfactual scenario may consist in the absence of an alternative project or in a clearly defined and sufficiently predictable alternative project considered by the beneficiary in its internal decision-making, and that it may relate to an alternative project that is wholly or partly carried out outside the European Union.

142 In the contested decision, in reaching the conclusion that the counterfactual scenario consists in the absence of an alternative project, the Commission relied on the information provided by the Danish authorities to demonstrate that there was no credible or realistic counterfactual description of an alternative project. Thus, in recital 307 of the contested decision, the Commission relied on a report, drawn up in 2001, on the commercial interest of the Fixed Link project ('the 2001 commercial interest report') in order to find that, in view of the substantial risks associated with a Fixed Link project, the requirements set out by the private sector were such that capital costs would have been so high that the project would not have been feasible without substantial public support. On the basis of information provided by the Danish authorities at the time of the notification of the financing of the Fixed Link, the Commission considered that that conclusion had not changed in the meantime. Thus, in recital 308 of the contested decision, the Commission found that no rational private investor would engage in such a project under normal market conditions and that the Fixed Link could be completed only with substantial public support. In addition, the Commission stated that the fact that the final technical solution had changed since the 2001 commercial interest report did not alter that conclusion and that nothing suggested that a counterfactual scenario without aid had become viable in the meantime. In addition, the Commission considers that the provision of EU financial assistance under the CEF is a strong indication of the necessity of public funding for the realisation of the project.

143 In the first place, it is necessary to ascertain whether, as the applicants, FSS, Aktionsbündnis, NABU and VDR submit, the Commission failed to take account

of alternative projects capable of constituting a counterfactual scenario within the meaning of paragraph 29 of the IPCEI Communication.

144 First, as regards a project for an improved ferry system, the applicants rely on the cost-benefit report drawn up in 2000 by the consultancy firm Planco (‘the Planco report’), which contained several alternatives to the current version of the Fixed Link project, including a project for an improved ferry system.

145 It should be noted that the Planco report does not contain any clear indication as to whether or not the improvement of ferry services requires the grant of aid. In that regard, the applicants acknowledged at the hearing that that report was not intended to determine whether the projects to which it refers could be completed without aid. In addition, it must be noted that, in recital 306 of the contested decision, the Commission considered that it was apparent from the Planco report that the absolute magnitude of net benefits gained by the Fixed Link solution could not be achieved by an improved ferry system, in particular as regards a reduction in travelling time and savings in transport costs. Consequently, the Commission concluded that an improved ferry system was not an alternative solution with the same scope and achieving comparable expected benefits as the Fixed Link project.

146 In that regard, for the purposes of interpreting the requirement for a counterfactual scenario, account must be taken of paragraph 28 of the IPCEI Communication, which states that, without the aid, the project’s realisation would be impossible, or it would be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits. Thus, where a project is not of a comparable size or scope or would significantly restrict benefits expected from the aided project, the Commission does not disregard the IPCEI Communication by finding that such a project does not constitute an alternative project capable of constituting a counterfactual scenario within the meaning of paragraph 29 of that communication.

147 In the present case, it should be noted that, as is apparent in particular from recitals 33 and 272 of the contested decision, the Fixed Link project must contribute to filling a missing link on the Scandinavian-Mediterranean corridor, to improving the connection between the Nordic countries and central Europe and to increasing flexibility and time savings for road and railway traffic.

148 It is true that, as NABU and VDR submit, in the original version of the Incentive studies, the main benefit of the Fixed Link came from its operating revenue. However, without there being any need to rule on the possibility of comparing the results of the Planco report with those of the Incentive studies, it is sufficient to note that, as regards road traffic, it is apparent from the initial version of the Incentive studies that the Fixed Link will reduce the time taken to cross the Fehmarn Belt to 10 minutes by passenger car, as opposed to 45 minutes by ferry, and that it will increase flexibility in that it will not be necessary to wait for a ferry departure. In addition, that study also highlights the benefits of the Fixed Link for

the improvement of railway transport, such as the reduction in train journey time between Germany and Denmark.

149 Thus, since a project for an improved ferry system would not be capable of attaining the objectives pursued by the Fixed Link project, the fact that the rate of return from a project for an improved ferry system is higher than the rate of return from a fixed link is irrelevant. In the examination of the existence of an alternative project, neither the Danish authorities nor the Commission can be criticised for not having taken into account a project that is not suitable for attaining the public interest objectives pursued by the public authorities.

150 It follows that the Commission has not made a manifest error of assessment in finding that an improved ferry service would not offer the same benefits as a fixed link in terms of reduced journey times and savings in transport costs. Accordingly, the Commission cannot be criticised for having failed to take into account the project for an improved ferry system.

151 Second, as regards the alternative fixed links referred to by the applicants, in particular those envisaged by the Planco report, namely a suspension bridge, a cable-stayed bridge and several configurations of bored tunnels and immersed tunnels, the applicants acknowledged at the hearing, as stated in paragraph 145 above, that that report was not aimed at determining whether the projects to which it refers could be carried out without aid.

152 As regards the solution consisting of a cable-stayed bridge and an immersed tunnel comparable to that at issue in the present case, set out in the report on the economic assessment of the Fehmarn Belt fixed link drawn up in March 2004 by the consultancy firm COWI ('the COWI report'), it must be noted that NABU, Aktionsbündnis and VDR do not refer to any specific passage in that report annexed to the application. When questioned at the hearing, the applicants were unable to indicate which extract from that report could demonstrate that the projects to which it refers could be completed without aid. In any event, it must be stated that it is not apparent from the summary of that report, which was translated into the language of the case, that the solution of a cable-stayed bridge or an immersed tunnel could be completed without aid. On the contrary, that report starts from the premiss that such a project would receive EU financing amounting to approximately 10% of the investment costs, with the result that that financing would have a positive impact on the costs borne by the Kingdom of Denmark and the Federal Republic of Germany.

153 The same finding may be made as regards the report on the environmental impact of the Fixed Link, carried out by Femern and relied on by FSS, Aktionsbündnis, NABU and VDR. It is true that, in that report, several alternatives were envisaged, namely a cable-stayed bridge, a suspension bridge and a bored tunnel. However, the interveners have not demonstrated that it is apparent from the extracts from that report, translated into the language of the case, that those alternative projects could be completed without aid.

154 Consequently, the Commission cannot be criticised for not having taken into account alternative fixed link projects.

155 Third, as regards the project consisting of an upgrade of the Jutland (Denmark) route, relied on by the applicants, it must be noted that the reference to page 5 of the summary of the COWI report is incorrect, since the summary of that report translated into the language of the case does not refer to such a project. As regards the project relied on by NABU, which consists of an upgrade of ferry services across the Fehmarn Belt and an upgrade of the existing railways through Jutland, it must also be stated that such a project does not appear in the summary of the COWI report, translated into the language of the case, to which no specific reference is made in the statement in intervention. In addition, as regards the project relied on by NABU, which is the improvement of a Jutland rail link passing through Kolding (Denmark), it must be noted that the statement in intervention does not contain sufficient details to enable that project to be identified. Therefore, the mere reference to those projects relied on by the applicants and NABU does not demonstrate that the Commission was wrong not to take them into account.

156 It follows from the foregoing considerations that the applicants, FSS, Aktionsbündnis, NABU and VDR have not demonstrated that the findings made in recitals 306 to 308 of the contested decision and the conclusion that the counterfactual scenario consists in the absence of an alternative project were vitiated by a manifest error of assessment.

157 In the second place, the Court cannot accept FSS' argument that, in essence, it is apparent from paragraph 150 of the judgment of 12 July 2018, *Austria* v *Commission* (T-356/15, EU:T:2018:439), and from paragraph 29 of the IPCEI Communication that a Member State cannot channel aid towards a project of its choosing where there are clearly defined and sufficiently predictable alternative projects which meet the same objectives and require a lower amount of aid.

158 First, it must be stated that that line of argument has no basis in the judgment of 12 July 2018, *Austria* v *Commission* (T-356/15, EU:T:2018:439).

159 Second, as the Commission stated, where there is an important project of common European interest, provided that the conditions laid down in Article 107(3)(b) TFEU and those laid down in the IPCEI Communication are satisfied, a Member State is free to grant aid to a project of its choosing.

160 In the third place, contrary to what the applicants claim, in order to conclude that, in the present case, the counterfactual scenario consists in the absence of an alternative project, the Commission did not rely on the finding in the third sentence of recital 304 of the contested decision that, as a specific-purpose company established to complete the Fixed Link, Femern has no power to decide to carry out an alternative project of a different scale. As is apparent from recitals 306 to 308 of the contested decision, in order to reach that conclusion, the

Commission relied on the information submitted by the Danish authorities according to which there is no project comparable to the Fixed Link that could be carried out without aid.

161 Since the applicants, FSS, Aktionsbündnis, NABU and VDR have not succeeded in demonstrating that there is an alternative project which is of a comparable size or scope or which provides benefits equivalent to those expected from the Fixed Link project and which could be carried out without aid, there can be no difference in treatment in favour of a public undertaking. Paragraph 29 of the IPCEI Communication expressly provides that the counterfactual scenario may consist in the absence of an alternative project in respect of projects such as that at issue in the present case, for which, due to the high investment costs and risks, no private investor would commit to under normal market conditions. Therefore, if the public authorities were to entrust a private undertaking with carrying out such a project, there would also be no disregarding of the IPCEI Communication if it were validly established that the counterfactual scenario consisted in the absence of an alternative project. It follows that Aktionsbündnis, NABU and VDR cannot maintain that the Commission breached infringed the principle of equal treatment.

162 Lastly, as regards the argument put forward by NABU and Aktionsbündnis that, in essence, the Fixed Link project is more harmful to the environment than improved ferry services, it must be held that such considerations are irrelevant for the purpose of determining whether there is an alternative project capable of being carried out without aid. Moreover, there is no evidence to support the argument as to the alleged harmful effects of the Fixed Link on the environment or the argument regarding the supposed beneficial effects of ferries on carbon dioxide (CO_2) emissions.

163 It follows from the foregoing considerations that the Commission did not err in law or make a manifest error of assessment in finding that the counterfactual scenario consisted in the absence of an alternative project.

164 Accordingly, the second complaint, alleging that the Commission was wrong to find that the counterfactual scenario consisted in the absence of an alternative project, must be rejected as unfounded.

(c) The third complaint, challenging the periods used for the purposes of calculating the IRR (necessity of the aid) and of calculating the funding gap (proportionality of the aid)

165 The applicants, FSS, ECSA, Trelleborg Hamn and VDR submit that the lifetime of the investment, provided for in paragraph 31 of the IPCEI Communication, for the purposes of calculating the funding gap should correspond to the lifetime of the project, provided for in paragraph 30 of that communication, in order to calculate the IRR. Therefore, the applicants and those interveners rely on the same arguments in support of the complaint, put forward in the part concerning the necessity of the aid, alleging a manifest error of assessment of the period used for

the purposes of calculating the IRR and in support of the complaint, put forward in the third part concerning the proportionality of the aid, alleging a manifest error of assessment of the period used for the purposes of calculating the funding gap.

166 The applicants, FSS, ECSA, Trelleborg Hamn and VDR submit that the Commission made manifest errors of assessment in relying on a period of 40 years for the calculation of the IRR and the funding gap. According to them, by using 120 years for the lifetime of the project, first, the IRR was higher because the revenue generated by the Fixed Link was higher over time and, second, the funding gap was lower.

167 The Commission, supported by the Kingdom of Denmark, rejects that line of argument.

168 In that regard, it should be noted that, first, in the absence of an alternative project, according to paragraph 30 of the IPCEI Communication, the Commission must verify that the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable, for example by making it possible to achieve an IRR corresponding to the sector- or firm-specific benchmark or hurdle rate, and all relevant expected costs and benefits must be considered over the lifetime of the project. It follows that the aid is necessary if the project is not profitable during its lifetime (see, to that effect, judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, T-630/15, not published, EU:T:2018:942, paragraph 210).

169 Second, in accordance with paragraph 31 of the IPCEI Communication, the maximum aid level is determined with regard to the identified funding gap in relation to the eligible costs and, if justified by the funding gap analysis, the aid intensity could reach up to 100% of the eligible costs. That same paragraph defines the funding gap as 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.

170 In the present case, it is apparent from recital 327 of the contested decision that, for the purposes of determining the funding gap, the Danish authorities used an expected economic lifetime of 40 years, on the ground that it is the timespan that an investor would normally consider when investing in a large-scale infrastructure such as the Fixed Link. Although the Commission stated that Femern’s website indicated a project lifetime of 120 years, the Commission nevertheless noted that when cash flows are distant, the impact of the discounting is significant. In addition, it considered that, due to the high degree of uncertainty surrounding any financial forecast over such a very long period of time, it is unlikely that any reasonable investor would accept to make an investment whose profitability prospects can be realised only over such a very long period of time. Therefore, the Commission considered that an operational period of 40 years was a reasonable assumption for the calculation of the funding gap of the Fixed Link.

171 As regards the IRR, in recitals 309 and 310 of the contested decision, since Femern does not have an investment project of a similar kind or overall cost of capital that could be used to calculate whether the aid amount exceeds the level necessary for the project to be sufficiently profitable, the Commission considered that it was appropriate to compare the IRR from the Fixed Link project, without aid, with the cost of capital requirements seen in the industry concerned, namely a 5.59% weighted average cost of capital ('WACC'). Thus, it is apparent from recital 312 of the contested decision that, by using 40 years for the economic lifetime of the investment, the Commission found that the IRR of the project without aid was 3.9% and that it would remain below the WACC even with a longer lifetime until 2100.

172 It should be noted that, by their line of argument, the applicants, FSS, ECSA, Trelleborg Hamn and VDR complain that the Commission calculated the IRR and the funding gap by using 40 years as the economic lifetime of the investment instead of a project lifetime of 120 years.

173 In that regard, in the first place, it should be noted that, in paragraph 213 of the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), the Court held that, when referring to the 'repayment period for the aid', the Commission had failed to apply correctly paragraph 30 of the IPCEI Communication, which states that the IRR is to be calculated taking into account all expected costs and benefits over the 'lifetime of the project'. Furthermore, the Court considered that, to base the calculation of the IRR on a very uncertain repayment period was also arbitrary, as that period may vary depending on subjective factors, including the type of aid and the arrangements for repayment negotiated between the beneficiary and the financial institution granting the loan.

174 Contrary to what is claimed by the applicants, ECSA, Trelleborg Hamn and VDR, it cannot be inferred from those considerations that the Court intended to require the Commission to take into account a period of 120 years for the calculation of the IRR, particularly since, in the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), the only reference to that period appears in the conditional tense in the parties' arguments. In addition, it must be noted that, in paragraph 217 of that judgment, the Court held that it could not be ruled out, in principle, that aid was necessary for the realisation of such a large project, but that an insufficient and imprecise examination of the necessity of the aid had indicated that there were serious difficulties, which should have prompted the Commission to initiate the formal investigation procedure, and which meant that it was not possible for the Court to examine whether the Commission had made a manifest error of assessment.

175 In the second place, it is necessary to ascertain whether, as the applicants, FSS, ECSA, Trelleborg Hamn and VDR claim, the Commission disregarded paragraphs 30 and 31 of the IPCEI Communication by taking into account the

conduct of investors on the market for the determination of the relevant period for the calculation of the IRR and the funding gap.

176 First, for the relevant lifetime for the purposes of calculating the IRR, the requirement to take into account all relevant expected costs and benefits 'over the lifetime of the project', laid down in the last sentence of paragraph 30 of the IPCEI Communication, must be interpreted in the light of the factors to be taken into consideration when carrying out the test of comparing the IRR, without aid, with a benchmark. It must be noted that paragraph 30 of the IPCEI Communication provides that the IRR must be compared with market indicators, namely the sector- or firm-specific hurdle rate, and that normal rates of return required by the beneficiary in other investment projects of a similar kind, as well as cost of capital as a whole or returns commonly observed in the industry concerned, may also be taken into account.

177 Furthermore, in the present case, as stated in paragraph 171 above, in order to determine whether the IRR without aid was sufficient to achieve the minimum level of profitability that would have been required by the market, it was necessary to use the WACC. This is a rate which represents the cost of financing from all sources (debt, equity) for a comparable project. It is common ground between the main parties that the value of that rate reflects the minimum level of profitability to be achieved in order for the project to be viable. It was calculated, as is apparent from recitals 328 to 339 of the contested decision, by taking into account market indicators (risk premium on debt, risk premium on equity, specific risk premium, risk-free rate). Thus, since the test laid down in paragraph 30 of the IPCEI Communication requires a determination of the minimum level of profitability on the market for a comparable project, the Commission cannot be criticised for having disregarded the IPCEI Communication by determining the relevant period for the calculation of the IRR by taking into account the conduct of investors on the market.

178 Similarly, the reference to the 'lifetime of the project' in the last sentence of paragraph 30 of the IPCEI Communication cannot be interpreted as requiring the Commission to examine whether the aid exceeds the minimum necessary for the investment project in respect of the aided Fixed Link to be sufficiently profitable over the lifetime of that infrastructure. That reference, which is intended to take into account all the expected costs and benefits that have to be taken into consideration, must be understood as referring to the economic lifetime of the investment project and not the infrastructure from a technical perspective. It follows that, in the circumstances of the present case, the Commission was entitled to calculate the IRR from the Fixed Link project without aid, on the basis of the economic lifetime of the investment project.

179 Second, as regards the period used to calculate the funding gap, it follows from paragraph 31 of the IPCEI Communication that the cash flows must be discounted 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. It follows that, as the Commission has stated, the purpose of the analysis of the funding gap is to determine the extent to which the project could be financed under market conditions. It follows from paragraph 5 of the IPCEI Communication that aid granted for the deployment of important projects of common European interest is intended to overcome the lack of financing available on the market for the completion of such projects which require significant participation by the public authorities. In the present case, for the calculation of the funding gap, the WACC was also used to discount the cash flows of the investment project. Since that rate was determined by taking into account market parameters, the Commission cannot be criticised for having disregarded paragraph 31 of the IPCEI Communication by taking into consideration, in order to determine the relevant period for the purpose of calculating the funding gap, the perception of investors on the market.

180 Third, as regards the argument of the applicants and of FSS that, in essence, the period for the calculation of the IRR and the funding gap should correspond to the 'period of the economic utilisation of the asset' set out in point 99 of the Guidelines on State aid to airports and airlines (OJ 2014 C 99, p. 3), it must be held that, as the Commission states, those guidelines are not applicable in the present case. In any event, in the context of the present case, a distinction must be drawn between, on the one hand, the period of the economic utilisation of the asset and, on the other hand, the lifetime of the asset, that is to say, the lifetime of the infrastructure from a technical perspective. In that regard, it must be stated that the 120-year lifetime referred to in recital 327 of the contested decision seems more to refer to the lifetime of the asset from a technical perspective. Given the evolution of modes of transport, it is difficult for an investor to predict whether it would be possible to operate an infrastructure economically over such a long period.

181 As regards the decisions on State aid in the airport sector relied on by the applicants and as regards the decision on a railway tunnel relied on by FSS, it should be noted that it is in the light of Article 107(3)(b) TFEU – and not of the Commission's previous practice – that it must be assessed whether or not aid satisfies the conditions laid down by that provision for its application (see, to that effect and by analogy, judgments of 21 July 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, C-459/10 P, not published, EU:C:2011:515, paragraph 38, and of 22 September 2020, *Austria* v *Commission*, C-594/18 P, EU:C:2020:742, paragraph 25). In any event, it must be noted that it is apparent from those decisions that the period used in those decisions in order to calculate the funding gap was less than 40 years and that it was not necessarily dependent on the duration of the concession awarded for the operation of the infrastructure when the latter duration is long.

182 It follows from the foregoing considerations that, in order to determine the relevant period for calculating the IRR and the funding gap, the Commission was entitled to rely on the conduct of investors on the market. It follows that the Commission cannot be criticised for not having calculated the IRR and the

funding gap on the basis of a period of 120 years corresponding to the estimated lifetime of the project.

183 In the third place, it is necessary to ascertain whether the Commission made a manifest error of assessment in using 40 years as the economic lifetime of the investment in order to calculate the IRR and the funding gap.

184 In the present case, as stated in paragraph 170 above, in recital 327 of the contested decision, the Commission explained why it would not be reasonable to use a period of 120 years. Thus, since it was for the Commission to determine the cost of financing, on the market, an investment comparable to that made for the Fixed Link, the Commission took the view that it was appropriate to work on the assumption that the operational period would be 40 years, which it considers to be longer than the period used for other infrastructure projects in the ports and airport sectors.

185 As regards the applicants' argument that, in essence, the period of 40 years does not allow certain future revenue to be taken into account, which has the effect of artificially reducing the IRR and artificially increasing the funding gap, given the uncertainties inherent in investments over a very long period, the Commission did not make a manifest error of assessment by considering that, even taking into account a longer period, the net effects on possible revenue beyond 40 years would probably be limited. As the Commission submits in its defence, in order to guard against the risks inherent in investments lasting beyond 40 years, an investor would probably have required a higher return, which would have had the effect of increasing the WACC and, consequently, of reducing the value of discounted future revenue.

186 As regards the arguments of the applicants, ECSA, Trelleborg Hamn and VDR that, in essence, the Commission made a manifest error of assessment in that it used a period of 40 years to calculate the IRR and the funding gap, whereas a period of 50 years was used in the Incentive studies for the assessment of the socioeconomic return, a distinction must be drawn between the socioeconomic return of a project and parameters such as the IRR and the funding gap, which relate solely to the financial evaluation of a project. First, it should be noted, as the main parties submit, that the socioeconomic return is the result of a socioeconomic analysis of a project, carried out in order to assess the benefits of a project for society, with the result that account is taken, in addition to the financial parameters, of the positive and negative externalities of a project. Second, it should be noted that, as the main parties submit, the IRR and the funding gap are parameters, determined solely on the basis of the cash flows generated by the project, which enable an investor to assess whether it is appropriate to invest in a project. In view of the differences between the socioeconomic analysis and the financial analysis of a project, the fact that the period used to assess the benefits of the project for society is longer than that used to assess its financial feasibility cannot render the results of each of those analyses implausible.

187 As regards the applicants' argument that the period of 40 years is incorrect on the ground that the Incentive studies show that, after a period of 50 years, the Fixed Link would still have a residual value of EUR 11.7 billion or a high capital value, so that, at the end of a period of 40 years, additional revenue could be generated or the sale of the tunnel could generate a profit, it must be stated that those studies do not refer to such a residual value. In response to the Court's request, at the hearing, for clarification in that regard, Trelleborg Hamn argued that it was a residual value of DKK 11.7 billion and not EUR 11.7 billion, based on Femern's financial analysis of February 2016. It must be noted that the passage of that financial analysis referred to by that intervener concerns stress tests and the finding that the project could bear additional costs of DKK 11.7 billion. Consequently, it must be held that the argument as to a residual value of DKK 11.7 billion after a period of 50 years is not supported by any evidence. Moreover, in order to justify a high residual value equivalent to the construction costs, reference is made to the handbook for socioeconomic assessment in the field of transport, drawn up in March 2015 by the Danish Ministry of Transport. It must also be stated that the applicants, VDR, ECSA and Trelleborg Hamn have not explained why a supposed high residual value after 50 years, determined in the context of a socioeconomic analysis, would mean that the Commission made a manifest error of assessment in using, in the financial analysis of a project, a period of 40 years to calculate the IRR and the funding gap. In particular, no information is provided to indicate that a market investor would take into account the residual value after an operational period of 40 or 50 years in order to determine the minimum return that would be required. In that regard, it should be noted that it is apparent from recitals 337 and 338 of the contested decision that, even over a period of 40 years, the level of uncertainty may constitute a difficulty for determining certain components of the WACC, in particular the risk-free rate. Therefore, over a period beyond 40 years, the even higher level of uncertainty would probably have made the WACC determination too approximate to reflect properly the cost of financing the project on the market.

188 It follows from the foregoing considerations that the applicants, FSS, VDR, ECSA and Trelleborg Hamn have not established that the Commission made a manifest error of assessment in relying on a period of 40 years to calculate the project's IRR and funding gap.

189 Therefore, there is no longer any need to rule on the arguments challenging the calculation of the IRR that was made until 2100 as a precautionary measure.

190 Accordingly, the complaint challenging the periods used for the calculation of the IRR (necessity of the aid) and for the calculation of the funding gap (proportionality of the aid) must be rejected.

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

3. The third part, alleging that the Commission was wrong to conclude that the aid was proportionate

192 In the third part of the second plea, the applicants raise three complaints, challenging, first, the temporal limitation of the aid, second, the funding gap and, third, the aid amount.

(a) The first complaint, challenging the temporal limitation of the aid

193 The applicants, ECSA, Trelleborg Hamn and VDR consider that the Commission made a manifest error of assessment with regard to the proportionality of the aid at issue, on the ground that the aid is not limited in time and, in any event, the period of 16 years after the opening of the Fixed Link, used in the contested decision, is too long.

194 The Commission, supported by the Kingdom of Denmark, disputes that line of argument.

195 In that regard, it should be noted that it is apparent from paragraph 36 of the IPCEI Communication that the choice of the aid instrument must be made with a view to the market failure or other important systemic failures which it seeks to address, and that, where the underlying problem is lack of access to finance, Member States should normally resort to aid in the form of liquidity support, such as a loan or guarantee. With regard to aid in the form of a loan or guarantee, footnote 27 to paragraph 36 of the IPCEI Communication states that aid in the form of guarantees must be limited in time, and aid in the form of loans must be subject to repayment periods.

196 In the present case, in recital 348 of the contested decision, the Commission stated that the Danish authorities had ensured that Femern would not adopt State loans and State guarantees, which, together, would exceed a maximum guaranteed amount of DKK 69.3 billion (approximately EUR 9.3 billion), and that those loans and guarantees are strictly limited to the planning and construction costs of the Fixed Link. In addition, according to the alternative funding gap model, submitted by the Danish authorities during the formal investigation procedure, the Commission found, in recital 349 of the contested decision, that, 16 years after the start of operation, all loans with a State guarantee would be terminated and all State loans obtained would be repaid. According to the Commission, as is apparent from recital 350 of the contested decision, the resulting aid is equal to the funding gap of DKK 12.046 billion (approximately EUR 1.615 billion). Moreover, it is apparent from recital 351 of the contested decision that, since it cannot be ruled out that the funding gap may be overestimated as a result of the inclusion of a reserve budget, the Danish authorities will have to recalculate the funding gap at the latest five years after the start of operation, and that, if the funding gap were below what was anticipated, the maximum guaranteed amount would be reduced to DKK 66.1 billion (approximately EUR 8.9 billion) and the

maximum guarantee period would be reduced to 11 years from the start of operation.

197 In the first place, as regards the arguments that the duration of the aid is not limited in time, first, the Court must reject the argument of the applicants, ECSA, Trelleborg Hamn and VDR that, in essence, the Commission provided no indication as to the point in time when the aid was granted. As the Commission submits, the dates on which the three individual aids were successively granted to Femern are set out in recital 259 of the contested decision. In addition, such an argument is irrelevant for the purpose of claiming that the Commission disregarded the requirement under paragraph 36 of the IPCEI Communication, referred to in paragraph 195 above, according to which aid in the form of guarantees must be limited in time and aid in the form of loans must be subject to repayment periods. Contrary to what the applicants claim, the IPCEI Communication does not require precise dates to be determined, and consequently it is not necessary to know precisely the point in time when the aid was granted.

198 Second, as regards the applicants' argument that, in essence, the aid is not limited in time on the ground that it is not possible to determine the end date of the aid because the date upon which the Fixed Link will be opened is uncertain, it must be noted that the Commission ensured, in recitals 348 to 351 of the contested decision, that temporal limits would be set for the grant of State loans and State guarantees.

199 As stated in recital 349 of the contested decision, all loans with a guarantee must have been terminated at the latest 16 years after the start of operation of the Fixed Link and all State loans must have been repaid, and no guarantee will be provided after the actual debt is repaid if the repayment period of that debt is less than 16 years.

200 Moreover, the State loans and State guarantees are strictly limited to financing the costs of planning and constructing the Fixed Link and the Danish authorities are not authorised to grant Femern such loans and guarantees for an amount exceeding the maximum guaranteed amount of DKK 69.3 billion (approximately EUR 9.3 billion), and that amount also includes interest on the debt taken on to finance the planning and construction of the Fixed Link. Therefore, as the Commission stated, any delays in the full opening of the Fixed Link would have the effect of increasing the debt taken on to finance the planning and construction of the Fixed Link, which is strictly capped by the maximum guaranteed amount and the repayment period of 16 years after the opening of the Fixed Link. It follows that, should Femern need, in order to finalise the construction of the Fixed Link, State loans or State guarantees for a combined amount that exceeds the maximum guaranteed amount, the Danish authorities would be required to notify such additional financing which would not be covered by the declaration of compatibility in the contested decision. It follows that the applicants cannot claim that it would be in Femern's interest to delay the full operation of the Fixed Link in order to extend the duration of the aid.

201 In addition, it must be noted that, since the funding gap might be overestimated because of the inclusion of a reserve budget in the maximum guaranteed amount, the Commission required, in recital 351 of the contested decision, that the Danish authorities recalculate the funding gap at the latest five years after the start of operation of the Fixed Link. If the funding gap were to have been overestimated, the maximum guaranteed amount could be reduced to DKK 66.1 billion (approximately EUR 8.9 billion) and the maximum guaranteed period could be reduced to 11 years from the start of operation.

202 Contrary to what the applicants claim, the rules governing how the duration of the State loans and the State guarantees is limited in the contested decision does not disregard the grounds of the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), because the end date of the aid is not sufficiently precise.

203 In that regard, it should be noted at the outset that, in the judgment of 13 December 2018, S*candlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), the Court did not hold that the Commission had made a manifest error of assessment in the examination of the proportionality of the aid, but that it should have initiated the formal investigation procedure on account of serious difficulties in the assessment of the proportionality of the aid. In particular, as regards the duration of the guarantees, the Court considered that, in view of the partially indeterminate nature of their object and the extremely long and indeterminate, or indeed unforeseeable, duration of the debt repayment period, the Commission should have questioned the proportionality of the aid at issue.

204 It must be noted that the applicants misunderstand the scope of the incidental finding concerning the date of opening of the Fixed Link, made in paragraph 230 of the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942). It is true that the Court referred to the date of the opening of the Fixed Link as being uncertain. However, it follows from a reading of paragraphs 230 to 233 of that judgment that that incidental finding was only one of the factors taken into account in order to conclude, in circumstances differing from those of the present case, that the Commission should have initiated the formal investigation procedure. As regards the partially indeterminate nature of the object of the guarantees, the Court stated that the guarantees at issue covered the debt taken on for the planning, construction and operation of the Fixed Link, but that those guarantees did not relate to a precise cost. As regards the extremely long and indeterminate, or indeed unforeseeable, debt repayment period, the Court stated that the Danish authorities could grant new guarantees for a period of 55 years from the date on which the Fixed Link is opened. Thus, the Court found that the effect of the guarantees extended well beyond the 55-year period from the opening of the Fixed Link, namely until the loans with a State guarantee are repaid.

205 It must be stated that the detailed rules for limiting the duration of the State loans and the State guarantees, as defined in the contested decision, cannot be compared to those which governed the grant of guarantees in the 2015 Construction Decision. As is apparent from recitals 348 to 351 of the contested decision, the Commission ensured that the object of the State loans and the State guarantees would be strictly limited, including as regards the maximum amount of debt that could be guaranteed. It is also required that, at the latest 16 years after the start of operation of the Fixed Link, all loans with a guarantee must be terminated and all State loans repaid. Moreover, should the funding gap have been overestimated, both the maximum guaranteed amount and the repayment period of the loans and guarantees are to be reduced.

206 It follows that the applicants cannot complain that the Commission disregarded the requirement under paragraph 36 of the IPCEI Communication that the aid be limited in time.

207 In the second place, it is necessary to examine whether, as the applicants, ECSA, Trelleborg Hamn and VDR claim, the Commission made a manifest error of assessment on the ground that the 16-year period from the opening of the Fixed Link is too long in that it goes beyond the point in time when Femern will be able, on the basis of its cash flow, to finance itself on the market, with the result that, beyond that point in time, the aid constitutes operating aid that is incompatible with the internal market.

208 It should be noted that that line of argument is based on an isolated reading of paragraph 242 of the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), in which the Court held that the aid should expire at the point in time when the beneficiary would be able, on the basis of its cash flow, to borrow on the open market without the support of State guarantees or State loans. In that regard, the Court stated that that point was normally reached when the amount of the beneficiary's debt had reached a level at which its income was likely to exceed operating costs and debt repayments under normal market conditions, and therefore before the debt had been repaid in full. Therefore, according to the Court, aid in excess of that level could be regarded as operating aid.

209 Paragraph 242 of the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), cannot be read or interpreted independently of the context in which that case was brought before the Court, namely, as follows from paragraph 240 of that judgment, the context of the measures at issue granted to Femern which covered not only the debt associated with the planning and construction of the Fixed Link, but also the debt relating to its operation. Therefore, in paragraph 241 of that judgment, the Court held that, as the aid at issue covered the operating costs of the Fixed Link, it cannot be ruled out that, to some extent, it may constitute operating aid which is intended to release an undertaking from the costs which it would normally have to bear in the day-to-day

management of its activities, which is why the Court laid down the criterion relied on by the applicants, ECSA, Trelleborg Hamn and VDR.

210 It must be stated that, unlike the 2015 Construction Decision which the Court annulled by the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), it is apparent in particular from recital 348 of the contested decision that the State loans and State guarantees are strictly limited to the financing needed for the costs incurred during the phases of planning and constructing the Fixed Link. It follows that, in the absence of loans or guarantees capable of covering operating costs, the Commission was not required to limit the duration of the aid to the point in time when the beneficiary would be able, on the basis of its cash flow, to borrow on the competitive market without having State guarantees or loans.

211 In any event, the applicants, ECSA, Trelleborg Hamn and VDR have not adduced any evidence to establish that the 16-year limit from the opening of the Fixed Link is manifestly incorrect. The applicants have merely submitted that the operating revenue of the entities responsible for the construction and operation of the Great Belt and Øresund Belt fixed links exceeded the amount of the operating costs and debt repayment costs from the fourth or fifth year from the opening of those links. Apart from the fact that that assertion is not supported by probative evidence, the applicants have also failed to demonstrate that Femern is in a situation that is comparable to that of the entities responsible for the construction and operation of the Great Belt and Øresund Belt fixed links, in particular as regards the remuneration required for the State loans and State guarantees or the fact that the entities responsible for those links were able to receive State guarantees capable of covering operating costs.

212 It must therefore be held that the applicants, ECSA, Trelleborg Hamn and VDR have not demonstrated that the Commission made a manifest error of assessment in limiting the duration of the aid to a period of 16 years from the opening of the Fixed Link.

213 Accordingly, the first complaint, challenging the temporal limitation of the aid, must be rejected.

(b) The second complaint, challenging the funding gap

214 The second complaint in the third part of the second plea is subdivided into three sub-complaints, challenging, first, the revenues taken into account in the calculation of the funding gap, second, the costs taken into account in the calculation of the funding gap and, third, the period used for the purposes of calculating the funding gap.

215 Since the third sub-complaint has already been examined in paragraphs 168 to 190 above, in the context of the third complaint in the second part of the second plea, the merits of the first and second sub-complaints remain to be examined.

(1) The first sub-complaint, challenging the revenue

216 The applicants, DFA and Rederi Nordö-Link submit that, for the calculation of the funding gap, the Commission underestimated Femern's revenues in order to increase artificially the funding gap.

217 The Commission, supported by the Kingdom of Denmark, disputes that line of argument.

218 In the present case, as regards the revenues from the Fixed Link, the Commission considered, in recital 322 of the contested decision, that the road traffic forecasts were reasonable, in particular in so far as those forecasts take into account redistribution of traffic linked to the reduction of the Great Belt fixed link toll and continued competition from ferry services. In that regard, it stated that a reasonable investor would, in its financial analysis, take into account a continued ferry service, and considers a one-hour ferry service to be appropriate.

219 In addition, in recital 323 of the contested decision, concerning the assumed prices, the Commission stated that operating revenues largely exceeded operating costs and that prices could not be required to compensate all the costs, including construction costs. However, it stated that the prices assumed in the funding gap model could not be artificially low. In the present case, it observed that the Danish legislation had laid down the principle 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. In that regard, the Commission stated that the traffic forecasts had been developed on the basis of those prices and that the establishment of a differentiated price structure would have a limited effect on revenues. The Commission therefore considered that the assumed road traffic revenues were plausible and appropriate. As regards railway revenues, in recital 324 of the contested decision, the Commission considered that the basis for the calculation of those revenues was reasonable.

220 It must be stated that, by the present sub-complaint, the applicants, DFA and Rederi Nordö-Link merely dispute the fact that, in order to find that road traffic revenues could be regarded as plausible and appropriate, the Commission accepted the assumption of prices at the level of the ferry prices for Rødby-Puttgarden in 2007, adjusted for inflation.

221 In that regard, it must be noted that, according to paragraph 31 of the IPCEI Communication, 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.

222 In addition, since the funding gap is intended to determine the extent to which the project could be financed under market conditions, in the assessment of revenues, the Commission, DFA and Rederi Nordö-Link rightly consider that account must be taken of the conduct, on the market, of a private investor who as far as possible would seek to ensure that revenue is established at a level that would enable investment costs to be recovered as much as possible.

223 It is in the light of those considerations that it is necessary to examine the arguments raised by the applicants, DFA and Rederi Nordö-Link.

224 First, as regards the applicants' argument that, in essence, the Commission made a manifest error of assessment in accepting that Femern's revenues did not compensate all of its costs, including the costs of constructing the Fixed Link, it should be noted that paragraph 31 of the IPCEI Communication cannot be interpreted as requiring that the revenues cover all of the costs incurred by the aid beneficiary. As the Commission stated in recital 323 of the contested decision, if revenues were required to be set at a level that would cover the full construction and operating costs, there would be no funding gap, with the result that no aid could be authorised even though the aid was necessary for the investment project to be carried out.

225 Furthermore, as the Commission rightly states, the fact that prices are higher does not automatically lead to an increase in revenue because of the elasticity of demand in relation to price. In that regard, it must be noted that the applicants, DFA and Rederi Nordö-Link do not dispute the finding made in recital 323 of the contested decision to the effect that it is apparent from the 2016 financial analysis that a differentiated price structure would have only a relatively limited impact on overall revenues.

226 Moreover, the applicants acknowledge in their reply that higher prices do not automatically lead to an increase in revenues because of competition from other operators on the market. Contrary to what the applicants claim, that does not mean that the economic model chosen for the Fixed Link is inappropriate, but confirms that the grant of aid is necessary for such a project to be carried out.

227 Second, it must be stated that the applicants, DFA and Rederi Nordö-Link have not adduced any evidence to establish that it would have been possible to achieve higher revenues by setting higher prices for road traffic.

228 It should be noted, first of all, that the argument put forward by DFA and Rederi Nordö-Link that, in essence, the prices for the use of the Fixed Link should be higher than the prices for ferry services on the route between Rødby and Puttgarden on the ground that the Fixed Link provides a service that is superior to those provided by the ferry operators is not supported by any evidence. Those interveners have not referred to any evidence relating to the prices charged by the

current ferry operator on the route between Rødby and Puttgarden. Therefore, DFA and Rederi Nordö-Link cannot claim that the prices for the use of the Fixed Link are in fact equal to or lower than those charged by the current ferry operator on that route.

229 Next, it must be stated that the example of the tariffs charged by Eurotunnel, relied on by DFA and Rederi Nordö-Link, is not supported by any evidence. Furthermore, in so far as it concerns the Channel Tunnel fixed link, that example cannot be relevant, since it is apparent from the information in the file that that fixed link is intended only for railway traffic. It must be noted that neither the applicants nor those interveners dispute the Commission's finding in recital 324 of the contested decision that the basis for the calculation of the railway operating revenues is reasonable.

230 Lastly, as regards the example of the Rio-Antirrio (Greece) bridge, the fact that the prices for road traffic over the fixed link are higher than those for ferry services cannot be relevant where there are no contextual factors capable of establishing that that fixed link's situation is, at least to some extent, comparable to the situation of the Fehmarn Belt fixed link. In the absence of data relating to the construction costs, of information concerning the way in which the Rio-Antirrio bridge is financed or of any price framework set by the public authorities for use of that fixed link, no conclusion can be drawn from the difference between the prices charged for road traffic using that bridge and the prices envisaged for use of the road part of the Fixed Link.

231 Third, as regards the argument put forward by DFA and Rederi Nordö-Link that, in essence, the Commission cannot authorise aid where the beneficiary's revenues are lower than its costs, to the detriment of its competitors, it should be noted that taking into account the negative effects of aid on competitors is irrelevant for the purposes of assessing the funding gap. It follows that that argument is ineffective. In any event, such an argument is unfounded for the same reasons as those set out in paragraphs 224 and 225 above.

232 Fourth, the argument put forward by DFA at the hearing, by which the Commission is criticised for having accepted that revenues are not determined by taking into account the prospect of maximising profits, cannot, in any event, succeed.

233 That line of argument based on the finding that Femern cannot itself determine the tariffs for use of the Fixed Link on the ground that the latter is not intended to be operated in order to produce a maximum return, but addresses concerns relating in particular to transport policy, cannot suffice to establish that the Commission made a manifest error of assessment where there is no other element from which it could be concluded that the revenues used to calculate the funding gap are implausible.

234 Moreover, as the Commission stated at the hearing, where the public authorities decide to regulate charges for use of an infrastructure for the purposes of implementing transport policy in order to take account of the price that future users would be prepared to pay, a private operator who is responsible for the operation of such an infrastructure, as with certain motorways the prices of which are regulated, cannot disregard, in the assessment of revenues for the calculation of the funding gap, the fact that prices are regulated by the public authorities.

235 It follows from the foregoing considerations that the applicants, DFA and Rederi Nordö-Link have not demonstrated that the Commission made a manifest error of assessment consisting in an underestimation of the revenues taken into account in the calculation of the funding gap.

236 Accordingly, the first sub-complaint, challenging the revenues taken into account in the calculation of the funding gap, must be rejected.

(2) The second sub-complaint, challenging the costs

237 The applicants, DFA and Rederi Nordö-Link submit that the Commission, for the calculation of the funding gap, erred by taking into account the costs of refinancing loans.

238 The Commission, supported by the Kingdom of Denmark, disputes that line of argument.

239 In that regard, it should be noted that, according to settled case-law, operating aid intended to maintain the status quo or to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities cannot, in principle, be considered compatible with the internal market (see, to that effect and by analogy, judgments of 6 November 1990, *Italy* v *Commission*, C-86/89, EU:C:1990:373, paragraph 18; of 22 September 2020, *Austria* v *Commission*, C-594/18 P, EU:C:2020:742, paragraph 119; and of 12 July 2018, *Austria* v *Commission*, T-356/15, EU:T:2018:439, paragraph 579).

240 In addition, as stated in paragraph 221 above, it is apparent from paragraph 31 of the IPCEI Communication that the maximum aid level will be determined with regard to the identified funding gap in relation to the eligible costs. As regards eligible costs under aid measures for an important project of common European interest, point (h) of the annex to the IPCEI Communication specifies that costs other than those referred to in points (a) to (g) of that annex may be accepted if justified and where they are inextricably linked to the realisation of the project, to the exclusion of operating costs not covered by point (g), which concerns aid to a project of first industrial deployment.

241 In the present case, first, in recital 320 of the contested decision, the Commission stated that the eligible costs were restricted to the project's construction costs, which include planning costs and costs for promotion, marketing and information.

Second, in recitals 325 and 326 of the contested decision, it stated that the question of whether operating costs could be included in the calculation of the funding gap differed from the question of whether operating aid was granted. It indicated that paragraph 31 of the IPCEI Communication referred to the difference between positive and negative cash flows when defining the funding gap, and that it is inherent in the logic of investment decision-making to compare, *ex ante*, investment costs against future operating revenues and costs. In that regard, the Commission also stated that investors typically did not take a positive investment decision as long as that comparison resulted in a gap or a negative net present value (NPV). Furthermore, the Commission stated that that method was confirmed by the compatibility criteria set out in 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 [TFEU] (OJ 2014 L 187, p. 1).

242 In the first place, it should be noted that the pleadings of the applicants, DFA and Rederi Nordö-Link do not contain any substantiated arguments in support of the assertion that the Commission erred in including operating costs in the negative cash flows of the investment project. In particular, no argument is expressly raised to call into question the merits of the Commission’s findings in recitals 325 and 326 of the contested decision.

243 When questioned by the Court at the hearing in order to clarify their arguments, the applicants stated that the judgment of 19 September 2018, *HH Ferries and Others* v *Commission* (T-68/15, EU:T:2018:563), prohibited the inclusion of operating costs in the funding gap. The applicants also stated that that prohibition followed from the annex to the IPCEI Communication, which excludes operating costs from the eligible costs. In addition, Rederi Nordö-Link submits that taking into account operating costs in the funding gap amounts to authorising operating aid and to artificially increasing the funding gap.

244 First, it should be noted that, as the Commission submits, the inclusion of operating costs in the negative cash flows of the investment project in order to calculate the funding gap does not result in the grant of operating aid. As is apparent from recital 323 of the contested decision, the operating revenues which, correlatively, should also be taken into account under the positive cash flows largely exceed operating costs. Therefore, Rederi Nordö-Link cannot claim that the inclusion of operating costs in the funding gap would result in the grant of operating aid.

245 Second, it must be stated that the argument put forward by DFA and Rederi Nordö-Link that the inclusion of operating costs in the calculation of the funding gap has the effect of artificially increasing that gap cannot suffice to conclude that the Commission disregarded paragraph 31 of the IPCEI Communication by including operating costs in the calculation of the funding gap. As stated in paragraph 241 above, the Commission explained, in recital 326 of the contested decision, the reasons why the operating costs formed an integral part of the

funding gap analysis. It follows that, in the absence of evidence capable of calling into question the validity of those explanations, that argument cannot succeed.

246 As regards the judgment of 19 September 2018, *HH Ferries and Others* v *Commission* (T-68/15, EU:T:2018:563), the Court was not called upon to interpret the concept of 'funding gap' within the meaning of paragraph 31 of the IPCEI Communication. It follows that the applicants are not justified in claiming that that judgment could be interpreted as prohibiting the inclusion of operating costs in the calculation of the funding gap.

247 Consequently, it must be held that the applicants, DFA and Rederi Nordö-Link have not demonstrated that the Commission's calculation of the funding gap disregarded paragraph 31 of the IPCEI Communication as a result of the inclusion of operating costs in the negative cash flows of the investment project.

248 In the second place, it should be noted that the applicants, DFA and Rederi Nordö-Link also rely on the judgment of 19 September 2018, *HH Ferries and Others* v *Commission* (T-68/15, EU:T:2018:563), in order to claim that the Commission erred in finding, in recital 294 of the contested decision, that the guarantees for refinanced loans relating to planning and construction costs did not constitute operating aid.

249 In that regard, it should be noted that it follows from the judgment of 19 September 2018, *HH Ferries and Others* v *Commission* (T-68/15, EU:T:2018:563), and in particular from paragraphs 107, 108 and 111 thereof, that it cannot be ruled out that State guarantees covering the operating costs of the beneficiary of the aid may constitute operating aid. However, it does not follow that guarantees such as those granted for refinanced loans relating to planning and construction costs, and not operating costs, constitute such operating aid.

250 It must be stated that, as is apparent from recitals 292 and 293 of the contested decision, the Danish authorities limited the provision of State loans and State guarantees to the financing needed for the costs incurred during the planning and construction phases, excluding operating costs. In the light of that limitation, the Commission was entitled to take the view that the aid in question was investment aid, and that conclusion cannot be called into question, as the applicants, DFA and Rederi Nordö-Link claim, by the findings made by the Court in the judgment of 19 September 2018, *HH Ferries and Others* v *Commission* (T-68/15, EU:T:2018:563).

251 As regards the argument put forward by DFA and Rederi Nordö-Link that Femern benefits from operating aid on the ground that the aid measures in its favour may continue for a period of 16 years after the full opening of the Fixed Link, whereas that period goes beyond the point in time when that entity will be able, on the basis of its cash flows, to finance itself on the competitive market without aid, it should be noted that that argument overlaps with the argument already examined

in paragraphs 208 to 212 above and must, therefore, be rejected for the same reasons.

252 In the light of the foregoing considerations, it must be held that the Commission did not err in finding that the refinancing of loans relating to the planning and construction costs did not constitute operating aid.

253 Accordingly, the second sub-complaint, challenging the costs taken into account in the calculation of the funding gap, must be rejected.

(c) The third complaint, challenging the aid amount

254 The applicants, FSS, DFA and Rederi Nordö-Link submit that the Commission made manifest errors of assessment in the calculation of the aid amount.

255 The Commission, supported by the Kingdom of Denmark, disputes that line of argument.

256 In the first place, it is necessary to ascertain whether, as the applicants and DFA submit, since Femern does not have the ability to repay its loans, as, they claim, is apparent from the 2001 commercial interest report, in accordance with point 4.1 of the Guarantee Notice, the aid amount should correspond, contrary to what the Commission found, to the value of all loans covered by the State guarantees and of all State loans.

257 In that regard, it should be noted that, according to point (a) of the third paragraph of point 4.1 of the Guarantee Notice, 'for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted charge a high premium given the expected rate of default[; if] the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee'.

258 Thus, it follows from point (a) of the third paragraph of point 4.1 of the Guarantee Notice that it is only where a company is in difficulty and in exceptional circumstances that the aid element of a guarantee is equivalent to the total amount of the loans covered by the guarantee. Given the far-reaching implications of such an approach, the possibility of calculating the benefit from a State guarantee as being equal to the entire amount of the guaranteed loan cannot be justified merely because the beneficiary undertaking is in difficulty. Thus, the Commission may use that approach only in exceptional circumstances and only if the company in difficulty is unable, through its own resources, to repay the loan covered by the guarantee.

259 In the present case, in recital 346 of the contested decision, the Commission found that the aid element did not have to equal the full amounts covered by the State loans and the loans with State guarantees, on the ground that Femern's situation

did not come under the exceptional circumstances referred to in point (a) of the third paragraph of point 4.1 of the Guarantee Notice.

260 It must be stated that the applicants and DFA have not adduced any evidence to support the view that Femern is an undertaking in difficulty within the meaning of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, or that that undertaking would be unable to repay the loans covered by the debt taken on to cover the planning and construction costs.

261 To support their line of argument, the applicants and DFA rely solely on the 2001 commercial interest report, from which it is apparent that the Fixed Link project could not be carried out by the private sector without substantial public support. While such a factor may be relevant for determining whether the State loans and the State guarantees granted to Femern constitute aid within the meaning of Article 107(1) TFEU or to establish that such a project cannot be carried out without aid, it is not sufficient to establish that Femern is an undertaking in difficulty which is unable to repay, at the stage of the Fixed Link being in operation, the debt taken on to cover the planning and construction costs.

262 Accordingly, it must be held that the applicants and DFA have not demonstrated that the Commission erred in finding that the aid amount cannot equal the full amounts covered by the State loans and loans with State guarantees.

263 In the second place, as regards the applicants' argument that Femern is not paying the premium set out in recitals 342 and 343 of the contested decision, it should be noted that, in support of that argument, the applicants rely only on elements subsequent to the adoption of the contested decision, namely a statement by the Danish Minister for Transport of 24 April 2020 and a proposal of 5 December 2020 regarding an amendment to the 2015 Construction Law. In that regard, it must be noted that, according to settled case-law, the legality of a Commission decision on State aid is to be assessed in the light of the information available to the Commission when that decision was adopted (judgments of 10 July 1986, *Belgium* v *Commission*, 234/84, EU:C:1986:302, paragraph 16, and of 12 July 2018, *Austria* v *Commission*, T-356/15, EU:T:2018:439, paragraph 333). It follows that that argument by the applicants cannot call into question the legality of the contested decision.

264 In the third place, it is necessary to examine the line of argument by which the applicants, FSS and Rederi Nordö-Link submit, in essence, that it is impossible for the result of the calculation of the aid amount to correspond to that of the funding gap.

265 In the present case, in recital 342 of the contested decision, the Commission first of all set out the methodology used by the Danish authorities to calculate the aid amount. The Commission stated that that method was based on an approach similar to that set out in point 4.2 of the Guarantee Notice, which provides that, where no market price for the guarantee 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 this company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account'. The Commission also stated that the Danish authorities, when calculating the aid amount, had not distinguished between the value of aid associated with the State loans and the value of aid associated with the State guarantees, and therefore the aid elements resulting from the State guarantees and from the State loans were therefore calculated in the same way. In addition, the Commission stated that the Danish authorities had 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 was required to pay to the Danish State, multiplied by the sum of outstanding guaranteed debt and outstanding State debt. The Commission set out, in recitals 343 to 345 of the contested decision, the reasons why it considered that method to be appropriate.

266 Next, in recital 347 of the contested decision, it explained the components of Femern's effective debt, namely that it reflects the accumulated amount of money spent to cover planning and construction costs, interest payments and own costs, from which the amount of paid-in equity and financing received from the European Union must be deducted. It also stated that Femern's net debt built up during the construction phase was expected to reach its maximum in the first year of operation and that that net debt will gradually decrease during the operational phase with the free cash flow of the project. In recitals 348 and 349 of the contested decision, the Commission indicated the other parameters taken into account in the calculation of the aid amount, namely the maximum guaranteed amount and the maximum guaranteed period. On the basis of those elements, in recital 350 of the contested decision, the Commission calculated the aid amount as being DKK 12.046 billion (approximately EUR 1.615 billion). In that regard, it stated that the aid was the discounted value using the WACC as the discount rate. It also stated that that calculation included capital injections and aid associated with State loans and State guarantees, and that the calculation of the aid amount was based upon an increase of the premium from 0.15% to 2%.

267 It should be noted that, in their pleadings, the applicants, FSS and Rederi Nordö-Link do not dispute either the methodology used to calculate the aid amount or the parameters used to calculate the aid amount, namely the maximum guaranteed amount, the WACC and the risk-free rate adjusted according to the premium. Furthermore, as follows from paragraph 212 above, the applicants have not demonstrated that the Commission made a manifest error of assessment in limiting the duration of the aid to a period of 16 years from the opening of the Fixed Link. The applicants, FSS and Rederi Nordö-Link merely claim that, because of differences in the manner in which the funding gap and the aid amount are calculated, it is mathematically impossible to achieve the same result.

268 It must be noted that, in recital 318 of the contested decision, the Commission explained the relationship between the aid amount and the funding gap by stating

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'.

269 Furthermore, as the Commission has submitted, since the funding gap is the funding which is missing for the investment to be carried out, it must be held that it is not unusual for the amount of aid to correspond to that of the funding gap.

270 It follows that the applicants, FSS and Rederi Nordö-Link are not justified in claiming that it is impossible for the aid amount to correspond to the amount of the funding gap.

271 As regards Rederi Nordö-Link's complaint that aid amount was calculated in order to ensure that that amount was the same as the funding gap, it should be noted that the Danish authorities cannot be criticised for having calibrated the various parameters used to calculate the aid amount, in particular the maximum guaranteed amount and the premium applicable to the risk-free rate and the duration of the aid, in order to ensure that the aid amount corresponded to the funding gap which constitutes the maximum aid ceiling that may be authorised.

272 As regards FSS's argument which, in essence, criticises the Commission for not having calculated the aid amount, it must be noted that the fact that the details of that calculation do not appear in the contested decision does not mean that the Commission did not calculate the aid amount in order to arrive at the result indicated in recital 350 of the contested decision.

273 Furthermore, it must be noted that the statement of reasons for a measure adopted by the Commission must enable the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the measure is well founded and so that the EU judicature can exercise its power of review. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraphs 62 and 63; of 16 October 2014, *Eurallumina* v *Commission*, T-308/11, not published, EU:T:2014:894, paragraph 44; and of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 80). In the present case, since, in recitals 342 to 350 of the contested decision, the Commission set out both the method used to calculate the aid and the parameters taken into account in order to calculate the aid amount, the Commission cannot be accused of having failed to comply with the obligation to state reasons.

274 In the fourth place, as regards the applicants' argument that, in essence, Femern received an economic advantage not taken into account in the aid amount, on the ground that the construction and operation of the Fixed Link were awarded to it without a tendering procedure taking place, suffice it to note that the applicants have not set out the reasons why obtaining a right to construct and operate without a tendering procedure taking place is likely to increase the aid amount. It follows that, without it being necessary to rule on the admissibility of that argument raised for the first time in their observations on Rederi Nordö-Link's statement in intervention, that argument must be rejected as unsubstantiated.

275 In the light of the foregoing considerations, the third complaint, challenging the aid amount, must be rejected.

276 Accordingly, the third part of the second plea must be rejected in its entirety.

4. The fourth part, challenging the analysis of the prevention of undue distortions of competition and the balancing test

277 The applicants, supported by FSS, DFA, Rederi Nordö-Link, ECSA, Trelleborg Hamn, Aktionsbündnis, NABU and VDR, submit that the Commission erred in concluding that the negative effects of the Fixed Link on competition were not capable of offsetting its positive effects.

278 The Commission, supported by the Kingdom of Denmark, disputes that line of argument.

279 In that regard, according to paragraph 41 of the IPCEI Communication, for the aid to be compatible with the internal market, the negative effects of the aid in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of the common European interest. Paragraph 42 of that communication states that, in the assessment of the negative effects of the aid, 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. In addition, according to paragraph 43 of the IPCEI Communication, the Commission is required to assess the risk of market foreclosure and dominance, and projects involving the construction of an infrastructure must ensure open and non-discriminatory access to the infrastructure and non-discriminatory pricing.

280 In the present case, as regards the positive effects, in recital 359 of the contested decision, the Commission stated that the Fixed Link was aimed at promoting mobility, further integration and cultural exchange of people living on both sides of that link, and to improve the connection between the Nordic countries and central Europe for passengers as well as road and railway freight. In that regard, the Commission stated that expected benefits from the Fixed Link had been recognised at European level by including that link in the list of TEN-T priority

projects. In addition, the Commission referred to the positive effects on certain economic sectors in the region, such as gas stations, retail, restaurants, hotels, amusement parks and railway and bus transport. The Commission also stated that the Fixed Link would also enhance the accessibility to railway transport with the possibility of there being a transfer of freight and passengers from road to rail.

281 As regards the negative effects, in recital 360 of the contested decision, the Commission stated that the opening of the Fixed Link would have a negative impact on ferry operators serving the Rødby and Puttgarden route, and on other routes, and on the activities of the ports used by those ferries. In that regard, the Commission considered that Femern's power to influence the operation of the ferry services was limited on the ground that the aid was limited to the financing needed for the costs incurred during the phase relating to the planning and construction of the Fixed Link, with the funding gap as the upper limit. Therefore, the Commission considered that the main impact on the ferry operators' services is created by the public authorities' decision to construct the Fixed Link, providing an alternative to existing modes of transport, and that it is not for the Commission to call into question the choice made by the public authorities.

282 In addition, in recitals 361 to 363 of the contested decision, the Commission examined, in turn, the risk of overcapacity on the market, the risk of a dominant position and the general impact on competition and the risk of market foreclosure.

283 After stating that it was not for the Commission to assess the effects of the public authorities' decision on the construction of the Fixed Link, after weighing up the negative and positive effects, in recital 365 of the contested decision, the Commission concluded that the aid measures in favour of Femern, as reduced following the revised notification that followed the Opening Decision, had only a limited effect on competition and trade that was offset by the positive effects in terms of contribution to the objective of common European interest.

284 In the first place, as regards the argument of the applicants, FSS, ECSA and Rederi Nordö-Link that the Commission failed to quantify the positive and negative effects of the aid for the purposes of assessing the seriousness of the distortion of competition, it should be noted that it is accepted that the consideration of the positive and negative effects of aid may be succinct (see, to that effect, judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, T-630/15, not published, EU:T:2018:942, paragraph 255), or inferred implicitly from the examination of the effects of the aid on competition and trade where the negative effects of the aid are limited (see, to that effect, judgment of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T-162/13, not published, EU:T:2016:341, paragraph 110).

285 In addition, it must be noted that paragraphs 41 to 43 of the IPCEI Communication merely set out principles for the purposes of the examination of the weighing up of the positive and negative effects of the aid, but do not require those effects to be quantified. Therefore, the Commission cannot be criticised for

not having assessed those positive and negative effects on the basis of quantitative factors taking into account the size of the beneficiary of the aid, its market share relative to its competitors and the size of the amount of aid granted.

286 Furthermore, as regards the decisions relied on by the applicants, Rederi Nordö-Link, Trelleborg Hamn and DFA, in which, according to those parties, the Commission carried out a detailed analysis of the distortion of competition for the purposes of weighing up the positive and negative effects, those decisions are manifestly irrelevant in the light of the case-law referred to in paragraph 134 above, especially since they concern texts other than those governing State aid intended to promote the completion of important projects of common European interest.

287 Accordingly, the Commission cannot be criticised for not having quantified the positive and negative effects of the aid for the purposes of assessing the seriousness of the distortion of competition.

288 In the second place, it is necessary to examine whether, as the applicants submit, the Commission made a manifest error of assessment in finding, in recital 360 of the contested decision, that Femern's ability to undermine competition from ferries was limited by the fact that the aid was capped at the funding gap.

289 It should be noted that, as regards the negative effects of the Fixed Link on existing transport services and in particular on the activities of ferry service operators, the Commission, in recital 360 of the contested decision, drew a distinction between, on the one hand, the negative effects attributable to the public authorities' decision to construct the Fixed Link, which offers an alternative to the existing modes of transport, and, on the other hand, the negative effects attributable to the aid measures granted to Femern. According to the Commission, when weighing up the positive and negative effects, it must confine itself to examining the negative effects of the aid measures granted to that undertaking.

290 In that regard, it must be noted that it has already been held that, in the context of the review of State aid, it is not for the Commission to call into question the public authorities' choice to decide on the construction of an infrastructure that will provide an alternative to existing means of transport on the ground that such a project provides a solution which, on the whole, has positive results, even if the putting into service of that infrastructure would result in the disappearance of the existing modes of transport (see, to that effect, judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, T-630/15, not published, EU:T:2018:942, paragraph 256).

291 Therefore, the Commission was entitled to consider that it could limit its examination to the negative effects of the aid measures granted to Femern.

292 As regards the negative effects of the grant of aid measures to Femern, the Commission found that the financing granted to Femern covered the costs of planning and constructing the Fixed Link up to the limit of the funding gap, that

the amount of the fees for use of the Fixed Link was regulated by the public authorities and that the possibility for that undertaking to grant discounts was limited by the need to ensure sufficient revenues to pay for the operating costs and to repay the loans taken out to finance the planning and construction of the Fixed Link. Therefore, the Commission considered that Femern's power to influence the operation of ferry services was limited and that the main negative effects resulted from the public authorities' decision to construct the Fixed Link.

293 As regards the applicants' argument that, in essence, the capping of aid at the level of the funding gap is irrelevant for the purpose of proving that the aid does not unduly distort competition on the ground that it is a factor taken into consideration at the stage of the examination of the proportionality of the aid, it must be noted that the need for a weighing of the expected positive effects in terms of realisation of the objectives set out in Article 107(3)(a) to (e) TFEU against the negative effects of aid in terms of distortion of competition and the effect on trade between Member States is no more than an expression of the principle of proportionality and the principle that the exemptions set out in Article 107(3) TFEU must be interpreted strictly (see, to that effect, judgment of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraph 124).

294 Furthermore, since the principle of proportionality seeks to limit aid to the minimum necessary so as to reduce distortions in the internal market, it must be held that the Commission is entitled to use, at the stage of weighing up the positive and negative effects of the aid measures, the findings made in the context of the examination of the proportionality of the aid. In the present case, the limitation of the aid amount to the funding gap of the investment project meant that the financing granted to Femern was limited to 27.3% of the eligible costs. Thus, where the examination of the proportionality of State aid and the examination of the weighing up of positive and negative effects are intrinsically linked, such a limitation of the aid amount is a relevant factor in finding that the negative effects of the aid measures are limited.

295 As regards the applicants' argument by which, in essence, they claim that Femern could use the option which it has under Paragraph 42(3) of the 2015 Construction Law to grant discounts in order to set prices below those charged by ferry operators, it must be noted that that argument is purely hypothetical, particularly since, as the Commission stated, Femern is required to generate sufficient revenues not only to be able to pay its operating costs but also to repay the loans taken out to finance the planning and construction of the Fixed Link. Thus, if any discounts granted by Femern were to involve a significant reduction in its revenues, that undertaking might not be in a position to repay the State loans and the loans with a State guarantee within the periods laid down in recitals 349 and 351 of the contested decision.

296 In the third place, it is necessary to ascertain whether, as the applicants submit, the Commission made manifest errors of assessment in the examination of certain

negative elements which, taken individually or together, are capable of offsetting the positive effects of the aid.

297 First, as regards the argument of the applicants, FSS, DFA, ECSA and VDR that the Commission incorrectly concluded that the aid would not have the effect of increasing overcapacity on the market for crossing the Fehmarn Belt, it must be noted that that argument is based on a misreading of the contested decision.

298 In recital 361 of the contested decision, the Commission merely referred to an argument that 'Scandlines et al. further argued that the Fixed Link would develop much additional capacity to an already saturated market' and merely observed 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'.

299 It cannot therefore be held that the Commission itself found that the market for crossing the Fehmarn Belt is saturated.

300 Moreover, it must be noted that the applicants, FSS, ECSA, DFA and VDR have not provided any evidence to substantiate the assertion that there is overcapacity on the market. Although the applicants rely on an average rate of use of ferry services of only 49%, they have not, however, adduced any probative evidence to support that assertion. In that regard, it must be stated that the mere reference to an identical assertion contained in observations submitted during the formal investigation procedure, which is also not supported by any probative documents, cannot constitute evidence.

301 In addition, as the Commission submits, it must be noted that neither the applicants nor FSS, ECSA, DFA and VDR put forward any substantiated arguments capable of calling into question the finding, in recital 361 of the contested decision, that the creation of an alternative to the existing services that is different from and considered superior, cannot be equated to adding capacity to a saturated market. It must be stated that their line of argument is based on the premiss, which is not supported by evidence, that there is overcapacity on the market.

302 Accordingly, the applicants and those interveners have not demonstrated that the Commission made a manifest error of assessment by finding that the Fixed Link would not lead to overcapacity on the market for services offered for crossing the Fehmarn Belt.

303 Second, it is necessary to ascertain whether, as the applicants claim, the Commission made a manifest error of assessment by taking insufficient account of the risk of a dominant position.

304 In the present case, in recital 362 of the contested decision, although the Commission accepted that it could not be excluded that Femern would acquire a dominant position on certain transport services on the Fehmarn Belt market, it

nevertheless stated that the existence of a dominant position was not in itself contrary to EU law. In addition, after finding that Scandlines currently held a monopoly on the route between Rødby and Puttgarden, it considered that, if there were continued ferry services on that route, the Fixed Link would contribute to breaking that monopoly, which would create a more competitive market.

305 It must be noted that paragraph 43 of the IPCEI Communication merely states that the Commission will assess the risk of dominance, without providing details for cases in which aid is granted for an infrastructure construction project. In addition, it must be noted that, according to paragraph 41 of the IPCEI Communication, aid may be declared compatible with Article 107(3)(b) TFEU where its negative effects 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.

306 Thus, contrary to what, in essence, the applicants claim, paragraph 43 of the IPCEI Communication cannot be interpreted as meaning that aid which is capable of contributing to the creation of a dominant position should systematically be regarded as having negative effects which necessarily offset the positive effects of an important project of common European interest, particularly since, in the present case, the risk of a dominant position is limited to the local market for transport services for crossing the Fehmarn Belt.

307 In that regard, it should be noted that neither the applicants nor the interveners in support of their claims dispute the positive effects of the Fixed Link identified in recital 359 of the contested decision. In that regard, the Commission found that the positive effects of the Fixed Link were not limited to the beneficiary of the aid or to the undertakings established in the Fehmarn Belt region, but extended more widely within the European Union in that the Fixed Link would improve the connection between the Nordic countries and central Europe for passengers and for road and railway freight, as well as accessibility to railway transport, thus contributing to the transfer of freight and passengers from road to rail. It follows that, as is apparent from recital 281 of the contested decision, the Fixed Link project, as an important project of common European interest, will contribute to improving the functioning of the internal market and strengthening economic and social cohesion.

308 In view of the fact that the positive effects of the Fixed Link are not limited to the economic operators in one Member State, but benefit other economic operators in the European Union more widely, the Commission was entitled, in the exercise of its broad discretion, to take the view that the risk of a dominant position on a local market for transport services was not capable of offsetting the positive effects of the Fixed Link in terms of a contribution to the objective of common European interest.

309 In addition, it is apparent from recital 362 of the contested decision that, on the market for transport services for crossing the Fehmarn Belt, namely on the route

between Rødby and Puttgarden, the applicants currently hold a monopoly. Therefore, the Commission was entitled to find, without making a manifest error of assessment, that, if ferry services continued to operate on that route, the Fixed Link would strengthen competition on that market.

310 Furthermore, while it is true that Scandlines does not hold a monopoly on a geographic market extending beyond that of the route between Rødby and Puttgarden, as the Commission rightly argues, there is also no risk that Femern will hold a dominant position on a more extended geographic market.

311 Accordingly, the Commission did not make a manifest error of assessment in finding that the risk of Femern holding a dominant position did not mean that that negative effect of the aid in terms of distortion of competition offsets the positive effects of the project in terms of contribution to the objective of common European interest.

312 Third, it is necessary to ascertain whether the Commission made a manifest error of assessment in not finding that there was a risk of market foreclosure.

313 It should be noted that, by their line of argument, the applicants, ECSA, Trelleborg Hamn, Rederi Nordö Link and VDR do not dispute, as such, the findings in recital 363 of the contested decision relating to the absence of a risk of market foreclosure. In the present case, the Commission considered that there was no risk of market foreclosure, including on the up- and downstream markets, on the ground that the Fixed Link would be open to all users on an equal and non-discriminatory basis. It also found that the pricing structure would be non-discriminatory and in line with 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 1999 L 187, p. 42) and with Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

314 By their line of argument, the applicants and those interveners complain that the Commission, in essence, failed to take account of a risk of price dumping. In that regard, it must be noted that that line of argument is essentially based on arguments similar to those raised in the first sub-complaint of the second complaint in the third part of the second plea, alleging a manifest error of assessment in the assessment of the funding gap revenues (see paragraphs 216 to 235 above). The applicants and those interveners complain that the Commission found that there was no risk of market foreclosure even though Femern's prices were lower than its costs.

315 It must be noted that the applicants, ECSA, Rederi Nordö Link, Trelleborg Hamn and VDR have not explained why the authorisation of aid measures covering a limited part of the planning and construction costs of an infrastructure project would have the effect of foreclosing the market. In addition, as follows from paragraph 224 above, it cannot be required that Femern's revenues should be

established at a level that would cover all the planning, construction and operating costs on the ground that that would mean that no aid could be granted to Femern even though it is necessary for the completion of the project. In addition, as the Commission rightly submits, since Femern is required to generate sufficient revenue not only to cover its operating costs, but also to repay the debt taken on to cover the planning and construction costs, the risk that that undertaking might grant significant price discounts is necessarily limited.

316 As regards the applicants' argument that Femern could use its dominant position to lower prices below its costs in order to foreclose the market, it must be noted that the amount of the fees for use of the Fixed Link is determined by the public authorities and that Femern has only a certain amount of leeway to grant some discounts. That undertaking is required to generate sufficient revenue not only to be able to pay its operating costs, but also to repay the loans taken out to finance the planning and construction of the Fixed Link. Therefore, if Femern were to grant some discounts, it would nevertheless have to ensure that the level of revenues remains sufficient to repay the State loans and the State guarantees within the periods specified in recitals 349 and 351 of the contested decision.

317 Moreover, the applicants cannot argue that Femern could drastically reduce prices in order to foreclose the market on the ground that, when the Danish authorities granted State aid for the Øresund Belt fixed link, the operator of that link significantly reduced the charges for road traffic. While it is true that the applicants have adduced evidence of a reduction in the amount of those charges compared with what was initially envisaged, they have not, however, adduced any evidence to support the conclusion that the situation of the operator of the Øresund Belt fixed link is comparable to that of Femern. In that regard, the Commission stated that, unlike the aid granted to the operator responsible for the Øresund Belt fixed link, in the present case the amount and duration of the measures granted to Femern were strictly limited.

318 Accordingly, the line of argument alleging that the Commission made a manifest error of assessment in finding that there was no risk of market foreclosure must be rejected.

319 It follows from the foregoing considerations that the applicants and the interveners in support of their claims have not demonstrated, first, that the Commission's findings that there was no risk of market saturation and no risk of market foreclosure are vitiated by manifest errors of assessment and, second, that the Commission made a manifest error of assessment in finding that the risk of a dominant position did not offset the positive effects in terms of contribution to the objective of common European interest.

320 Accordingly, the line of argument alleging that the Commission made manifest errors of assessment in the examination of certain negative elements which, taken individually or together, are capable of offsetting the positive effects in terms of contribution to the objective of common European interest must be rejected.

321 In the fourth place, as regards the applicants' line of argument by which, in essence, it is alleged that the Commission failed to take account of the fact that the access plans for Scandlines' facilities in Puttgarden are downgraded, it should be noted, first of all, that the evidence adduced by the applicants, on which there are road layout modifications in the vicinity of Puttgarden, is not sufficiently precise to determine that Femern is responsible for the construction of those modifications to the roads. In that regard, as the Kingdom of Denmark has stated, it follows from Article 5(2) of the Fehmarn Belt Treaty that, in principle, it is for the German authorities to carry out the upgrading and financing of the hinterland connections up to the Fixed Link.

322 Next, even if Femern were to carry out works for the construction of certain roads in the territory of the Federal Republic of Germany, there is no evidence to establish that that undertaking decided on the layout of those roads. Contrary to what the applicants submit, it is not apparent from the contract concluded on 30 October 2009 between Femern and the Federal Republic of Germany represented by the *Land* of Schleswig-Holstein that the German authorities delegated to that undertaking the necessary powers to decide on the layout of roads in the territory of the Federal Republic of Germany. It is apparent from Article 2(1) of that contract that the sovereign powers of the State are not transferred to Femern.

323 It follows that, since responsibility for ensuring access to the port of Puttgarden lies with the German authorities, the Commission was fully entitled to consider that it was not for the Commission, in the context of the review of State aid, to assess whether road modifications would hinder access to the port of Puttgarden.

324 Furthermore, as regards the claim that Femern has used the aid to remove Scandlines' rail access to the port of Rødby, it must be noted that the evidence provided is not precise enough to determine whether the removal of that access concerns the construction of the Fixed Link as such or whether it concerns the construction of the rail hinterland connections, which are the responsibility of Banedanmark on behalf of Femern Landanlæg.

325 In the fifth place, as regards the applicants' argument that the aid distorts competitors' investments on the ground that the Danish Minister for Transport refused to support an application for financing under the CEF for a zero-emissions ferry project, it must be noted that that decision not to support the applicants' project was adopted by the Danish Government in the context of the implementation of transport policy and is not imputable to Femern. It follows that the Commission was entitled to conclude, in recital 360 of the contested decision, that such a decision cannot be taken into account in the balancing assessment.

326 In the sixth place, as regards the line of argument, raised for the first time at the hearing by NABU, that, in the balancing exercise, the Commission did not take sufficient account of the environmental impact of the Fixed Link, that line of argument must be rejected as inadmissible on the ground that the application does

not contain any complaint or argument calling into question the merits of the findings made by the Commission in recitals 366 to 368 of the contested decision. In any event, that line of argument cannot succeed. It is not supported by any evidence and, moreover, taking into account environmental considerations is not part of weighing up the positive and negative effects of the aid measure (see, by analogy, judgment of 22 September 2020, *Austria* v *Commission*, C-594/18 P, EU:C:2020:742, paragraphs 101 and 102). Moreover, although the Commission found, in recitals 367 and 368 of the contested decision, that the Danish authorities took account of the environmental impact of the Fixed Link, that that impact was considered and mitigated and that the basis for the project was that it should be prepared, constructed and operated so that harmful effects on nature and the environment are prevented and so that considerable adverse impacts are countered, NABU has not adduced any evidence capable of calling into question those findings.

327 In the light of the foregoing considerations, the fourth part of the second plea must be rejected in its entirety.

328 In the light of all of the foregoing considerations, the action must be dismissed.

III. Costs

329 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

330 Under Article 138(1) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. Accordingly, the Kingdom of Denmark, which intervened in support of the form of order sought by the Commission, must bear its own costs.

331 Under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article to bear its own costs. In the present case, ECSA, DFA, NABU, VDR, Aktionsbündnis, FSS, Rederi Nordö-Link and Trelleborg Hamn must bear their own costs.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Scandlines Danmark ApS and Scandlines Deutschland GmbH to bear their own costs and to pay those incurred by the European Commission;**

3. **Orders the Kingdom of Denmark, European Community Shipowners' Associations (ECSA), Danish Ferry Association, Naturschutzbund Deutschland eV (NABU), Verband Deutscher Reeder eV, Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV, Föreningen Svensk Sjöfart (FSS), Rederi AB Nordö-Link and Trelleborg Hamn AB to bear their own costs.**

Papasavvas Spielmann Brkan

Gâlea Tóth

Delivered in open court in Luxembourg on 28 February 2024.

V. Di Bucci M. van der Woude

Registrar President

Certified copy of an original signed by qualified electronic signature

Registry of the General Court

28 February 2024

Table of contents

I. Background to the dispute 3

A. The Fehmarn Belt Fixed Link project.. 3

B. Events prior to the dispute 5

C. Administrative procedure 6

D. Contested decision 6

E. Forms of order sought... 7

II. Law 7

A. The first plea in law, alleging that the Commission incorrectly classified the measures at issue as one single ad hoc aid 7

B. The second plea in law, alleging infringement of Article 107(3)(b) TFEU ……………………………………………………………………15

1. The first part, alleging that the Commission incorrectly classified the project as a project of common European interest... 16

(a) Admissibility of the new complaint alleging breach of the principle of the phasing out of environmentally harmful subsidies.......................... 16

(b) The third complaint, alleging that the project is not co-financed by Femern 17

(c) The first and second complaints, alleging that there is no positive socioeconomic return 18

2. The second part, alleging that the Commission was wrong to conclude that the aid was necessary 23

(a) The first complaint, alleging that the aid had no incentive effect 23

(b) The second complaint, alleging that the Commission was wrong to find that the counterfactual scenario consisted in the absence of an alternative project 29

(c) The third complaint, challenging the periods used for the purposes of calculating the IRR (necessity of the aid) and of calculating the funding gap (proportionality of the aid).. 33

3. The third part, alleging that the Commission was wrong to conclude that the aid was proportionate 40

(a) The first complaint, challenging the temporal limitation of the aid . 40

(b) The second complaint, challenging the funding gap 44

(1) The first sub-complaint, challenging the revenue 45

(2) The second sub-complaint, challenging the costs 48

(c) The third complaint, challenging the aid amount 51

4. The fourth part, challenging the analysis of the prevention of undue distortions of competition and the balancing test 55

III. Costs 64