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COMMISSION DECISION

of 13.2.2024

on the measures
State aid SA.52162 (2019/C) (ex 2018/FC) - Denmark
State aid SA.52617 (2019/C) (ex 2018/FC) - Sweden
implemented by Denmark and Sweden for Øresundsbro Konsortiet

(Text with EEA relevance)

(Only the English text is authentic)

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PUBLIC VERSION

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THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

1.1. The formal complaint

(1) On 16 April 2013, ForSea[2] (the 'Complainant') filed a complaint with the Commission alleging that the State guarantees granted by Denmark and Sweden (together, the 'States') in favour of Øresundsbro Konsortiet I/S (the 'Consortium') in respect of the Øresund Fixed Link (the 'Fixed Link') constitute unlawful State aid,

[1] OJ C 109, 22.3.2019, p. 46, and OJ C 109, 22.3.2019, p. 72.

[2] It was Scandlines Øresund I/S that, on 16 April 2013, filed the complaint with the Commission. In January 2015, Scandlines Øresund I/S was bought by the HH Ferries Group and was renamed as HH Ferries I/S. On 9 November 2018, the HH Ferries Group announced that it would change its name to ForSea.

and that that State aid is incompatible with the internal market.[3] The Complainant operates a ferry service between Helsingør, Denmark, and Helsingborg, Sweden across the northern, and narrowest part of the Øresund strait.

(2) The Commission sent a request for information to the States on 13 May 2013. The States submitted a joint reply, registered on 28 June 2013. The Commission requested additional information on 15 October 2013, to which the States replied on 11 December 2013 and 12 March 2014.

(3) On 2 December 2013, the Complainant submitted additional information. By letter of 8 January 2014, the Complainant submitted further documentation on the State guarantees and alleged that, in addition to the guarantees, the Consortium also benefited from a favourable taxation regime in Denmark.[4] Following the Complainant's submission, the Commission sent a request for information to the States on 21 February 2014. On 11 March 2014, Sweden informed the Commission that it had no comments on the alleged tax advantages. Denmark submitted its reply on 24 April 2014.

(4) On 15 May 2014, the Commission sent another request for information to Denmark, to which it replied on 13 June 2014.

(5) On 24 March, and on 2, 3, 24, and 28 April 2014, the Complainant submitted additional information in the form of an annual report of the Consortium, press articles and a note on the alleged tax advantages. The Commission did not forward those submissions to Denmark or Sweden.

(6) On 20 May 2014, the Complainant submitted further information. On 4 June 2014, the Commission invited the States to provide comments on the Complainant's submission of 20 May 2014. The States submitted a joint reply on 26 June 2014.

(7) On 30 May, and on 3 and 17 June 2014, the Complainant submitted further information related to press articles. The Commission did not forward those submissions to Denmark or Sweden.

(8) On 18 June 2014, the Complainant submitted supplementary information. On 30 June 2014, the Commission forwarded that submission to the States. On 1 September 2014, the States submitted a joint reply.

(9) On 27 August, and again on 8 and 9 September 2014, the Complainant submitted additional information related to press articles. The Commission did not forward those submissions to Denmark or Sweden.

(10) On 15 September 2014, the States submitted a joint statement and additional information.

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[3] This complaint was registered as SA.36558 for Denmark and as SA.36662 for Sweden.

[4] This part of the complaint was registered as SA.38371.

1.2. The 2014 decision

(11) On 15 October 2014, the Commission adopted a decision[5] (the '2014 decision') finding, firstly, that the public financing of the road and rail hinterland connections to the Fixed Link and the Danish 'joint taxation regime' should not be considered as State aid within the meaning of Article 107(1) TFEU. Secondly, the Commission decided not to raise objections against 'the Danish special tax measures for depreciation of assets and carry-forward losses and the guarantees granted by Denmark to the Consortium' on the ground that, although those measures constituted State aid within the meaning of Article 107(1) TFEU, they were compatible with the internal market on the basis of Article 107(3), point (b) TFEU. In the same decision, the Commission considered that 'the guarantee granted to the Consortium by Sweden' was existing aid within the meaning of Article 1(b), point (i) of Council Regulation No 659/1999[6] ('Regulation 659/1999') and Article 144 of the Act of Accession of Norway, Austria, Finland and Sweden[7] ('Act of Accession of Austria, Finland and Sweden'), in relation to which there was no reason to initiate the procedure to propose appropriate measures regarding existing aid schemes[8]. The Commission also found that 'the States and the Consortium could have legitimate expectations that the Commission would not call into question the State guarantees and the tax measures on the basis of State aid rules'. The Commission based that finding on the specific circumstances of the case and on the general policy adopted by the Commission that financing measures for the construction and operation of infrastructure definitively adopted before the judgment of the General Court of 12 December 2000 in *Aéroports de Paris*[9] (the '*Aéroports de Paris* judgment') can no longer be called into question on the basis of State aid rules, because public authorities could legitimately consider that such measures did not constitute State aid, and, accordingly, did not need to be notified to the Commission (see further, recital (504)) Additionally, the Commission found in the 2014 decision that, given that 'the State guarantees and the fiscal benefits are, in any event, compatible with the internal market', it was not necessary to determine whether those legitimate expectations extended beyond the date of the *Aéroports de Paris* judgment.

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[5] Commission decision C(2014) 7358 final of 15 October 2014 in case SA.36558 (2014/NN) and SA.38371 (2014/NN) – Denmark and SA.36662 (2014/NN) – Sweden – Aid granted to Øresundsbro Konsortiet (OJ C 418, 21.11.2014, p. 1 and OJ C 437, 5.12.2014, p. 1).

[6] Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 83, 27.3.1999, p. 1.

[7] Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, OJ C 241, 29.8.1994, p. 21.

[8] Article 18 of Regulation 659/1999 provides: 'Where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned'.

[9] Judgment of the General Court of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, EU:T:2000:290.

1.3. Partial annulment of the 2014 decision

(12) On 12 February 2015, the Complainant brought an action for annulment, pursuant to Article 263 TFEU, before the General Court, against the 2014 decision. By its ruling of 19 September 2018, the General Court partially annulled the 2014 decision (the '*Øresund* judgment')[10], insofar as the Commission decided not to raise objections with respect to the guarantees granted by the States to the Consortium or the aid relating to depreciation of assets and carrying forward of losses granted by Denmark to the Consortium.

(13) The General Court dismissed the action as to the remainder. In particular, it rejected the Complainant's arguments in respect of the Commission's finding that the measures for the public financing of the road and rail hinterland connections, and the Danish 'joint taxation regime', did not constitute State aid within the meaning of Article 107(1) TFEU. The General Court also rejected the argument that the Commission had erred in law by finding that the Consortium and the States could claim the benefit of legitimate expectations that precluded recovery, in the event that the aid granted to the Consortium should be considered incompatible with the internal market, for the period before the *Aéroports de Paris* judgment.

(14) The *Øresund* judgment was not appealed.

1.4. Exchanges following the *Øresund* judgment

(15) On 22 October 2018, the Commission sent a request for information to the States, requesting factual information and evidence on the guarantees provided to the Consortium, to which the States replied on 10 December 2018.

(16) On 10 December 2018, the Commission services had a meeting with the Complainant.

(17) On 11 December 2018, the States provided the Commission with a note on the possible implications of the *Øresund* judgment and a future Commission decision.

(18) On 17 December 2018, the Commission services had a meeting with the States and the Consortium, to discuss the economic and financial aspects of the Fixed Link, in relation to which the Commission services had sent preparatory questions to the States on 10 December 2018.

(19) Scandlines Danmark ApS and Scandlines Deutschland GmbH (together, 'Scandlines') submitted a letter to the Commission on 21 December 2018 in relation to the *Øresund* judgment and its link with the judgment of the General Court of 13 December 2018 on Fehmarn Belt, *Scandlines* v *Commission* ('*Scandlines Fehmarn Belt* judgment')[11].

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

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

(20) The States submitted additional information on 21 December 2018 to follow up on the meeting held on 17 December 2018. Denmark submitted further information on 17 January 2019, and the States provided further information on 21 January 2019 in this respect.

(21) On 30 January and on 1 February 2019, Stena Line Scandinavia AB ('Stena Line') submitted information to the Commission in relation to the *Øresund* judgment and its link with the judgment of the General Court of 13 December 2018 on Fehmarn Belt, *Stena Line* v *Commission* ('*Stena Line Fehmarn Belt* judgment')[12].

(22) On 6 February 2019, the Commission requested further information from the States in view of the meeting held on 17 December 2018 and the information provided on 21 December 2018, which was provided on 29 March 2019.

1.5. The Opening decision

(23) By letter dated 28 February 2019, the Commission informed the States that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the State guarantees granted by the States to the Consortium for the financing of the Fixed Link and the special tax rules on depreciation of assets and on carry-forward of losses that Denmark granted to the Consortium (the 'Opening decision').

(24) The Opening decision was published in the Official Journal of the European Union on 22 March 2019[13]. The Commission invited interested parties to submit their comments within one month.

1.6. The formal investigation procedure

(25) On 23 April 2019, the Complainant, Scandlines, and Stena Line submitted comments in relation to the Opening decision. On 2 and 8 May 2019, the Commission forwarded those comments to the States. On 17 May 2019, three further interested parties (Föreningen Svensk Sjöfart ('FSS'), Grimaldi Group ('Grimaldi') and Trelleborg Hamn AB ('Trelleborg Port')) submitted comments in relation to the Opening decision. On 7 June 2019, the Commission forwarded those comments to the States. The States included their reply to those submissions in their comments of 8 July 2019 on the Opening decision (recital (28)).

(26) On 24 April 2019, the States provided an informal proposal to the Commission for a mutually agreed timetable for the formal investigation procedure.

(27) On 24 June 2019, Stena Line submitted additional comments. On 25 June 2019, the Commission forwarded those additional comments to the States. The States did not submit a reply specifically related to that submission.

(28) On 8 July 2019, the States sent their comments to the Commission in respect of the Opening decision.

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

13 *Supra,* footnote 1.

(29) On 28 August and 9 October 2019, the Commission services held telephone conferences with the States and the Consortium.

(30) On 18 November and 9 December 2019, the Complainant submitted additional information, which the Commission forwarded to Denmark on 16 December and to Sweden on 20 December 2019. On 20 December 2019, the Complainant submitted additional information. On 4 February 2020, the Commission forwarded those additional comments to the States. The States did not submit a reply specifically related to the submissions of 18 November, 9 December or 20 December 2019.

(31) On 22 April 2020, the States submitted a note to the Commission on the basis of which, on 23 April 2020, the Commission services held a virtual meeting with the States and the Consortium.

(32) On 28 May 2020, the Commission services held a virtual meeting with the States and the Consortium. On 29 May 2020, the Commission submitted questions to the States, to which they replied on 2, 17 and 18 June 2020. On 17 June 2020, the States submitted a note to the Commission on the future refinancing needs of the Consortium.

(33) On 17 June 2020, the Commission services held a virtual meeting with the Complainant.

(34) On 1 July 2020, the Complainant submitted further comments to the Commission.

(35) On 1 July 2020, the States submitted further information to the Commission on the future refinancing of the Consortium.

(36) On 13 July 2020, the States submitted further comments to the Commission, on the basis of which, on 17 September 2020, the Commission services held a virtual meeting with the States and the Consortium. On 21 September 2020, Denmark submitted additional information.

(37) On 1 September 2020, the States submitted further information to the Commission on the future refinancing of the Consortium.

(38) On 17 September 2020, the Complainant submitted further comments. On 18 September 2020 and on 14 October 2020, the Commission forwarded those additional comments, and the comments of 1 July 2020 (recital (34)), to the States, to which the States replied on 11 November 2020.

(39) On 28 September 2020, the States submitted further information to the Commission.

(40) On 14 October 2020, the Commission sent questions to Denmark. On 16 December 2020, Denmark submitted a reply to those questions. On 29 January 2021, the Commission services requested further clarifications from Denmark which were discussed on 3 February 2021 during a virtual meeting between the Commission services, the States and the Consortium. On 4 February and 7 April 2021, Denmark submitted further information to the Commission.

(41) On 29 April 2021, the Complainant submitted further observations to the Commission.

(42) On 10 May 2021, the Commission services requested further clarifications from Denmark which were discussed on 27 May 2021, during a virtual meeting between the Commission services, Denmark and the Consortium.

(43) On 3 June 2021, the Commission sent questions to the States to which they replied on 16 June 2021. On 23 June 2021, the Commission services held a virtual meeting with the States and the Consortium.

(44) On 4 June 2021, the Commission services held a virtual meeting with the Complainant. On 10 June 2021, the Complainant submitted replies to the Commission on questions raised during the virtual meeting of 4 June 2021.

(45) On 5 October 2021, the Complainant submitted information to the Commission.

(46) On 22 November 2021, the Commission services held a virtual meeting with the States.

(47) On 25 November 2021, the States provided further information.

(48) On 20 February 2022, the Commission sent questions to Denmark. On 28 May 2022, Denmark replied to those questions.

(49) On 28 October 2022, the Commission services sent some preliminary observations relating to its formal investigation to the States, which were discussed during a virtual meeting between the Commission services, the Consortium, and the States on 5 December 2022. On 6 December 2022 the Commission services sent, as follow-up, some further reference information to Denmark. On 3 and 16 May 2023, the States replied to the preliminary observations of the Commission services of 28 October 2022. On 9 June 2023, the Commission services held a virtual meeting with the States and the Consortium on which the Commission services sent further preliminary observations to the States on 20 July 2023.

(50) On 3 July 2023, the States submitted information to the Commission on a potential commitment with regards to the future State guarantees.

(51) On 22 September 2023, the Commission services held a virtual meeting with the States and the Consortium.

(52) On 2, 11, and 27 October 2023, the Commission requested further information from the States, to which they replied on 7 November 2023.

(53) On 3 January 2024, Trelleborg Port submitted a letter to the Commission, stating that if, within two months, the Commission had not defined its position, it would promptly bring an action against the Commission’s failure to act before the General Court of the European Union.

(54) On 29 January 2024, the States submitted a commitment that the Consortium would finance new debt, and refinance existing debt, on market terms.

(55) By letters of 15 August 2023 and of 22 September 2023, the States exceptionally agreed to waive their rights deriving from Article 342 TFEU, in conjunction with

Article 3 of Regulation 1/1958[14], and agreed to have this decision adopted and notified in the English language, only.

2. DETAILED DESCRIPTION OF THE PROJECT AND ALLEGED AID MEASURES

2.1. The Fixed Link

(56) The Fixed Link is a 16 km long fixed link for road and railway traffic between the Swedish coast and the Danish island of Amager, and is composed of a toll-funded bridge, the artificial island of Peberholm, and an immersed tunnel. It provides a direct connection between Copenhagen, in Denmark, and Malmö, in Sweden, and was constructed as the longest combined road and rail bridge in Europe.

(57) The Fixed Link was constructed between 1995 and 2000 and has been in operation since July 2000.

(58) The Fixed Link was on the first list of Trans-European Transport Network ('TEN-T') priority projects endorsed by the European Council in 1994. The States referred to an analysis from 2010 on the TEN-T priority projects, in which the Commission stated that the Fixed Link 'has contributed to a great increase of the traffic and it has a very important positive impact on the development of the regions of Copenhagen and Scania'.[15] The Fixed Link connects the 'Nordic Triangle road and rail links' (TEN-T priority project 12) via Denmark and via the 'Fehmarn Belt' (TEN-T priority project 20) with Germany and Central Europe.

(59) The objective of the States, with the Fixed Link, was to create an improved road and rail traffic connection between Denmark and Sweden, and, thereby, provide the necessary conditions for more intense and extensive cultural and economic cooperation, and for the development of a common labour and housing market in the Øresund region, to the benefit of both States. The Fixed Link would also significantly improve the accessibility of the airports of Copenhagen and Malmö, located on either side of the Øresund strait.

(60) In addition, the construction of road and rail hinterland connections was necessary in both States to make the Fixed Link functional. That hinterland infrastructure connects the Fixed Link with the respective national road and rail network systems in Denmark and Sweden. Denmark and Sweden agreed that it was their responsibility to construct those connections on their respective territories[16].

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[14] Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

[15] TEN-T Priority Projects – Progress Report 2010, European Commission, Directorate General for Mobility and Transport, 2010.

[16] Article 8 of the Treaty of 23 March 1991 between the Government of Denmark and the Government of Sweden concerning a Fixed Link across the Sound.

2.1.1. Legal setup and tasks of the Consortium

(61) The States set out the legal and operational aspects of the construction, management, and operation of the Fixed Link on 23 March 1991 in the 'Treaty of 23 March 1991 between the Government of Denmark and the Government of Sweden concerning a Fixed link across the Sound' (the 'Intergovernmental Agreement'). The Intergovernmental Agreement includes, as an attachment, an additional protocol determining details on the States' joint and several guarantee obligation (see further, recital (85)) (the 'Additional Protocol to the Intergovernmental Agreement'). The Intergovernmental Agreement, including the Additional Protocol to the Intergovernmental Agreement, was ratified by Sweden on 8 August 1991 and by Denmark on 24 August 1991. The Intergovernmental Agreement and the Additional Protocol to the Intergovernmental Agreement entered into force on exchange of the instruments of ratification in Stockholm on 24 August 1991.

(62) With the Intergovernmental Agreement, the States agreed to jointly finance, construct, and operate the Fixed Link. To that end, Article 10 of the Intergovernmental Agreement provides that it is for Denmark and Sweden to each form a limited liability company, wholly owned by the respective States. Article 10 of the Intergovernmental Agreement, further, provides that those companies should, in turn, form a consortium that would own the Fixed Link, and would be 'responsible, on their joint account and as one entity, for the project design and any other preparations for the Fixed Link, as well as for its financing, building, and operation'. That setup was chosen so that the States would remain the ultimate owners of the companies involved, and, thus, all profits and losses generated by the Fixed Link would lie with the States.

(63) The Intergovernmental Agreement was implemented by the States in their national laws: (i) in Sweden, through the Government bill 1990/91:158 on an agreement between Sweden and Denmark on a fixed link across Øresund ('Government bill 1990/91:158') of 25 March 1991 that was adopted by the Swedish Parliament decision of 12 June 1991[17] (the 'Swedish Parliament decision'), and (ii) in Denmark, through the 'Act on the construction of the Øresund fixed link' (Act No 590 of 19 August 1991) (the 'Construction Act')[18].

(64) Section 5 of the Construction Act provides that the Danish Minister for Transport would set up a holding company. Section 6 of the Construction Act specifies that that holding company would set up a public limited liability company, responsible for the Danish road and rail hinterland connections. That limited liability company would enter into a consortium agreement with a limited liability company set up by Sweden. Sund & Bælt Holding A/S ('Sund & Bælt'), was established as a 100 % Danish State-owned holding company on 4 December 1991. On 9 December 1991, Sund & Bælt established the limited liability company, A/S Øresundsforbindelsen ('A/S Øresund').

[17] Riksdagsskrivelse 1990/91:379.

[18] The Construction Act, together with the Act for the Construction of a Fixed Link across Storebælt (Consolidated Act No 260 of 4 May 1998), was replaced by Act No 588 of 24 June 2005 concerning Sund & Bælt Holding A/S.

(65) Section 4 of the Government bill 1990/91:158, as adopted by the Swedish Parliament decision, provides that the Swedish National Road Administration and the Swedish National Rail Administration[19] would set up a Swedish company to be responsible for the Swedish road and rail hinterland connections and to enter into a consortium agreement with a Danish State-owned company. On 30 August 1991, Sweden formed a limited liability company: Svensk-Danska Broförbindelsen AB ('SVEDAB'), which is 100 % owned by the Swedish State, through the Swedish National Road Administration (50 %) and the Swedish National Rail Administration (50 %)[20].

(66) Through a consortium agreement and its additional protocol dated 27 January 1992 (the 'Consortium Agreement'), A/S Øresund and SVEDAB established the Consortium (i.e. Øresundsbro Konsortiet I/S)[21], and laid down its ownership structure. The Consortium Agreement entered into force upon approval by the Governments of Denmark and Sweden on 13 February 1992. In accordance with the Intergovernmental Agreement, the Consortium Agreement provides that the Consortium owns and is responsible for the planning, project design, financing, construction, operation and maintenance of the Fixed Link, and other operations in association therewith[22]. A/S Øresund and SVEDAB own jointly, on a fifty-fifty basis, all of the Consortium's assets and all of its rights[23]. Both the profits and the losses derived from the activities of the Consortium are shared equally by the two partner companies, A/S Øresund and SVEDAB. In relation to any third party, A/S Øresund and SVEDAB are jointly and severally liable for the Consortium's obligations[24].

(67) The Consortium cannot engage in activities other than those related to the Fixed Link, as defined in Section 1 of the Consortium Agreement. The Consortium is not responsible for the construction of the road and rail hinterland connections to the Fixed Link. The States delegated that task to the parent companies of the Consortium, i.e., A/S Øresund and SVEDAB, which are responsible for the planning, project design, financing, construction, operation and maintenance of those connections in their respective countries[25].

(68) As already clarified at recital 48 of the Opening decision, the formal investigation, and, therefore, this decision, do not concern the measures in favour A/S Øresund and SVEDAB, relevant to the financing of the road and rail hinterland connections. The

[19] In 2010, the Swedish National Road Administration (Vägverket) and the Swedish National Rail Administration (Banverket) merged into Trafikverket (the Swedish Transport Administration).

[20] With effect from 1 January 2008, following a decision by the Swedish Government, the Swedish National Road Administration and the Swedish National Rail Administration handed over the mandate to exercise the ownership rights of SVEDAB to the Swedish Ministry of Enterprise, Energy and Communications.

[21] Established as 'Øresundskonsortiet', it changed its name to 'Øresundsbro Konsortiet' with effect from January 2000.

[22] Article 10 of the Intergovernmental Agreement and Section 1 of the Consortium Agreement.

[23] Article 11 of the Intergovernmental Agreement and Section 3 of the Consortium Agreement.

[24] Article 11 of the Intergovernmental Agreement and Section 3 of the Consortium Agreement.

[25] Section 2(5) of the Consortium Agreement.

Commission found in the 2014 decision that those measures do not constitute State aid within the meaning of Article 107(1) TFEU, and, in the *Øresund* judgment, the General Court rejected the action for annulment brought by the Complainant as regards those measures. The Commission notes, in this respect, that the Complainant has not appealed the *Øresund* judgment.

2.1.2. Financing model for the Fixed Link

(69) Article 1 of the Intergovernmental Agreement refers to a 'toll-financed' Fixed Link. The Intergovernmental Agreement also specifies, in Article 14, that the costs of the project design and other preparations for the Fixed Link, as well as its construction, maintenance, and operation, shall be fully covered by the Consortium through user charges. Article 14, further, stipulates that Denmark and Sweden agreed that no subsidies should be granted for the activities of the Consortium from the budgets of the respective States.

(70) Section 4(6) of the Consortium Agreement provides, in essence, that the toll charges to be levied on the users of the Fixed Link are intended to cover the costs of planning, project design, construction, operation, and maintenance of the Fixed Link. The Consortium is to determine and levy the toll charges, in accordance with the principles agreed by the Danish and Swedish Governments. As stated in the preparatory notes to the Construction Act[26] ('preparatory notes to the Construction Act'), and in the Government bill 1990/91:158, the revenues from road and rail collected by the Consortium for the use of the Fixed Link are intended to finance the road and rail hinterland connections, as well. In practice, this happens through the payment of dividends by the Consortium to the parent companies.

(71) The toll-financing includes fees from users for the use of the toll road, and fees paid by Trafikverket (the 'Swedish Transport Administration') and Banedanmark (the 'Danish State Rail Administration') for the use of the Øresund railway line. The Swedish Transport Administration and the Danish State Rail Administration pay a fixed annual amount to the Consortium, established in the Additional Protocol to the Intergovernmental Agreement and amounting to DKK 150 million (EUR 20.10 million[27])[28,29] for each of them, adjusted with the general price evolution.

(72) The preparatory notes to the Construction Act include an estimate of the planning, project design, and construction costs of the Fixed Link and the Danish road and rail hinterland connections, amounting to DKK 11.7 billion[30] (EUR 1.57 billion) and DKK 3.2 billion (EUR 0.43 billion) respectively. Government bill 1990/91:158

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26 Proposal for an Act on the construction of a fixed link across the Øresund, LFF1990-1991.2.178, delivered on 2 May 1991 by the Danish Minister for Transport.

27 Denmark conducts a fixed exchange rate policy for its Danish krone (DKK) against the euro at EUR 1 = DKK 7.46038. This exchange rate is applied throughout this decision when calculating the approximate EUR equivalent of DKK.

28 Price level on 1 January 1991.

29 Paragraph 4 of the Additional Protocol to the Intergovernmental Agreement.

30 At 1990 price level.

includes a range for the costs of the Fixed Link of SEK 10 to 12 billion[31] (EUR 1.33 billion to EUR 1.60 billion)[32] and a maximum amount for the cost of the hinterland of SEK 1.9 billion (EUR 0.25 billion). The Government bill 1990/91:158 specifies that the lowest value of the range corresponds to the Swedish estimate and the highest value to the Danish estimate. To those amounts the financing costs were to be added. The Fixed Link was partially co-financed by the Union, with a grant of EUR 127 million under the TEN-T Framework. Following the completion of the Fixed Link in 2000, the Consortium's interest-bearing net debt totalled DKK 19.6 billion[33] (EUR 2.63 billion). The States explained that, since the opening of the Fixed Link, the revenues have always exceeded operating costs and the operation of the Fixed Link has not been financed with debt.

(73) When founded, the Consortium was provided with initial capital by its parent companies, of a total of DKK 50 million (EUR 6.70 million), pursuant to Section 4(1) of the Consortium Agreement and as provided for by Article 11 of the Intergovernmental Agreement. Article 11 of the Intergovernmental Agreement also provides that the Consortium shall raise loans to finance the Fixed Link, and Article 12 of the Intergovernmental Agreement provides that the States shall 'jointly and severally guarantee the obligations in respect of the [Consortium]'s loans and other financial instruments used in connection with the financing'. This is reflected in Section 4(3) of the Consortium Agreement, which provides that the capital requirements of the Consortium shall 'be satisfied by obtaining loans or the issuance of financial instruments in the open market, with security in the form of Swedish and Danish government guarantees'.

(74) The Consortium raised loans as liquidity needs arose during the planning and construction phase. The debt is regularly refinanced with the purpose, as the States explained, of reducing the overall financing costs. The Consortium entered into several types of financial transactions: bonds under certain bond programmes (recitals (75) to (78)), individual loans (recital (79)), credit facilities (recital (80)), and derivatives (recitals (81) to (83)). Those transactions each have their own maturity date.

(75) The Consortium has established two standard Medium Term Note ('MTN') bond programmes, one directed towards the European bond market (the 'EMTN programme') and the other directed towards the Swedish bond market (the 'Swedish MTN programme'). Through those MTN bond programmes, the Consortium has raised the majority of its capital needs. The States explained that the main benefit of the bond programmes is that the Consortium can make several issuances of debt instruments under the same programme in a time- and cost-efficient manner. The bond programmes consist of a series of documents, including an information

[31] At 1990 price level.

[32] According to Eurostat, the average exchange rate, in 1990, between the ECU and the Swedish krona amounted to ECU 1 = SEK 7.5205. This exchange rate is applied to calculate the approximate EUR equivalent of SEK.

[33] Construction and financing costs of the Fixed Link shown as net debt in 2000 prices.

memorandum[34], which is the central programme document. The establishment of a bond programme does not, per se, mean that any debt has been established. As such, it is possible to have a bond programme without any underlying bonds. The debt is only established when bonds are issued to investors.

(76) The Consortium's first bond programme was a EMTN programme established on 21 September 1995, and which is updated on an annual basis. The States explained that those updates are done to reflect an update of risk factors and to supply correct information to the market on the Consortium, its management, certain important events, etc. Those updates are required as part of the ongoing information obligations to the financial markets. The maximum aggregate principal amount of the EMTN programme increased from USD 1 billion (EUR 0.76 billion)[35] to USD 2 billion (EUR 2.17 billion)[36] in 2000, and to USD 3 billion (EUR 2.41 billion)[37] in 2004.

(77) The Swedish MTN programme, under which the Consortium could take out loans in Swedish krona, with an aggregate principal amount of SEK 3 billion (EUR 0.35 billion)[38] was established on 2 December 1996. The Swedish MTN programme has been updated on an ad hoc basis. Updates[39] include, for example, the addition of issuing credit institutions under the programme, or an entitlement for the Consortium to issue loans in euro instead of krona. The aggregate principal amount of the Swedish MTN programme has been updated on two occasions and amounts, since 2000, to SEK 10 billion (EUR 1.17 billion)[40].

(78) The Consortium has obtained bonds under those EMTN and Swedish MTN programmes in order to finance and refinance the costs of planning and construction of the Fixed Link. Once a bond under the EMTN programme or the Swedish MTN programme has become due and needs to be refinanced, the origination process commences and arrangements with a bank regarding the specific details of that bond are negotiated and set forth in the pricing terms document of that bond (amount, interest rate, payment details, etc).

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[34] An information memorandum describes the programme, including the terms and conditions that will apply to the debt instruments issued under the programme, and includes descriptive information about the issuer (in this case the Consortium).

[35] According to Eurostat, the average exchange rate, in 1995, between the ECU and the US dollar amounted to ECU 1 = USD 1.3080 (source: Eurostat). This exchange rate is applied to calculate the approximate EUR equivalent of USD.

[36] According to Eurostat, the average exchange rate, in 2000, between the Euro and the US dollar amounted to EUR 1 = USD 0.9236. This exchange rate is applied to calculate the approximate EUR equivalent of USD.

[37] According to Eurostat, the average exchange rate, in 2004, between the Euro and the US dollar amounted to EUR 1 = USD 1.2439. This exchange rate is applied to calculate the approximate EUR equivalent of USD.

[38] According to Eurostat, the average exchange rate, in 1996, between the ECU and the Swedish krona amounted to ECU 1 = SEK 8.5147. This exchange rate is applied to calculate the approximate EUR equivalent of SEK.

[39] Implemented e.g. by supplementary agreement of 22 September 1998 and by supplementary agreement of 3 February 2000.

[40] It was also possible to issue loans in euro up to the corresponding maximum amount.

(79) As set out at recital (74), the Consortium also directly obtained several loans, outside the context of those MTN programmes. In particular, during the construction phase of the Fixed Link, the Consortium obtained several loans from the European Investment Bank ('EIB'), by entering into finance contracts that contain the terms and conditions of the loan, and the Consortium obtained loans directly from private lenders, entering into standalone loan agreements.

(80) Furthermore, the Consortium has held credit facilities with certain banks for overnight payment purposes and for short term variations in liquidity. The credit facilities were established in 1994 and are renewed every four years.

(81) Finally, the loans are usually, but not necessarily, combined with a derivative transaction to re-allocate and mitigate the financial risk related to the loan (such as interest rate exposure or currency risks), or to optimise the entire portfolio of financial transactions. Such instruments, mostly swap transactions, are entered into between the Consortium and relevant banks offering those financial products. Usually, a derivative transaction is entered into with the same bank that arranged the loan, but this is not mandatory.

(82) In order to enter into such a transaction, an International Swaps and Derivatives Association ('ISDA') master agreement ('ISDA Master Agreement') is signed with each counterparty. The ISDA Master Agreement is a framework agreement issued by the ISDA. The framework consists of standard base documentation, which ensures that all transactions between the Consortium and the particular counterparty bank are subject to the same documentation, and that all transactions will be subject to netting in case a party becomes insolvent or enters default in other ways.

(83) The Consortium has also entered into Global Master Repurchase Agreements with certain banks, with the aim of entering into repurchase transactions[41], primarily for use as collateral for derivative transactions. However, no transactions have been entered into pursuant such agreements and, as such, the agreements have never been utilised.

2.2. Description of alleged aid measures

(84) As noted at recital 50 of the Opening decision, the formal investigation procedure covers the following measures taken to finance the construction and operation of the Fixed Link: (i) the State guarantees granted by Sweden and Denmark for loans and financial instruments taken out by the Consortium, (ii) the Danish rules applicable to the Consortium with regard to loss carry-forward and (iii) the Danish rules applicable to the Consortium with regard to the depreciation of assets. Section 2.2.1 further elaborates on point (i) and Section 2.2.2 elaborates on point (ii) and (iii). As noted at recital 51 of the Opening decision, the formal investigation procedure does not cover other possible measures granted by Denmark or Sweden to the Consortium, A/S Øresund, SVEDAB, Sund & Bælt, or any other related company. Recital 48 of the Opening decision clarified that the measures in favour of SVEDAB and A/S

[41] A repurchase agreement is a type of financial transaction in which a borrower sells a financial security to a lender in exchange for cash with a simultaneous agreement to buy it back in the short term.

Øresund, relevant to the financing of the road and rail hinterland connections, do not constitute State aid within the meaning of Article 107(1) TFEU.

2.2.1. The State guarantee model

2.2.1.1. Legal set up of the State guarantee model

(85) According to Article 12 of the Intergovernmental Agreement, the States undertook to jointly and severally guarantee all loans and other financial instruments taken out by the Consortium in connection with the financing of the Fixed Link. The Additional Protocol to the Intergovernmental Agreement states that those guarantee agreements should be provided without charging a guarantee premium[42]. For the purposes of this decision, the Commission uses the term 'State guarantee model' to refer to the overall arrangement consisting of the joint and several State guarantee obligation deriving from Article 12 of the Intergovernmental Agreement and implemented in Danish and Swedish legislation (see further, recitals (86) to (90)), the administration of that obligation by the Danish National Bank and the Swedish National Debt Office (see further, recitals (91) to (102)) and the implementation of that obligation by means of specific guarantee agreements relating, for example, to bond programmes and individual loans (see further, recitals (103) to (116)).

(86) As described at recital (63), the joint and several State guarantee obligation for the Consortium's borrowing, deriving from the Intergovernmental Agreement, was implemented in Swedish and Danish national legislation in 1991, via the Swedish Parliament decision and the Construction Act.

(87) In Denmark, the joint and several State guarantee obligation for the Consortium's borrowing was implemented by Section 8 of the Construction Act. This was subsequently replaced by Section 11 of Act No 588 of 24 June 2005[43] (the 'Sund & Bælt Act'). Both provisions are substantially identical and provide that the Danish State shall guarantee the obligations relating to the Consortium's loans and other financial instruments that are used in connection with the financing of the Fixed Link.[44]

(88) The preparatory notes to the Construction Act state that Section 8 of the Construction Act entails that the Danish State guarantees the interest and principal payments and other commitments relating to loans and financial instruments that the Consortium uses for financing the Fixed Link. Those preparatory notes further clarify that the background for Section 8 of the Construction Act is Article 12 of the

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[42] Paragraph 1 of the Additional Protocol to the Intergovernmental Agreement provides: 'Denmark and Sweden are agreed that no charge or the like shall be levied by the two states for the guarantee undertakings assumed by them in respect of the consortium's loans and other financial instruments used in connection with the financing'.

[43] Act No 588 of 24 June 2005 on Sund and Bælt Holding A/S.

[44] The original text of Section 8 of the Construction Act reads as follows: 'Den danske stat garanterer for forpligtelser vedrørende konsortiets lån og andre finansielle instrumenter, som benyttes i forbindelse med finansieringen af Øresundsforbindelsen'. The text of Section 11 of the Sund & Bælt Act reads as follows: 'Den danske stat garanterer for forpligtelser vedrørende Øre sundsbro Konsortiet I/S' lån og andre finansielle instrumenter, som benyttes i forbindelse med finansieringen af den faste forbindelse over Øresund.'

Intergovernmental Agreement, which entails that the States guarantee jointly and severally those obligations and that the States mutually hold equal responsibility. Those preparatory notes also state that it had not been the intention of the States, when deciding on the organisational set up (recital (62)), to limit their liability as economic guarantors for the financing of the Fixed Link.

(89) In Sweden, Section 7 of Government bill 1990/91:158, as adopted by the Swedish Parliament decision, includes a request for the Swedish parliament to authorise the Government, or the authority determined by the Government, to assume on behalf of the Swedish State, jointly and severally with the Danish State, a guarantee for the Consortium's loans and other financial instruments that are used in connection with the financing of the planning, project design, construction and operation of the Fixed Link. Section 4 of Government bill 1990/91:158, as adopted by the Swedish Parliament decision, includes the proposed organisation structure and financing of the Fixed Link, including the guarantee obligation. It provides that the Consortium will initially need significant financial funding which the Consortium should obtain by raising loans on the market. That borrowing shall be jointly and severally guaranteed by the States, which entails that both States individually guarantee the entire amount, with a right of recourse against each other for half of the amount. Section 4 of Government bill 1990/91:158, as adopted by the Swedish Parliament decision, further provides that like this, the Consortium should be able to finance the Fixed Link on favourable terms. The total guarantee commitments related to the Fixed Link were estimated to reach approximately SEK 15 billion (EUR 2.01 billion)[45,46] at the time of its completion, and included construction and financing costs. It was also noted that, for projects like the Fixed Link, with large investments over several years, it was extraordinarily difficult to estimate an exact amount, since the project costs in current prices depended, inter alia, on future interest rates and general price trends. The Government therefore intended to return to the Parliament with a report on how the project would progress. Furthermore, it was stated that during the initial years of the operational phase, the Consortium would experience negative results, since revenues from user tolls would be insufficient to completely cover the Consortium's costs. That deficit would be covered either by the holding companies, through contributions, or by the Consortium, through loans. The Government bill 1990/91:158 states that the best solution would be that the Consortium obtained the necessary funds itself, with a joint and several guarantee from the States. Correspondingly, the total guarantee commitments in this respect were estimated to reach approximately SEK 1.8 billion (EUR 0.24 billion)[47,48]. The Government intended, in this regard, to report to the Parliament on the progress of the project.

(90) The Consortium Agreement recalls this joint and several State guarantee obligation for the Consortium's borrowing. It provides, at Section 4(3): 'The Consortium's

[45] According to Eurostat, the average exchange rate, in 1991, between the ECU and the krona amounted to ECU 1 = SEK 7.4793. This exchange rate is applied to calculate the approximate EUR equivalent of SEK.

[46] At 1991 price level.

[47] *Supra*, footnote 45.

[48] At 1991 price level.

capital requirements for the planning, project design and construction of the [Fixed Link], including loan servicing costs, and for covering the capital requirements arising as a consequence of book losses which are expected to occur for a number of years after the [Fixed Link] has been opened to traffic, shall, in accordance with that agreed in the [Intergovernmental Agreement], be satisfied by obtaining loans or the issuance of financial instruments in the open market with security in the form of Swedish and Danish government guarantees.'

2.2.1.2. Administration of the State guarantee model

(91) In Sweden, the competence and obligation to jointly assign guarantees for all financing needed by the Consortium in relation to the Fixed Link was delegated to Riksgäldskontoret (the 'Swedish National Debt Office') by decisions of the Swedish Government of 13 February 1992 (K91/1443/3, K92/320/3), 1 April 1993 (K91/1443/3, K93/202/3) and 23 June 1994 (K91/1443/3, K94/1680/3).

(92) The decision of the Swedish Government of 13 February 1992 (K91/1443/3, K92/320/3) approved the Consortium Agreement.

(93) The decision of the Swedish Government of 1 April 1993 (K91/1443/3, K93/202/3) authorised the Swedish National Debt Office to issue, jointly and severally with the Danish State, guarantees in the amount of SEK 600 million (EUR 65.78 million)[49] and DKK 600 million (EUR 80.42 million). This related to financing for the Consortium's planning and project design.

(94) The decision of the Swedish Government of 23 June 1994 (K91/1443/3, K94/1680/3) authorised and imposed a commitment on the Swedish National Debt Office to administer and issue guarantees on behalf of the Swedish State and jointly and severally with the Danish State to cover all of the Consortium's financing needs for costs related to the planning, project design, construction and operation of the Fixed Link, in accordance with the Intergovernmental Agreement. The decision of the Swedish Government of 23 June 1994 has not been subject to amendments.

(95) In Denmark, Nationalbanken (the 'Danish National Bank') received a corresponding delegation through the Construction Act. In Denmark, the government debt is managed by the Danish National Bank, on behalf of the Ministry of Finance, through a power of attorney. Therefore, when the Construction Act authorised the Danish Ministry of Finance to assume – jointly and severally with the Swedish State – a guarantee on behalf of the Danish State for the financing of the Fixed Link, it also authorised the Danish National Bank to assume this joint and several State guarantee obligation.

(96) As noted at recital 30 of the Opening decision, the Danish National Bank and the Swedish National Debt Office define the general framework for the Consortium's financing policy (see further, recitals (97) to (102)), and supervise the implementation of the State guarantee model when the Consortium signs new loan agreements or uses other financial instruments in connection with the financing of

[49] According to Eurostat, the average exchange rate, in 1993, between the ECU and the Swedish krona amounted to ECU 1 = SEK 9.1215. This exchange rate is applied to calculate the approximate EUR equivalent of SEK.

the Fixed Link (see further, recitals (103) to (116)). In their comments in response to the Opening decision[50], the States provided further details on those elements, which are included in the overview below.

(97) On 16 December 1997, the Danish National Bank and the Swedish National Debt Office (on behalf of the States) and the Consortium signed a tripartite cooperation agreement (the '1997 Cooperation Agreement') to regulate some of the parties' dealings, including the right of recourse of the Danish National Bank and the Swedish National Debt Office against the Consortium, and the Consortium's reporting and information obligations to them (see further, recital (99)). That agreement was supplemented by an agreement between the Consortium and the Swedish State (through the Swedish National Debt Office), concluded on 23 October 2000 (see further, recital (100)). The 1997 Cooperation Agreement was replaced by a new tripartite cooperation agreement, concluded on 8 November 2004 (the '2004 Cooperation Agreement') (see further, recital (101)). That agreement was supplemented by an agreement between the Consortium and the Swedish State (through the Swedish National Debt Office), concluded on 14 November 2012 (see further, recital (102)).

(98) The 1997 and 2004 Cooperation Agreements contain a number of formal terms, rights, and obligations for the parties. The States explained that those practical administrative arrangements by the Swedish National Debt Office and the Danish National Bank were introduced in order to give the States an opportunity to monitor and influence the Consortium's financing policy, and to ensure that the Consortium does not exceed its mandate and that a financing policy is followed that minimises the States' long-term risk. According to the States, that mechanism further ensured that the aid granted to the Consortium does not go beyond what is necessary.

(99) The 1997 Cooperation Agreement specifies that the Danish National Bank and the Swedish National Debt Office intend to limit their right of recourse, in case of activation of guarantees, to the Consortium, and, therefore, not to use it against the parent companies. It contains a repayment plan, which can be adjusted from time to time, risk limits for liquidity investments and derivative transactions by the Consortium, and specifies certain information and reporting obligations. That agreement also provides certain details on borrowing and derivative transactions that are guaranteed by the States. As such, the Consortium shall obtain approval from the Danish National Bank and the Swedish National Debt Office for all the Consortium's transactions, such as loans and ISDA Master Agreements. The Consortium shall not enter into transactions with counterparties that have not received the prior approval of the Danish National Bank and the Swedish National Debt Office. The Consortium shall obtain the approval of the Danish National Bank and the Swedish National Debt Office for all contract documentation in connection with the Consortium's borrowing. The Danish National Bank and the Swedish National Debt Office will assess whether the individual agreements are, or may become, of importance for the scope of their joint and several State guarantee obligation, their risk, and all other circumstances that may affect the guarantee obligation or the guarantee providers.

[50] The States' comments in response to the Opening decision also refer to information provided by the Swedish and the Danish authorities in SA.36558, SA.36662, SA.51262 and SA.52617, prior to the notification of the formal investigation procedure to the States.

(100) The supplemental agreement of October 2000 between the Consortium and the Swedish State defines guidelines for the Consortium's State guaranteed borrowing and portfolio management, and specifies that, if the Consortium complies with those guidelines, individual transactions would not need to be approved by the Swedish National Debt Office before they are entered into by the Consortium. For transactions for which compliance with the guidelines might be unclear, the Consortium should first contact the Swedish National Debt Office and explain why those transactions might be considered as being covered by the agreement.

(101) The 2004 Cooperation Agreement lists certain obligations and risks concerning the Consortium's financial management. The Consortium shall have a financial policy containing guidelines and rules for financial management and financial risk management. The financial policy and financial strategy are adopted each year by the Consortium's board of directors, and shall take account of comments of the Danish National Bank and the Swedish National Debt Office. The 2004 Cooperation Agreement contains a section on the information and reporting obligation, recalls the right of recourse of the Danish National Bank and the Swedish National Debt Office, recalls the obligation of the Consortium to obtain the approval of all contract documentation in connection with its borrowing and with its entering into ISDA Master Agreements, and the need for written consent from the Danish National Bank and the Swedish National Debt Office to alter terms or conditions of a guaranteed transaction. In the event that the Consortium enters into transactions falling outside the guidelines stated in the Consortium's financial policy, the Danish National Bank and the Swedish National Debt Office have the joint and separate right to require the Consortium to cease, run down, or refrain from transactions as part of its financial management. The Consortium shall also draw up, and continuously update, the plan for the long-term development of the Consortium's financial liabilities, including a presentation of planned repayment and dividends.

(102) The supplemental agreement of November 2012 between the Consortium and the Swedish State specifies that, if the Consortium complies with its financial policy within the meaning of the 2004 Cooperation Agreement, individual transactions do not need to be approved by the Swedish National Debt Office before the Consortium enters into them. For other transactions, which do not comply with the financial policy, the Consortium should obtain the written approval of the Swedish National Debt Office to ensure that the specific transaction is covered by the joint and several State guarantee obligation.

2.2.1.3. <u>Implementation of State guarantee model</u>

(103) The Commission will first describe the implementation of the State guarantee model as it was applied until the *Øresund* judgment of 19 September 2018 (see further, recital (104) to (115)). Recital (116) provides further details for the period thereafter.

(104) In the period prior to the *Øresund* judgment, debt instruments (such as bonds) issued under the EMTN programme[51] were all guaranteed by the States. This was formalised in the form of a deed of guarantee signed by the States on 21 September 1995 in respect of the EMTN programme, established on the same day. With their

[51] 'Programme' means the programme for the issuance of debt instruments established by the Consortium.

signature, the States jointly and severally guaranteed to the holders of the instruments that if for any reason the Consortium fails to pay any guaranteed sum when due and payable, the States shall, within four business days of written demand by a holder upon both States and the Consortium, unconditionally pay that sum. The deed of guarantee was an integral part of the information memorandum. The deed of guarantee signed on 21 September 1995 did not include a direct reference to the Intergovernmental Agreement or subsequent implementing legislation, however, the EMTN programme acknowledged the establishment of the Consortium pursuant to the Intergovernmental Agreement.

(105) The subsequent EMTN programme updates also referred to the deed of guarantee of 21 September 1995, and the validity of that deed of guarantee was confirmed by the States in letters of 10 February 2000. On 22 May 2001, a new deed of guarantee was signed in respect of the EMTN programme update, published on the same date. The deed of guarantee, signed on 22 May 2001 by the States, had substantially the same conditions as the deed of guarantee signed by the States on 21 September 1995. The subsequent annual updates of the EMTN programme all referred to that deed of guarantee of 22 May 2001.

(106) Each time the Consortium issued bonds under the EMTN programme, the Danish National Bank and the Swedish National Debt Office confirmed that such bonds were subject to the deed of guarantee. The deed of guarantee of 21 September 1995 applied to bonds under the EMTN programme until 2000, whilst the deed of guarantee of 22 May 2001 applied to bonds under the EMTN programme from 2001.

(107) The States explained that this means that the Danish National Bank and the Swedish National Debt Office did not issue a specific guarantee for each individual bond, but confirmed that an already-issued deed of guarantee covered the individual bond under the EMTN programme, by consenting to the pricing terms of that loan and confirming their acceptance.

(108) Bonds issued under the Swedish MTN programme were also subject to a guarantee from the States. A deed of guarantee was issued on 2 December 1996 in favour of the holders of debt instruments issued under the Swedish MTN programme. Individual bonds issued under the Swedish MTN programme were subject to that guarantee agreement. The Swedish MTN programme referred back to the Intergovernmental Agreement. Each time an individual bond was issued under the Swedish MTN programme, bonds were approved by the Danish National Bank and the Swedish National Debt Office, without explicitly mentioning that the deed of guarantee covered the individual bond.

(109) For the stand-alone loan agreements, such as those from the EIB, the Consortium signed finance contracts with the financial institution. Attached to each finance contract was a guarantee agreement document. Those guarantee agreements between the States and financial institutions covered the entire loan facility pursuant to a respective finance contract. The guarantee agreement referred to the Intergovernmental Agreement. The last guarantee agreement related to EIB loans was entered into by Sweden and Denmark on 22 October 2001.

(110) The Consortium also obtained loans directly from private lenders, entering into stand-alone loan agreements. All of those loans were guaranteed by the States on the basis of individual guarantee agreements, and in line with the obligations in the Intergovernmental Agreement and the Consortium Agreement.

(111) As for the credit facilities held by the Consortium with a bank for overnight payment purposes and for short term variations in liquidity, Denmark and Sweden entered into a new guarantee agreement for each refinancing. The credit facilities were established in 1994 and are renewed every four years. Those guarantee agreements referred back to the Intergovernmental Agreement, the Construction Act, the Swedish Parliament Decision and the Government decisions of 1 April 1993 (K91/1443/3, K93/202/3) and 23 June 1994 (K91/1443/3, K94/1680/3).

(112) In addition, each ISDA Master Agreement was accompanied by a guarantee agreement between the Swedish National Debt Office and the Danish National Bank, and the respective counterparty, in implementation of the Intergovernmental Agreement, the Construction Act, the Swedish Parliament decision and the Government decisions of 1 April 1993 (K91/1443/3, K93/202/3) and 23 June 1994 (K91/1443/3, K94/1680/3). That guarantee agreement covered the individual transactions under the ISDA Master Agreement. The Swedish National Debt Office and the Danish National Bank did not issue individual guarantee agreements at transaction level, and did not specifically confirm that the guarantee associated with the ISDA Master Agreement applied.

(113) Finally, the Global Master Repurchase Agreements were also accompanied by a guarantee agreement between the Swedish National Debt Office and the Danish National Bank, and the respective counterparty, in implementation of the Intergovernmental Agreement, the Construction Act, the Swedish Parliament decision and the Government decisions of 1 April 1993 (K91/1443/3, K93/202/3) and 23 June 1994 (K91/1443/3, K94/1680/3). As mentioned at recital (83), no transactions have been entered into pursuant such agreements and, as such, no individual guarantee agreements.

(114) The various guarantee agreements all created directly applicable and general obligations for Sweden and Denmark, and rank *pari passu* with all other unsecured unsubordinated obligations and indebtedness of the Swedish National Debt Office and the Danish National Bank. The guarantee agreements are unconditional; the investors are not obliged to seek to enforce the claim from the Consortium but may address claims to the Swedish National Debt Office and the Danish National Bank directly upon default.

(115) The guarantees are continuing guarantees, but are *de facto* limited to the term of the loan or transaction that the guarantee secures. In case there are no transactions under a master agreement, for example, with a certain counterparty, that counterparty has no claim against the Swedish National Debt Office or the Danish National Bank, despite the existence of a guarantee; hence the guarantee may only cover actual debt of the Consortium, until the time that debt is fully repaid.

(116) With respect to the period following the *Øresund* judgment, the States informed the Commission that no further State guaranteed debt was issued. The last State guaranteed refinancing, therefore, occurred on 24 August 2018. This is because the Consortium's Board of Directors decided to avoid, to the extent possible, State guaranteed borrowing in the period up to the Commission's final decision. For the required refinancing that was needed by the end of 2020, to avoid that such refinancing would be automatically covered by the existing guarantee agreements, the Consortium initiated amendments to the annual update of the EMTN programme in June 2020. In order to keep options open, the relevant pricing terms of the programme now specify whether the instruments to be issued are guaranteed or not.

2.2.2. The special Danish rules on loss carry-forward and depreciation

2.2.2.1. The Danish corporate income tax system

(117) In Denmark, corporate income tax is levied in accordance with the Danish Corporate Income Tax Act[52]. Other rules relevant for corporate income tax purposes are to be found in other Danish acts, such as the Danish Tax Assessment Act[53], the Danish Act on the Taxation of Income and Property[54], and the Danish Tax Depreciation Act[55]. The Danish Tax Assessment Act provides rules for how tax laws are applied to both individuals and companies. The Danish Corporate Income Tax Act establishes the tax rate applicable to companies, and details rules that are specifically relevant for the taxation of companies. The Danish Tax Depreciation Act provides rules regarding the depreciation of assets used for commercial purposes.

(118) The legal entities that are subject to Danish corporate income tax are listed in Section 1 of the Danish Corporate Income Tax Act. The Danish corporate income tax system makes a distinction between separate entity taxation and taxation of transparent entities. As a general rule, only corporations are subject to Danish corporate income tax (i.e. separate entities for tax purposes), as partnerships are treated as transparent for tax purposes. Limited liability companies, such as A/S Øresund, the Danish partner in the Consortium, are listed at Section 1 of the Danish Corporate Income Tax Act. Partnerships, such as the Consortium, are not listed at Section 1, and are treated as transparent entities for tax purposes. This means that Danish corporate income tax rules apply only to the Danish partner in the Consortium, A/S Øresund, and not to the Consortium, itself. The Consortium Agreement, in Section 12.4, confirms that it falls upon A/S Øresund and SVEDAB to declare the profit or the loss of the Consortium, for tax purposes.

[52] The Danish Corporate Income Tax Act 'Selskabsskatteloven'.

[53] The Danish Tax Assessment Act 'Ligningsloven'.

[54] The Danish Act on the Taxation of Income and Property 'Statsskatteloven'.

[55] The Danish Tax Depreciation Act 'Afskrivningsloven'.

(119) For legal entities subject to Danish corporate income tax, the rules regarding loss carry-forward and depreciation are laid down, respectively, in the Danish Tax Assessment Act, the Danish Corporate Income Tax Act, and the Danish Tax Depreciation Act.

(120) For the partnership between A/S Øresund and SVEDAB in the Consortium, each partner recognises its 50 % share of the taxable income or loss of the partnership. A/S Øresund, being subject to the Danish corporate income tax, has a proportional right to (i) depreciate on the basis of the partnership's assets, and (ii) deduct and carry-forward (for future deduction) its part of the partnership's losses, to determine the taxable income.

(121) For the determination of the taxable income ('tax base'), reference must be made to Section 4 of the Danish Act on the Taxation of Income and Property. That section lists the items that constitute taxable income. The section is broadly worded and includes almost all income, whether principal or accessory in nature, and whether received in money or money's worth. In computing taxable gross income, all income is pooled. In general, no schedular system or basket system applies for purposes of deducting expenses or off-setting losses from one income source against profits from another income source, or for purposes of carrying forward losses.

(122) In general, the profit and loss account in the annual report is the starting point for determining taxable income, although a separate profit and loss account for tax purposes must be drafted. Income and expenses are generally recognised on an accrual basis. For income, this means that income is taxable in the year in which the taxpayer becomes entitled to the income. Expenses are normally deductible in the year in which the obligation to pay them is incurred.

(123) Expenses incurred in acquiring, securing or maintaining income are deductible (Section 6(a) of the Danish Act on the Taxation of Income and Property). The corporate income tax rules allow the carry-forward of tax losses. However, the conditions and limits of the loss carry-forward rules have changed over the relevant period (1991-2016) (see further, recitals (135) to (142)). No loss carry-back is allowed.

(124) Under the Danish corporate income tax system, depreciation deducted for tax purposes need not conform to the depreciation shown in the annual accounts. The rate and method of depreciation for tax purposes depends on the asset group being depreciated (immovable property, plant, machinery, equipment, etc).

(125) The Danish tax depreciation rules do not prescribe a mandatory tax depreciation requirement. Rather, the rules of the Danish Tax Depreciation Act set out the maximum annual depreciation allowed for tax purposes. Accordingly, companies subject to corporate income tax in Denmark may delay the application of the depreciation allowances for tax purposes, without losing their right to depreciation. For buildings, depreciation may be taken for the first time in the year of acquisition or the year in which construction is finalised. Depreciable assets are valued at the acquisition cost for purposes of depreciation.

(126) In Denmark, the digital tax return filing system is called DIAS[56], which has been implemented as from 2014.

(127) Due to the mandatory joint taxation regime in Denmark, the company that heads the joint taxation group (the management company) is the company that submits information on taxable income and tax losses for all members of the joint taxation group. The individual members of the joint taxation group still submit a tax return of their own that contains information on intercompany transactions. When the management company files a tax return for a given tax year, which includes losses for one or more members of the joint taxation group, the management company must specify: the taxable income (whether positive or negative) for each member of the joint taxation group, which means that the loss is registered in the year where it occurs; the utilisation by each member of their own carried-forward losses; the offset for the year between profit- and loss-making entities; the utilisation by each entity of carried-forward losses from other entities that are available to them (joint taxation losses); and the remaining tax losses end of the tax year specified per member of the joint taxation group and per year in which the tax loss arose. A first in, first out ('FIFO') principle exists for the utilisation of tax losses, meaning that the oldest losses must be utilised first. A tax loss carried-forward that can be utilised in a given tax year, must be used in that year, otherwise it will be forfeited[57]. The use of losses carried forward in the annual tax returns of a company is, therefore, essentially automatic.

(128) There are validations within the DIAS system to ensure that the registered data is in line with the expectations of the system.

(129) The ordinary deadline[58] for submission of a tax return is six months after the tax year ends[59]. After a tax return has been filed, the tax authorities issue a tax assessment. There is no fixed deadline for the issuing of a tax assessment, as its issuance is dependent on the tax return being filed. The assessment is, however, normally issued during October of the following year, with a final settlement due on 20 November. The tax to be paid is already visible on the submitted tax return. The tax assessment is merely an acceptance of the data submitted through the tax return. The tax assessment is automatically generated, save to the extent that it may subsequently be amended following a manual audit by the tax authorities.

[56] Prior to 2014, the tax returns were done on paper, but the same principles applied.

[57] According to Section 12(3) of the Danish Corporate Income Tax Act.

[58] It is possible to apply for an extension of the ordinary filing deadline, if there is a valid reason for so doing. Such an application is individually assessed by the Danish tax authorities, and, if the reason is deemed appropriate, an extension is granted. It is normally not possible to get an extension that goes beyond 30 September of the following year. In some years, the Danish tax authorities have granted a general extension of the ordinary filing deadline for all entities, for example, during the COVID-19 pandemic.

[59] For A/S Øresund, the deadline is, therefore, 30 June of the following year.

2.2.2.2. Legal setup of the special Danish rules on loss carry-forward and depreciation

(130) As indicated at recital (84), the formal investigation procedure – and, therefore, this decision – covers the special Danish rules applicable to the Consortium, with regard to loss carry-forward and depreciation. As such, this decision will analyse the special Danish rules on loss carry-forward and depreciation by reason of A/S Øresund's position as a partner in the Consortium. A/S Øresund's own activities, independent of its participation in the Consortium, concern the Danish road and rail hinterland connections, and are not considered to constitute State aid (recital 48 of the Opening decision); the special Danish rules on loss carry-forward and depreciation, as they apply to A/S Øresund's own activities, are, therefore, outside of the scope of this decision.

(131) The Opening decision, at recital 49, also referred to the joint taxation regime with Sund & Bælt. However, since the Commission had found in the 2014 decision that that measure does not constitute State aid, and, in the *Øresund* judgment, the General Court upheld the 2014 decision as regards that measure, the joint taxation regime is not part of the scope of the formal investigation procedure.

(132) When A/S Øresund was established, and despite being subject to Danish corporate income tax, it was not subject to the Danish rules regarding loss carry-forward and depreciation under the Danish Tax Assessment Act and the Danish Tax Depreciation Act. Rather, Section 11 of the Construction Act provided for a special rule on the applicable time period for loss carry-forward, and Sections 12 and 13 of the Construction Act provided for a special rule on the maximum rates for depreciation. Those special rules on loss carry-forward and depreciation applied both to the taxable income of A/S Øresund's own activities (not covered by this decision (recital (130)), and to the taxable income in light of its 50 % ownership of the Consortium.

(133) In 2005, the Construction Act, including the special Danish rules on loss carry-forward and depreciation, was incorporated into the Sund & Bælt Act. The special rule on loss carry-forward could be found in Section 12 of the Sund & Bælt Act, and the special rule on depreciation could be found in Sections 13 and 14 of the Sund & Bælt Act. Both provisions remained unchanged as compared to the provisions of the Construction Act.

(134) The special Danish rules on loss carry-forward and depreciation were repealed by Act No 581 of 4 May 2015, which entered into force on 1 January 2016, amending the Sund & Bælt Act, such that, since 1 January 2016, A/S Øresund has been subject to the normal Danish corporate income tax system, including with regard to loss carry-forward and depreciation in the Danish Corporate Income Tax Act, the Danish Tax Assessment Act, and the Danish Tax Depreciation Act.

2.2.2.3. The special Danish rules on loss carry-forward

(135) The Construction Act established, in Section 11, that A/S Øresund could carry-forward its losses for a period of 15 tax years, and, for losses incurred before the

Fixed Link was put into service, for a period of 30 tax years[60]. That rule is referred to in this decision as the '1991-2001 LCF'. For the period from the entry into force of the Construction Act, in 1991, up to and including the tax year 2001, under Section 15 of the Danish Tax Assessment Act[61], the general rule applicable to legal entities subject to Danish corporate income tax was that they could carry-forward losses incurred during a specific tax year, and deduct them from their taxable income, for five subsequent years[62]. Within the periods referred to, under both acts, the loss could, however, only be carried forward to a later tax year, if it could not be deducted from the taxable income in a previous tax year. Under both acts, tax losses could not be carried back for utilisation in previous tax years.

(136) By Section 8 of Act No 313 of 21 May 2002, Section 15 of the Danish Tax Assessment Act[63] was amended and the generally applicable five year limitation of loss carry-forward was abolished[64]. By Section 14 of Act No 313 of 21 May 2002, the Construction Act[65] was also amended, to abolish the 15 year limitation[66]. The amendments had an effect on losses that occurred in the tax year 2002 or later, as provided for by Section 19(3) of Act No 313 of 21 May 2002. The resulting loss carry-forward rule applicable to A/S Øresund as from the tax year 2002 is referred to in this decision as the '2002-2012 LCF'.

(137) Legal entities subject to Danish corporate income tax, including A/S Øresund, could, therefore, carry-forward their losses incurred in the tax year 2002 up to and including the tax year 2012[67] (recital (138)) without any limits in time or amount.

60 The Opening decision, at recital 37, incorrectly stated that Section 11 of the Construction Act allowed the Consortium to include, in the total amount of losses that could be carried forward, losses resulting from the deduction of operating expenses incurred prior to the start of the operation of the Fixed Link.

61 The Danish Tax Assessment Act applicable for this period: Act No 660 of 19 October 1989.

62 Section 15 of the Danish Tax Assessment Act stated that 'If the taxable income calculated for a tax year shows a loss, that loss may be deducted from the taxable income for the next five subsequent years. However, during that period, the deduction may be carried forward to a subsequent income year only if it cannot be included in the taxable income of a previous year.'

63 Consolidated Act 887 of 8 October 2001 as last amended by Section 5 of Act 271 of 8 May 2002, in which Section 15 remained unchanged with regard to the five year limitation period compared to the Act No 660 of 19 October 1989.

64 Section 8 of Act No 313 of 21 May 2002 replaced the words 'next five subsequent' with 'following'.

65 Act No 313 of 21 May 2002 amended Act No 353 of 16 May 2001, which constituted the consolidated version of the Construction Act, as amended by Act No 894 of 3 December 1997, Act No 986 of 20 December 1999, and Act No 217 of 28 March 2001. Those amendments did not concern Section 11.

66 Act No 313 of 21 May 2002 did not amend the second sentence of Section 11 concerning the losses incurred before the Fixed Link or the Danish road and rail hinterland connections were put into service.

67 Provided the tax year 2012 started before 1 July 2012.

(138) By Act No 591 of 18 June 2012[68], Section 15 of the Danish Tax Assessment Act was repealed. At the same time, Act No 591 of 18 June 2012 introduced a limitation on the utilisation of losses carried-forward, by adding Section 12 to the Danish Corporate Income Tax Act[69]. Section 12 of the Danish Corporate Income Tax Act applied to tax years starting on or after 1 July 2012.

(139) The limitation in the new Section 12 of the Danish Corporate Income Tax Act provided that legal entities subject to Danish corporate income tax were still allowed to deduct losses from previous tax years in their future taxable income for an unlimited period of time; however, only a loss amounting to DKK 7 500 000 (EUR 1 005 311)[70,71], plus, if an additional loss remained, an amount corresponding to a maximum of 60 % of the taxable income in excess of DKK 7 500 000 (EUR 1 005 311)[72], could be deducted in a given year. Hence, legal entities subject to Danish corporate income tax were not allowed to offset all their profits in a certain tax year with losses. The limitation, nonetheless, did not lead to the expiry of their losses; remaining losses could still be deducted in future tax years. For legal entities subject to group taxation, this threshold applied for the entire group on a consolidated basis, i.e. not for each entity separately.

(140) With respect to A/S Øresund, the rule on loss carry-forward provided for by Section 12 of the Sund & Bælt Act[73] and amended on 21 May 2002 (recital (136)), did not change, and continued to apply to A/S Øresund even after the introduction of the new Section 12 of the Danish Corporate Income Tax Act[74].That rule did not refer to any limitation as to the utilisation of carried forward losses. The first tax year of A/S Øresund to which the 2013-2015 LCF applied was the tax year 2013.

(141) By Act No 581 of 4 May 2015, Section 12 of the Sund & Bælt Act was repealed with effect as of 1 January 2016, and A/S Øresund became subject to the normal rules of the Danish Corporate Income Tax Act.

(142) A summary of the special Danish rules on loss carry-forward is set out at Table 1.

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68 Act amending the Danish Corporate Income Tax Act, the Withholding Tax Act, the Tax Control Act, the Tax Administration Act and various other Acts (among which the Danish Tax Assessment Act).

69 Section 12(1) of the Danish Corporate Income Tax Act stated: 'If taxable income shows a loss, that loss may be deducted when calculating the taxable income for the following tax years, in accordance with the rules laid down in paragraphs 2 and 3.'

70 Indexed annually.

71 In 2012 prices.

72 In 2012 prices.

73 The Construction Act was replaced by the Sund & Bælt Act in 2005 (recital (87)).

74 Since the generally applicable rule changed on 18 June 2012 (and remained in force until 2016 as explained at recital (141), the Commission will refer to the rule applicable to A/S Øresund in that period as the '2013-2015 LCF'.

Table 1: Special Danish rules on loss carry-forward

Year	Name of measure	A/S Øresund	Other entities subject to Danish corporate income tax
1991	1991-2001 LCF	Losses expire after (i) 15 years (ii) 30 years for costs incurred prior to Fixed Link being put into service No limits as to the utilisation of losses Applicable rule: Section 11 of the Construction Act	Losses expire after five years No limits as to the utilisation of losses Applicable rule: Section 15 of the Danish Tax Assessment Act
2002	2002-2012 LCF	Losses do not expire No limits as to the utilisation of losses Applicable rule: Section 11 of the Construction Act, as amended by Section 14 of Act No 313 of 21 May 2002	Losses do not expire No limits as to the utilisation of losses Applicable rule: Section 15 of the Danish Tax Assessment Act, as amended by Section 8 of Act No 313 of 21 May 2002
2013	2013-2015 LCF	No change Applicable rule: Section 12 of the Sund & Bælt Act (which replaced Section 11 of the Construction Act)	Losses do not expire Limit on the utilisation of losses: (i) a carried forward loss of DKK 7.5 million can always be deducted from taxable income (ii) Additional losses cannot reduce the taxable income by more than 60 % in any subsequent year Applicable rule: Section 12 of the Danish Corporate Income Tax Act (repeal of the above-noted Section 15 of the Danish Tax Assessment Act)
2016	N/A	Losses do not expire Limit on the utilisation of losses: (i) a carried forward loss of DKK 7.5 million can always be deducted from taxable income (ii) Additional losses cannot reduce the taxable income by more than 60 % in any subsequent year Applicable rule: repeal of Section 12 of the Sund & Bælt Act	No change Applicable rule: Section 12 of the Danish Corporate Income Tax Act

2.2.2.4. The special Danish rules on depreciation

(143) Pursuant to Sections 12 and 13 of the Construction Act, the maximum annual depreciation rate, applicable to all assets of A/S Øresund, was set at 6 % of the initial acquisition costs, on a straight-line basis[75]. When the total depreciation reached 60 % of the acquisition costs, the depreciation rate would be limited to maximum 2 % of the acquisition cost, annually. The acquisition costs were defined as the total construction costs. The special Danish rule on depreciation applied both to A/S Øresund's own assets[76] and its right to depreciation on 50 % of the Consortium's assets[77]. As noted at recital (84), the formal investigation procedure – and, therefore, this decision – is limited, in this regard, to analysing the effect of A/S Øresund's right to depreciation on 50 % of the assets of the Consortium (recital 48 of the Opening decision). The depreciation, at a maximum rate of 6 %, could start as from the tax year the Fixed Link was put into service – no depreciation was allowed prior to the entry into service.

(144) When the Construction Act was established, up to and including the tax year 1998, the 6 % / 2 % rate corresponded to the depreciation rates of 6 % / 2 % and straight-line method applicable to the category 'buildings and installations', pursuant to Section 22 of the Danish Tax Depreciation Act[78], which applied to legal entities subject to Danish corporate income tax, during that period. The Danish Tax Depreciation Act requires legal entities subject to Danish corporate income tax to use, depending on the category of assets, a specific depreciation method, including maximum depreciation rates[79]. According to the Danish Tax Depreciation Act, the category 'buildings and installations' had, compared to the other categories of assets, a lower maximum depreciation rate, to reflect the long lifespan of 'buildings and installations'. The Construction Act however, established a uniform annual depreciation rate of maximum 6 % / 2 % on a straight-line basis, applying to all assets of A/S Øresund, without any differentiation by category of assets. The rule applicable to A/S Øresund is referred to in this decision as the '1991-1998 DEP'.

(145) For tax years starting from 1999 onwards, the normal depreciation rate for 'buildings and installations' set in the Danish Tax Depreciation Act decreased to 5 %[80] and, for

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75 Under the straight-line method, assets are depreciated by a fixed amount each year, until they are fully depreciated.

76 Construction costs for the Danish road and rail hinterland installations are capitalised as assets in the balance sheet of A/S Øresund.

77 Construction costs for the Fixed link are capitalised as assets in the balance sheet of the Consortium.

78 Consolidated Act No 597 of 16 August 1991.

79 The only other category relevant to the Fixed Link was 'machinery and equipment'. According to consolidated Act No 597 of 16 August 1991, the maximum depreciation rate for that category was 30 % on a declining balance basis (reduced to 25 % from 2001). Under a declining balance method, assets are depreciated by a proportion of their value net of depreciation each year, meaning that the depreciation is reduced as the net value of the asset approaches zero. The Danish authorities further explained that until the tax year 2008, railroad installations such as tracks, signals and overhead cables were generally treated as 'machinery and equipment'. As of the income year 2008, the rate for railroad installations in the Danish Tax Depreciation Act changed to 7 %, on a declining balance basis.

80 Section 17 of Act No 433 of 26 June 1998, amending the Danish Tax Depreciation Act (Consolidated Act No 932 of 24 October 1996).

tax years starting from 1 July 2007 onwards, to 4 %[81]. Those maximum depreciation rates applied until the asset was fully depreciated (no limitation to 2 % after 10 years as in the Danish Tax Depreciation Act applicable until then[82]). The depreciation rate for A/S Øresund remained at 6 % / 2 %, pursuant to Sections 12 and 13 of the Construction Act, and Sections 13 and 14 of the Sund & Bælt Act[83,84].

(146) Depreciation is generally optional for legal entities subject to the Danish corporate income tax, as there is no obligation to claim a depreciation allowance for tax purposes. The depreciation rate can vary from year to year at the taxpayer's discretion, within the limits of the maximum rate set. This flexibility also applied for A/S Øresund.

(147) By Act No 581 of 4 May 2015, Section 12 of the Sund & Bælt Act was repealed with effect as of 1 January 2016, and A/S Øresund became subject to the normal rules of the Danish Tax Depreciation Act.

(148) A summary of the special Danish rules on depreciation is set out at Table 2.

Table 2: Special Danish rules on depreciation

Year	Name of measure	A/S Øresund	Other entities subject to Danish corporate income tax
1991	1991-1998 DEP	All assets are depreciated at a rate of up to 6 % on a straight-line basis until total sum of depreciations reaches 60 % of acquisition costs and subsequently at a rate of up to 2 % on a straight-line basis. Applicable rule: Sections 12 and 13 of the Construction Act	'Buildings and installations' are depreciated at a rate of up to 6 % on a straight-line basis until the total sum of depreciations reaches 60 % of acquisition costs and subsequently at a rate up to 2 % on a straight-line basis. 'Machinery and equipment' are depreciated at a rate up to 30 % on a declining balance basis. Applicable rule (for buildings and installations): Section 22 of the Danish Tax Depreciation Act.
1999	1999-2007 DEP	No change Applicable rule: Sections 12 and 13 of the Construction Act, then Sections 13 and 14 of the Sund & Bælt Act	'Buildings and installations' are depreciated at a rate of up to 5 % on a straight-line basis. 'Machinery and equipment' are depreciated at a rate up to 30 % on a declining balance basis. (This rate was reduced to 25 % on a declining balance basis in 2001). Applicable rule (for buildings and installations): Section 17 of the Danish Tax Depreciation Act, as amended by Act No 433 of 26 June 1998

[81] Section 2 of Act No 540 of 6 June 2007, amending the Danish Tax Depreciation Act (Consolidated Act No 856 of 8 August 2006).

[82] See footnote 78.

[83] Although the maximum depreciation rate applicable to A/S Øresund remained at 6 % up to and including the tax year 2015, the Commission uses, in this decision, the term '1999-2007 DEP' to refer to the rule applicable to A/S Øresund in the period in which the normal depreciation rate was 5 %, and the term '2008-2015 DEP' to refer to the rule applicable to A/S Øresund in the period in which the normal depreciation rate was 4 %.

[84] During that period, some amendments were also introduced for the category 'machinery and equipment'. The rates however remained higher than the 6 % applicable to A/S Øresund.

2007	2008-2015 DEP	No change Applicable rule: Sections 13 and 14 of the Sund & Bælt Act	'Buildings and installations' are depreciated at a rate of up to 4 % on a straight-line basis. 'Machinery and equipment exclusively used for commercial activities' is depreciated at a rate of 25 % on a declining balance basis, infrastructure installations (such as railroad installations) at a rate of 7 %. Applicable rule (for buildings and installations): Section 17 of the Danish Tax Depreciation Act, as amended by Act No 540 of 6 June 2007.
2016	N/A	The normal rules of the Danish Tax Depreciation Act apply: 'Buildings and installations' are depreciated at a rate of up to 4 % on a straight-line basis. 'Machinery and equipment exclusively used for commercial activities' is depreciated at a rate of 25 % on a declining balance basis, infrastructure installations (such as railroad installations) at a rate of 7 %. Applicable rule (for buildings and installations): Section 17 of the Danish Tax Depreciation Act, as amended by Act No 540 of 6 June 2007 (repeal of Sections 13 and 14 of the Sund & Bælt Act.	No change

2.3. Past contacts between the Commission and the Consortium

(149) By letter dated 1 August 1995, the Consortium informed the Commission of the State guarantee model granted free of charge by the States in its favour for the financing of the Fixed Link. The Consortium asked the Commission to confirm that the State guarantee model should not be considered as State aid, or, should the Commission have reservations as to the validity of that interpretation, to approve the State guarantee model as compatible State aid.

(150) By letters to the Danish and Swedish authorities of 27 October 1995 (the '1995 letters'), the Commission services[85] confirmed that the construction and operation of the Fixed Link did not constitute an economic activity, and that the State guarantee model did not need to be notified as State aid[86].

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85 Director General of the Directorate General for Transport.

86 The 1995 letters stated as follows:

'After examining the arrangements undertaken by both [S]tates in relation to the Øresund link, the Commission's services are of the opinion that the guarantee is attached to an infrastructure project of public interest, improving the countries' infrastructure and transport services. Guaranteeing investment in public goods cannot, in principle, be considered as [S]tate aid in the sense of Article 92.1: governments provide many such goods and services because of the inability of the market system to

(151) Following those letters, the States did not take any further steps to obtain the Commission's approval for the financing model of the Fixed Link.

3. GROUNDS FOR INITIATING THE PROCEDURE

(152) The Commission initiated the formal investigation procedure on 28 February 2019. In the Opening decision, adopted on that date, it provided its preliminary assessment of the measures, and raised doubts as to their compatibility with the internal market.

3.1. Qualification of the alleged aid measures

(153) On the basis of the preliminary investigation, the Commission preliminarily concluded that Denmark and Sweden granted State aid, within the meaning of Article 107(1) TFEU, to the Consortium for the financing of the Fixed Link, in the form of State guarantees, and that Denmark granted further State aid to the Consortium, in the form of special Danish rules on loss carry-forward and depreciation (recital 100 of the Opening decision).

(154) However, the Commission did not find itself in a position to make a definitive assessment as to the qualification of the measures as individual aid or as an aid scheme, and could not establish the number of measures or the date(s) on which they were granted (recital 108 of the Opening decision).

(155) More specifically, the Commission had doubts as to whether the State guarantees should be considered as an aid scheme, or whether they should be considered as individual aid granted when the Consortium was established, or as individual aid granted each time a financial transaction of the Consortium is approved by the national authorities (recital 110 of the Opening decision).

(156) As regards the special Danish rules on loss carry-forward and depreciation, the Commission preliminarily considered those measures as having been granted with the same purpose and scope as the State guarantees and, therefore, could not conclude on their specific nature, number, or granting date(s) (recitals 109 and 110 of the Opening decision).

(157) Consequently, the Commission also had doubts as to whether all or some of the measures constituted existing or new aid (recital 117 of the Opening decision).

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provide these goods effectively. These goods tend to be indivisible and collectively consumable by all citizens whether they pay for them or not.

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

Consequently, on the basis of the information at its disposal, the services of the Directorate-General for Transport consider that the guarantee issued by your government for the construction of the Øresund link does not fall under the scope of Article 92.1, and […] should not be notified to the Commission.'

3.2. Compatibility assessment

(158) The States had argued that, should the Commission consider the measures to constitute State aid, it should assess their compatibility on the basis of Article 107(3), point (b) TFEU, which allows aid to promote the execution of an important project of common European interest. In 2014, the Commission established the principles according to which the Commission assesses the public financing of such projects, with the adoption of the Communication for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest[87] (the 'IPCEI Communication')[88]. Although during the preliminary investigation, the Commission did not conclude on the granting date of the measures, it considered it obvious that the State guarantees and the special Danish rules on loss carry-forward and depreciation were first put in place before the entry into force of the IPCEI Communication. The Commission, therefore, considered that the IPCEI Communication was not applicable, as such, but considered that, since it consolidates Commission practice as regards the compatibility assessment of aid on the basis of Article 107(3), point (b) TFEU, the basic guiding principles set out therein would be of use for the Commission's assessment (recital 129 of the Opening decision).

(159) The Commission took the preliminary position that the measures were intended to promote an important project of common European interest (recital 127 of the Opening decision). However, in light of the *Øresund* judgment, the Commission considered it appropriate to assess the extent to which the measures involved investment aid, only, or both investment aid and operating aid, a question on which the Commission could not conclude in the preliminary investigation (recital 134 of the Opening decision). Furthermore, the Commission had doubts as regards the necessity (recital 143 of the Opening decision) and proportionality (recital 152 of the Opening decision) of the measures, as it did not have all of the information necessary to determine the reasonable limits on the amount and duration of the State guarantees and the special Danish rules on loss carry-forward and depreciation. In addition, the Commission was not in a position to definitively conclude on whether the measures resulted in undue distortions of competition that cannot be outweighed by their positive effects (recital 157 of the Opening decision), and could not assess the existence, or the conditions of mobilisation of, the guarantees (recital 160 of the Opening decision).

3.3. Legitimate expectations

(160) Finally, the Commission noted that it would further examine, in the context of the formal investigation procedure, the precise period during which the Consortium, Sweden, and/or Denmark could invoke legitimate expectations, should the measures be found to constitute incompatible State aid (recital 181 of the Opening decision).

[87] Commission communication (2014/C 188/02), OJ C 188 of 20 June 2014, p. 4.

[88] Replaced by Commission communication C(2021)8481 of 25 November 2021.

4. COMMENTS RECEIVED FROM INTERESTED PARTIES

(161) This section summarises the comments submitted to the Commission on the Opening decision by six interested parties[89]. Those interested parties are all involved in the shipping industry (ferry operators, ports, and associations). They expressed concern over the alleged State aid in favour of the Consortium. Overall, they consider that the measures constitute individual and, partially, new aid that is incompatible with the internal market, for which the States cannot claim legitimate expectations.

(162) Several of those interested parties submitted that the General Court, in the *Øresund* judgment, limited the Commission's discretion as regards the outcome of the formal investigation procedure, because the General Court's reasoning constitutes a *prima facie* finding on the unlawfulness of the aid. According to those interested parties, those restrictions relate both to the qualification of the aid measures as individual aid or schemes, as well as to their compatibility with the internal market. In that regard, they recall that the Court's judgments are binding on the Commission pursuant to the first paragraph of Article 266 TFEU.

(163) As they consider the financing model for the Fixed Link to be comparable to that of the Fehmarn Belt Fixed Link between Denmark and Germany, several interested parties further argue that the reasoning of the General Court in the *Scandlines Fehmarn Belt* judgment and the *Stena Line Fehmarn Belt* judgment must also be taken into consideration by the Commission, as those cases concern the same issues.

(164) The comments from Scandlines, Stena Line, FSS, Grimaldi Group, and Trelleborg Port, to a large extent, overlap. For ease of reference, therefore, those comments will be referred to below as comments from 'Scandlines et al.'.

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

(165) The Complainant confirmed that it considers that both the State guarantee model and the special Danish rules on loss carry-forward and depreciation constitute State aid, since the Consortium should be considered as an undertaking, the measures are imputable to the Danish and/or Swedish States (as applicable), are liable to affect trade between Member States, confer a selective advantage on the beneficiary, and distort competition. For the sake of clarity, the Complainant recalls that the taxation of the financial result of the Consortium occurs at the level of its two parent companies, which, on the Danish side, is A/S Øresund.

(166) Although not comprised in the scope of the Opening decision, the Complainant also added that already the fact that Denmark and Sweden directly assigned the Consortium as the sole constructor and operator of the Fixed Link, without running a public procurement procedure to award a concession to exploit the infrastructure, would, in and of itself, present an economic advantage, and result in State aid.

(167) Additionally, Stena Line, Scandlines, Grimaldi and FSS explicitly argued that they consider the Consortium to be an undertaking within the meaning of Article 107(1) TFEU, as it is engaged in an economic activity by offering transport services in

[89] The Complainant, Scandlines, Stena Line, FSS, Grimaldi, and Trelleborg Port.

return for remuneration. They add, in this respect, that they consider it irrelevant, for determining whether the Consortium performs an economic activity, that the Consortium determines its own prices.

4.2. Classification as a scheme or individual aid

(168) The Complainant and Scandlines et al. commented upon the reasoning in the Opening decision, which considers that there are three possible ways of classifying the alleged aid related to State guarantee model, namely, as (i) an aid scheme, (ii) individual aid, granted when the Consortium was established, or (iii) individual aid, granted each time a financial transaction of the Consortium is approved by the national authorities.

(169) The Complainant and Scandlines et al. argue that the State guarantee model and the special Danish rules on loss carry-forward and depreciation do not qualify as aid schemes within the meaning of Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union[90] ('Regulation 2015/1589'), as the aid is granted specifically to the Consortium, for a specific project, and as, furthermore, the condition that it must be possible to grant aid awards 'without further implementing measures being required' is not met, given that each State guarantee has to be specifically approved by either the Danish or Swedish State prior to its issuance. Therefore, the aid should be considered as individual aid (i.e., ad hoc aid). In this respect, the Complainant and Scandlines et al. refer to the *Øresund* judgment[91], and the Complainant notes that paragraph 83 of the *Øresund* judgment 'only referred back to the Commission, the analysis concerning the time when the State guarantees were granted, their number and whether they should be classified as new or existing aid, not whether they constituted aid schemes'.

(170) The Complainant argues that Section 2.1 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees[92] (the '2008 Guarantee Notice') implies that the amount of State aid in a guarantee must be assessed at the moment when it is issued, which is the moment when the risk associated with the guarantee is taken on by the State. The Complainant argues that the States did not take on any risk associated with a guarantee through the Intergovernmental Agreement or the Consortium Agreement, that Article 12 of the Intergovernmental Agreement does not constitute a legally enforceable right, and that, in order for a guarantee to be considered granted, it must be possible to measure its extent, which is not possible on the basis of those agreements, since there is no limit as regards time and amount[93].

(171) In this respect, the Complainant claims that the Consortium is required to obtain the consent of the States for all contractual obligations related to loan and securities'

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90 OJ L 248, 24.9.2015, p. 9.

91 Paragraphs 77, 80, and 83.

92 OJ C 155, 20.6.2008, p. 10.

93 The Complainant refers, in this respect, to Section 3.2 of the 2008 Guarantee Notice.

transactions that are to be covered by guarantees issued by the States.[94] As an example, the Complainant argues that it is explicitly set out in the MTN programmes that each debt transaction agreed under those programmes, which is to be supported by a guarantee, requires the Consortium to obtain an individual approval from each of the guarantors for that specific debt transaction. As such, while the Complainant acknowledges that the Intergovernmental Agreement constitutes a pledge, or a commitment, by and between the States that they will issue guarantees, they argue that this pledge or commitment is not unconditional. The Complainant submits that the MTN programmes lay down the framework conditions for issuing guarantees in order to facilitate the Consortium obtaining loans, by allowing the Consortium to show potential creditors the conditions under which a guarantee may be issued. The Complainant, further, submits that the deed of guarantee signed by the States in 1996 set forth that the States only guarantee debt instruments which have been subject to approval by the States prior to their respective issuance – such approvals have been made in relation to each issuance of debt instruments under the Swedish MTN programme.

(172) As another example, the Complainant submits that, in order for the provisions of the deed of guarantee dated 22 May 2001 to apply to any tranche of debt instruments issued by the Consortium under the EMTN programme, such tranche of debt instruments must have been approved by each of the States in writing prior to the time of issue of such tranche of debt instruments.

(173) The Complainant submits that, up until November 2019, the States had issued nearly 250 specific guarantees. This includes 96 guarantees under the EMTN programme, 34 guarantees under the Swedish MTN programme, 44 guarantees for loans from private lenders, 14 guarantees regarding credit facilities for short-term loans in commercial banks, 60 guarantees for obligations under ISDA Master Agreements, and 1 guarantee for a Global Master Repurchase Agreement. The Complainant provided a detailed overview of the various financial instruments and the various State guarantees in relation thereto.

(174) As part of that overview, the Complainant also submits that the deeds of guarantee contain provisions stipulating that the guarantee can be withdrawn by the States. In this respect, the Complainant mentions, for example, Section 2.3 of the deed of guarantee dated 22 May 2001, which sets out that the States are entitled to revoke the guarantee under certain circumstances, even though such revocation shall not release the States from their respective obligations under the 2001 deed of guarantee in existence prior to the date of revocation.

(175) Furthermore, the Complainant submits that, should Article 12 of the Intergovernmental Agreement be considered to confer a legal right to aid in the form of State guarantees, that aid measure has since changed, because the conditions attached to the guarantees have been fundamentally altered. For example, the conditions of the guarantees under the Swedish MTN programme changed the States' undertakings from secondary guarantees to personal guarantees. If the Intergovernmental Agreement were to be considered as granting the Consortium a

[94] The Complainant refers to the 1997 Cooperation Agreement and the subsequent 2004 Cooperation Agreement, which, in their opinion, both contain such a provision.

State guarantee, the guarantee would be considered as a secondary guarantee according to Swedish law, because there is no clear basis for interpreting the guarantee as a personal guarantee. It is a general principle under Swedish law that a guarantee is to be interpreted as a secondary guarantee unless there is a clear basis for interpreting the guarantee as a personal guarantee. The qualification as a secondary guarantee means that the guarantor's responsibility is subsidiary and the obligation to pay arises only when the debtor itself is unable to fulfil its obligations. The creditor must, therefore, prove the debtor's inability to pay before it can make a claim to the guarantor. A secondary guarantee is, in general, also not considered as an impediment to bankruptcy under Swedish law. A personal guarantee requires a clear written or oral commitment in which it is normally stated that the guarantor is responsible 'for own debt', and, thus, has primary responsibility. A creditor does not have to prove the debtor's inability to pay. A personal guarantee is, under Swedish law, considered an impediment to bankruptcy because the conditions governing the guarantee prohibit the creditor from filing for bankruptcy of the debtor. The Complainant submits that the guarantees related to the Swedish MTN programme are personal guarantees. Therefore, if the Commission found that the Intergovernmental Agreement conferred a legal right on the Consortium to a State guarantee, then the conditions for that State guarantee have been substantially changed through the Swedish MTN programme. Therefore, the guarantees related to the Swedish MTN programme, like all guarantees issued by the States with such changed conditions, constitute new aid.

(176) In addition, after the Commission adopted the final decision in the Fehmarn Belt case on 20 March 2020[95] (the 'Fehmarn Belt final decision'), the Complainant submitted an analysis of the implications of that case for the assessment of the Fixed Link. The Complainant considers that, in contrast to the Fehmarn Belt case, the national regimes that give the Consortium a right to State guarantees do not consist of merely one legislative text and one agreement, but of several different acts and agreements, jointly forming the conditions governing the guarantees. Furthermore, the Intergovernmental Agreement is an international agreement between two dualist States, which do not recognise the direct applicability *per se* of international agreements. Also, the Consortium had not yet been created when the Intergovernmental Agreement was concluded on 23 March 1991, nor when the Consortium Agreement was signed on 27 January 1992. The Consortium was only registered with the Swedish Companies Registration Office on 23 July 1993. So long as there is no beneficiary, no legal right can be conferred. Nor does the national implementation of those agreements lead to the conclusion that the entry into force of the implementing acts conferred on the Consortium the legal right to finance the Fixed Link by way of State guaranteed loans. The Complainant, further, submits that the 1997 Cooperation Agreement is different from the Agreement of 29 May 2017 between Femern A/S and the Danish Central Bank, the Ministry of Finance and the Ministry of Transport[96] in that the former contains detailed provisions[97] on the parties' relations regarding the issuance of guarantees.

[95] Commission decision C(2020) 1683 final, of 20 March 2020, in case SA.39078 - 2019/C (ex 2014/N) on the State aid which Denmark implemented for Femern A/S, OJ L 339, 15.10.2020, p.1.

[96] See recital 256 of the Fehmarn Belt final decision.

(177) As such, the Complainant considers that each individual State guarantee agreement constitutes a separate ad hoc aid.

(178) In the opinion of Scandlines et al., the Commission is disregarding Regulation 2015/1589, and is violating the principle of supremacy of Union State aid law over national law, when it states, at recital 107 of the Opening decision, that the position of the Complainant has to be balanced against the States' argument that the States' authorities are giving effect to the State guarantees as set out in the Intergovernmental Agreement, the Consortium Agreement, and their national law. In the view of Scandlines et al., the Commission must apply the legal provisions of Regulation 2015/1589 strictly.

(179) Moreover, Scandlines et al. consider that the Commission treats the aid as falling under an aid scheme and disregards the ad hoc nature of the aid, by arguing that the aid measures could constitute individual aid granted at one point in time, in 1992, which violates Article 1(d) and 1(e) of Regulation 2015/1589 and the *Øresund* judgment. They consider that it cannot be accepted that so many separate State guarantees, over 100 granted for different financial transactions, amounts, and durations, over a period of more than 25 years, the terms or the necessity of which could not be foreseen in 1992, were granted in one instance. Such a conclusion would presuppose the existence of a general provision authorising the granting of multiple aid measures, which they consider could only be possible under an aid scheme. FSS and Trelleborg Port also refer to the position of the Court of Justice in case C-438/16 P[98], in which it rejected the concept of a 'scheme of aid schemes'.

4.3. Classification as new aid or existing aid

(180) According to the Complainant, the limitation period with regard to the State guarantee model was interrupted on 13 May 2013, when, following the complaint, the Commission requested information from Denmark and Sweden. Hence, as the State guarantee model consists of several individual aid measures, all guarantees granted after 13 May 2003 constitute new aid. The Complainant argues that the granting moment is the moment when the risk associated with the guarantees is taken on by the States. Before that moment there is no transfer of State resources. The Complainant, therefore, concludes that a new guarantee is granted each time the States issued an approval for a specific loan or financial instrument. According to the

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[97] The Complainant provided the following quotes: Paragraph 14: '[t]he Consortium shall, as soon as possible, obtain the approval from both Guarantors for all the Consortium's transactions, such as loans including bank credits and derivative transactions. The Guarantors assess in this connection whether the transactions have or could come to have an importance for the scope of the guarantee liability, the Guarantor's risk and all circumstances that may come to affect the guarantee / the Guarantors. The Guarantors will maintain the preparedness necessary to ensure that their approval of a transaction can be given before the time-limit for acceptance, except in case of extraordinary circumstances'. Paragraph 15: '[t]he Consortium is not to enter into derivative transactions with counterparts that have not on beforehand been approved by the Guarantors.' Paragraph 16: '[t]he Consortium shall obtain the approval from the Guarantors of all contractual documentation in relation to its loans and derivative transactions.'

[98] Judgment of the Court of Justice of 19 September 2018, *Commission* v *France and IFP Energies Nouvelles*, C-438/16 P, EU:C:2018:737, paragraph 71.

Complainant, nearly 90 of these approvals (see recital (173)) have been issued after 13 May 2003, and thus constitute new aid.

(181) In addition, the aid contained in the special Danish rules on loss carry-forward and depreciation, granted as from 10 years prior to the interruption of the limitation period, constitutes new aid.

(182) Stena Line, Scandlines, and Grimaldi also start from the position that there is ad hoc aid each time a new loan or credit facility transaction is agreed. They refer, in this context, to the judgment of the Court of Justice in *France Télécom* (the '*France Télécom* judgment')[99], which states that Article 15(2) of Regulation 659/1999 'refers to the grant of aid to a beneficiary, not the date on which an aid scheme was adopted. The determination of the date on which aid was granted may vary depending on the nature of the aid in question. Thus, in the case of a multi-annual scheme, entailing payments or advantages granted on a periodic basis, the date on which an act forming the legal basis of the aid is adopted and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In such a case, for the purpose of calculating the limitation period, the aid must be regarded as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary.' Stena Line, Scandlines and Grimaldi consider it evident that that principle also applies to ad hoc aid. They consider the aid in the form of State guarantees to be granted in two ways: first, every time the Consortium takes out a loan covered by a State guarantee, and, second, every time the Consortium does not pay the market premium for such loans. The aid contained in the special Danish rules on loss carry-forward and depreciation is granted every time the Danish authorities make use of the special provisions in order to grant anew the advantages prescribed under them. Consequently, according to Stena Line, Scandlines, and Grimaldi, all State guarantees, and the advantages contained in the special Danish rules on loss carry-forward and depreciation, granted after 2003 constitute new aid.

4.4. Compatibility of the aid measures

4.4.1. Qualification of the project in light of the IPCEI Communication

(183) The Complainant does not object to the Commission using the basic guiding principles set out in the IPCEI Communication for the compatibility assessment. It recalls that the aid element must be quantified, that any operating aid must be separated from investment aid, that the necessity and proportionality of the measures must be established, and that the mobilisation conditions must be identified and demonstrated as sufficient.

4.4.2. Determination of the aid element

(184) The Complainant emphasises that the aid element must be determined, both for the State guarantees and the special Danish rules on loss carry-forward and depreciation, and that knowledge of how to determine the aid element, while there is no

[99] Judgment of the Court of Justice of 8 December 2011, *France Télécom SA* v *European Commission*, Case C-81/10 P, EU:C:2011:811, paragraphs 80-82.

requirement for a final precise figure, is an essential prerequisite for assessing the necessity and proportionality of the aid.

(185) Stena Line, Scandlines, and Grimaldi submit that it is difficult for them to calculate the aid amount under the State guarantee model and the special Danish rules on loss carry-forward and depreciation. Concerning the State guarantees, the aid would not only consist of the absence of a requirement to pay a (market) premium, but, since it is unlikely that any private party would offer such guarantees due to the very high risk involved in the project, also of the entire amount of the guaranteed loans.

(186) Trelleborg Port submits that it is not possible to determine the aid amount, given that, in the 2014 decision, there are no parameters allowing for its quantification. Since, at the time the State guarantees were granted, the Consortium's prospects of profitability were such that nobody was willing to grant it any guarantee at all, the aid element does not merely consist of the difference between the market premium for the guarantee and the premium actually paid, but also of the State guarantee itself. The value of the State guarantee corresponds to the underlying loan value. Trelleborg Port adds that, with regard to the special Danish rules on loss carry-forward and depreciation, the aid element corresponds to the difference between the amount that the Consortium would have paid, if the ordinary tax rules were applied, and what it has actually paid.

4.4.3. The granting of operating aid

(187) The Complainant refers to the *Øresund* judgment[100], Article 10 of the Intergovernmental Agreement, Article 4(3) of the Consortium Agreement, recital 50 of the 2014 decision[101], and the 1997 and 2004 Cooperation Agreements, in arguing that it is common ground that the State guarantees cover both the construction costs and the operating costs of the Fixed Link. The Complainant and Stena Line consider that the State guarantees permit the Consortium to disregard costs when setting its prices[102]. The Complainant considers it necessary, both for the State guarantees and the special Danish rules on loss carry-forward and depreciation, to draw a distinction between the aid for the construction of the Fixed Link and the aid for the operation of the Fixed Link.

(188) The Complainant also refers to the *Scandlines Fehmarn Belt* judgment[103], in recalling that aid granted beyond the point in time when the amount of the beneficiary's debt has reached a level at which its income is likely to exceed

[100] Paragraphs 108, 111, and 116.

[101] The Complainant refers also to paragraph 107 of the *Øresund* judgment in this regard.

[102] As an example, the Complainant considers that the Consortium's price reduction to the freight segment, introduced on 29 November 2019, would not have been possible without the State guarantees. The example specifically concerned all vehicles from 9 meters length, which, according to the Complainant, had a price reduction of 15 % on the normal rate during the night, and all vehicles of more than 20 meters, which would be charged the same rate as vehicles between 9 and 20 meters. As such, they argue that the price reduction is solely aimed at diverting freight traffic from the Complainants' ferry service to the Fixed Link. Stena Line argues that, shortly after the Fixed Link opened in 2000, the Consortium dumped its toll prices for cars and trucks by 40 % and 50 %, respectively.

[103] Paragraph 242.

operating costs and debt repayments under normal market conditions, and, therefore, before the debt has been repaid in full, may be regarded as operating aid. The Complainant, further, commented on recital 124 of the Opening decision, and noted that the risks of the Fixed Link project were limited after the Fixed Link was put into service. It considers the State guarantees for loans taken out to meet the Consortium's operating costs as inappropriate, and not necessary for the investment in the Fixed Link to be made (which differentiates this case from the *Hinkley Point C*[104] project). For operating aid to be justified, it must also be limited in time, and declining.

(189) Stena Line, Scandlines, and Grimaldi consider that operating aid, which is prohibited, is not merely aid granted during the operational phase of the project, but all aid relating to operating costs including during the construction phase of the project[105]. This means that aid granted to the Consortium may not cover any refinancing loans, since such loans, in their interpretation of paragraph 111 of the *Øresund* judgment, constitute prohibited operating aid. The Complainant considers that, like for the State guarantees, for the State aid derived from the special Danish rules on loss carry-forward and depreciation, a distinction must be made between aid for the construction of the Fixed Link and aid for the operation of the Fixed Link.

(190) Stena Line, Scandlines, and Grimaldi do not consider that infrastructure projects like the Fixed Link justify blurring the line between investment aid and operating aid, as allegedly suggested at recital 131 of the Opening decision. Furthermore, large scale projects, in particular, should not be allowed to benefit from operating aid[106]. Stena Line, Scandlines, and Grimaldi also provide several arguments to demonstrate that the *Hinkley Point C* judgment is not applicable to the present case. Finally, they strongly oppose the Commission's suggestion, at recital 132 of the Opening decision on the possible equivalence of State guarantees and an upfront capital injection.

(191) According to the Complainant, an economic assessment of the Internal Rate of Return ('IRR') and the Net Present Value ('NPV') of the Consortium[107] (see further, recital (201)) indicates that the Consortium would have been able to finance the Fixed Link on commercial terms without the State guarantees as from 2003, which it argues also indicates that aid from that point forward constitutes operating aid.

[104] Judgment of the General Court of 12 July 2018, *Republic of Austria* v *European Commission*, T-356/15, EU:T:2018:439.

[105] In this context, they refer to paragraphs 106 and 108 of the *Øresund* judgment.

[106] The interested parties refer specifically to paragraph 14 of the Commission Guidelines on Regional State aid for 2014-2020 (OJ C 209, 23.7.2013, p. 1.), which provide that '... large companies are more likely to be significant players on the market concerned and, consequently, the investment for which the aid is awarded may distort competition and trade on the internal market.'

[107] Report prepared by Dr. Sten Nyberg, Professor of Economics at Stockholm University and Chairman of the Center for European Law and Economics, Stockholm, and Dr. Mattias Ganslandt, Associate Professor of Economics at the School of Economics and Management, Lund University, and Director of the Center for European Law and Economics, Stockholm.

4.4.4. *Necessity of the aid*

(192) In order to assess whether the aid is necessary, the Complainant considers that the Commission should carry out a calculation similar to that included in its decision of 2015 regarding the Fehmarn Belt[108,109], where it calculated the IRR of the project and compared it to the weighted average cost of capital ('WACC'). As such, aid can only be necessary if the IRR is lower than the WACC. For the purpose of that calculation, the Complainant notes that the Consortium, itself, considers the lifetime of the Fixed Link to be at least 100 years. A separate analysis of the necessity of the aid with respect to the operational phase of the Fixed Link must be carried out. In the Complainant's opinion, it is irrelevant for the assessment of the necessity of the aid to evaluate whether or not the measures were adopted at a time when it was generally considered that the public financing of infrastructure projects was not covered by Union State aid rules. As concerns the question of whether a large-scale infrastructure project such as the Fixed Link could be carried out without public support, the Complainant indicates that the development, financing, construction, and operation of the Channel Tunnel[110] were all performed by private companies, subject to a public competition in which private companies were granted a concession.

(193) The results of the economic assessment of the Fixed Link that the Complainant commissioned in September 2019 (recital (191)), and, in particular, of the IRR and the WACC of the Consortium under different scenarios, are summarised at recitals (201) to (206).

4.4.5. *Proportionality of the aid*

(194) The Complainant and Scandlines et al., referring to the *Øresund* judgment[111], submit that the aid is not proportionate, because the State guarantees and the special Danish rules on loss carry-forward and depreciation are not limited in time, in amount, or in number, and are not linked to specific financial transactions. Moreover, the debt repayment period is unclear, and fluctuates.

(195) Furthermore, the Complainant and Scandlines et al. consider it important to note that the General Court held in its *Scandlines Fehmarn Belt* judgment[112] and its *Stena Line Fehmarn Belt* judgment[113] that aid may be necessary and proportionate only until '"the point in time when the beneficiary would be able, on the basis of its cash flow,

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[108] Commission decision of 23 July 2015 on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt fixed link project, (C(2015) 5023 final), OJ 2015 C 325, p. 1, recital 103, and the *Scandlines Fehmarn Belt* judgment, paragraph 211.

[109] Initially the Complainant referred to the decision referred to in footnote 108, however when the final decision was adopted in that case, the Complainant provided further observations (see further, recital (199)).

[110] Commission decision 88/568/EEC of 24 October 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.437/8 – Eurotunnel) (OJ L 311, 17.11.1988, p. 36) and Commission decision C(2015)1816 final of 22 June 2005 in case State aid N 159/2005 – United Kingdom – EWSI Channel Tunnel Freight Support Funding (OJ C 314, 10.12.2005, p. 2).

[111] Paragraphs 118 to 139.

[112] Paragraph 242.

[113] Paragraph 213.

to borrow on the open market without the support of State guarantees or State loans". That point is normally reached when the amount of the beneficiary's debt has reached a level at which its income is likely to exceed operating costs and debt repayments under normal market conditions, and therefore before the debt has been repaid in full'. Some of the interested parties add that '[a]id in excess of that level may, therefore, be regarded as operating aid, for which the Commission has not provided any justification in the contested decision.' According to the interested parties, it is, therefore, evident that the aid must be limited to the point in time when the beneficiary is able to borrow on its own on the open market.

(196) The Complainant refers to the General Court's findings in its *Scandlines Fehmarn Belt* judgment[114], in claiming that aid is proportionate up to the amount at which the project becomes profitable. Furthermore, the General Court found, in the *Øresund* judgment, that it is not relevant for the assessment of proportionality that other forms of financing by the States would have a higher financial burden on the State budget[115], or that more direct forms of aid might have been liable to generate more significant aid[116]. The Complainant, further, claims, by referring to the 2014 annual report of SVEDAB, that, at least by 2012, the Consortium reached the breakeven point, where there was no net profit or loss, and that the following year the Consortium would have been able to distribute a dividend, or share in profits, to its parent companies. The Complainant, further, refers to the Standard&Poor's Global Ratings research update from 18 November 2016, noting that the Consortium started paying down debt in 2004, five years ahead of schedule, and that, from 2000, the operating profit of the Consortium was, and has remained, positive. The Complainant notes that the equity of the Consortium became positive in 2016 and, that, according to the Consortium, it started distributing dividends to the parent companies in 2018, when a DKK 1.1 billion (EUR 0.15 billion) dividend for the tax year 2017 was paid out, and that, in 2018, the parent companies decided to increase the annual dividend payment, with the effect that the Consortium's debt was, thereafter, expected to be repaid only in 2050, which is substantially later than the previously expected year 2033. In addition, the Danish State takes money out of A/S Øresund for purposes other than repayment of the debt related to the costs of the Danish road and rail hinterland connections. As a consequence, the repayment period for the Consortium has been extended. On the basis of those observations, the Complainant considers it evident that the income of the Consortium is quite substantial, apparently even enough to finance other projects, and likely to exceed operating costs and debt repayments under normal market conditions.

(197) In this regard, the Complainant also recalls that, among the major Danish publicly-owned companies to which the Danish State has provided guarantees, including those responsible for the construction and operation of the Great Belt bridge and for the Fehmarn Belt Fixed Link, the Consortium is the only one that does not pay any premiums for the State guarantees, while almost all others pay 0.15 % on outstanding debt. According to the Complainant, this clearly shows that the construction and operation of the Fixed Link could be achieved with less aid than a 0 % premium.

114 Paragraph 224.

115 Paragraph 191 and 153.

116 Paragraph 153.

(198) The Complainant makes specific reference to recital 150 of the Opening decision, at which the Commission stated that it appeared that the special Danish rules on loss carry-forward and depreciation were expected to contribute to the viability of the project, thereby rendering the effects of the guarantees and the advantage of those special rules interdependent. The Complainant considers this statement to be incorrect. The special Danish rules on loss carry-forward and depreciation constitute additional advantages over the State guarantees and cannot be considered as interdependent for the purposes of State aid rules. The Complainant urged the Commission to request the tax declarations of the Consortium in order to make a correct calculation of the size of the advantage that those special rules provided to the Consortium.

(199) The Complainant also submitted observations after analysing the proportionality analysis contained in the Fehmarn Belt final decision. The Complainant notes, in particular, the difference between *ex ante* risk (before construction) and *ex post* risk (after the Fixed Link entered into service), the need to re-evaluate the State aid after construction, and the restrictions (scope limited to construction, priority given to repayment of State-subsidised loans, and a guarantee fee), which are also necessary to ensure proportionality of State aid for the Fixed Link.

(200) Stena Line further argued that, in view of the fact that the Fixed Link was profitable, and the Consortium had positive cash flows exceeding its operating and debt repayment costs by 2004, State aid to the Consortium has not been proportionate since at least 2004.

(201) As noted at recitals (191) and (193), the Complainant commissioned an economic assessment on the Consortium's IRR and WACC for the purposes of analysing whether, and when, the Consortium could have financed the Fixed Link on market terms, without State guarantees. The Complainant argues that the State guarantees have two effects on the financing. First, the guarantees enabled the Consortium to get into debt above 100 % of its equity and debts during its first 17 years of operation (negative equity until 2016). Second, the guarantees enabled the Consortium to borrow at a lower cost than comparable companies (the Consortium obtained a AAA credit rating). The Complainant adds that the State guarantees have resulted in an actual average maturity (close to five years) of the Consortium's debt, which is very short compared to the economic lifetime of the assets (more than 100 years). The assessment concludes that in 2003 or 2004, i.e., just a few years after the entry into service of the Fixed Link, the Consortium could have financed the Fixed Link on commercial terms without the State guarantees. In all scenarios, (referring to the sensitivity scenarios performed), State aid was no longer needed as from 2009 or 2010 onwards. In order to come to this conclusion, the study made several analyses, including a comparison of the IRR of the Consortium with a WACC calculation based on 37 comparable companies, market conditions for debt and equity in Denmark (see further, recital (202)), and an estimation of the market value of the Consortium during the years 2000 to 2018 (see further, recital (203)).

(202) The economic assessment includes an analysis of the Consortium's annual reports, which shows that the Consortium's IRR, based on a linear projection of the operational result over a 100-year period, is 7.2 % (before tax), and, if the period is limited to 40 years, the IRR is 6.2 %. The WACC of comparable non-subsidised companies dropped below the IRR of the Consortium in 2004 in the 100-year

scenario[117]. Thus, according to the Complainant, from that point in time, State aid was no longer needed (during the global financial crisis, the WACC temporarily went above the IRR in the 100-year scenario, but, since 2009, the WACC has stayed below the IRR). In the 40-year scenario, the WACC of comparable companies has stayed below the IRR since 2010.

(203) An estimation of the Consortium's market value (based on discounted cash flows) during the years 2000 to 2018 shows that the value of the discounted cash flows exceeds the cost of the project as from 2003 (calculated with the Consortium's average interest rate based on a linear projection of the operational results over a 100-year period). The Complainant submits that further sensitivity analysis shows that the conclusions are robust, both for shorter and longer periods of cash flows. In particular, the analysis shows that, in all scenarios, the discounted amount of future cash flows is higher than the total cost as from 2009. On that basis, the Complainant concludes that it should have been attractive for a commercial actor to acquire the Consortium as from 2003, or, in any event, as from 2009. In the Complainant's view, this indicates that the Consortium would have been able to finance the Fixed Link on market terms, without the State guarantees, from 2003, or at least from 2009.

(204) The Complainant also provided an analysis, by the same authors, of the Consortium's funding gap. In 1999, prior to the Fixed Link's entry into service, the WACC of comparable companies was slightly higher (8.0 %) than the IRR (7.2 %) of the Fixed Link project. This resulted in a funding gap of DKK 2.9 billion (EUR 0.39 billion) in 1999, justifying limited State aid. For the sake of completeness, the Complainant notes that the funding gap was DKK 5.9 billion (EUR 0.79 billion) in 2000, due to a higher WACC of comparable companies (9.3 %) but stresses that, already from the Fixed Link's entry into service, the State guarantees were too generous.

(205) According to the analysis, thanks to the State guarantees, the Consortium could finance its costs entirely by debt with an interest rate on that debt of only 3 % in 1999 and 3.5 % in 2000. This means that the WACC of the Consortium was only 3 % to 3.5 % (100 % debt financing). The IRR of 7.2 % is therefore considerably higher than the WACC of the Consortium, and the State guarantee model is disproportionate and unjustified. The State aid should only result in a reduction of the WACC by 0.8 % (from 8 % to 7.2 %) so that the WACC of the Consortium is equal to the IRR of the Fixed Link project. According to the report, the disproportionate State aid, in terms of NPV, amounted to DKK 54.3 billion (EUR 7.28 billion), when quantified with the interest rate of the Consortium in 1999 and to DKK 41.8 billion (EUR 5.60 billion), when quantified with the interest rate in 2000.

(206) The authors of the report also provided an additional analysis of the NPV of the Consortium, based on a comparison of the interest rate applicable to the Consortium and the interest rate of a company with 100 % AAA debt financing. The purpose of the analysis was to quantify the amount of the disproportionate State aid. The

[117] According to the report, the analysis of the comparable companies and market conditions for debt and equity in Denmark shows that during the period 2000-2018 the WACC of comparable companies dropped from 9.3 % to 3.0 %. For Sweden, this was respectively 8.7 % and 3.3 %.

analysis is based on the fact that, if the IRR is higher than the average annual interest rate of the Consortium, the Fixed Link will have a positive NPV, or the yield of the project is higher than the costs. Also on that basis, the Complainant stresses that the State guarantees were too generous and already resulted in disproportionate State aid from the Fixed Link's entry into service. This conclusion is further supported by an analysis of annualised returns and annuities.

(207) In addition, the Complainant provided a memorandum relating to some of the Commission's findings in the Fehmarn Belt final decision with respect to the financing of the Fixed Link, in particular as concerns proportionality.

(208) Finally, the Complainant submitted observations on the Consortium's 2020 annual report, as, in spring 2020, the Consortium launched a number of initiatives transferring its debt from borrowing guaranteed by the States, to borrowing without State guarantees. The Complainant observed the associated credit ratings, and concluded that State-owned entities already enjoy an advantage due to the fact that the State is the owner, which, in the eyes of their creditors, implies higher collateral security. The Complainant also notes that the amount raised by loans without State guarantees in 2020 represents about 28 % of the Consortium's gross borrowing, which further illustrates that the State guarantees were already disproportionate during the first years of operation.

(209) Stena Line refers to the IPCEI Communication, recalling that a funding gap calculation may only include eligible costs. Given that the road and rail hinterland connections are considered to be a separate project, Stena Line argues that the costs of such facilities are irrelevant for calculating how much aid the Fixed Link may benefit from. In this regard, Stena Line notes that the Consortium adjusted its dividend policy in 2018, in order to primarily focus on maximum debt reduction in the owner companies, A/S Øresund and SVEDAB, which are in charge of the road and rail hinterland connections. Stena Line argues that this constitutes clear evidence that State aid to the Consortium for the Fixed Link finances ineligible costs.

4.4.6. Prevention of undue distortion of competition and balancing test

(210) According to the Complainant, the aid contained in the State guarantees and the special Danish rules on loss carry-forward and depreciation causes undue distortion of competition.

(211) The Complainant states that it was never the objective of the Fixed Link project to replace the ferry services between Helsingborg and Helsingør, nor was this considered a necessary or unavoidable consequence thereof. Further, they recall that the link between the ports of Helsingborg and Helsingør, which are both part of the TEN-T network, connects the TEN-T roads E47, E4 and E20, and, thus, central Europe to the Nordic countries. The Complainant refers to one of the main objectives of the TEN-T, which is to contribute to low greenhouse gas emissions, clean transport, and low carbon emissions, and notes that its zero emission ferries are a green alternative to the Fixed Link. Finally, the Complainant refers to the Commission's White Paper on a roadmap to a Single European Transport Area[118], in

[118] White Paper, Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, C(2011) 144 final, paragraph 59.

which the Commission noted that 'the elimination of tax distortions and unjustified subsidies and free and undistorted competition are […] necessary to establish a level playing field between modes which are in direct competition'. The Complainant considers that the socio-economic outcome of the disappearance of its ferry service would be disastrous. In this context, the Complainant recalls that the State guarantees allow the Consortium to set the toll charges for the Fixed Link at artificially low levels, which permits the Consortium to increase its traffic volumes and its market share. The State guarantees allow the Consortium to take higher risks, with bankruptcy, de facto, excluded. The Complainant also points to another mechanism that leads to market distortion, which is linked to the objectives of the States to foster traffic across the Fixed Link. Since the Consortium is supported by the States, the objective of the Consortium would also shift from strict profit maximisation to increasing traffic volume. This is made possible thanks to the State guarantees.

4.4.7. Mobilisation conditions of the State guarantees

(212) Referring to the 2008 Guarantee Notice, the Complainant recalls that the Commission is not entitled to authorise aid in the form of State guarantees unless the Commission knows beforehand the conditions for triggering those guarantees. According to the Complainant, there are no conditions for the mobilisation of the guarantees determined in the loan agreements concluded between the Consortium and the financial institutions concerned, and the Commission is, consequently, not in a position to find that the State guarantees are compatible with the internal market.

4.5. Legitimate expectations

(213) The Complainant and Scandlines et al. argue that the *Øresund* judgment should be interpreted in such a way that legitimate expectations on the part of the Consortium and the States are excluded after the *Aéroports de Paris* judgment.

(214) Accordingly, they submit that, in the *Øresund* judgment[119], the General Court expressly held that legitimate expectations could exist only for the period before the *Aéroports de Paris* judgment, and not, as the Commission seems to suggest at recital 178 of the Opening decision, *at least* until 2000.

(215) The Complainant refers to the case law as cited in the *Øresund* judgment[120], listing the three cumulative conditions that must be satisfied for a claim of entitlement to the protection of legitimate expectations to be well founded: (i) precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the authorities; (ii) those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed; and (iii) the assurances given must comply with the applicable rules.

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[119] Paragraph 322.

[120] Paragraph 306: judgment of the General Court of 30 June 2005, *Branco* v *Commission*, T-347/03, EU:T:2005:265, paragraph 102 and the case-law cited; judgment of the General Court of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 77; judgment of the General Court 30 June 2009, *CPEM* v *Commission*, T-444/07, EU:T:2009:227, paragraph 126.

(216) While the Complainant and Scandlines et al. acknowledge the presence of legitimate expectations until the *Aéroports de Paris* judgment, they consider that the assurances given by the Commission in the 1995 letters were no longer in compliance with the applicable rules after that judgment. Scandlines et al. submit that, in any case, the right to rely on legitimate expectations would expire after the end of a transition period of three years that allows the beneficiary to adjust its behaviour in view of the new legal circumstances[121].

(217) Moreover, the Complainant argues that, after the *Aéroports de Paris* judgment, there can be no doubt that a prudent and alert economic operator could have foreseen that the Commission could potentially adopt a decision finding that the aid measures concerned were subject to State aid rules. The Complainant and Scandlines et al. consider that the States and the Consortium should have adjusted their behaviour in accordance with the judgment, and that the period between the *Aéroports de Paris* judgment and the alleged interruption of the limitation period must be considered as an ample amount of time to adjust, and to notify the aid measures concerned to the Commission.

(218) Finally, the Complainant argues that, even if the Commission were to consider that the States granted two State guarantees in 1992, constituting individual ad hoc aid, it is clear that the principle of legitimate expectations cannot be invoked for the period after 13 May 2003. If that were not the case, the States would be allowed to invoke the principle of legitimate expectations in order to continue to provide State guarantees to the Consortium, without the payment of any premium and without any limitation as to the amounts to be guaranteed and the time during which they can be granted, for as long as they consider necessary.

4.6. Recovery of aid

(219) Scandlines et al. consider that the aid contained in the special Danish rules on loss carry-forward and depreciation and the State guarantees granted since 2003 should be recovered. This concerns, in particular, the State guarantees for all loans taken out to refinance the initial debt, and also the aid for all other operating costs covered by loans. Trelleborg Port stresses that the actual State guarantees must be revoked, in addition to having the Consortium pay back the difference between the market premium and the premium paid. Stena Line argued that recovery must be requested of (i) any aid granted after 2004 (since, at least as from 2004, the Consortium would have been able to borrow on market terms); (ii) operating aid granted between 2003 and 2004; and (iii) for 2003-2004, the difference between the Fixed Link prices based on actual costs and the below-cost based pricing, as well as of State guarantees and State loans[122] covering any operating costs.

(220) The Complainant adds that, even if the Commission were to declare the aid compatible with the internal market, this would not have the effect of regularising the

[121] Reference is made to the judgment of the General Court of 16 October 2014, *Alcoa Trasformazioni* v *Commission*, T-177/10, EU:T:2014:897, paragraph 72.

[122] Stena Line did not submit any further or specific information as to which State loans they are referring to.

measures, implemented contrary to Article 108(3) TFEU, ex post facto, and interest should be applied from the date each new aid was granted.

(221) FSS, Trelleborg Port, and Grimaldi submit that the State guarantees and the special Danish rules on loss carry-forward and depreciation have not been notified to the Commission under Article 108(3) TFEU, and, therefore, constitute unlawful aid. This includes the State guarantees and the aid contained in the special Danish rules on loss carry-forward and depreciation that was granted after the adoption of the 2014 decision, which was subsequently annulled. Since there is no evidence to suggest that Denmark and Sweden have stopped granting State guarantees and aid derived from the special Danish rules on loss carry-forward and depreciation, the Commission should adopt a decision ordering Denmark and Sweden to stop granting new guarantees and Denmark to stop granting aid related to the special Danish rules on loss carry-forward and depreciation, and to suspend existing State guarantees and advantages related to the special Danish rules on loss carry-forward and depreciation until the Commission has taken a decision on their compatibility with the internal market.

(222) The Complainant considers that the disproportionate State aid to the Consortium has created lasting consequences, which have to be corrected by forward-looking measures. Simply ending the State aid by recalling and ending the State guarantees would not suffice to establish a level playing field for the Fixed Link and the ferries. In this context, the Complainant refers to paragraph 96 of the *Øresund* judgment, in which the General Court pointed out that the Commission had suggested that liquidation of the Consortium would be legally impossible, having regard to the Intergovernmental Agreement. Since the 2008 Guarantee Notice considers that more favourable funding terms obtained by enterprises whose legal form provides for exemption from ordinary rules on bankruptcy or other insolvency procedures may constitute State aid, the Consortium would continue to enjoy a significant advantage, even after the States cease to issue specific State guarantee agreements.

(223) The Complainant considers that such forward-looking measures need to restore normal costs, normal objectives, and normal commercial risks of the Fixed Link operator. Specifically, they consider three possible solutions for restoring normal market conditions for traffic across the Øresund, namely, privatisation of the Fixed Link, incorporation of the Fixed Link as a public company with floating shares listed on the stock exchanges in Copenhagen and/or Stockholm, or granting a concession to an independent operator on commercial terms.

5. COMMENTS RECEIVED FROM THE STATES

(224) This section describes the States' comments on the Opening decision. Those comments contain the States' remarks on the comments of the interested parties that were submitted to the States' authorities in a non-confidential format. This section also includes further information submitted by the States in response to specific questions from the Commission.

5.1. Factual clarifications to the Opening decision

(225) The States provided factual clarifications to the descriptive part of the Opening decision.

(226) Specifically, the States clarify that there is no legal basis for providing State loans to the Consortium in either Swedish or Danish law. This is a clarification to recital 31 of the Opening decision, where it is stated that the Consortium is able to obtain State loans from the Danish National Bank against an annual fee of 0.15 % of the outstanding loan values, plus an annual interest rate set by the Minister of Finance. The States specify that this may be based on a confusion between the financing of the Consortium and the financing of A/S Øresund, the Danish parent company of the Consortium. According to Section 7(1) of the Construction Act (now Section 10(4) of the Sund & Bælt Act), when deemed appropriate, the Danish Minister of Finance is empowered to cover A/S Øresund's funding needs through State loans.

(227) The States underline that the direct consequence of the Intergovernmental Agreement, the Swedish and Danish implementing legislation, and the Consortium Agreement is that, from the day on which the Consortium was founded, the States have been obliged to guarantee all loans and other financial instruments, taken out by the Consortium to finance the Fixed Link. While the Swedish National Debt Office and the Danish National Bank are responsible for the practical administration of the guarantees, in relation to specific loans and financing arrangements, they do not have the competence to refuse to grant the Consortium the necessary guarantees to fund the project.

(228) As such, the Consortium Agreement was approved by Denmark on 4 February 1992, and by Sweden on 13 February 1992. The Consortium Agreement, therefore, entered into force on 13 February 1992. The States, further, clarified that the Consortium is not registered with the Swedish Companies Registration Office, as claimed by the Complainant (recital (176)), as it has unique legal personality. It was, however, registered for VAT and social security fees as of 23 July 1993. Registration with the Swedish Companies Registration Office is not necessary in order for the Consortium to acquire rights and obligations.

(229) The States provided further details on what is provided for in the Swedish Parliament decision in relation to the joint and several State guarantee obligation (recital (89)), and on the practical administration of the joint and several State guarantee obligation by the Swedish National Debt Office (recitals (91) to (94)). As for the implementation of the State guarantee obligation in Denmark, the States referred to Section 8 of the Construction Act and to the preparatory notes to the Construction Act, related to Section 8 (recital (95)).

(230) The States specified that the practical administrative arrangements by the Swedish National Debt Office and the Danish National Bank (through the Cooperation Agreements) were introduced in order to give Sweden and Denmark an opportunity to monitor and influence the Consortium's financing policy. The mechanism gives the States the opportunity to ensure that the Consortium does not exceed its mandate, and that a financing policy is followed that minimises the States' long-term risk. The mechanism, thus, allows the States to ensure that the aid granted to the Consortium does not go beyond what is necessary.

(231) The States provided an updated overview of the outstanding debt of the Consortium.

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

5.2.1. The Consortium as beneficiary

(232) The States acknowledge the Consortium as a beneficiary of the State guarantee model. The Danish authorities do not accept, however, that the Consortium is a beneficiary of the special Danish rules on loss carry-forward and depreciation. They note, in that respect, that the Consortium is a partnership that, as regards Danish tax rules, is transparent. It is, thus, not the Consortium, but A/S Øresund, only, that could possibly have benefited from the special Danish rules on loss carry-forward and depreciation, and, moreover, only as regards half of the income and costs incurred by the Consortium.

(233) According to Danish tax law, all partnerships are tax transparent. It is, thus, not the fact that the Consortium is tax transparent that benefits A/S Øresund; rather, it is the special Danish rules on loss carry-forward and depreciation. Those rules are created especially for A/S Øresund, in its capacity as a partner in the Consortium. A/S Øresund does not carry out any own activities in a competitive market, and, thus, A/S Øresund does not receive State aid within the meaning of Article 107(1) TFEU. The Danish authorities, further, submit that the case at hand must be distinguished from case C-128/16 P[123], in which the Court considered that a fiscally transparent entity was the beneficiary of tax measures, because the Consortium's tax transparency means that any possible tax advantage is received by its owners.

(234) For those reasons, the Danish authorities maintain that the Consortium did not obtain any economic advantage as a result of the special Danish rules on loss carry-forward and depreciation.

5.2.2. No economic activity by the Consortium

(235) The States maintain their position as outlined in Section 4.2.1 of the Opening decision, that the planning, construction, and operation of the Fixed Link cannot be considered as an economic activity falling within the scope of Article 107(1) TFEU. In the States' view, the construction and operation of the Fixed Link are classic examples of the exercise of public planning power, which are not, and ought not to be, covered by Article 107(1) TFEU. Consequently, the State guarantee model and the special Danish rules on loss carry-forward and depreciation fall outside the scope of Union State aid rules.

(236) In their response to the Opening decision, the States refer to their previous submissions, provided in the context of the preliminary investigation procedure for cases SA.36558, SA.38371, and SA.36559, and confirm that they maintain the positions set out therein. In that regard, the States submitted that, until the early 2000s, under a long-standing decision-making practice, the Commission had consistently held that the construction by a public authority of infrastructure, open to all potential users on non-discriminatory terms, did not constitute an economic activity falling within the scope of Union competition rules. Rather, such activities

[123] Judgment of the Court of 25 July 2018, *Commission* v *Spain and Others,* C-128/16 P, EU:C:2018:591.

were considered to be an exercise of public (planning) power, in order to provide general transport infrastructure.

(237) The States submitted that the objectives they sought to achieve by constructing the Fixed Link are clearly and exclusively public policy aims, relating, in particular, to furthering cultural, regional, and economic development and cooperation between two countries. They argued that the *Aéroports de Paris* judgment and the *Leipzig Halle* judgment of the General Court of 24 March 2011, upheld by the Court of Justice on 19 December 2012[124] (the '*Leipzig Halle* judgments'), do not necessarily apply to infrastructure projects, such as the Fixed Link. Contrary to airports, the development and operation of cross-border bridges, which require the conclusion of international agreements, cannot be implemented by ordinary investors. The construction and operation of bridges has not undergone a liberalisation similar to the airport sector. The Fixed Link can be distinguished from the situation in the *Leipzig Halle* judgments, they claim, as the construction of the Fixed Link was never meant to expand the Consortium's commercial activities; the Consortium came into existence with the sole aim of carrying out public policy aims, and not to pursue economic activities.

(238) The States, further, submit that the Consortium's activities exclusively relate to the construction and operation of the Fixed Link, i.e., public duties, which are a direct consequence of public planning measures. The basic conditions for the Consortium's economic operations are predetermined, and the result of the States' exercise of public power. The Consortium performs its public duties in a ringfenced economic circuit; thus, there is no risk that its financing activities on the basis of the State guarantee model could be used to cross-subsidise other activities, not relating to its public tasks. In this sense, the Consortium's activities and means of financing are comparable to those of (other) public authorities that charge a cost-based fee for providing specific public goods or services to their users, such as the production of certain official documents, for example, passports and driver licences, and health and animal welfare checks of veterinary agencies. When State-owned entities are exclusively empowered to carry out such public duties in a closed economic circuit, their activities must be considered to be an exercise of public power. The States recall that, in that respect, the Consortium is 100 % publicly owned, and no private operator could benefit from the State guarantee model.

(239) The States, further, submitted that the Consortium cannot be considered as competing with the Complainant's ferry services. While the Consortium's pricing policy may affect the Complainant's business, that is not the consequence of a competitive relationship between two comparable actors offering substitutable services on the same market. Rather, while the Complainant offers a commercial ferry service, the Consortium offers a public good, in the form of access to a particular piece of road and rail infrastructure. When the Consortium sets the price for that public good, it acts within the framework of the public policy decision concerning the financing of the Fixed Link, including the road and rail hinterland

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

connections. Thus, the relationship between the Consortium and the Complainant differs fundamentally from ordinary competitive relationships.

(240) Nevertheless, the States provided further arguments on the classification of the State guarantee model and of the special Danish rules on loss carry-forward and depreciation as aid schemes versus individual aid, on their classification as new versus existing aid, and on the existence of legitimate expectations.

5.3. Classification of the State guarantee model as a scheme or individual aid

(241) In the States' view, the characterisation of the State guarantee model is an essential issue, and the assessment must have due regard to the purpose of Regulation 2015/1589, and to the practical consequences of this characterisation, both for the Fixed Link and for other similar cases.

(242) In the States' view, the wording of Regulation 2015/1589 provides that the State guarantee model consists of ad hoc aid, and not aid schemes. As such, the States consider that the State guarantee model is not aimed at 'undertakings defined within the act in a general and abstract manner' and, further, that it is 'linked to a specific project'. According to the States, this is supported by the fact that the Consortium is a special purpose vehicle with tasks associated with the Fixed Link, and that the State guarantees provided to the Consortium are inextricably linked, and restricted, to activities associated with the construction and operation of the Fixed Link. Consequently, the States submit that the State guarantee model consists of individual aid.

(243) The States consider that the State guarantee model in this case is fundamentally different from, for example, indirect guarantees granted to public undertakings in the form of national legislation ruling out bankruptcy[125].

(244) The States refer, in this context, to the legal literature that provides examples of aid schemes coming within the definition in the second part of Article 1(d) of Regulation 2015/1589, including a scheme under which a specific undertaking receives annual compensation for losses incurred in providing a service of general economic interest[126] and tax incentives, unlimited in amount or time, granted to specific undertakings.[127] Such schemes are, in the States' view, also fundamentally different in purpose and nature from the State guarantee model granted to the Consortium.

(245) Moreover, according to the States, the Intergovernmental Agreement and the implementing legislation in Sweden and Denmark clearly show that the joint and several State guarantees were granted to the Consortium indefinitely and irrevocably in 1992, as a legal and economic precondition for the Consortium's obligation to

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[125] They refer in this context to the judgment of the Court of 3 April 2014, *French Republic* v *European Commission*, C-559/12, EU:C:2014:217.

[126] Mederer, W., Pesaresi, N. and Van Hoof, N., EU Competition law: Volume IV, State aid, Book 1, Claeys & Casteels, 2008, p. 566.

[127] Heidenhain, M., ed., European State Aid Law: A Handbook, Beck/Hart, 2010, pp 587-588; and Sinnaeve, A. and Slot, P. J., 'The new regulation on State aid procedures', Common Market Law Review 36, Issue 6, 1999, pp. 1153-1194, p. 1161.

establish and operate the Fixed Link. As such, both States have a clear and unequivocal legal obligation vis-à-vis each other and vis-à-vis the Consortium to ensure that subsequent financial transactions falling within the scope of the Intergovernmental Agreement and the implementing legislation are guaranteed by the States. The States argue that the fact that this requires subsequent administration from the Swedish National Debt Office and the Danish National Bank does not mean that the States have any choice to refuse to guarantee such transactions.

(246) Therefore, the State guarantee model should, in the opinion of the States, be characterised as consisting of two individual ad hoc aids, granted when the Consortium was established on 13 February 1992. As from that day, the States have been legally obliged to guarantee all financing required by the Consortium to establish the Fixed Link and put it into service. The States consider this conclusion supported both by the legal arrangements and the economic rationale of the State guarantee model.

(247) In relation to the legal arrangements, the States argue that, while the Swedish National Debt Office and the Danish National Bank are responsible for the practical administration of the guarantee agreements in relation to specific loans and financing arrangements, they do not have any competence to refuse the Consortium the guarantee to fund the project. Further, while the Swedish National Debt Office and the Danish National Bank, from time to time, issue, reissue, or confirm the original guarantees vis-à-vis a specific lender, this does not change the States' legal obligation, vis-à-vis the Consortium, to guarantee the Consortium's financial commitments concerning the project.

(248) The States note that the wording of the relevant provisions of the Intergovernmental Agreement, the substance of the implementing national legislation, and the Consortium Agreement have not been amended since their adoption. As the legal basis from which the Consortium derives the right for its financing to be State guaranteed remains unaltered, the States consider that the State guarantees were definitively and irrevocably granted to the Consortium at the time it achieved a legal right to obtain State guaranteed funding, i.e., from the day it was founded.

(249) The States provided further details on the implementation of the Swedish joint and several State guarantee obligation in the context of the Complainant's claim that the Swedish guarantees were changed from secondary to personal guarantees (recital (175)). The States submitted that the original joint and several State guarantee obligation has never changed. The State guarantee obligation towards the Consortium was established by the Swedish Parliament decision, following up on the Intergovernmental Agreement. The Swedish Parliament decision was later implemented by the decision of the Swedish Government of 1 April 1993 (K91/1443/3, K93/202/3) and the decision of the Swedish Government of 23 June 1994 (K91/1443/3, K94/1680/3), by which the Swedish National Debt Office was commissioned to issue guarantees. None of those decisions regulate in detail how the terms of the individual guarantee agreements were to be determined. Instead, this was to be decided upon and implemented by the Swedish National Debt Office. There has been no subsequent decision by the Swedish Parliament in this context, nor any decision by the Swedish Government, which would have amended the State guarantee obligation established by the Swedish Parliament decision. The individual deeds of guarantee serve to fulfil the right already given to the Consortium. The

deeds of guarantee are indeed to be interpreted as personal guarantees. This, however, does not constitute a change of the Swedish guarantee obligation to the Consortium and does not go beyond the rights given to the Consortium in the Intergovernmental Agreement or in the Swedish Parliament decision. Furthermore, the States note that the Swedish National Debt Office does not have the legal power or mandate to amend or extend the original joint and several State guarantee obligation – or to issue a new guarantee – without a new Government decision. The variations in the wording used in the reissued guarantee documents in respect of the individual loans are to be interpreted as different implementations of the original joint and several State guarantee obligation and not as new individual guarantees.

(250) As regards the implementation of the Danish joint and several State guarantee obligation, the States explained that the State guarantee obligation as provided by the Construction Act has not changed since it entered into force. The mobilisation conditions are not expressly provided for in that legislation, thus, by default, this guarantee obligation will be considered as a 'simpel kaution'. Danish law on guarantees distinguishes between 'simpel kaution' and 'selvskyldnerkaution'. A 'simpel kaution' means that the party calling upon the guarantee must show to the guarantor that the principal (the debtor) is unable to pay its obligations. Normally this requires either (i) that it has been established during an execution (i.e., that party's attempt to execute its claim against the principal's assets) that the principal is unable to pay its obligations as they fall due; or (ii) that the principal has been taken under bankruptcy or similar insolvency proceedings. A 'selvskyldnerkaution' means that the party calling upon the guarantee can ask the guarantor to pay if the principal has failed to make payment in due time. According to Danish jurisprudence on guarantees, a guarantee is normally interpreted as a 'simpel kaution' unless there is a clear basis for interpreting it as a 'selvskyldnerkaution'. Thus, unless the guarantee is clearly described as a 'selvskyldnerkaution', the party calling upon the guarantee will have to show to the guarantor that the principal is unable to pay its obligations as they fall due.

(251) In practice, the conditions for mobilisation are further specified in the guarantee agreements issued under the various financial transactions. It follows from the wording of those guarantee agreements that they are unconditional and, thus, the investors are not obliged to seek to enforce a claim against the Consortium, but may address the guarantors directly upon default. The creditors are not obliged to activate any insolvency steps. On the other hand, there is a specific provision in the EMTN programme, in the EIB loans, and in the ISDA Master Agreements governing a potential insolvency situation. According to that provision, all creditors undertake not to accelerate any insolvency preparations or proceedings or to activate or participate in filing for bankruptcy, reconstruction, administration, dissolution, etc., so long as the guarantees cover the obligations of the Consortium.

(252) The States also referred to the Fehmarn Belt final decision and, in particular, pointed to the observation that, at recital 253 of that decision, the Commission emphasised that the act governing the construction and operation of the Fehmarn Belt Fixed Link contains a clear commitment by the State to finance the construction costs by State loans and/or State guarantees, under which the Minister of Finance has authorisation to decide on the mix of State loans versus State guarantees, only. They further pointed to recital 256 of the Fehmarn Belt final decision, stating that the Minister of Finance has limited discretion, only, regarding the implementation of State loans and

State guarantees. In the Øresund case, the Danish National Bank and the Swedish National Debt Office are responsible for the practical administration of the guarantees in relation to specific loans and financing arrangements, without any competence to refuse to grant the Consortium the necessary guarantees to fund the project. Thus, the States submit, in the Øresund case, the States' discretionary power is even more limited that in the Fehmarn Belt case.

(253) Furthermore, the States note that the Commission emphasised that the aid granted to Femern A/S – the special purpose vehicle responsible for the construction and operation of the Fehmarn Belt Fixed Link – is exclusively related to the financing of the planning and construction of that fixed link, to the exclusion of other projects and activities. The States submit that the same applies in the Øresund case. The Consortium is a 'special purpose vehicle' that must not carry out activities other than those associated with the Fixed Link. An overall assessment of the scope of the guarantees that takes account of the fact that the Consortium cannot carry out other activities could in their view only lead to the conclusion that the guarantees are linked to a specific project.

(254) The States conclude that for the same reasons as in the Fehmarn Belt case, the Consortium is clearly not awarded new aid every time a new transaction, which is guaranteed, is entered into. The Fehmarn Belt final decision, therefore, confirms the States' view that the State guarantees should be characterised as two individual ad hoc aids granted when the Consortium was established in 1992.

(255) The economic rationale of the State guarantee model is to minimise the total financing costs of the project. That aim would be undermined if each State had discretion as to whether to issue a specific guarantee agreement vis-à-vis the Consortium. The model would not function as a financing mechanism if the Consortium needed to 'apply' to the States for a State guarantee each time the Consortium were to take out a new loan. Also, it would make no market economic sense to assume, on the one hand, that the Consortium has the characteristics of an 'undertaking', in competition with other market operators, and, on the other hand, to assume that this undertaking would have accepted responsibility for the financing of the Fixed Link, without having, first, obtained a clear legal right to finance its construction costs with State guarantees, from the outset. Moreover, the States argue that the fact that the granting occurred in 1992 is also confirmed by economic reality, in particular, by the financial markets. In the summary of Standard & Poor's credit analysis of the Consortium of 18 November 2016, it is stated that '[t]hese guarantees, according to their wording, irrevocably and unconditionally cover all of Øresundsbron's debt and interest payment'. For that reason, Standard & Poor's links the rating on the Consortium's debt to the long-term rating for Sweden and Denmark – i.e., AAA.

(256) Finally, the States argue that the general principles in Union State aid law and case-law support the conclusion that the aid derived from the State guarantee model was granted when the Consortium was established. In their view, the commitments to guarantee the Consortium's loans for the Fixed Link were firm, precise, and unconditional when the Consortium was established. The aid derived from the State guarantee model was, thus, granted in 1992, when the Consortium obtained an unconditional and irrevocable legal right to make use of the State guarantee model to finance its commitments relating to the specific project, even if those future financial

arrangements had not yet been entered into (i.e. even if the guarantees had not actually been 'paid out' yet).

5.4. Classification of the State guarantee model as new aid or existing aid

(257) The States refer to Article 17(2) of Regulation 2015/1589, stating that the limitation period of ten years (for recovery) shall begin on the day on which the unlawful aid has been awarded to the beneficiary as individual aid.

(258) The States consider that the ten year limitation period expired on 13 February 2002, which is ten years after the Consortium was established, on 13 February 1992. All aid related to the State guarantee model is, therefore, existing aid and cannot be recovered.

(259) In addition, the Swedish authorities maintain that any possible aid was definitively granted prior to its accession to the Union, and prior to the entry into force of the EEA Agreement[128], on 1 January 1994. Accordingly, the joint and several State guarantee provided by Sweden is existing aid, in accordance with Article 1(b), point (i) of Regulation 2015/1589 and Article 144 of the Act of Accession of Austria, Finland and Sweden.

(260) In the States' view, the fundamental distinctions between 'new aid' and 'existing aid', and between 'aid schemes' and 'ad hoc aid', aim to strike a balance between two fundamental considerations: (i) effective enforcement of the State aid rules; and (ii) legal certainty for the Member States, the aid recipient, and its contractual partners, which have adjusted their situation in reliance on the aid.

(261) From that perspective, the States add that it was a fundamental legal and economic assumption for launching the project, and for incurring the expenditure associated with the construction of the Fixed Link, that the Consortium was granted the State guarantees from both participating States, and that those State guarantees would remain valid until the Consortium's debt was fully repaid.

(262) The States, further, note that any interested party or potential competitor could have complained to the Commission or have invoked Article 108(3) TFEU directly before national courts as from the establishment of the Consortium, and within the respective time limits under Union and national law. After the expiration of those time limits, the Commission does not have the competence to order recovery, or to impose appropriate measures for the future. They argue that it would give rise to unacceptable legal uncertainty for the Consortium and the States if the Commission were to have this competence several decades after the project was launched and the debt had been incurred.

(263) The States add that the practice of refinancing loans on an ongoing basis has ensured minimal overall borrowing costs, and that State guaranteed loans which, as a consequence, are taken out on an ongoing basis should not lead to the Consortium being treated differently from if it had, instead, in 1992, chosen to incur debt as long-term State guaranteed loans that would not need to be refinanced.

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128 Agreement on the European Economic Area (EEA), OJ 1994 L 1, 3.1.1994, p. 3.

(264) Based on the above arguments, the States maintain that aid deriving from the State guarantee model was definitively and irrevocably granted to the Consortium on 13 February 1992.

(265) Nevertheless, and considering the States' point of view that the aid deriving from the State guarantee model is existing aid and therefore, cannot be recovered, the States have committed to ensure that the Consortium will finance new debt, and refinance existing debt, on market terms. Therefore, the existing aid to the Consortium deriving from the State guarantee model will be phased out as the Consortium's outstanding debt instruments expire. The States provided the Commission with an overview of the transition to market terms of the remaining debt, and the expected repayment profile. That debt will be refinanced on market terms as it matures and the need for refinancing arises. Therefore, the future financing on market terms will gradually be implemented when future refinancing needs occur. The States confirmed, in this context, that the Consortium has not obtained any new State guaranteed financing or refinancing since the *Øresund* judgment (recital (116)). Therefore, in practice, the phasing out has already started.

5.5. Comments on the special Danish rules on loss carry-forward and depreciation

(266) As to the special Danish rules on loss carry-forward and depreciation, Denmark argues that, should they need to be considered as falling under State aid rules, the measures would have to be considered mainly as 'existing aid'.

(267) Denmark argues (also referring to arguments that had been submitted in the context of SA.38371 (2014/CP)) that the Construction Act established, from the outset, and in light of the specific circumstances where infrastructure construction costs entailed an obvious need for long-term planning of A/S Øresund's financing, that A/S Øresund would be subject to more favourable loss carry-forward rules than under the general Danish Tax Assessment Act (Section 15). Thus, in the preparatory notes to the Construction Act, the legislator explicitly stated that the reason for granting an extended limitation period for loss carry-forward in 1991 was that A/S Øresund would not be able to benefit from the generally applicable rules on loss carry-forward (with a limitation of five years), due to significant expenditure, combined with a lack of profits during the construction period. Denmark notes that the losses incurred prior to the entry into service of the Fixed Link were, basically, due to interest on the loans that were necessary for the construction of the Fixed Link. Financing costs (interest) are not part of the acquisition costs that can be capitalised as an asset in the balance sheet of the Consortium, on the basis of which depreciation can be applied. Interest costs are, however, deductible as an expense according to the general rule on deduction of interest in the general Danish Act on the Taxation of Income and Property[129] and, therefore, generated losses in the initial phase of the project.

(268) On the special Danish rule on depreciation, Denmark argues that, under Section 12 of the Construction Act, A/S Øresund was covered by a separate legal basis regarding depreciation of the initial acquisition costs of the project. Denmark noted that the normal depreciation rules (i.e., the generally applicable rules) were found in the Danish Tax Depreciation Act. Denmark referred, in this context, to the preparatory

[129] 'Statsskatteloven', Section 6(1)(e).

notes to the Construction Act, which state that those provisions correspond to similar provisions applicable in regard to 'buildings and other installations' under the Danish Tax Depreciation Act that was in force at the time, i.e., Section 22 of the consolidated Act No 597 of 16 August 1991. Denmark explained that the special Danish rule on depreciation was to be considered as a practical rule allowing a uniform regime for all assets, that was originally, if anything, detrimental to the Consortium, as the least favourable rate of depreciation was applied to all assets (other items, such as machinery, could normally be depreciated faster than at 6 % / 2 %, but for A/S Øresund, the 6 % / 2 % applied as a maximum).

(269) In the Danish authorities' opinion, the special Danish rules on loss carry-forward cannot be viewed as advantages that have to be examined separately from the State guarantee model. The rules applying to A/S Øresund pursue the same aim as the State guarantee model, namely, to ensure the financing of the Fixed Link, at the least cost. Moreover, the amounts contained in those tax advantages are inextricably linked to the State guarantee model, and the combined net effect neutralises any tax benefit that A/S Øresund may have received. In particular, the total amount of aid (gross grant equivalent) granted through the State guarantee model is reduced to the extent that the special Danish rules on loss carry-forward entail a lower tax liability and, therefore, a lower debt burden for the Consortium. Conversely, had A/S Øresund not been subject to the special rules, the Consortium would have had a higher debt burden, and thus a higher amount of aid would have been granted through the State guarantee model. In other words, the special Danish rules on loss carry-forward applying to A/S Øresund had, as their basic aim, improving the financial robustness of the project, thereby lowering the risk associated with providing loans to the Consortium.

(270) Denmark, further, submits that, if any of the special Danish rules on loss carry-forward should be subject to State aid rules, the relevant period to consider potential advantages as a result of the loss carry-forward rules is limited to the period from 1 January 2013 until 31 December 2015, i.e., three years. For the period starting with tax year 2002 and up to and including the tax year 2012, no advantage existed since all legal entities subject to Danish corporate income tax could carry-forward their losses without any limitation in future tax years. The special rule on loss carry-forward as it was in place before that period, should be considered as existing aid granted with the entry into force of the Construction Act. Denmark notes in this context that the 1991-2001 LCF differs significantly from the situation applicable in the *France Télécom* judgment. The Construction Act established, from the outset, and in light of the specific circumstances of A/S Øresund, that A/S Øresund would be subject to more favourable rules on loss carry-forward in light of the long-term planning of the financing of an infrastructure investment. The potential advantage should be considered as granted, at the latest, when the losses occurred, and the fact that the losses are utilised at a later date is irrelevant for the purpose of determining when the advantage was granted, and, thus, for the assessment of whether the aid is now existing aid. Such advantage was, therefore, not determined, and dependent, upon a yearly regulation of the tax contribution as in *France Télécom*, and could only be removed by amending the legislation.

(271) Denmark also provided further details on the annual tax returns of A/S Øresund, in particular on the losses carried-forward and utilised since 1992, and on the annual depreciated amounts. Denmark confirmed that losses were utilised that occurred

more than five years earlier (and, therefore, under the normal rules would have expired). Moreover, for the period 2013-2015, 100 % of the profits was offset with carried-forward losses, which would not have been possible under the normal taxation rules, due to the limit that applied. Denmark, further, confirmed that the first depreciation in relation to the Fixed Link assets occurred with regard to the tax year 2004, at a rate of 6 %; at the time, the rate of depreciation under the normal taxation rules was 5 %. A/S Øresund also made use of the possibility to depreciate at 6 % in the period starting with its tax year 2008, when the depreciation rate under the normal taxation rules was 4 %. In addition, Denmark confirmed that the total accumulated depreciation amount remained below 60 %, up to and including the tax year 2015, after which the special Danish rules on loss carry-forward and depreciation were repealed.

5.6. Compatibility of the aid measures

(272) The States did not consider it appropriate or necessary to comment in detail on the doubts raised in the Opening decision on the compatibility of any possible aid to the Consortium, in light of their position regarding the presence of State aid and the qualification as existing aid, as described in Sections 5.2 to 5.5.

5.7. Legitimate expectations

(273) In the States' view, the General Court, in the *Øresund* judgment, did not adopt a position on legitimate expectations for the period after the *Aéroports de Paris* judgment. Thus, they disagree with the interested parties, who all argued that the General Court's judgment should be interpreted in a way that legitimate expectations are excluded for the Consortium and the States after 12 December 2000.

(274) The States request that, if the Commission's State aid assessment leads it to become relevant to determine the precise point in time from which the States and the Consortium could no longer rely on legitimate expectations, the Commission take the specific circumstances of the project into account.

(275) Specifically, they consider, first, that it must be acknowledged that the Consortium and the States did have legitimate expectations in relation to the measures before the *Aéroports de Paris* judgment, and, thus, throughout the entire construction phase during which the Consortium's debt was incurred. After that, the States and the Consortium had little room to amend the financing model. The States submit that, in such a situation, in order to be effective, legitimate expectations obtained prior to that judgment must continue to produce effects beyond the date of the judgment. As such, even if the States and the Consortium cannot rely on legitimate expectations after December 2000, the Consortium's expectations about how it would be able to finance and refinance its construction debt were formed prior to the *Aéroports de Paris* judgment. If that judgment removed the Consortium's possibility to (re)finance itself with State guarantees, it would effectively threaten the Consortium's continued operation, and, in practice, retroactively remove the States' and the Consortium's legitimate expectations prior to December 2000.

(276) Second, for more than 20 years after the Consortium Agreement in 1992, and for more than 12 years after the entry into service of the Fixed Link, none of the interested parties (including the Complainant) complained about the State guarantees

available to the Consortium, or about the special Danish rules on loss carry-forward and depreciation.

(277) Third, the *Aéroports de Paris* judgment did not give the Consortium or the States any reason to believe that the Fixed Link was covered by State aid rules. The judgment was very specific and was, at the time, treated as an airport sector case, linked to the liberalisation of that sector. Furthermore, as mentioned at recital (276), neither the Commission nor any third party gave the Consortium or the States reason to doubt the lawfulness of the Consortium's financing for more than 12 years after the start of the Fixed Link' operation.

(278) Therefore, in light of those three arguments, and in light of the particular circumstances of this case, the States submit, first, that aid measures benefiting the Consortium after the *Aéroports de Paris* judgment, and until the construction debt has been fully repaid, should also be covered by legitimate expectations. Otherwise, the Consortium's and the States' legitimate expectations prior to December 2000 would be meaningless.

(279) Second, and in any event, the States consider that legitimate expectations continued until the General Court annulled the 2014 decision on 19 September 2018, as neither the Consortium nor the States realised that the Commission's examination in the 2014 decision had been insufficient, prior to that date.

(280) Third, and in any event, the States consider that the Consortium and the States had legitimate expectations until the Commission adopted its 2014 decision, which was subsequently challenged before the General Court, as the 1995 letters produced the same legal effects as a no aid decision. Since that letter was not challenged, or in any other way questioned by the Commission before the 2014 decision, the States enjoyed legitimate expectations.

(281) Fourth, and in any event, the States are of the view that the Consortium and the States had legitimate expectations at least until they received the Commission's letter of 13 May 2013, with which the complaint was forwarded.

5.8. Forward-looking measures

(282) The States consider that none of the forward-looking measures or structural remedies proposed by the Complainant have any legal basis in Union State aid law, and should, therefore, be disregarded. They note, in this context, that Article 345 TFEU provides that the TFEU shall in no way prejudice the rules in Member States governing the system of property ownership. According to case-law[130], Member States are free to determine, in their internal systems, the system of property ownership, including whether they want to establish State-owned companies.

(283) In the context of the Complainant's claim that the Consortium would continue to enjoy a significant advantage, even after the States cease to issue specific State guarantees because of the exemption from bankruptcy (recital (222)), the States

[130] Judgment of the Court of Justice of 20 March 1985, *Italy* v *Commission*, C-41/83, EU:C:1985:120, paragraph 22 and judgment of the Court of Justice of 30 April 1974, *Sacchi*, C-155/73, EU:C:1974:40, paragraph 14.

submitted that nothing prevents, as a matter of principle, the Consortium from being subject to ordinary bankruptcy procedures under Danish or Swedish law. This is clearly illustrated by the observation that there is a specific reference to a potential insolvency situation in the EMTN programme, the EIB loans, and in the ISDA Master Agreements (recital (251)).

6. ASSESSMENT OF THE MEASURES

6.1. Assessment of the existence of aid within the meaning of Article 107(1) TFEU

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

(285) On the basis of this provision, the qualification of a measure as State aid requires the following cumulative conditions to be met: (i) the recipient of the measure is an undertaking; (ii) the measure is imputable to the State and is financed through State resources; (iii) the measure confers a selective advantage on its recipients; and (iv) the measure distorts or threatens to distort competition and is likely to affect trade between Member States.

(286) The Opening decision expressed, at recital 100, the Commission's preliminary view that the State guarantees granted by the States to the Consortium for the financing of the Fixed Link, as well as the special Danish rules on loss carry-forward and depreciation, constitute State aid within the meaning of Article 107(1) TFEU.

6.1.1. Economic activity and notion of undertaking

(287) The Commission notes that the State aid rules only apply where the recipient of an aid is an 'undertaking'. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed[131]. Any activity consisting of offering goods and/or services in a given market is an economic activity[132]. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former[133].

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[131] Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten*, Joined Cases C-180/98 to C-184/98, EU:C:2000:428, paragraph 74; judgment of the Court of Justice of 10 January 2006, *Ministero dell'Economia e delle Finanze* v *Cassa di Risparmio di Firenze SpA , Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA,* C-222/04, EU:C:2006:8, paragraph 107.

[132] Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, 118/85, EU:C:1987:283, paragraph 7; judgment of the Court of Justice of 18 June 1998, *Commission* v *Italian Republic*, C-35/96 EU:C:1998:303, paragraph 36; judgment of the Court of Justice of 12 September 2000, *Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten*, Joint Cases C-180/98 to C-184/98, EU:C:2000:428, paragraph 75.

[133] *Aéroports de Paris* judgment, paragraph 108.

(288) In addition, for a certain activity to be classified as an economic activity, it is irrelevant whether a private investor could have carried out the same activity[134]. Once an entity engages in economic activities, regardless of its legal status, or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) TFEU, and the State aid rules may apply to financial advantages granted by the State or through State resources to that entity[135].

(289) The Union Courts have, moreover, held that services normally provided for remuneration may be classified as an economic activity, and that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question[136]. It follows that it is the nature of the activity carried out that determines whether an entity is an undertaking for the purposes of State aid law.

(290) In the *Aéroports de Paris* judgment[137], the General Court ruled that the operation of an airport had to be seen as an economic activity. Subsequently, the *Leipzig Halle* judgments concluded that, if an airport runway will be used for economic activities, its construction also constitutes an economic activity, and thus its funding may fall within the ambit of State aid rules. While those cases relate specifically to airports, it appears that the principles developed by the Union Courts are also applicable to the construction of other infrastructure that is indissociably linked to an economic activity[138,139], as confirmed by the General Court in the *Belgian ports* judgment[140].

(291) The Commission already stated, at recitals 74 to 76 of the Opening decision, that it could be considered *prima facie* that the Consortium is engaged in an economic activity and should be considered as an undertaking. The States claim that the Consortium is not an undertaking, as it does not carry out an economic activity (Section 5.2.2). In the States' view, the construction and operation of the Fixed Link are classic examples of the exercise of public powers, which are not, and ought not to be, covered by Article 107(1) TFEU.

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134 See, to that effect, judgment of the Court of 19 February 2002, *Wouters, Savelbergh and Price Waterhouse Belastingadviseurs BV* v *Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, EU:C:2002:98, paragraph 58.

135 Judgment of the Court of 17 February 1993, *Christian Poucet* v *Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* and *Daniel Pistre* v *Cancave*, Joint Cases C-159/91 and C-160/91, EU:C:1993:63, paragraph 17.

136 Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission*, T-696/17 EU:T:2019:652, paragraph 75.

137 Paragraph 125, confirmed by the Court of Justice in its judgment of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617.

138 Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, EU:C:2015:9, paragraph 42; judgment of the General Court of 15 March 2018, *Naviera Armas* v *Commission*, T-108/16, EU:T:2018:145, paragraph 119.

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

140 Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission*, T-696/17 EU:T:2019:652, paragraphs 98-107.

(292) It is true that Article 107(1) TFEU does not apply where States act 'by exercising public power'[141], or where public entities act in their capacity as public authorities[142]. An entity may be deemed to act by exercising public power, where the activity in question forms part of the essential functions of the State, or is connected with those functions by its nature, its aim, and the rules to which is it subject[143].

(293) The Commission considers that an overall assessment is necessary, and that, to qualify as acting by exercising public power, the Consortium's activity should be connected with the essential functions of the State, by its nature, its aim, and the rules to which it is subject. Only non-economic activities may fall within the concept of the exercise of public power[144].

(294) According to settled case-law[145], the qualification of economic activity should be based upon factual elements, namely the provision of goods or services on a given market. The Consortium, as the owner and operator of the Fixed Link infrastructure, is active on the market of providing a transport service for remuneration to citizens and undertakings: the Consortium will charge a fee (toll) from the users of the road section of the Fixed Link for crossing the Øresund strait; in addition, the Swedish Transport Administration and the Danish State Rail Administration pay a fee for the use of the railway infrastructure on the Fixed Link. The Consortium's revenues from road and rail are intended to finance the total cost of planning, project design, construction, maintenance and operation of the Fixed Link, and also the costs of the construction of the road and rail hinterland connections, through the distribution of dividends to the parent companies (recital (70)).

(295) It should be noted that the Consortium has not been granted specific public powers in relation to the construction and operation of the Fixed Link, but it will construct and operate the infrastructure as an economic operator. The construction and commercial operation of large infrastructure projects does not, in itself, constitute an exercise of public powers, and the construction and operation of the Fixed Link is governed by an economic logic, given that it is financed to a very large extent by user fees[146]. Indeed, the activities of the Consortium are very different from what, in the past, has been held to be part of public power activities, such as the army or the police, air navigation safety and control, maritime traffic control and safety, anti-pollution surveillance, organisation, financing and enforcement of prison sentences,

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

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

[143] See, in particular, judgment of the Court of Justice of 19 January 1994, *SAT Fluggesellschaft mbH* v *Eurocontrol*, C-364/92, EU:C:1994:7, paragraph 30 and judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, EU:C:1997:160, paragraphs 22 and 23.

[144] Judgment of the Court of Justice of 26 March 2009, *SELEX Sistemi Integrati SpA* v *Commission*, C-113/07 P, EU:C:2009:191, paragraph 70.

[145] For example, judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, EU:C:1987:283, paragraph 7.

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

development and revitalisation of public land by public authorities, and the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data[147].

(296) There is a market for crossing the Øresund strait, in particular, because the service was already provided for remuneration by an existing ferry operator, which is a private undertaking operating under market conditions. Hence, the transport services provided by the Consortium are in competition with the transport services provided by ferry operators. The Commission does not accept the States' argument, summarised at recital (239), that the Consortium cannot be considered to compete with the ferry services. As the States admit, the Consortium's pricing policy can significantly affect the Complainant's business. Whether the Consortium was conceived with the intention of competing with the ferry service or not[148], it is offering a service to cross the Øresund strait, which directly affects the competitive position of the already-established market operators. The Commission, therefore, concludes that the Consortium, in operating the Fixed Link, is engaged in an economic activity.

(297) In addition, the Commission notes that an activity that consists of offering goods or services on a market does not acquire the character of the exercise of public power solely because a Member State chose to grant a public entity a monopoly to offer the goods or services in question[149]. In that regard, the Commission recalls that the question of whether a market exists for certain services may depend on the way those services are organised in the Member State concerned, and that, due to political choice or economic developments, the classification of a given activity can change over time[150]. The mere fact that a public company falls within the competence of a Minister, however, does not preclude it from being regarded as carrying on an economic activity[151]. In addition, the mere fact that an entity is established on the

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

148 See also judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission*, T-696/17, EU:T:2019:652, paragraph 100, where the General Court dismissed the claim that the absence of competition meant that an activity could not be classified as economic.

149 See, to that effect, judgment of the Court of Justice of 23 April 1991, *Höfner and Elser* v *Macrotron*, C-41/90, EU:C:1991:161, paragraphs 22-23.

150 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, p. 1, paragraph 13 (and case-law cited).

151 *Aéroports de Paris* judgment, paragraph 109.

basis of an international agreement does not mean that the activity carried out by that entity is the exercise of public power; this must be assessed on a case-by-case basis, in light of the activity carried out by that entity[152]. The Commission considers that the crucial question is whether, by operating the Fixed Link, the Consortium is providing a good or a service on a market. The Commission notes that that is clearly the case, as set out above.

(298) The Commission notes, further, that, even if it could be found that the Consortium exercises some powers as a public authority, this does not, in itself, preclude its other strands of activity from being an economic activity. It follows from settled case-law that an entity may, in parallel, carry out an economic activity and public power[153].

(299) In any event, it is clear that the States' authorities have decided to introduce a market mechanism, as the Fixed Link was always intended to be operated as a commercially exploited, toll-funded[154] infrastructure. This goes against the argument that the activity of the Consortium would be the exercise of public power.

(300) Therefore, the Commission considers that the operation of the Fixed Link constitutes an economic activity.

(301) In light of the case-law referred to at recital (290), the construction of infrastructure that is indissociably linked to that economic activity, also constitutes an economic activity. It is clear from the Intergovernmental Agreement (recital (61)) that the construction of the Fixed Link cannot be dissociated from its future operation. In addition, the Consortium Agreement (recital (66)) considers the construction and the operation of the Fixed Link as one project. The Commission finds, on that basis, that the construction of the Fixed Link is indissociably linked to its operation. As the operation of the Fixed Link constitutes economic activity, so, too, does its construction.

(302) The Commission, therefore, concludes that the Consortium, in carrying out the construction and operation of the Fixed Link, is engaged in economic activities. As a result, the Consortium must be considered as an undertaking for the purposes of Article 107(1) TFEU, with respect to those activities.

6.1.2. State resources and imputability to the States

(303) With regard to the State origin of the advantages resulting from the application of the measures, the concept of State aid is broader than that of a subsidy. This is because it embraces not only positive benefits, such as subsidies and capital injections, but also measures which, in various forms, mitigate the charges which are normally included

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[152] See, to that effect, judgment of the Court of Justice of 19 January 1994, *SAT Fluggesellschaft mbH* v *Eurocontrol*, C-364/92, EU:C:1994:7, in particular paragraph 19.

[153] See judgment of the Court of Justice of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraphs 76 to 78, and, to that effect, judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, , C-288/11, EU:C:2012:821, paragraph 43.

[154] In contrast to a service provided free of charge, see judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, EU:C:2015:9, paragraph 43.

in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect[155].

(304) The Opening decision, at recital 79, preliminarily concluded that the State guarantees, granted by Denmark and Sweden without the payment of any fee, as well as the special Danish rules on loss carry-forward and depreciation granted to the Consortium by Denmark, involve State resources, and are imputable to the States. This was not disputed by the States or any of the interested parties.

(305) A measure by which public authorities grant certain undertakings favourable tax treatment, although not involving a positive transfer of funds, places beneficiaries in a more favourable financial situation than other taxpayers, and constitutes a transfer of State resources[156].

(306) Furthermore, the creation of a risk of imposing an additional burden on the State in the future, by constituting a guarantee on terms that do not correspond to those of the market, is sufficient to be considered a transfer of State resources[157]. The same is true, for instance, when guarantees are granted by a Member State, without requiring the payment of a premium on market terms from the beneficiary of the guarantee.

(307) The Commission, therefore, concludes that the arrangement of the State guarantee model, obliging the States to guarantee the financial instruments for the financing of the Fixed Link, without the payment of any fee, involves Danish and Swedish State resources and that the special Danish rules on loss carry-forward and depreciation involve Danish State resources. As the State guarantee model was set up by Denmark and Sweden, it is imputable to the States. Similarly, the special Danish rules on loss carry-forward and depreciation derive from the Construction Act, which is a legislative act adopted by Denmark; and are, therefore, imputable to Denmark.

6.1.3. Selective economic advantage

(308) According to settled case-law, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market

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

[156] See, for example, judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14; judgment of the Court of Justice of 9 October 2014, *Ministerio de Defensa and Navantia*, EU:C:2014:2262.

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

conditions, i.e., in the absence of State intervention[158]. Only the effect of the measure on the undertaking is relevant; not the cause or the objective of the State intervention[159]. To assess this, the financial situation of the undertaking following the measure should be compared with the financial situation in which it would have been if the measure had not been introduced.

(309) Furthermore, to fall within the scope of Article 107(1) TFEU, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, not all measures which favour economic operators fall under the notion of aid, but only those that grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.

(310) The Commission also notes that a single aid measure may consist of combined elements, if, having regard to their chronology, purpose, and the circumstances of the undertaking at the time of their intervention, they are so closely linked that they are inseparable from one another. In that context, a combination of elements may be categorised as State aid where the State acts in such a way as to protect one or more operators already on the market[160].

6.1.3.1. The State guarantee model

(311) A public guarantee, granted on preferential terms, may grant the borrower an advantage by enabling it to borrow at an interest rate that would not have been obtainable on the market without the guarantee[161]. Under Article 12 of the Intergovernmental Agreement, the States undertook to jointly and severally guarantee all loans and other financial instruments taken out by the Consortium in connection with the financing of the Fixed Link. The Consortium is not required to pay an annual guarantee premium on the outstanding debt covered by the State guarantee model, as provided for by Additional Protocol to the Intergovernmental Agreement (recital (85)). The Consortium Agreement recalls that joint and several State guarantee obligation for the Consortium's borrowing (recital (90)). The States have not provided any evidence that the absence of a guarantee premium is in line with market terms; they do not even argue that such would be the case. Since the benefit of a guarantee is that the risk associated with the guarantee is carried by the guarantor, that guarantor would normally be remunerated by an appropriate premium for such risk-carrying. There is clearly a risk associated with the guarantees for the financing of the Fixed Link and therefore such guarantees would not be available on the market without the requirement to pay a premium. In the *Øresund* judgment[162], the General Court held that the grant of a guarantee on terms not equivalent to

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

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

160 Judgment of the General Court of 12 November 2013, *MOL Magyar Olaj- és Gázipari Nyrt.* v *Commission*, T-499/10, EU:T:2013:592, paragraph 67.

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

162 Paragraph 120.

market terms, is, as a rule, liable to confer an advantage on the beneficiary. In this case, the States, moreover, went beyond simply granting a guarantee to the Consortium on non-market terms, but, in fact, undertook a legal obligation to guarantee all of the Consortium's borrowing in connection with the financing of the Fixed Link, without requiring any compensation for the States undertaking the risks associated with that obligation. The Commission notes that, as the beneficiary of that obligation, the Consortium would have enjoyed an immediate advantage, as from when that obligation was granted, insofar as it had an enforceable right to State guarantees in respect of all of its borrowing needs in connection with the financing of the Fixed Link. The Commission finds, therefore, that in setting up a State guarantee model by incurring an obligation to guarantee the financial instruments for the financing of the Fixed Link without requiring the payment of a guarantee premium on market terms, the States conferred an advantage on the Consortium in the form of lower financing costs.

(312) According to settled case law, when Member States adopt measures benefiting specific entities, the identification of an advantage, in principle, allows its selective nature to be presumed[163]. This is because it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or few undertakings[164]. In the present case, given that the advantage specifically concerns the Consortium, the State guarantee model constitutes a selective advantage in favour of the Consortium within the meaning of Article 107(1) TFEU.

6.1.3.2. The special Danish rules on loss carry-forward and depreciation

(313) In Denmark, partnerships, such as the Consortium, are treated as transparent entities for tax purposes. This means that the Danish tax rules only apply to the Danish partner of the Consortium, A/S Øresund, and not to the Consortium, itself (recital (118)). In this context, the Commission first must assess whether the Consortium should be considered as a beneficiary of the special Danish rules on loss carry-forward and depreciation (see further, recitals (314) to (319)). Second, the Commission must assess to what extent those rules conferred a selective advantage on the beneficiary that it would not have obtained under normal taxation rules (see further, recitals (320) to (347)).

6.1.3.2.1. The beneficiary of the special Danish rules on loss carry-forward and depreciation

(314) To establish which entity should be considered as beneficiary of the special Danish rules on loss carry-forward and depreciation, the Commission notes that, for the purposes of the application of State aid rules, separate legal entities may be considered to form one economic unit with regard to an economic activity. That economic unit is then considered to be the relevant undertaking. In this respect, the

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

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

Court of Justice considers the existence of a controlling share and other functional, economic, and organic links to be relevant[165].

(315) The Commission considers that, for the purposes of the economic activity of the Fixed Link, A/S Øresund, insofar it is involved in that economic activity, and the Consortium form a single undertaking. The Consortium is a partnership between a limited liability company set up by the Danish State (A/S Øresund) and a limited liability company set up by the Swedish State (SVEDAB) (recitals (64) and (65)). A/S Øresund, holding 50 % of its shares, is, together with SVEDAB, liable jointly and severally against third parties for any obligation which may arise for the Consortium in connection with its operations; and it nominates four of the eight board members[166].

(316) The Commission recalls that the economic activity of the Fixed Link consists in the planning, project design, construction, maintenance, and operation of the Fixed Link. The costs of the project design and other preparations for the Fixed Link, as well as its construction, maintenance, and operation, shall be fully covered by the Consortium through user charges (recital (69)). That cost of the Fixed Link includes a cost related to Danish corporate income tax. As described at recital (118), however, the Consortium, itself, is not subject to taxation, as it is a partnership that is tax transparent. The special Danish rules on loss carry-forward and depreciation are part of the Construction Act (and were incorporated in the Sund & Bælt Act in 2005), and apply to the taxable income of A/S Øresund. Due to A/S Øresund's 50 % ownership of the Consortium, this includes 50 % of the taxable income deriving from the activities of the Consortium. The financial model (i.e. the entirety of financial flows, including all costs and revenues) of the economic activity of the Fixed Link, on the Danish side, therefore, involves not only the Consortium, but also A/S Øresund, insofar as A/S Øresund is responsible for the payment of taxes relating to that economic activity.

(317) The Commission considers that the payment of those taxes cannot be separated from the economic activity of the Fixed Link. This is because the entire cost of the Fixed Link (and costs of the road and rail hinterland connections) is to be financed by user charges, collected by the Consortium. Those charges constitute income that is subject to corporate income tax – payable at the level of A/S Øresund – on the basis of the Danish Corporate Income Tax Act. As such, while the charges that the Consortium levies for using the Fixed Link constitute revenue, they also attract a cost in the form of the related tax payments. In practice, the organisational and financial setup provides for a payment of dividends by the Consortium to the parent companies, which will not only finance the cost of the hinterland connections, but also the tax liabilities related to the Fixed Link. Therefore, any reduction in the amount of tax liability connected to the activity of the Fixed Link is of benefit to the undertaking engaged in that economic activity. As a consequence, it benefits the Consortium as it reduces a financial burden that the Consortium would otherwise have to bear, given

[165] Judgment of the Court of Justice of 16 December 2010, *AceaElectrabel Produzione SpA* v *Commission*, C-480/09 P, EU:C:2010:787, paragraphs 47 to 55; judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, EU:C:2006:8, paragraph 112.

[166] Sections 3.1, 3.2, and 8.2 of the Consortium Agreement.

that it is the Consortium's income stream that is used to discharge A/S Øresund's tax liability stemming from the income generated by the Fixed Link.

(318) Moreover, the Danish authorities have observed (recital (269)), that the total amount of aid (gross grant equivalent) granted through the State guarantee model is reduced to the extent that the special Danish rules on loss carry-forward and depreciation lead to a lower debt burden for the Consortium. It follows that, conversely, had A/S Øresund, in light of its ownership of 50 % of the Consortium, not been granted those special rules, the Consortium would have had a higher debt burden, and thus, according to the logic followed by the Danish authorities, a larger amount of aid would have been granted through the State guarantee model. This confirms the Commission's view that the Consortium and A/S Øresund should be considered to be a single undertaking for the purposes of the economic activity of the Fixed Link and that it is that single undertaking that should be considered as a beneficiary of the special Danish rules on loss carry-forward and depreciation, and, that, as a consequence, the Consortium is also a beneficiary.

(319) In light of the considerations set out at recitals (314) to (318), the Commission considers that, should the special Danish rules on loss carry-forward and depreciation create a selective advantage, the Consortium would be a beneficiary of that advantage.

6.1.3.2.2. Selective advantage

(320) Having established that the single undertaking, and therefore, also the Consortium, would be a beneficiary of an advantage created by the special Danish rules on loss carry-forward and depreciation (recital (319)), the Commission must establish whether those rules create such an advantage. To do so, given that the Consortium is transparent for Danish tax purposes (recital (118)), and given that A/S Øresund is responsible for the payment of the taxes relating to 50 % of the economic activity of the Fixed Link (recital (120)), the Commission must examine the tax liabilities of A/S Øresund, resulting from the activities of the Consortium. To determine whether the special Danish rules on loss carry-forward and depreciation create such an advantage, the tax liabilities under those rules must be compared with the tax liabilities to which A/S Øresund would have been subject under the normal taxation rules, i.e. in the absence of those special rules.

(321) For a measure to fall within the scope of Article 107(1) TFEU, it must, within the context of a particular legal system, favour 'certain undertakings or the production of certain goods' over others which are in a legal and factual situation that is comparable, in light of the objective pursued by the system of reference[167] (this is usually referred to as the 'three-step test' and further explained in the next recital). However, as set out at recital (312), when Member States adopt measures benefiting specific entities, the identification of an advantage, in principle, allows its selective

[167] See, to that effect, judgment of the Court of Justice of 5 December 2023, *Engie* v *Commission*, joined cases C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 106 and judgment of the Court of Justice of 2 February 2023, *Spain, Lico and Others* v *Commission*, joined cases C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraph 46 and the case law cited therein; see also judgment of the Court of Justice of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54 and the case law cited therein.

nature to be presumed. In the present case, given that the special Danish rules on loss carry-forward and depreciation concern specifically A/S Øresund and the Consortium, to the extent those rules constitute an advantage, that advantage is selective.

(322) Nevertheless, in order to determine whether the single undertaking enjoyed a selective advantage by virtue of the special Danish rules on loss carry-forward and depreciation, the Commission assessed those measures under the standard three-step analysis established by the Union Courts[168]. First, the system of reference must be identified, that is, the 'normal' taxation rules[169]. Second, it must be determined whether a given measure constitutes a derogation from that system, insofar as it differentiates between economic operators that, in light of the objective intrinsic to the system, are in a comparable factual and legal situation. If the measure constitutes a derogation from the system of reference, and, thus, is prima facie selective, it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the system. In this context, it is for the Member State to demonstrate that the differentiated tax treatment derives directly from the basic or guiding principles of that system[170].

6.1.3.2.2.1. Selective advantage: special Danish rules on loss carry-forward

(323) As recalled at recital (322), in order to classify a national tax measure as 'selective', the Commission must begin by identifying the system of reference, that is the 'normal' tax system applicable in the Member State concerned. The determination of the system of reference is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with 'normal' taxation. Thus, determination of the set of undertakings that are in a comparable factual and legal situation depends on the prior definition of the legal regime in light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not.

(324) As noted at recital (118), Section 1 of the Danish Corporate Income Tax Act lists the legal entities that are subject to Danish corporate income tax. Limited liability companies, such as A/S Øresund, are included in that list. In addition, as noted at recitals (135) and (136), the relevant loss carry-forward rules can be found in the Danish Tax Assessment Act (Section 15) for the periods between 1991 and 2012, and in the Danish Corporate Income Tax Act (Section 12) for the following periods (recitals (138) and (139)). Those rules determine the conditions and limits for the

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

[169] Judgment of the Court of Justice of 28 June 2018, *Andres* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 88.

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

carry-forward of loss for tax purposes for legal entities subject to Danish corporate income tax (including limited liability companies). As already explained at recital (117), the Danish Tax Assessment Act provides rules for how the tax laws are applied to both individuals and companies, and the Danish Corporate Income Tax Act determines the entities subject to corporate income tax, the rate and other rules relevant for the taxation of companies.

1991-2001 LCF

(325) First, as noted by Denmark (recital (267)), for the 1991-2001 LCF, the generally applicable rule on the carry-forward of losses was found in Section 15 of the Danish Tax Assessment Act. That act includes income tax rules for both individuals and companies, and forms part of the corporate income tax system (together with the relevant income tax acts, in particular, the Danish Corporate Income Tax Act). As such, the Danish Corporate Income Tax Act determines which entities must pay corporate income tax, and the Danish Tax Assessment Act provides the parameters by which the amount they need to pay is determined. One of the factors that determines that amount is whether the taxable entity has any carried forward losses that it may use to reduce its taxable base. Section 15 of the Danish Tax Assessment Act established that, for the 1991-2001 LCF period, losses could be carried forward in the taxable income of the taxpayer for the five subsequent years (recital (135)). The limitation of five years was an integral part of the generally applicable loss carry-forward rule (a general measure, applicable without distinction to all economic operators), rather than an exception to a broader legislative framework[171]. In this regard, it must be noted that that five-year limitation is inseparable from the general corporate income tax system, which provides for the carry-forward of tax losses, as those rules are relevant to determine the tax base. The Commission finds that the relevant system of reference for the assessment of the 1991-2001 LCF is the Danish corporate income tax system, including, in particular, Section 1 of the Danish Corporate Income Tax Act and Section 15 of the Danish Tax Assessment Act, which provided that, for the purposes of assessing the amount of corporate income tax payable by a legal entity subject to that tax (including limited liability companies), losses could be carried forward for a maximum period of five years. The tax provisions included in the Construction Act, including the 1991-2001 LCF, do not form part of that system, as they apply to one particular project, only. The relevant objective of the Danish corporate income tax system is to establish a general system of taxation for companies on their profits, and, more specifically, to provide rules relating to the determination of the tax base, including rules allowing carry-forward of losses (and depreciation of assets) for all companies, without distinction. It is, therefore, against the benchmark of both Section 1 of the Danish Corporate Income Tax Act and Section 15 of the Danish Tax Assessment Act, and, in light of the above objective, that the 1991-2001 LCF must be assessed under the second step of the three-step analysis (recitals (326) and (327)).

(326) Second, the Commission notes that, under Section 11 of the Construction Act, A/S Øresund could carry-forward losses for 15 tax years or, for losses incurred before the Fixed Link was put into service, for 30 tax years. This also applied to 50 % of the

[171] See, for example, judgment of the Court of Justice of 28 June 2018, *Andres* v *Commission*, C-203/16 P, EU:C:2018:505, paragraphs 103 and 104.

losses of the Consortium, in light of A/S Øresund's 50 % ownership. If A/S Øresund had been subject to the normal rules under the system of reference (including Section 15 of the Danish Tax Assessment Act), its losses would have expired earlier, and those expired losses would have no longer been available to offset profits in A/S Øresund's tax returns[172]. Accordingly, Section 11 of the Construction Act constituted a derogation to the system of reference, conferring an advantage to A/S Øresund, as compared to other legal entities (including limited liability companies) subject to Danish corporate income tax, as it could carry-forward its losses to reduce its tax burden for a longer period than would have been available to those entities. As noted by the Commission at recitals (314) to (319), this also benefits the Consortium, insofar as a reduction in A/S Øresund's tax burden results in a reduction in the Consortium's financial burden.

(327) The Commission finds, moreover, that A/S Øresund, which, for the purposes of the application of the special Danish rules on loss carry-forward and depreciation, is a single undertaking with the Consortium (recital (315)), should be considered as being in the same factual and legal situation as other legal entities (including limited liability companies) subject to Danish corporate income tax, in light of the objectives intrinsic to the system of reference. As noted at recital (325), the relevant objective of that system of reference is to establish a general system of taxation for companies on their profits, and, more specifically, to provide rules relating to the determination of the tax base, including rules allowing carry-forward of losses (and depreciation of assets) for all companies, without distinction; this is regardless of whether or not they engage in certain projects. Denmark confirmed that the special Danish rules on loss carry-forward and depreciation were created for A/S Øresund, and apply in its capacity as partner in the Consortium (recital (233)). The preparatory notes to the Construction Act indicate that the 1991-2001 LCF was put in place by analogy to the rule applicable to the Great Belt bridge. The Danish authorities had explained, during the preliminary investigation phase, that this was because of the extraordinary nature of the construction project characterised by considerable costs over a prolonged period of time, still coupled with reasonable prospects of long-term viability. The Commission notes, however, that the Danish tax system (including the normal loss carry-forward rule under Section 15 of the Danish Tax Assessment Act) does not distinguish between entities according to the size of the projects they undertake. While it is true that A/S Øresund is responsible for a large investment, it is not precluded that other limited liability companies could undertake similarly significant investments, or investments for which losses can be expected to extend beyond five years. The scope of the Fixed Link project, therefore, does not alter the fact that, in light of the objective of taxing profits, A/S Øresund is in the same legal and factual position as other legal entities (including limited liability companies) subject to Danish corporate income tax. In other words, the fact that A/S Øresund – including via its 50 % ownership of the Consortium – is responsible for a large infrastructure investment, does not differentiate its position, legally or factually, for the purposes of the system of reference, from other limited liability companies subject to Danish

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[172] In practice, it is Sund & Bælt that files the corporate income tax returns for its group members. In addition to the separate tax returns filed for its group members, Sund & Bælt files a consolidated corporate income tax return for the group. For the ease of reading and in the context of this decision, the Commission referred to the tax returns of A/S Øresund and to the submission of the tax returns by A/S Øresund.

corporate income tax. Therefore, the Commission finds that the 1991-2001 LCF as it applied to A/S Øresund clearly derogated from the general system applicable in Denmark, as it differentiated between economic operators that are in a comparable factual and legal situation in light of the objective pursued by the tax system concerned.

(328) Third, the Commission finds that the derogation noted at recital (327) is not justified by the nature or the general scheme of the system. The Commission recalls that a measure, which is prima facie selective, may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the system of reference, or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system[173]. External policy objectives, which are not inherent to the general tax system, cannot be relied upon for that purpose[174]. It is up to the Member State concerned to demonstrate that a measure, which is, at first sight, selective, is justified by the nature or general scheme of its tax system[175].

(329) The Commission notes that the Danish authorities had argued, in the course of the preliminary investigation, that the special Danish rules on loss carry-forward and depreciation can be regarded as justified by the logic of the system due to the extraordinary character of the entire Fixed Link project in terms of its size and purpose, making it incomparable to any other infrastructure project that has been subject to Danish corporate income tax. In that regard, the Commission recalls that the objective of the system of reference is to establish a general system of taxation for companies on their profits, and, more specifically, to provide rules relating to the determination of the tax base, including rules allowing carry-forward of losses for all companies, without distinction (recital (325)). As indicated at recital (327), the system of reference does not distinguish between entities according to the size of the projects they undertake, and it is not precluded that other limited liability companies could undertake similarly significant investments, or investments for which losses can be expected to extend beyond five years. In those circumstances, the Commission does not consider that the character of the Fixed Link project would justify a different treatment for A/S Øresund, in view of the nature and general scheme of that system. In other words, the Commission does not consider that such different treatment would be consistent, necessary, and proportionate in light of the guiding principles of the Danish tax system. At recital 90 of the Opening decision,

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

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

175 Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 146; judgment of the Court of Justice of 29 April 2004, *Netherlands* v *Commission*, C-159/01, EU:C:2004:246, paragraph 43; judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511.

the Commission noted that the Danish authorities had not sufficiently demonstrated why, and to what extent, the size and the purpose of a project would be sufficient to justify different tax treatment. Following the adoption of the Opening decision, the Danish authorities did not bring any new evidence to the attention of the Commission that would alter the Commission's view, and so did not discharge the burden of proof of the third step[176]. The Commission, therefore, concludes that the measure does not constitute a justified derogation to the application of the system of reference, directly resulting from the basic or guiding principles of that tax system.

(330) The Commission, therefore, finds that the 1991-2001 LCF resulted in a selective advantage to A/S Øresund, connected to the economic activity of the Fixed Link. As noted at recital (319), the Consortium would be the beneficiary of any selective advantage created by the special Danish rules on loss carry-forward and depreciation, in view of the fact that both A/S Øresund and the Consortium form a single undertaking for the purpose of the economic activity of the Fixed Link. Therefore, the Commission concludes that the 1991-2001 LCF resulted in a selective advantage to the Consortium.

2002-2012 LCF

(331) For the 2002-2012 LCF, the Commission recalls that, as noted at recital (136), the Danish Tax Assessment Act (Section 15) was amended on 21 May 2002, and no longer imposed any limitation on the possibility for legal entities (including limited liability companies) subject to Danish corporate income tax to carry-forward their losses. The Commission does not consider that that specific legislative amendment impacted either (i) the scope of the system of reference for the 2002-2012 LCF, as compared to the 1991-2001 LCF, or (ii) the objective of that system of reference. The Commission, therefore, finds that, for the 2002-2012 LCF period, the system of reference provided that legal entities (including limited liability companies) subject to Danish corporate income tax were entitled to carry-forward their losses, without any limitation with respect to the period within which losses could be carried forward. The Commission, therefore, finds that the relevant system of reference for the assessment of the 2002-2012 LCF is the Danish corporate income tax system, including, in particular, Section 1 of the Danish Corporate Income Tax Act and Section 15 of the Danish Tax Assessment Act, which provided that, for the purposes of assessing the amount of corporate income tax payable by a legal entity subject to that tax (including limited liability companies) losses could be carried forward without time limitation.

(332) The Commission notes that, similar to the Danish Tax Assessment Act, the Construction Act was amended to remove the limitation of 15 years that had been applicable to A/S Øresund according to the 1991-2001 LCF. In those circumstances, for losses incurred as from the tax year 2002, A/S Øresund was subject to the same rule as was present in the generally applicable rules (i.e. no limitation in time to carry-forward losses). In other words, A/S Øresund was not subject to a derogation from the system of reference.

[176] Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, EU:C:2011:550, paragraph 65.

(333) Consequently, the Commission concludes that the 2002-2012 LCF did not result in a selective advantage for A/S Øresund. As a result, the 2002-2012 LCF did not, either, result in a selective advantage for the Consortium. Therefore, the 2002-2012 LCF did not constitute State aid to A/S Øresund or the Consortium.

2013-2015 LCF

(334) For the 2013-2015 LCF period, the generally applicable loss carry-forward rule is found in Section 12 of the Danish Corporate Income Tax Act. As noted at recital (138), Act No 591 of 18 June 2012, Section 15 of the Danish Tax Assessment Act was repealed. At the same time, Act No 591 of 18 June 2012 added Section 12 to the Danish Corporate Income Tax Act, which introduced a new limitation on the utilisation of losses carried-forward, which applied to tax years starting on or after 1 July 2012. Under those changes, legal entities (including limited liability companies) subject to Danish corporate income tax could carry-forward losses for an unlimited period. However, only a loss amounting to DKK 7 500 000 (EUR 1 005 311) plus, if an additional loss remained, an amount corresponding to a maximum of 60 % of the taxable income in excess of DKK 7 500 000 (EUR 1 005 311), could be deducted in a given tax year (recital (139)). That limitation was an integral part of the generally applicable loss carry-forward rule, rather than an exception to a broader legislative framework. The Commission, therefore, finds that the relevant system of reference for the assessment of the 2013-2015 LCF is the Danish corporate income tax system, including, in particular, Sections 1 and 12 of the Danish Corporate Income Tax Act, which provided that, for the purposes of assessing the amount of corporate income tax payable by a legal entity (including limited liability companies) subject to that tax, losses could be carried forward without limitation in time, but could only be utilised to offset profits subject to the limitations as set out in Section 12. As already explained at recital (325), the objective of the Danish corporate income tax system is to establish a general system of taxation for companies on their profits, and, more specifically, to provide rules relating to the determination of the tax base, including rules allowing carry-forward of losses and deprecation of assets (for all companies, without distinction).

(335) The Commission notes that, prior to the amendment to the Sund & Bælt Act of 4 May 2015 (recital (134)), the limitations in terms of the amount of losses that could be utilised that applied to legal entities subject to Danish corporate income tax (including limited liability companies) by virtue of the system of reference did not apply to A/S Øresund. Therefore, in relation to the tax years 2013, 2014, and 2015, A/S Øresund could offset its entire profit base by utilising losses carried forward, which it would not be able to do if it were subject to the normal rules, under the system of reference. As noted at recital (327), A/S Øresund is in a similar factual and legal position to other limited liability companies that are subject to Danish corporate income tax. The Commission, therefore, considers that, for the 2013-2015 LCF, A/S Øresund enjoyed a derogation from the normal taxation rules, which placed it in a more advantageous position than other undertakings in a similar legal and factual situation as regards the objective of the system of reference. In that regard, the Commission notes that, unlike for the 2002-2012 LCF, no amendment was made to the Sund & Bælt Act to reflect the amendment to the Danish Corporate Income Tax Act. Therefore, by declining to make such an amendment, the Danish authorities allowed A/S Øresund to enjoy a more advantageous position than other limited

liability companies subject to Danish corporate income tax. The combination of the amendment to the Danish Corporate Income Tax Act, and the absence of a corresponding amendment to the Sund & Bælt Act, therefore, must be considered as constituting a derogation to the system of reference, conferring an advantage on A/S Øresund as compared to other legal entities (including limited liability companies) subject to Danish corporate income tax, as it could use its losses to reduce its tax liability, without the limitations that applied to those other entities. Those other entities were in a similar legal and factual situation to A/S Øresund, in light of the tax system of reference, which had the objective of setting up a general system of taxation for companies and their profits.

(336) As noted at recital (329), the Danish authorities had argued, during the course of the preliminary investigation, that the special Danish rules on loss carry-forward and depreciation can be regarded as justified by the logic of the system of reference due to the extraordinary character of the Fixed Link project in terms of its size and purpose, making it incomparable to any other project subject to Danish corporate income tax. As noted at recital (329), the Commission does not consider that the character of the Fixed Link project would justify a different treatment for A/S Øresund, in view of the nature and general scheme of the system of reference. Following the Opening decision, the Danish authorities did not submit any further evidence that would alter the Commission's view. The Commission, therefore, concludes that the 2013-2015 LCF does not constitute a justified derogation to the application of the system of reference, directly resulting from the basic or guiding principles of the Danish corporate income tax system.

(337) The Commission, therefore, finds that the 2013-2015 LCF resulted in a selective advantage to A/S Øresund. Since the Consortium and A/S Øresund form a single undertaking for the purpose of the economic activity of the Fixed Link (recital (315)), the single undertaking is a beneficiary of the selective advantage created by the 2013-2015 LCF, and, as a consequence, the 2013-2015 LCF resulted in a selective advantage to the Consortium.

(338) The Commission recalls that the special Danish rules on loss carry-forward were repealed with effect from 1 January 2016, following which A/S Øresund has been subject to the normal Danish corporate income tax system (recital (134)). The Commission, therefore, notes that no further selective advantage in favour of A/S Øresund or the Consortium, in respect of the rules on loss carry-forward, has been in place since that date.

6.1.3.2.2.2. Selective advantage: special Danish rules on depreciation

(339) As noted at recital (118), Section 1 of the Danish Corporate Income Tax Act lists the legal entities that are subject to Danish corporate income tax. Limited liability companies, such as A/S Øresund, are included in that list. Denmark noted that, for the entire period under assessment, the normal rules for tax depreciation are found in the Danish Tax Depreciation Act (recital (268)), which sets the maximum depreciation rates, the depreciation methods, and the possible limitations for the different categories of depreciable assets, for tax purposes, by entities subject to Danish corporate income tax. As such, the Danish Corporate Income Tax Act determines which entities must pay corporate income tax, and the Danish Tax

Depreciation Act sets the rates and thresholds according to which such entities may depreciate their assets, in order to offset that depreciation against their taxable base.

1991-1998 DEP

(340) For the 1991-1998 period, Section 22 of the Danish Tax Depreciation Act determined that the normal depreciation rate for buildings and installations was, for the period up to and including the tax year 1998[177], 6 % on a straight-line basis until reaching 60 % of the acquisition costs, and, thereafter, limited to 2 % of the acquisition cost, annually (recital (144)). The Commission finds that the system of reference for the 1991-1998 DEP is the Danish corporate income tax system, including, in particular, Section 1 of the Danish Corporate Income Tax Act, combined with the generally applicable rules of the Danish Tax Depreciation Act, which provides for the rates, methods, and possible limitations for the depreciation of fixed assets. With regard to buildings and installations, that system of reference provided, during the relevant period, for depreciation at a rate of 6 % (with a limitation to 2 %, after the cumulated depreciation had reached 60 %). As already explained at recital (325), the relevant objective of the Danish corporate income tax system is to establish a general system of taxation for companies on their profits, and, more specifically, to provide rules relating to the determination of the tax base, including rules allowing carry forward of losses and depreciation of assets, for all companies, without distinction. The system of reference, therefore, provided that buildings and installations could be depreciated for tax purposes at a rate of up to 6 % (with the above-noted limitation). Other types of assets had higher maximum depreciation rates in that system of reference, in accordance with the Danish Tax Depreciation Act.

(341) As explained at recital (143), in the Construction Act, the depreciation rate for A/S Øresund was set at 6 % / 2 % of the initial acquisition costs, which meant that a single general rule on depreciation was applied to all assets of A/S Øresund, including its 50 % share on the assets of the Consortium. According to the preparatory notes to the Construction Act, that rate corresponded to comparable provisions applicable to buildings and installations under the Danish Tax Depreciation Act, in force at the time. Denmark explained that the rule applicable to A/S Øresund was to be considered as a practical rule, allowing a uniform regime for all assets that was originally, if anything, detrimental to A/S Øresund, as the least favourable rate of depreciation was applied to the entire project (other items, such as machinery, could normally be depreciated at a higher rate than at 6 % / 2 %, but for A/S Øresund, a flat rate applied) (recital (268)). As a result of the provisions in the Construction Act, therefore, A/S Øresund could apply a single deprecation rule but could, for none of the asset categories, depreciate at a faster rate than other legal entities subject to Danish corporate income tax.

(342) The Commission, therefore, finds, that the 1991-1998 DEP did not constitute a derogation capable of resulting in a selective advantage to A/S Øresund, or, by extension, the Consortium, as compared to the 'normal' taxation set out in the system of reference. Therefore, the 1991-1998 DEP did not constitute State aid to A/S Øresund or to the Consortium.

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177 At least as from 1991 - the period before is not relevant for this assessment.

1999-2007 DEP and 2008-2015 DEP

(343) The Commission notes that, on 26 June 1998, the Danish Tax Depreciation Act was amended, such that, as from the tax year 1999, the normal depreciation rate for buildings and installations decreased to a maximum of 5 % (Section 17 of the Danish Tax Depreciation Act). At the same time, the rule according to which a 2 % depreciation rate applied after ten years was abolished. On 6 June 2007, the Danish Tax Depreciation Act was amended further, such that, as from the tax year 2008, the normal depreciation rate for buildings and installations decreased to maximum 4 % (recital (145)). The Commission finds that the system of reference for the 1999-2007 DEP is the Danish corporate income tax system, including, in particular, Section 1 of the Danish Corporate Income Tax Act, combined with the generally applicable rules of the Danish Tax Depreciation Act, which provides for the rates, methods, and possible limitations for the depreciation of fixed assets. Those rules provided that, for the purposes of assessing the amount of corporate income tax payable by a legal entity subject to that tax (including limited liability companies), buildings and installations could be depreciated at a rate of 5 % for the 1999-2007 DEP period, and for the 2008-2015 DEP period at a rate of 4 %. The Commission does not consider that the legislative amendments of 26 June 1998 and 6 June 2007 impacted the objective of that framework, as compared to the 1991-1998 DEP period.

(344) Second, those changes were not reflected in the Construction Act (or, later, the Sund & Bælt Act), which maintained the rate of 6 % / 2 % on the entire asset base. Inthat context, the Commission first analysed the effect of the 2 % rate applicable to A/S Øresund, once the accumulated depreciation reaches 60 % and the effect of the non-differentiated deprecation of the entire asset base. On the first point, the Commission notes that, for the entire period from the establishment of A/S Øresund and the Consortium, until the tax year 2016, the 2 % rate was not of any practical relevance, since the overall amount of the Consortium's assets that could be depreciated by A/S Øresund had not yet reached 60 % (recital (271)). On the second point, the Commission notes that the 6 % depreciation rate applied to the Consortium's entire asset base that was subject to Danish tax rules (that is, the 50 % owned by A/S Øresund), without differentiating between 'buildings and installations' and other assets that might potentially have a more favourable depreciation regime in the Danish Tax Depreciation Act. In that context, the Danish authorities, in particular, referred to railroad installations, such a tracks, signals and overhead cables (recital (144) and footnote 79), but also noted that the effect of applying a faster rate of depreciation on those assets had never been examined or estimated in detail. The Commission considers that, even if more favourable depreciation regimes on certain assets were not applicable to A/S Øresund, and therefore, to its depreciation of those specific assets, for the large majority of its assets (the project consisting of, essentially, the construction of a bridge and a tunnel), A/S Øresund was allowed to depreciate at a higher rate than it would have been able to under normal taxation rules. A higher rate of depreciation can lead to the faster depreciation of an asset, which allows the reduction of the tax base to occur more intensely in the early years of an asset's life; the fiscal effect of this over the total lifespan of the asset, therefore, could be comparable to a free loan. The Commission notes, in this context, that it is only relevant to consider the period until the tax year 2016, since, as from that year, A/S Øresund was subject to the normal rules. By declining to amend the Construction Act, or the Sund & Bælt Act, to impose a similar limitation on the maximum rate of depreciation for A/S Øresund as under the normal rules, the Danish

authorities allowed it to enjoy an advantageous position over other legal entities subject to Danish corporate income tax. The combination of the amendments to the Danish Tax Depreciation Act, and the absence of corresponding amendments to the Construction Act or the Sund & Bælt Act, therefore, must be considered as constituting a measure in favour of A/S Øresund. The Commission considers that A/S Øresund enjoyed a derogation from the system of reference, as, for the reasons explained at recital (327), the 1999-2007 DEP and 2008-2015 DEP differentiated between economic operators that are in a comparable factual and legal situation in light of the objective of the system of reference.

(345) As noted at recital (329), the Danish authorities had argued, during the course of the preliminary investigation, that the special Danish rules on loss carry-forward and depreciation can be regarded as justified by the logic of the system of reference, due to the extraordinary character of the Fixed Link project in terms of its size and purpose, making it incomparable to any other project subject to Danish corporate income tax. As noted at recital (329), the Commission does not consider that the character of the Fixed Link project would justify a different treatment for A/S Øresund, in view of the nature and general scheme of the system of reference. Following the Opening decision, the Danish authorities did not submit any further evidence that would alter the Commission's view. The Commission, therefore, concludes that the 2013-2015 LCF does not constitute a justified derogation to the application of the system of reference, directly resulting from the basic or guiding principles of the Danish corporate income tax system.

(346) The Commission, therefore, concludes that the 1999-2007 DEP and the 2008-2015 DEP resulted in a selective advantage to A/S Øresund. As noted at recital (319), the Consortium would be a beneficiary of any selective advantage created by the special Danish rules on loss carry-forward and depreciation, in view of the fact that both A/S Øresund and the Consortium form a single undertaking for the purpose of the economic activity of the Fixed Link. Therefore, the Commission concludes that the 1999-2007 DEP and the 2008-2015 DEP resulted in a selective advantage to the Consortium.

(347) The Commission recalls that the special Danish rules on depreciation were repealed with effect from 1 January 2016, following which A/S Øresund has been subject to the normal Danish corporate income tax system (recital (134)). The Commission, therefore, notes that no further selective advantage in favour of A/S Øresund or the Consortium, in respect of the rules on depreciation, has been in place since that date.

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

(348) Aid granted by a Member State that strengthens the position of an undertaking as compared to other undertakings competing in intra-Union trade must be regarded as affecting trade between Member States[178]. A measure granted by the State is

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

considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient, compared to its competitors.

(349) At recital 97 of the Opening decision, the Commission preliminarily concluded that, without it being necessary to decide whether the measures are liable to distort competition and affect trade between Member States on the market for construction and operation of (cross-border) bridges, it is clear that the grant of a selective advantage may strengthen the position of the Consortium on the market for transport services to cross the Øresund strait, compared to other undertakings, such as, in particular, ferry operators.

(350) The Consortium is active on the market for the construction and operation[179] of (cross border) bridges and on the market for transport services to cross the Øresund strait. On the latter, the Consortium competes in trade between Member States with undertakings providing alternative transport services, ferry services, in particular.

(351) It is clear from the preparatory notes to the Construction Act that the traffic on the Fixed Link would consist, in addition to newly generated traffic, of the existing traffic on the southern ferry routes on the Øresund, the shift of traffic from other ferry routes in the Øresund, as well as from the ferry routes over the Kattegat and the Baltic Sea. In addition, the Danish Minister for Transport was authorised to close down the existing Danish State Rail Administration ferry service across the Øresund (other than the service between Helsingør, Denmark and Helsingborg, Sweden), after the Fixed Link had been put into service. Government bill 1990/91:158 noted that the Helsingør – Helsingborg ferry service was assumed to remain operating even if part of the traffic would be transferred to the Fixed Link. All other ferry services across the Øresund, however, were assumed to cease operating. Government bill 1990/91:158 also made reference to competition from ferry services on other routes between Sweden, Germany and Jutland, Denmark.

(352) Moreover, the Consortium's annual reports provide market share figures, which, as such, is a strong indication of competition. The 2005 annual report provides data on the evolution of passenger traffic across Øresund between 1999 and 2005. The data show that the Dragør-Limhamn service had its last year of operation in 1999, with 1.6 million passengers. The number of passengers served by the 'Hydrofoils Copenhagen – Skåne' dropped from 3.6 million passengers in 1999 to 150 000 in 2002, after which it stopped operating. The number of passengers served by the Complainant dropped from 14.3 million in 1999 to 13.3 million in 2000, and, further, to 11.5 million in 2001.

(353) The Commission considers that the findings as described at recitals (351) and (352) evidence the potential competition that exists between the Fixed Link and ferry operators, operating ferry routes across the Øresund. The measures that confer a selective advantage on the Consortium were liable to strengthen the Consortium's financial position, and, as a result, to distort that competition. Since the Consortium and the ferry operators are operating on a market providing transport services across

[179] The Commission recalls in this context that it established at recital (301) that the construction of the Fixed Link cannot be dissociated from its future operation.

the Øresund, between Denmark and Sweden, that competition affects trade between Member States.

(354) In light of the foregoing, the Commission considers that the measures entailing a selective advantage may be considered as affecting intra-Union trade and are liable to distort competition.

6.1.5. Conclusion on the existence of aid

(355) On the basis of its assessment at recitals (287) to (354), the Commission concludes that the State guarantee model, according to which the States provided an enduring commitment to guarantee the financial instruments for the financing of the Fixed Link, and which Denmark and Sweden granted to the Consortium, constitutes State aid within the meaning of Article 107(1) TFEU. The Commission also concludes that the 1991-2001 LCF, the 2013-2015 LCF, the 1999-2007 DEP, and the 2008-2015 DEP, which Denmark granted to A/S Øresund, and which result in an advantage to A/S Øresund and, therefore, the Consortium as part of the same single undertaking for the purpose of the economic activity of the Fixed Link (recital (319)), constitute State aid to the Consortium within the meaning of Article 107(1) TFEU. The 2002-2012 LCF and the 1991-1998 DEP do not constitute State aid to the Consortium within the meaning of Article 107(1) TFEU.

6.2. Classification as a scheme or individual aid

(356) In the Opening decision, at recital 108, the Commission expressed doubts as to whether the State guarantees should be considered as an aid scheme, whether they should be considered as individual aid, granted when the Consortium was established, or whether they should be considered as individual aid, granted each time a financial transaction of the Consortium is approved by the national authorities. At recital 107 of the Opening decision, the Commission stated its preliminary view that the administration of the guarantees in relation to specific financial transactions cannot be considered in isolation from the State guarantees granted in 1992, and, at recital 109, the Commission noted that its preliminary qualification of the guarantees as individual aids should also be applied to the tax measures. Given that the Commission could not conclude on the question of whether the support measures constitute a scheme or individual aid measures, it could not conclude either on the date at which the guarantees and the tax measures were granted, as well as their number.

(357) To determine whether the aid measures qualify as aid schemes or individual aid, the Commission must examine the nature of the aid measures, in light of the definitions set out in Regulation 2015/1589.

(358) According to Article 1(d) of Regulation 2015/1589,'"aid scheme" means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'.

(359) In contrast, 'individual aid' is defined at Article 1(e) of Regulation 2015/1589 as 'aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme'.

6.2.1. The State guarantee model

6.2.1.1. Scheme or individual aid

(360) The Commission considered at recital 103 of the Opening decision that the first situation included in the definition of an aid scheme cannot be considered applicable to the State guarantee model as it is not aimed at 'undertakings defined within the act in a general and abstract manner', but at the Consortium, specifically. Neither the States, nor any interested party, submitted arguments to the contrary. As noted at recital (169), the Complainant and Scandlines et al. referred to the *Øresund* judgment to support their view that the State guarantee model cannot constitute a scheme. According to the Complainant, the Commission should not even assess whether the State guarantee model could constitute a scheme (recital (169)). The Commission notes, however, that such analysis is required since the General Court annulled the 2014 decision with regard to the special Danish rules on loss carry-forward and depreciation, and the State guarantees granted to the Consortium (recital (12)). The Commission gave effect to the *Øresund* judgment by opening the formal investigation procedure in which the nature of measures as individual aid or a scheme was an explicit ground for opening that procedure (recital (155)).

(361) Following its formal investigation, the Commission concludes that the State aid deriving from the State guarantee model cannot be considered as a scheme, as explained further at recitals (362) and (363).

(362) First, the aid deriving from the State guarantee model is not granted on the basis of an act that provides for individual aid awards to be made to undertakings defined within the act in a general and abstract manner. The Construction Act provides for a special rule applicable specifically to the Consortium. The State guarantee model, therefore, does not fulfil the first condition in the definition of an aid scheme as set out at Article 1(d) of Regulation 2015/1589.

(363) Second, the Construction Act explicitly specifies the project concerned as the financing of the Fixed Link. Both the States and the interested parties consider that the aid deriving from the State guarantee model is linked to that specific project. The Commission notes that Article 2 of the Intergovernmental Agreement specifies that the Fixed Link shall be built as a combined road and rail link, consisting of a twin-track railway and a four-lane motorway, and that it shall extend from an artificial peninsula at Kastrup Airport and cross the Øresund strait via an immersed tunnel to an artificial island and from there proceed as a combined high- and low bridge to join Sweden to the south of Linhamn. In addition, Annex 1 to the Intergovernmental Agreement provides a detailed description of the technical design of the Fixed Link. Thus, at the time when the State guarantee model was set up and integrated into the Consortium Agreement, the project was, both in terms of geographical location and technical design, very specifically and clearly defined. Moreover, in the *Øresund* judgment, the General Court explicitly considered that the aid relating to the State

guarantees must be regarded as linked to a specific project[180]. The Commission, therefore, concludes that the State guarantee model is linked to a specific project and that, therefore, the State guarantee model does not fulfil the second condition in the definition of an aid scheme as set out at Article 1(d) of Regulation 2015/1589.

(364) In light of the foregoing the Commission concludes that aid deriving from the State guarantee model does not fulfil the definition of an aid scheme as set out at Article 1(d) of Regulation 2015/1589.

(365) The aid deriving from the State guarantee model should, therefore, be qualified as one or more individual aid measures, within the meaning of Article 1(e) of Regulation 2015/1589.

6.2.1.2. Granting date

(366) It remains to be determined whether the State guarantee model consists of individual aid granted when the Consortium was established, or whether it consists of a series of individual aid measures, granted each time a financial transaction of the Consortium is guaranteed by the States.

(367) Based on the case-law of the Union courts[181], it is well established that the aid granting date refers to the date when the legal right to receive the aid is conferred on the beneficiary under the applicable national regime.

(368) As stated at recital (85), the joint and several guarantee of all loans and other financial instruments taken out by the Consortium in connection with the financing of the Fixed Link, was established in 1991, with Article 12 of the Intergovernmental Agreement, which was ratified by Sweden on 8 August 1991 and by Denmark on 24 August 1991 (recital (61)). The guarantee obligation deriving from the Intergovernmental Agreement was implemented in Swedish and Danish national legislation in 1991, by the Construction Act and the Swedish Parliament decision (recital (63)). The Consortium Agreement recalls the States' guarantee obligation to the Consortium. Section 4(3) of the Consortium Agreement provides the legal basis for the financing of the Fixed Link: 'The Consortium's capital requirements for the planning, project design and construction of the [Fixed Link], including loan servicing costs, and for covering the capital requirements arising as a consequence of book losses which are expected to occur for a number of years after the [Fixed Link] has been opened to traffic, shall, in accordance with that agreed in the [Intergovernmental Agreement], be satisfied by obtaining loans or the issuance of financial instruments in the open market with security in the form of Swedish and Danish government guarantees' (recital (90)).

(369) On the basis of the provisions of the Consortium Agreement, the Consortium could take out State guaranteed loans to finance the planning and construction phases of the Fixed Link. The Consortium could further increase its debt by guaranteed loans in the first years after the Fixed Link had been put into service. This provision was

180 *Øresund* judgment, paragraph 80.

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

necessary since it was expected that the Fixed Link would be loss making for the first number of years. This means that the operating profit, in the first years, would not be sufficient for the Consortium to cover the financing costs on the debt it would have built up during the planning and construction phases. Therefore, during the first number of years, the Consortium would need to incur further debt. The Consortium Agreement, however, did not provide for a right to any further guarantees to finance the operations of the Fixed Link. In this context, the States confirmed that no State guarantees have been provided to finance the operations of the Fixed Link. It is clear from the Consortium's annual reports that the revenues, as from the first year of operation, exceeded the operating costs and the operating profit was positive. Up to and including 2003, that operating profit was, although positive, smaller than the financing cost and therefore, the debt increased. As from 2004, the operating profit was sufficient to contribute to debt reduction, and, consequently, the overall debt was reduced, year by year.

(370) However, notwithstanding the analysis at recital (369), the Consortium could, based on the provisions of the Consortium Agreement, use the State guarantees to refinance its debt (relating to the planning and the construction phases), during the operational phase. This, however, does not mean that the Consortium Agreement provided for the possibility for the States to finance the operations of the Fixed Link. This is also clear from Section 6 of the Consortium Agreement, according to which the entire cost of planning, project design, financing, construction, operation and maintenance of the Fixed Link was to be covered by the operating revenues. In other words, the operating revenues should not only be sufficient to cover the operating costs, but should be sufficient to cover the entire cost of the Fixed Link, including the construction and related financing costs of the Fixed Link (and the hinterland connections). The Commission notes that this point was not clear in the 2014 decision. Recital 50 of the 2014 decision referred to two State guarantees 'for loans that the Consortium had taken out in order to finance the construction and operation of the [Fixed Link] infrastructure project'. It was on this basis that the General Court, in the *Øresund* judgment[182], considered that the State guarantees could cover operating costs incurred during the operational phase. This point was further clarified during the formal investigation procedure.

(371) In light of the foregoing, the Commission considers that the State guarantee model, including the underlying guarantee agreements, does not cover the operations of the Fixed Link. Rather, it guarantees the financing for investment in the planning and construction of the Fixed Link.

(372) The States provided further clarifications on the administration of the State guarantee obligation. In Sweden, the competence and obligation to jointly assign guarantees for all financing needed by the Consortium in relation to the planning and construction of the Fixed Link has been delegated to the Swedish National Debt Office (recital (91)). In Denmark, this competence and obligation has been delegated to the Danish National Bank (recital (95)). The Swedish National Debt Office and the Danish National Bank define the general framework for the Consortium's financing policy and supervise the implementation of the State guarantee obligation when the Consortium signs new loan agreements or uses other financial instruments in

[182] *Øresund* judgment, paragraphs 107 and 108.

connection with the financing of the Fixed Link. The 1997 Cooperation Agreement and 2004 Cooperation Agreement (recitals (97) to (102)) contain a number of formal terms, rights and obligations of the parties. The Cooperation Agreements give the States an opportunity to monitor and influence the Consortium's financing policy, to ensure that the Consortium does not exceed its mandate, and to ensure that a financing policy is followed that minimises the States' long-term risk. According to the States, this mechanism further allowed the States to ensure that the aid granted to the Consortium does not go beyond what is necessary.

(373) As outlined at recital (74), in practice, the Consortium regularly takes out new loans to refinance its planning and construction costs, often through the issuance of bonds under previously established programmes such as the EMTN programme. Guarantees exist at several levels. The EMTN and the Swedish MTN programmes each include a deed of guarantee. As described at recitals (103) to (108), this is a deed in favour of the holders (i.e. the investors into the bond) under which the Danish National Bank and the Swedish National Debt Office have agreed jointly and severally to guarantee all sums the Consortium is legally liable to pay. Recitals (107) and (108) clarify that, when the Consortium issues bonds under the EMTN programme, the Danish National Bank and the Swedish National Debt Office confirm that the specific bond is subject to the respective deed of guarantee. Under the Swedish MTN programme, the bonds are approved by the Danish National Bank and the Swedish National Debt Office, without confirmation of the respective deed of guarantee (recital (108)). Concerning the stand-alone loan agreements, as described at recitals (109) and (110) the Consortium signs finance contracts with financial institutions. Attached to each finance contract is a guarantee agreement document. Furthermore, guarantee agreements are also issued for credit facilities (recital (111)) and for ISDA Master Agreements (recital (112)). According to the interested parties, each such deed of guarantee, confirmation, bond approval, or guarantee agreement should be considered as an individual aid, granted at the time such guarantee agreement is signed, because the Consortium is required to obtain an individual approval by the guarantors for a specific debt transaction. Furthermore, the deeds of guarantee contain provisions stipulating that the guarantee can be withdrawn by the States.

(374) The States clarified that the fact that individual financial transactions require subsequent administration by the Swedish National Debt Office or the Danish National Bank, however, does not mean that they or the States have any option to refuse to guarantee such transactions (see recital (245)). Although a guarantee for one specific loan or bond could be refused (for example because of risks associated with that loan or bond), the Swedish National Debt Office and the Danish National Bank would still have the obligation to provide all necessary guarantees for the financing of the Fixed Link. In such case, they would need to guarantee another transaction so that the Consortium could obtain the required guaranteed financing.

(375) The Commission is of the view that the advantage to the Consortium deriving from the State guarantee model resides, essentially, in the fact that the Consortium is the beneficiary of the joint and several State obligation to guarantee its borrowing in respect of the Fixed Link project. Based on the wording of Section 4(3) of the Consortium Agreement, the Consortium Agreement conferred on the Consortium the legal right to finance the planning and construction of the Fixed Link by way of debt instruments benefitting from State guarantees, when the Consortium was established

on 13 February 1992. It is A/S Øresund and SVEDAB, both 100 % owned by the respective States, that established the Consortium, upon approval of the Consortium Agreement by the Governments of Denmark and Sweden on 13 February 1992 (recital (66)). The organisational arrangement chosen for the implementation of the guarantees, requiring ex-ante approval of the Swedish National Debt Office and the Danish National Bank, for individual transactions, is not intended to limit or materially alter the States' responsibility to guarantee the financing costs in question, as further explained in the following recitals.

(376) As such, the Commission considers that the Consortium Agreement is the legal act by which the aid in the form of State guarantees was definitively granted to the Consortium. Denmark and Sweden, based on the Intergovernmental Agreement, undertook, with the Consortium Agreement, a legal obligation to guarantee loans and financial instruments taken out by the Consortium for the purposes of financing the planning and construction of the Fixed Link. The Consortium was formally established via the Consortium Agreement, which recalled the fact that the Consortium had the right to the State guarantees. In those circumstances, it can be considered that the Consortium has enjoyed the legal right to benefit from the State guarantees as from its establishment, which crystallised the States' guarantee obligation that was set out in the Intergovernmental Agreement. As that legal right has remained in place consistently since that time, and its scope did not change (see also recital (387), in that regard), the Commission considers that the State guarantees were definitively granted on 13 February 1992[183]. The Commission considers that, for the reasons set out below, the arrangements for implementing the State guarantees do not change this fact.

(377) Even though the States, through the Swedish National Debt Office or the Danish National Bank, might be able to refuse to guarantee a specific new debt contract the Consortium would like to conclude, they retain the obligation to guarantee all necessary financing for the Fixed Link (recital (374)). This also applies in relation to the Complainant's argument that the deeds of guarantee contained provisions that the deeds could be withdrawn (recital (174)). The Commission finds that, even if individual deeds of guarantee may be withdrawn, this does not mean that the States' obligation to guarantee the necessary financing for the Fixed Link would be lifted. Another deed of guarantee could, for example, be set up in that regard, or the financing could be guaranteed by means of individual, stand-alone guaranteed loans.

(378) The Commission considers that the approvals or confirmations by the Danish National Bank or the Swedish National Debt Office (recital (373)) cannot be considered as new grants of aid, since those transactions are a mere implementation of the guarantee obligation the States undertook with the Consortium Agreement.

(379) The Commission, further, notes that, when embarking on major investments, it is customary for an investor to require a certain amount of stability in the financial planning for the investment. Without being able to make reasonable estimations concerning the financial conditions that will be applicable to an investment, investors are unlikely to risk the time and resources required to achieve the project. The

[183] The Commission notes that the States' commitment to ensure that the Consortium will finance new debt and refinance existing debt on market terms (recital (265)) does not alter this finding.

Commission notes, in that regard, that the economic rationale of the State guarantee model was to minimise the total financing costs of the project (recital (255)). The State guarantee model was already described in the Intergovernmental Agreement, and, so, was defined before the investment got underway. As such, it should be considered as one of the fundamental conditions applicable to the investment, upon which the financial planning of the investment was prepared. The application of the State guarantee model, therefore, was clear from the outset, and was an inherent part of the financial model, on the basis of which the Consortium undertook a significant investment.

(380) The Commission notes the Complainant's assertion at recital (170) that, according to Section 2.1 of the 2008 Guarantee Notice, the amount of State aid in a guarantee must be assessed at the moment it is issued. The Complainant argues that this means that the guarantee must be considered as granted when the risk associated with it is taken on by the State. It argues that there is no risk associated with the State guarantee model through the Intergovernmental and Consortium Agreements, and that Article 12 of the Intergovernmental Agreement does not constitute a legally enforceable right. In addition, it considers that, in order for a guarantee to be considered granted, it must be possible to measure its extent, which is not possible on the basis of the Intergovernmental or Consortium Agreements, since there is no limit in time and amount. The Complainant also refers to Section 3.2 of the 2008 Guarantee Notice, in support of that claim. The Complainant, further, considers that, even if the Intergovernmental Agreement could be considered as conferring a legal right to aid in the form of the State guarantees, the conditions of those guarantees have since been fundamentally altered, for example, by the MTN programmes changing the States' undertakings from secondary to personal guarantees (recital (175)).

(381) The Commission does not agree with the Complainant's assertions.

(382) Firstly, as stated at recital (367), State aid is considered to be granted on the date when the unconditional legal right to receive it was conferred on the beneficiary under the applicable national regime. The Commission concluded, at recital (376), that that right was conferred upon the Consortium on the date of its establishment.

(383) Secondly, Section 2.1 of the 2008 Guarantee Notice states that State aid connected with a guarantee is granted 'at the moment the guarantee is given, not when it is invoked nor when payments are made under the terms of the guarantee.' As explained by the States (recital (227)), as from the date the Consortium was founded, the States have been obliged to guarantee the loans and other financial instruments taken out by the Consortium to finance the Fixed Link; the Swedish National Debt Office and the Danish National Bank do not have the competence to refuse to grant the Consortium the necessary guarantees to fund the project. The guarantee should, therefore, be considered as having been given on the date of the Consortium's establishment.

(384) Thirdly, the Commission notes that the Complainant suggests that the guarantee must be considered as granted when the risk associated with it is taken on by the State, and that there is no risk associated with the State guarantee model through the Intergovernmental and Consortium Agreements. In that regard, Section 2.1 of the 2008 Guarantee Notice states that the benefit of a State guarantee is 'that the risk

associated with the guarantee is carried by the State'. The Commission considers that, as the States have been obliged to guarantee the Consortium's debt financing in connection with the Fixed Link since its establishment, the Consortium has enjoyed the benefit of the risks associated with that guarantee obligation and its subsequent implementation being carried by the States as from that date.

(385) Fourthly, the Commission notes that the Complainant claims that Article 12 of the Intergovernmental Agreement does not constitute a legally enforceable right, in particular, due to the dualist legal systems of the States (recital (176)). In a dualist legal system, international law becomes valid at a national level only once it has been incorporated into national law. The Commission notes that it does not consider that the Intergovernmental Agreement, on a standalone basis, created a legally enforceable right but rather, that the Consortium obtained the right to the State guarantees as from the date of the Consortium Agreement (recital (376)). Furthermore, Sweden ratified the Intergovernmental Agreement on 8 August 1991 and Denmark on 24 August 1991 (recital (61)). The States implemented it into their national legal orders, through the Swedish Parliament decision and the Construction Act. Those national laws created legally enforceable rights in the States, which, along with the Consortium Agreement, gave rise to the enforceable guarantee obligation in favour of the Consortium.

(386) Fifthly, the Commission does not agree with the Complainant's claim that a guarantee cannot be considered granted unless its extent can be measured. Section 2.1 of the 2008 Guarantee Notice states that '[w]hether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment when the guarantee is given.' The Commission notes that the structure of this sentence indicates that (i) the determination of whether a guarantee constitutes State aid, and (ii) if so, the amount of that aid, can be two separate, consecutive steps. This provision of the 2008 Guarantee Notice, therefore, provides that the Commission should, firstly, establish whether a guarantee constitutes State aid, and, only if it confirms that it does, should it, secondly, determine the amount of that aid. In those circumstances, it is incorrect to say that aid cannot be considered to be granted unless its extent can be measured, as the assessment of the amount of the aid should only be made after it has already been established that the aid has been granted. Section 3.2 of the 2008 Guarantee Notice does not alter that conclusion. That section sets out a list of cumulative conditions, which, if fulfilled, allow the presence of State aid to be ruled out regarding an individual State guarantee. Point (b) of that section notes that one of those conditions is that the 'extent of the guarantee can be properly measured when it is granted'. This, however, does not require such measurement to be possible in order for aid to exist; rather, it may allow for the absence of aid to be established.

(387) Finally, concerning the Complainant's claim that the nature of the guarantees has been fundamentally changed, the Commission notes that, for the purposes of determining the date on which the State aid deriving from the State guarantee model was granted to the Consortium, the key issue is to identify the date on which the Consortium received a legally enforceable right to that aid. As concluded at recital (375), the Consortium has had that right as from its establishment. As from that date, the States have been obliged, vis-à-vis the Consortium, to guarantee the entire cost of financing of the Fixed Link. As noted at recital (384), the advantage for the Consortium of the guarantee obligation is the fact that the States are obliged to

undertake the risks connected with the financing of the planning and construction of the Fixed Link. That advantage, and the right to it, has not been altered since it was established. As explained by the States (recital (249)), in the legal setup by means of the Intergovernmental Agreement, the Swedish Parliament decision, the decision of the Swedish Government of 1 April 1993 (K91/1443/3, K93/202/3) and the decision of the Swedish Government of 23 June 1994 (K91/1443/3, K94/1680/3), there are no details on how the terms of the individual guarantee agreements were to be determined. Instead, this was to be decided upon and implemented by the Swedish National Debt Office. There is no subsequent decision by the Swedish Parliament in this context, nor any decision by the Swedish Government, that would have amended the State guarantee obligation established by the Swedish Parliament decision. The individual deeds of guarantee and guarantee agreements serve to fulfil the right already given to the Consortium. On the Danish side, as set out at recital (250), there are no details on mobilisation conditions in the Construction Act, implementing the Intergovernmental Agreement. Those mobilisation conditions are only specified in the guarantee agreements under the various financial transactions. As the States acknowledge, the deeds of guarantee and individual guarantee agreements are indeed to be interpreted as personal guarantees ('selvskyldnerkaution' in Danish law). This, however, does not constitute a change of the joint and several guarantee obligation, and does not go beyond the rights given to the Consortium in the Consortium Agreement, implementing the Intergovernmental Agreement. In any event, the Commission notes that, while the question of whether a guarantee is personal or secondary (or 'simpelkaution' versus 'selvskyldnerkaution') may affect the legal relationship between the Consortium and its creditors, or those creditors and the States, it does not alter the fundamental legal obligation of the States to provide guarantees for the Consortium's activities in relation to the Fixed Link. As noted at recitals (311) and (375), the advantage to the Consortium of the State guarantee model, and therefore, the aid deriving from it, is inherent in that legal obligation, and that has not been altered since the Consortium was established on 13 February 1992.

(388) The Commission concludes that the State aid deriving from the State guarantee model must be considered as one individual aid, granted by the two States to the Consortium on 13 February 1992.

6.2.2. The special Danish rules on loss carry-forward and depreciation

(389) In the Opening decision, the Commission considered, at recital 109, that the definition in the relevant legal acts of the Danish tax measures under assessment, seemed to be open-ended in terms of amount and duration, but that it was specifically related to the Consortium's activity with respect to the project. As those measures seemed to have been granted with the same purpose and scope as the State guarantees, the Commission's considerations mentioned in the Opening decision concerning the qualification of those guarantees as individual aids were also to be applied as regards the tax measures.

6.2.2.1. The special Danish rules on loss carry-forward

6.2.2.1.1. 1991-2001 LCF

(390) The Construction Act established, from the outset, that A/S Øresund would be subject to more favourable loss carry-forward rules than under the general Danish

Tax Assessment Act. Already in 1991, it was clear that the general loss carry-forward period of five years would not be sufficient to utilise the losses incurred for the project to offset profits. In the preparatory notes to the Construction Act, the legislator explicitly stated that the reason for granting an extended limitation period for loss carry-forward in 1991 was that A/S Øresund would not be able to benefit from the generally applicable rules on loss carry-forward (with a limitation of five years), because of the significant expenditure sustained in the construction period, combined with the fact that A/S Øresund would not, in the same period, be able to procure any profits (recital (267)).

6.2.2.1.1.1. 1991-2001 LCF: Scheme or individual aid

(391) The Commission considers that the State aid deriving from the 1991-2001 LCF cannot be considered as a scheme.

(392) First, the aid deriving from the 1991-2001 LCF is not granted on the basis of an act that provides for individual aid awards to be made to undertakings defined within the act in a general and abstract manner. Rather, the Construction Act provides for a special rule applicable to A/S Øresund, specifically.

(393) Second, the Construction Act explicitly specifies the project it concerns as being the construction and operation of the Fixed Link. The Commission, therefore, considers that the aid deriving from the 1991-2001 LCF must be regarded as linked to a specific project, as the advantage inherent to the aid is linked solely to losses incurred in the context of the Fixed Link project, to the exclusion of other projects or activities. The aid deriving from the 1991-2001 LCF, therefore, does not fulfil the definition of an aid scheme as set out at Article 1(d) of Regulation 2015/1589.

(394) The aid deriving from the 1991-2001 LCF should, therefore, be qualified as one or more individual aids, within the meaning of Article 1(e) of Regulation 2015/1589.

6.2.2.1.1.2. 1991-2001 LCF: Granting date

(395) The 1991-2001 LCF constitutes State aid in the form of a tax advantage. The Commission recalls that it has previously found that State aid deriving from advantageous tax treatment is granted on an annual basis, upon the acceptance of the beneficiary's tax declaration by the tax authorities[184], as that is the moment the advantage usually materialises for such State aid. The Commission, therefore, considers that the special Danish rules on loss carry-forward and depreciation should, similarly, be found to be granted on an annual basis, unless there are clear reasons for departing from that approach.

(396) The Commission considers that, as far as the 1991-2001 LCF is concerned, there are clear reasons for departing from that approach, as set out further at recitals (397) to (403).

[184] See, for example, Commission decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (OJ 2018 L 153, p. 1). This approach has been accepted by Union Courts – see, for example, judgment of the General Court of 12 May 2021, *Luxembourg* v *Commission*, Joined Cases T-816/17 and T-318/18, EU:T:2021:252, paragraphs 153 and 339.

(397) The Commission notes that the Danish authorities explained (recital (267)) that the losses incurred by the Consortium before the Fixed Link was put into service were, essentially, due to interest incurred on the loans, which were necessary for the construction of the Fixed Link. As Denmark explained (recital (267)), given the significant initial expenditure on the investment, and the lack of profits for the Fixed Link during its construction period, the generally applicable rule on loss carry-forward, with a limitation of five years, would not have been sufficient to enable those losses to be utilised to offset profits. In other words, in order to carry out the investment in the Fixed Link, the Consortium was obliged to incur significant losses, and, without application of a special rule, it would not have been possible for those losses to be usefully carried forward, so that they could offset profits in future years. As a result, as part of the conditions for the investment into the Fixed Link by the Consortium, and to establish the long-term planning of the financing of the construction of the Fixed Link, the Danish legislator established the 1991-2001 LCF.

(398) The Danish authorities note that, together with the State guarantee obligation, the 1991-2001 LCF was established at the outset, in order to ensure the financing of the significant investment in the Fixed Link, at the least cost (recital (269)). The 1991-2001 LCF enabled A/S Øresund to offset future profits with non-expired losses, thereby reducing its tax base. This resulted in an advantage for the Consortium. At the same time, however, the 1991-2001 LCF allowed for a higher liquidity base, with the objective of lowering the debt burden. A lower overall debt burden, also meant a lower overall guaranteed amount, and, therefore, less State aid in the form of the guarantees.

(399) As noted at recital (379), when embarking on major investments, it is customary for an investor to require a certain amount of stability in the financial planning for the investment. Without being able to make reasonable estimations concerning the financial conditions that will be applicable to an investment, investors are unlikely to risk the time and resources required to achieve the project. The Commission notes, in that regard, that the 1991-2001 LCF was established with a view to providing specific tax treatment to the Fixed Link investment, in order to facilitate its long-term financial planning and to minimise the overall cost of the investment. That tax treatment was defined by the Construction Act before the investment got underway, and, as such, should be considered as one of the fundamental conditions applicable to the investment (along with the State guarantee obligation and the State guarantee model), upon which the financial planning of the investment was prepared. As such, the application of the 1991-2001 LCF was clear from the outset, and was an inherent part of the financial model, on the basis of which the Consortium would engage to undertake a significant investment. In particular, the Commission notes that the legislative intent behind the enactment of the 1991-2001 LCF, as evidenced by the preparatory notes to the Construction Act, was to enable the meaningful utilisation of losses incurred as a result of the construction of the Fixed Link.

(400) The Commission also notes, as concluded at recital (330), that the right for A/S Øresund to carry-forward its losses for a longer period than permissible under normal Danish taxation rules presented an advantage as from the establishment of that right. The advantage of being able to carry-forward losses for a longer period, coupled with the fact that it was clear from the beginning that significant losses would be incurred so as to ensure the use of that longer period, meant that the advantage associated with the 1991-2001 LCF was obvious from the outset. This is different from the situation

in, for example, the *France Télécom*[185] judgment, where the advantage deriving from a special tax treatment could only be confirmed on an annual basis upon the establishment of the rate of business tax applicable under the normal tax rules[186].

(401) Section 11 of the Construction Act established, from 1991, a preferential rule for A/S Øresund, insofar as it had the right to carry-forward its losses for a longer period than other legal entities subject to corporate income tax. In enacting the Construction Act, Denmark committed to allow A/S Øresund to enjoy the legal right to that longer carry-forward period. The Construction Act provided, at Section 6, that the Fixed Link was to be developed by a consortium between a limited liability company set up by the Danish State (via a holding company) and a limited liability company set up by the Swedish State. A/S Øresund was established as limited liability company on 9 December 1991 (recital (64)) and the Consortium was established, through the Consortium Agreement, on 13 February 1992 (recital (66)). The Commission has found that the advantage deriving from the 1991-2001 LCF benefits the Consortium, as it reduces the tax liability which its income must be used to discharge (recital (317)). The fact that that advantage would accrue to the Consortium via the 1991-2001 LCF was obvious from the outset (recital (400)). The legal right to that advantage to the Consortium was established in law, via the Construction Act, before the Consortium was even established.

(402) On the basis of those elements (recitals (397) to (401)), the Commission considers that the advantage deriving from the 1991-2001 LCF was established in order to facilitate the financing of the Fixed Link investment (an investment that would obviously lead to significant losses being incurred, which could not be used within five years), and to support that investment. The advantage resulted from the Construction Act itself, and constituted one of the conditions for investment. From the moment the Consortium was established, and was able to enjoy the legal right to the advantage established by the Construction Act, the 1991-2001 LCF was liable to distort competition and affect trade between Member States, by strengthening the Consortium's position on a market that is open to competition and trade between Member States. In those circumstances, the Commission concludes that there are clear reasons for finding that the aid deriving from the 1991-2001 LCF was not granted on an annual basis, but, rather, was granted at one time, upon the establishment of the Consortium.

(403) The Commission, moreover, notes that the materialisation of the advantage deriving from the legal right to the longer carry-forward period occurred automatically, without any discretion on the part of A/S Øresund, the Consortium, or the Danish authorities. For the determination of its annual corporate income tax liability, A/S Øresund is subject to the same process as any other legal entity (including limited liability companies) subject to Danish corporate income tax. As described at recital (127), each year, under the mandatory joint taxation regime in Denmark, the undertaking that heads the joint taxation group submits information on taxable income and tax losses for all members of that group. The tax return states, for each member of the group, the taxable income, the utilisation of own carried-forward

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[185] *Supra,* footnote 99.

[186] Judgment of the General Court of 30 November 2009, *France* v *Commission*, Joined Cases T-427/04 and T-17/05, EU:T:2009:474, paragraphs 321-323.

losses, the utilisation of losses from other members of the group, and the remaining tax losses. Legal entities subject to Danish corporate income tax do not have discretion on the use of carried forward losses. According to the Danish Tax Assessment Act, and, since 18 June 2012, according to the Danish Corporate Income Tax Act, a tax loss carried forward that can be utilised in a given tax year must be utilised in that year; otherwise, it will be forfeited. Tax losses carried forward must be utilised according to the FIFO principle, meaning that the oldest tax losses must be utilised first. The annual tax assessment, issued by the tax authorities, is automatically generated. Every year the tax authorities then select entities whose tax returns are manually audited. In those circumstances, given the absence of discretion at the moment of the beneficiary's tax declaration and the acceptance of the tax return by the authorities, the Commission concludes that the submission of the annual tax returns does not amend the fact that the aid had already been granted in 1992. The submission of the tax returns, therefore, represented merely a formal step necessary to obtain the aid already granted, rather than a request for an annual grant of aid.

(404) The Commission, therefore, concludes that the 1991-2001 LCF constitutes one individual aid, for the purposes of supporting a significant investment, which was granted to the Consortium by Denmark on 13 February 1992.

6.2.2.1.2. 2013-2015 LCF

(405) As noted at recital (333), the Commission concluded that there was no advantage to A/S Øresund or the Consortium that derived from the 2002-2012 LCF, as, for that period, A/S Øresund was subject to the same rules on loss carry-forward as other undertakings in Denmark. Therefore, the 2002-2012 LCF did not constitute State aid to A/S Øresund, or, by extension, the Consortium (recitals (333) and (355)).

(406) As explained at recital (138), by Act No 591 of 18 June 2012, a limitation on the access to carry-forward losses was introduced for undertakings in Denmark. That limitation did not apply to A/S Øresund, however, as the provisions of the Construction Act, as amended in 2002, and incorporated in the Sund & Bælt Act, remained in force until 2016. It was only by Act No 581 of 4 May 2015 that Section 12 of the Sund & Bælt Act was repealed with effect of 1 January 2016, and that A/S Øresund became subject to the normal rules of the Danish Corporate Income Tax Act. The Commission, therefore, concluded, at recital (337), that the 2013-2015 LCF constituted an advantage for A/S Øresund, and, therefore, also for the Consortium. The aid measure consists of a combination of elements (recital (334)) as A/S Øresund obtained a right to a selective advantage over other undertakings in a similar situation, by virtue of the fact that the rules applicable to A/S Øresund provided for a derogation from the system of reference, leading to a selective advantage.

6.2.2.1.2.1. 2013-2015 LCF: Scheme or individual aid

(407) The Commission considers that the aid deriving from the 2013-2015 LCF cannot be considered as a scheme.

(408) First, the aid deriving from the 2013-2015 LCF is not granted on the basis of an act that provides for individual aid awards to be made to undertakings defined within the act in a general and abstract manner. The 2013-2015 LCF provides for a special rule

applicable specifically to A/S Øresund. That aid, therefore, does not fulfil the first condition in the definition of an aid scheme, as set out at Article 1(d) of Regulation 2015/1589.

(409) Second, the Construction Act, as amended in 2002, and incorporated into the Sund & Bælt Act, explicitly specifies the project it concerns as being the construction and operation of the Fixed Link. The Commission, therefore, considers that the aid deriving from the 2013-2015 LCF must be regarded as linked to a specific project, as the advantage inherent to the aid is linked solely to losses incurred in the context of the Fixed Link project, to the exclusion of other projects or activities. The aid deriving from the 2013-2015 LCF, therefore, does not fulfil the second condition in the definition of an aid scheme as set out at Article 1(d) of Regulation 2015/1589.

(410) The aid deriving from the 2013-2015 LCF, therefore, does not fall within the definition of an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. It must, therefore, be qualified as one or more individual aids, within the meaning of Article 1(e) of Regulation 2015/1589.

6.2.2.1.2.2. 2013-2015 LCF: Granting date

(411) As noted at recital (395), State aid deriving from tax advantages is usually considered to be granted on an annual basis, unless there is reason to determine that the advantage connected to that aid materialised at a different time. The Commission does not consider that, as far as the 2013-2015 LCF is concerned, there are clear reasons for departing from that approach The situation applying to the 1991-2001 LCF as set out at recitals (396) to (404) is fundamentally different from the situation applying to the 2013-2015 LCF, as set out at recitals (412) to (417).

(412) The Commission has concluded that the 1991-2001 LCF constitutes one individual aid, for the purposes of supporting a significant investment, which was granted to the Consortium by Denmark on 13 February 1992 (recital (404)). In particular, in reaching that conclusion, the Commission noted that the 1991-2001 LCF was established with a view to facilitating the long-term planning of the Fixed Link investment, the advantage resulted from the Construction Act itself, and was one of the fundamental conditions upon which the financial planning of the investment was prepared (recital (399)).

(413) The Commission, first, notes that the aid deriving from the 2013-2015 LCF cannot be considered as having been granted before 18 June 2012, when the Danish Corporate Income Tax Act was amended (recital (138)), and the Sund & Bælt Act was not. Before that amendment was applicable, A/S Øresund and the Consortium could not benefit from any advantage resulting from that amendment.

(414) The Commission, further, notes that the Fixed Link entered into service in July 2000. The decision to invest in the Fixed Link, and the financial planning of the investment, was carried out before that time.

(415) In those circumstances, the Commission considers that the 2013-2015 LCF must be distinguished from the 1991-2001 LCF, insofar as it could not be deemed to have been implemented in order to support the financial investment into the Fixed Link, or to have been a condition for such investment, or to ensure the feasibility of the long-term financial planning of the investment, given that the decision to invest, and,

indeed, the investment, had been completed long before the 2013-2015 LCF became applicable. As a result, the Commission finds that the reasons for which it determined that the advantage connected to the aid deriving from the 1991-2001 LCF was granted on one occasion, which are based significantly on the fact that the long-term investment planning of the Fixed Link relied on the 1991-2001 LCF, the certainty that it had been granted, and the need to be sure that it could be taken into account in the financial planning, do not apply to the 2013-2015 LCF.

(416) Furthermore, the Commission notes that, between the 1991-2001 LCF and the 2013-2015 LCF, there was the 2002-2012 LCF, which the Commission has concluded did not constitute State aid to A/S Øresund or to the Consortium (recitals (333) and (355)). The 2013-2015 LCF represented a reintroduction of advantageous treatment, despite the fact that it was no longer required for the investment planning. In that regard, the 2013-2015 LCF would have the effect of supporting day-to-day operations of A/S Øresund or the Consortium, rather than the initial investment in the Fixed Link.

(417) The Commission, therefore, does not consider that there are clear reasons to depart from the usual approach that tax advantages are granted on an annual basis. It follows that the aid deriving from the 2013-2015 LCF can be considered as having been definitively granted at the moment of the acceptance by the tax authorities of A/S Øresund's tax returns relating to the tax years in the 2013-2015 LCF period, in which a higher amount of losses could be utilised.

(418) The Commission, therefore, considers that the State aid deriving from the 2013-2015 LCF constitutes several grants of individual aid, granted from 2014[187] onwards, on an annual basis, at the moment of the acceptance of A/S Øresund's tax returns by the authorities, and until the acceptance of the tax return for the tax year 2015. The 2013-2015 LCF was repealed by Act No 581 of 4 May 2015, applicable as from the tax year 2016.

6.2.2.2. Special Danish rules on depreciation

6.2.2.2.1. 1999-2007 DEP and 2008-2015 DEP

(419) As explained at recital (145), by Act No 433 of 26 June 1998, the normal maximum depreciation rate for buildings and installations set in the Danish Tax Depreciation Act decreased to 5 %, and, by Act No 540 of 6 June 2007, to 4 %. The depreciation rate for A/S Øresund, however, remained at 6 % / 2 %, pursuant to Sections 12 and 13 of the Construction Act and the corresponding Sections 13 and 14 of the Sund & Bælt Act, which remained in force until 2016. As noted at recital (344), it was by declining to change the rules applicable to A/S Øresund to reflect the changes to the normal taxation rules that the Danish State placed A/S Øresund in a more advantageous position than other legal entities subject to Danish corporate income tax. It is only by Act No 581 of 4 May 2015, which entered into force on 1 January 2016, that Section 13 and 14 of the Sund & Baelt Act were repealed and that A/S Øresund became subject to the normal rules of the Danish Corporate Income Tax Act and the Danish Tax Depreciation Act. The aid measure consists of a

187 The tax return relating to the tax year 2013 being in 2014.

combination of elements (recital (344)) as A/S Øresund was placed in a more advantageous position over other undertakings in a similar situation, by virtue of the fact that the Sund & Bælt Act provided for a more beneficial tax treatment and, therefore, derogated from the amended Danish Tax Depreciation Act, which was more restrictive and which did not apply to A/S Øresund, but to other undertakings that are legally and factually comparable. As concluded at recital (319), any advantage to A/S Øresund created by the special Danish rules on loss carry-forward and depreciation is also an advantage to the Consortium.

6.2.2.2.2. 1999-2007 DEP and 2008-2015 DEP: Scheme or individual aid

(420) The Commission considers that the State aid deriving from the 1999-2007 DEP and the 2008-2015 DEP cannot be considered as being granted on the basis of a scheme.

(421) First, that aid is not granted on the basis of an act that provides for individual aid awards to be made to undertakings defined within the act in a general and abstract manner. The Construction Act, as incorporated in the Sund & Bælt Act, refers to A/S Øresund explicitly as being entitled to the special Danish rule on depreciation. The aid deriving from the 1999-2007 DEP and the 2008-2015 DEP, therefore, does not fulfil the first condition in the definition of an aid scheme, as set out at Article 1(d) of Regulation 2015/1589.

(422) Second, the 1999-2007 DEP and the 2008-2015 DEP must be regarded as being linked to a specific project, since the aid deriving from those measures covers an advantage linked to the depreciation of the investment costs of the Fixed Link, to the exclusion of other projects or activities. This is because the Construction Act, and the Sund & Bælt Act, explicitly specify the relevant project as the construction and operation of the Fixed Link. The aid deriving from the 1999-2007 DEP and the 2008-2015 DEP, therefore, does not fulfil the second condition in the definition of an aid scheme as set out at Article 1(d) of Regulation 2015/1589.

(423) The aid deriving from the 1999-2007 DEP and the 2008-2015 DEP, therefore, does not fall within the definition of an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. It must, therefore, be qualified as one or more individual aids, within the meaning of Article 1(e) of Regulation 2015/1589.

6.2.2.2.3. 1999-2007 DEP and 2008-2015 DEP: Granting dates

(424) As noted at recital (395), in the case of State aid deriving from tax advantages, that advantage usually materialises on an annual basis, unless there are reasons to consider that another view is justified. The Commission considers that, as far as the aid deriving from the 1999-2007 DEP and the 2008-2015 DEP is concerned, it appears that the aid would, in theory, be granted on an annual basis. However, as A/S Øresund had discretion as to when it could depreciate its assets in its tax returns (recital (125)), in practice, the advantage materialised on a less frequent basis (recitals (425) to (428)).

(425) The Commission first notes that the advantage inherent in the aid deriving from the 1999-2007 DEP cannot be considered as having been granted before 26 June 1998, when the normal depreciation rate for buildings and installations set in the Danish Tax Depreciation Act decreased to 5 %, and a similar change was not applied to the depreciation rules applicable to A/S Øresund. Similarly, the advantage inherent in the

aid deriving from the 2008-2015 DEP cannot be considered as having been granted before 6 June 2007, when the normal depreciation rate for buildings and installations set in the Danish Tax Depreciation Act decreased to 4 %, and a similar change was not applied to the depreciation rules applicable to A/S Øresund. Therefore, it cannot be argued that, because the rule applicable to A/S Øresund was, as such, already part of the Construction Act, that also the aid should be considered as being granted with the Construction Act.

(426) The Commission further notes the situation applying to the 1991-2001 LCF as set out at recitals (396) to (404) is fundamentally different from the situation applying to the 1999-2007 DEP and the 2008-2015 DEP. When the Danish Tax Depreciation Act was amended on 26 June 1998 and on 6 June 2007, the decision to invest in the construction of the Fixed Link had already been taken, and, in fact, the Fixed Link was almost ready to be put into operation. As such, unlike the 1991-2001 LCF (recital (399)) the decision of the Danish State to offer A/S Øresund more advantageous tax depreciation conditions than other legal entities subject to Danish corporate income tax cannot be considered to be one of the fundamental conditions underpinning the financial planning of the investment. In particular, the Commission notes that, at the time that financial planning was being undertaken, the Danish authorities did not consider it necessary to grant A/S Øresund advantageous treatment as compared to other limited liability companies subject to corporate income tax as regards asset depreciation rules – in fact, the Danish authorities even consider that the 1991-1998 DEP was actually detrimental to A/S Øresund / the Consortium (recital (268)). The aid deriving from the 1999-2007 DEP and the 2008-2015 DEP, therefore, cannot be considered to be aid granted to support the investment in the Fixed Link. In those circumstances, the considerations that led the Commission to conclude that the 1991-2001 LCF was granted as one individual aid upon the creation of the Consortium, notably, due to the necessity of the 1991-2001 LCF for the financial planning of the Fixed Link investment, do not apply to the 1999-2007 DEP or the 2008-2015 DEP. The Commission notes that the aid deriving from the 1999-2007 DEP and the 2008-2015 DEP should, therefore, more properly be considered to support the day-to-day operations of A/S Øresund and the Consortium, rather than the initial investment into the Fixed Link.

(427) The Commission notes that A/S Øresund would have relied on the rules applicable to it at the time of submitting its tax returns, in order to determine its tax liabilities for a given year. Unlike the utilisation of tax loss carry-forward, which is automatically applied (recital (127)), in Denmark, legal entities subject to Danish corporate income tax may choose when to depreciate their assets, and at what rate, in their tax returns, within the limits provided for by the applicable law (recital (125)). A/S Øresund could, therefore, choose the moment at which it wanted to depreciate its assets at a rate beyond that provided for in the Danish Tax Depreciation Act. As a result, the advantage deriving from the 1999-2007 DEP and the 2008-2015 DEP would not have automatically materialised each year upon the annual acceptance of the tax returns, if no depreciation beyond the rate available under normal Danish taxation rules had been applied.

(428) In those circumstances, the Commission considers that the advantage associated with the higher rate of depreciation available to A/S Øresund, in light of the absence of an amendment to the rules applicable to it to reflect the limitations in the general law, would have materialised at the moment of the acceptance of the tax returns in which

it applied such a higher rate of depreciation (recital (129)). It is at that moment, also, that the State aid deriving from the 1999-2007 DEP and the 2008-2015 DEP would have been able to distort competition, or affect trade between Member States.

(429) The Commission, therefore, considers that the aid deriving from the 1999-2007 DEP and the 2008-2015 DEP constitutes a number of individual aids, granted by Denmark from 2000[188] onwards, at the moment of the acceptance of A/S Øresund's tax returns in which it applied a depreciation rate beyond the rate provided for in the Danish Depreciation Act, until the acceptance of the tax return for the tax year 2015. The 2008-2015 DEP was repealed with effect from 1 January 2016 by Act No 581 of 4 May 2015, applicable as from the tax year 2016.

6.3. Classification as new or existing aid

(430) Having established that the aid measures constitute individual aid not awarded on the basis of an aid scheme, and their granting dates, the Commission must determine, for each of the aid measures, whether they constitute new or existing aid.

(431) New aid, pursuant to Article 1(c) of Regulation 2015/1589, is all aid that is not existing aid, including alterations to existing aid.

(432) 'Existing aid' is defined at Article 1(b) of Regulation 2015/1589, as follows:

'(i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden … all aid which existed prior to the entry into force of the TFEU in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the TFEU in the respective Member States;

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of Regulation (EC) No 659/1999 or to Article 4(6) of [Regulation 2015/1589], or prior to Regulation (EC) No 659/1999 but in accordance with this procedure;

(iv) aid which is deemed to be existing aid pursuant to Article 17 of [Regulation 2015/1589];

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalisation'.

(433) In connection with Article 1(b), point (iv) of Regulation 2015/1589, Article 17(3) of Regulation 2015/1589 provides that any aid of which the limitation period of ten years has expired shall be deemed to be existing aid. Article 17(2) provides that the

[188] The tax return relating to the tax year 1999 being in 2000. In practice, the first granting date would not occur before the acceptance of the tax return of tax year 2004, since Denmark confirms that A/S Øresund did not depreciate for earlier tax years (recital (271)).

limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh.

6.3.1. State guarantees: new or existing aid

(434) The Commission concluded at recital (388) that the aid deriving from the State guarantee model was definitively granted to the Consortium by the Consortium Agreement and as from the day it was founded on 13 February 1992. In light of that conclusion, it is necessary to determine whether the aid deriving from the State guarantee model falls within any of the definitions of existing aid under Article 1(b) of Regulation 2015/1589.

(435) Firstly, the Commission recalls that the Complainant filed its complaint with the Commission on 16 April 2013, alleging that the State guarantee model constituted illegal State aid. The Commission sent a request for information to Denmark and Sweden, in respect of that complaint, on 13 May 2013. The Commission considers that that request for information constituted an action taken by the Commission with regard to the aid deriving from the State guarantee model, which, pursuant to Article 17 of Regulation 2015/1589, would have interrupted the limitation period in connection with aid granted as from 13 May 2003 (that is, ten years before the request for information).

(436) The Commission notes, however, that the limitation period connected with the aid deriving from the State guarantee model expired on 13 February 2002, that is, ten years after the date it was granted. That limitation period had, therefore, expired by the time the Commission's request for information of 13 May 2013 could have interrupted it.

(437) In those circumstances, the Commission concludes that the aid deriving from the State guarantee model, granted by Denmark and Sweden to the Consortium, constitutes existing aid within the meaning of Article 1(b), point (iv) of Regulation 2015/1589.

(438) Secondly, the Commission notes that the Swedish authorities argue that any possible aid granted by Sweden in connection with the Fixed Link was granted prior to its accession to the Union, and prior to the entry into force of the EEA Agreement, on 1 January 1994.

(439) As noted at recital (432), under Article 1(b), point (i) of the Regulation 2015/1589, aid that existed prior to the entry into force of the TFEU in Sweden is considered existing aid. That is, however, without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden. According to Article 144 of that Act, '…among the aids applied in the new Member States prior to access only those communicated to the Commission by 30 April 1995 will be deemed to be "existing aids"…'.

(440) At recital 113 of the Opening decision, the Commission indicated that, if the aid deriving from the State guarantee model, granted to Sweden by the Consortium, should be considered as having been granted in 1992, as it was not communicated to

the Commission at the time, it could not be considered as existing aid on the basis of Article 1(b), point (i) of Regulation 2015/1589.

(441) The Commission recalls, however, that, at the time when the State guarantee model was put in place by Sweden, it was clear Commission practice to find that the construction and operation of transport infrastructure was not considered to constitute an economic activity[189]. In those circumstances, the Commission considers that it is understandable that the State guarantee model was not communicated to the Commission as aid that existed prior to the entry into force of the TFEU because, at that time, such measure was not generally considered as constituting State aid.

(442) In any event, the Commission notes that the Fixed Link project was approved as one of the priority projects under TEN-T by the European Council in December 1994 (recital (58)). Prior to the Council's approval of its inclusion in that list, the States had communicated the outline of the project, including their intention to finance it by way of the State guarantee model, to the Commission. Therefore, even though the State guarantee model did not qualify as State aid prior to Sweden's accession to the Union, it had nevertheless been communicated to the Commission by 30 April 1995, in the context of the preparation for its inclusion in the TEN-T priority project list.

(443) Consequently, the Commission considers that the aid deriving from the State guarantee model, granted by Sweden to the Consortium, constitutes existing aid within the meaning of Article 1(b), point (i) of Regulation 2015/1589.

(444) Moreover, as noted at recital (387), the advantage for the Consortium of the State guarantee model is the fact that the States are obliged to undertake the risks connected with the financing of the planning and construction of the Fixed Link – that advantage, and the right to it, has not been altered since it was established. The Commission notes that the replacement of Section 8 of the Construction Act by Section 11 of the Sund & Bælt Act is not relevant in this context since both provisions are substantially identical (recital (87)).

(445) In light of the considerations set out at recitals (434) to (444), the Commission concludes that the aid deriving from the State guarantee model, granted by Denmark and Sweden to the Consortium, constitutes existing aid, within the meaning of Article 1(b), point (iv) of Regulation 2015/1589. In addition, the Commission concludes that that aid, granted by Sweden to the Consortium, constitutes existing aid within the meaning of Article 1(b), point (i) of Regulation 2015/1589.

6.3.2. The special Danish rules on loss carry-forward: new or existing aid

6.3.2.1. <u>1991-2001 LCF: new or existing aid</u>

(446) The Commission concluded at recital (404) that the aid deriving from the 1991-2001 LCF was granted to the Consortium by Denmark on 13 February 1992. In light of that conclusion, it is necessary to determine whether the aid deriving from the 1991-2001 LCF falls within any of the definitions of existing aid under Article 1(b) of Regulation 2015/1589.

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[189] See *Øresund* judgment, paragraph 308.

(447) Firstly, as noted at recital (435), the Complainant filed its complaint, alleging that the State guarantee model constituted illegal State aid, on 16 April 2013, in relation to which the Commission sent a request for information to the States on 13 May 2013. At that point in time, neither the complaint, nor the Commission's request for information, made reference to the special Danish rules on loss carry-forward and depreciation. The Commission concluded that that request for information interrupted any limitation period in connection with that aid that had not expired by 13 May 2003 (recitals (434) to (437)). On 8 January 2014, the Complainant submitted further documentation, alleging that the Consortium also benefited from special Danish rules on loss carry-forward and depreciation. The Commission sent a request for information to the States concerning the special Danish rules on loss carry-forward and depreciation on 21 February 2014 (recital (3)).

(448) The Commission considers that the request for information of 21 February 2014 constituted an action taken by the Commission with regard to the special Danish rules on loss carry-forward and depreciation, including the aid deriving from the 1991-2001 LCF, which, pursuant to Article 17 of Regulation 2015/1589, would have interrupted the limitation period in connection with aid granted as from 21 February 2004 (that is, ten years before that request for information).

(449) The Commission notes, however, that the limitation period connected with the aid deriving from the 1991-2001 LCF expired on 13 February 2002, that is, ten years after the date it was granted. That limitation period had, therefore, expired by the time the Commission's request for information of 21 February 2014 could have interrupted it.

(450) In those circumstances, the Commission concludes that the aid deriving from the 1991-2001 LCF, granted by Denmark to the Consortium, constitutes existing aid, within the meaning of Article 1(b)(iv) of Regulation 2015/1589.

6.3.2.2. 2013-2015 LCF: new or existing aid

(451) The Commission concluded at recital (418) that the aid deriving from the 2013-2015 LCF was granted to the Consortium by Denmark on an annual basis, at the moment of the authorities' acceptance of A/S Øresund's tax returns, until the acceptance of the tax return for the tax year 2015. In light of that conclusion, it is necessary to determine whether the aid deriving from the 2013-2015 LCF falls within any of the definitions of existing aid under Article 1(b) of Regulation 2015/1589.

(452) Firstly, as noted at recital (447), on 21 February 2014, the Commission sent a request for information concerning the alleged aid deriving from the special Danish rules on loss carry-forward and depreciation to the States. The Commission concluded at recital (448) that that request for information constituted an 'action taken' by the Commission with regard to the special Danish rules on loss carry-forward and depreciation. The 2013-2015 LCF forms part of those rules. As such, all aid deriving from the 2013-2015 LCF was granted after the action taken by the Commission and, therefore, does not constitute existing aid within the meaning of Article 1(b), point (iv) of Regulation 2015/1589.

(453) Secondly, the Commission notes that the aid deriving from the 2013-2015 LCF does not fulfil the conditions of any of the other sub-paragraphs of Article 1(b) of Regulation 2015/1589.

(454) The Commission, therefore, concludes that the aid deriving from the 2013-2015 LCF, granted by Denmark to the Consortium, constitutes new aid, within the meaning of Article 1(c) of Regulation 2015/1589.

6.3.3. The special Danish rules on depreciation: new or existing aid

6.3.3.1. 1999-2007 DEP: new or existing aid

(455) The Commission concluded, at recital (429), that the State aid deriving from the 1999-2007 DEP was granted from 2000 onwards, at the moment of the authorities' acceptance of A/S Øresund's tax returns in which it applied a depreciation rate beyond the rate provided for in the Danish Tax Depreciation Act. In light of that conclusion, it is necessary to determine whether the aid deriving from the 1999-2007 DEP falls within any of the definitions of existing aid under Article 1(b) of Regulation 2015/1589.

(456) Firstly, the Commission notes that, as explained with respect of the 1991-2001 LCF (recital (452)), the request for information it sent on 21 February 2014 constituted an 'action taken' by the Commission with regard to the special Danish rules on loss carry-forward and depreciation.

(457) As such, the limitation period for any aid granted as from 21 February 2004 was interrupted on 21 February 2014 and that aid, therefore, does not constitute existing aid within the meaning of Article 1(b), point (iv) of Regulation 2015/1589.

(458) The limitation period for any aid granted before 21 February 2004, however, expired by the time it could have been interrupted and, therefore, constitutes existing aid within the meaning of Article 1(b), point (iv) of Regulation 2015/1589. The Commission notes that Denmark confirmed at recital (271) that, in practice, A/S Øresund did not claim depreciation in its tax returns prior to 21 February 2004, so no aid that could be qualified as existing aid under that Article was, in fact, granted.

(459) Secondly, the Commission notes that the aid deriving from the 1999-2007 DEP does not fulfil the conditions of any of the other sub-paragraphs of Article 1(b) of Regulation 2015/1589.

(460) The Commission, therefore, concludes that the aid deriving from the 1999-2007 DEP, granted by Denmark to the Consortium, constitutes new aid, within the meaning of Article 1(c) of Regulation 2015/1589, insofar as it was granted after 21 February 2004.

6.3.3.2. 2008-2015 DEP: new or existing aid

(461) The Commission concluded, at recital (429), that the State aid deriving from the 2008-2015 DEP was granted at the moment of the authorities' acceptance of A/S Øresund's tax returns in which it applied a depreciation rate beyond the rate provided for in the Danish Tax Depreciation Act, until the acceptance of the tax return for the tax year 2015. In light of that conclusion, it is necessary to determine whether the aid

deriving from the 2008-2015 DEP falls within any of the definitions of existing aid under Article 1(b) of Regulation 2015/1589.

(462) Similarly as for the 1999-2007 DEP (recital (456)), the request for information the Commission sent on 21 February 2014 constituted an 'action taken' by the Commission so that, also for the 2008-2015 DEP, the limitation period would have been interrupted on 21 February 2014. As such, the limitation period for any aid granted as from 21 February 2004 would have been interrupted on 21 February 2014 and does not constitute existing aid within the meaning of Article 1(b), point (iv) of Regulation 2015/1589.

(463) In that regard, the Commission notes that any aid deriving from the 2008-2015 DEP necessarily has been granted after 21 February 2004, and so does not constitute existing aid within the meaning of Article 1(b), point (iv) of Regulation 2015/1589.

(464) Secondly, the Commission notes that the aid deriving from the 2008-2015 DEP does not fulfil the conditions of any of the other sub-paragraphs of Article 1(b) of Regulation 2015/1589.

(465) The Commission, therefore, concludes that the aid deriving from the 2008-2015 DEP, granted by Denmark to the Consortium, constitutes new aid, within the meaning of Article 1(c) of Regulation 2015/1589.

6.4. Legality of the aid

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

(467) Article 1(f) of Regulation 2015/1589 notes that new aid put into effect in contravention of Article 108(3) TFEU is unlawful.

(468) The Commission concluded at recitals (454), (460) and (465) that the aid deriving from the 2013-2015 LCF, the 1999-2007 DEP, and the 2008-2015 DEP constitutes new aid. The Commission notes that Denmark put those measures into effect without first notifying them to the Commission and awaiting the Commission's decision in their regard. Denmark, therefore, put those new aid measures into effect in contravention of Article 108(3) TFEU.

(469) For completeness, the Commission notes that the Consortium had informed the Commission of the existence of the State guarantee model in relation to the Fixed Link project by its letter of 1 August 1995 (recital (149)).

(470) Even if that letter could possibly be understood to also cover the special Danish rules on loss carry-forward and depreciation as they were part of the Construction Act in 1991 (see further, recital (504)(c)), such that it could be determined that the Commission had been informed of the plans to grant the aid deriving from those measures, this would not alter the conclusion that Denmark put those measures into effect in contravention of Article 108(3) TFEU, given that it did not await the receipt of a Commission decision before so doing.

(471) In any event, the Commission considers that the letter of 1 August 1995 could not be considered as constituting a notification of the new aid measures (recitals (454), (460) and (465)) which were granted at the earliest, as from the acceptance of A/S Øresund's tax return for the tax year 2004 (recitals (418) and (429)), that is, almost ten years after the letter of 1 August 1995 was submitted to the Commission.

(472) The Commission, therefore, concludes that the aid deriving from the 2013-2015 LCF, the 1999-2007 DEP, and the 2008-2015 DEP constitutes unlawful aid.

6.5. Compatibility assessment

6.5.1. State guarantees and 1991-2001 LCF

(473) The Commission concluded, at recitals (388) and (404), respectively, that the aid deriving from the State guarantee model and the 1991-2001 LCF constitutes individual aid, and, at recitals (445) and (450), respectively, that it constitutes 'existing aid'.

(474) Article 22 of Regulation 2015/1589 provides that the Commission can propose appropriate measures to the Member State concerned where the Commission has concluded that an existing aid scheme is not, or is no longer, compatible with the internal market. This does not apply, however, to individual existing aid. Therefore, given that the Commission cannot propose appropriate measures in relation to individual existing aid, it is not necessary to assess its compatibility with the internal market.

(475) The Commission, therefore, concludes that it is not necessary for the Commission to determine whether the aid deriving from the State guarantee model or the 1991-2001 LCF is compatible with the internal market.

(476) The Commission notes, however, that, going forward, the Consortium has agreed not to avail itself of its right to State guarantees without a market conform premium, to finance new debt, or refinance existing debt. To that end, the States have committed (recital (265)) to ensure that the Consortium will finance new debt, and refinance existing debt, on market terms. Therefore, the aid to the Consortium deriving from the State guarantee model will be phased out as the Consortium's outstanding debt instruments expire. The States provided the Commission with an overview of the transition to market terms of the remaining debt, and the expected repayment profile (recital (265)). The States confirmed, in this context, that the Consortium has not obtained any new State guaranteed financing or refinancing since the *Øresund* judgment (recital (265)).

(477) The Commission recalls that the Complainant claims (recital (222)) that more favourable funding terms obtained by enterprises whose legal form provides for an exemption from ordinary rules on bankruptcy or other insolvency procedures may constitute State aid, such that the Consortium would continue to enjoy a significant advantage even after the States cease to issue specific State guarantees. Without determining whether it is correct to say that the Consortium is exempted from such rules or procedures (which is denied by the States), the Commission notes that such an exemption would, first, be inherent in the establishment of the Consortium itself, and second, if such exemption did constitute State aid, such State aid would, in any event, not be covered by the scope of the formal investigation procedure which is

limited to the State guarantee model and the special Danish rules on loss carry-forward and depreciation.

6.5.2. 2013-2015 LCF, 1999-2007 DEP and 2008-2015 DEP

(478) The Commission concluded that the aid deriving from the 2013-2015 LCF constitutes new aid (recital (454)), granted on an annual basis, when the tax returns of A/S Øresund are accepted by the authorities (recital (418)). It also concluded that the aid deriving from the 1999-2007 DEP and the 2008-2015 DEP constitutes new aid (recitals (460) and (465)), granted after 21 February 2004 onwards, at the moment of the authorities' acceptance of A/S Øresund's tax returns in which it applied a depreciation rate beyond the rate provided for in the Danish Tax Depreciation Act, until acceptance of the tax return for the tax year 2015 (recital (429)).

(479) In the course of the preliminary investigation procedure, Denmark and Sweden had argued that, should the Commission consider the support measures to constitute aid, it should assess their compatibility on the basis of Article 107(3)(b) TFEU, which allows aid to promote the execution of an important project of common European interest.

(480) The IPCEI Communication[190], sets out the principles according to which the Commission assesses the public financing of such projects. Paragraph 52 of the IPCEI Communication provides that 'in the case of non-notified aid, the Commission will apply the [IPCEI] Communication if the aid was granted after its entry into force, and the rules in force at the time when the aid was granted in all other cases'. The IPCEI Communication entered into force on 1 July 2014.

(481) It follows from recital (429) that the aid granted on the basis of the 1999-2007 DEP was granted before 1 July 2014, and that at least part of the aid granted on the basis of the 2013-2015 LCF and of the 2008-2015 LCF was granted after that date. However, since the IPCEI Communication consolidates the Commission practice as regards the compatibility assessment of aid on the basis of Article 107(3)(b) TFEU[191], the basic guiding principles set out therein are also informative for the Commission's assessment of the aid granted before its entry into force.

(482) One of those basic guiding principles is the principle of proportionality, which requires that aid measures do not exceed what is necessary to attain their objectives.

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190 On 25 November 2021, the Commission adopted a revised Communication on State aid rules for Important Projects of Common European Interest (OJ C 528 of 30 December 2021, p. 10). Since that communication only applied as from 1 January 2022, it is not relevant for any aid granted before that date. In any event, the Commission notes that the provisions on proportionality assessment in the 2014 IPCEI Communication and the 2021 revision are substantially similar.

191 See, for example, Commission decision of 17 March 2009, in case N 157/2009 – Denmark – Financing of the planning phase of the Fehmarn Belt fixed link, OJ C 2002, 27.08.2009, p. 1; Commission decision of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility, OJ L 146, 20.06.1996, p. 42; Commission decision of 22 December 1998, N 576/98 in case N 576/98 – United Kingdom – Channel Tunnel Rail Link, OJ C 56, 26.02.1999, p. 6; and Commission decision of 13 May 2009 in case N 420/08 – United Kingdom – Restructuring of London & Continental Railways, OJ C 183, 5.08.2009, p. 2.

Thus, if the construction and operation of the Fixed Link could have been achieved with less aid, then the aid would not be considered proportionate. This principle is also laid down in paragraph 28 of the IPCEI Communication.

(483) In Section 5.4.4 of the Opening decision, the Commission expressed doubts as to the proportionality of the support measures, including the special tax measures. The Commission noted, at recital 151 of the Opening decision, that it did not have all of the elements to determine the limits on the amount and duration of the State guarantees and the tax advantages that could be considered reasonable. From recital 152 of the Opening decision, it can be deduced that this was a prerequisite to allow for a proper quantification method of the aid involved and its limitation. Therefore, the Commission expressed doubts as regards the proportionality of the measures under examination.

(484) The States did not submit any further information in reply to the Opening decision that could allow the Commission to determine any limits on the amount and duration of the aid derived from the 2013-2015 LCF, the 1999-2007 DEP and the 2008-2015 DEP that could be considered as proportionate, or to quantify the aid involved. In particular, the States did not submit a funding gap model, which is required by paragraph 31 of the IPCEI Communication, which provides that '[t]he maximum aid level will be determined with regard to the identified funding gap in relation to the eligible costs. If justified by the funding gap analysis, the aid intensity could reach up to 100 % of the eligible costs. The funding gap refers to the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value on the basis of an appropriate discount factor reflecting the rate of return necessary for the beneficiary to carry out the project notably in view of the risks involved. The eligible costs are those laid down in Annex […]'.

(485) The States submitted that they would encounter several methodological challenges in setting up such funding gap model and indicated a risk that such funding gap calculations would point to overcompensation of the Consortium.

(486) Moreover, the States did not consider it appropriate or necessary to provide further comments on the compatibility of any possible aid to the Consortium in light of their position on the existing aid qualification of the State guarantee model and the no aid classification of the special Danish rules on loss carry-forward and depreciation. In addition, the States did not comment on the economic assessment of the Fixed Link that the Complainant commissioned (recitals (191), (193), and (201) to (206)), and which was forwarded to the States (recitals (30) and (38)).

(487) On that basis, the Commission finds that the States failed to demonstrate that the aid derived from the 2013-2015 LCF, the 1999-2007 DEP and the 2008-2015 DEP was proportionate.

(488) Since the States failed to establish the proportionality of the aid derived from the 2013-2015 LCF, the 1999-2007 DEP or the 2008-2015 DEP, the Commission concludes that that aid is not compatible with the internal market. In light of this, it is unnecessary to determine whether the Fixed Link concerns a project that is eligible in accordance with the IPCEI Communication or whether the measures are necessary and do not lead to undue distortions of competition that cannot be outweighed by their positive effects.

7. RECOVERY

(489) In accordance with the TFEU and the established case-law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market[192]. The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation[193].

(490) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored[194].

(491) In line with the case-law, Article 16(1) of Regulation 2015/1589 states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'

(492) Article 16(1) of Regulation 2015/1589 also provides, however, that '[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law'. In this respect, it has been ruled that the Commission is required to take into consideration, on its own initiative, exceptional circumstances that provide justification, pursuant to Article 16(1), for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Union law[195]. The Commission, therefore, must, first, assess whether such circumstances existed (Section 7.1), and, second, decide on the methodology for recovery of aid (Section 7.2).

7.1. Legitimate expectations

(493) The States argue that recovery should be prevented by the principle of legitimate expectations. The principle of protection of legitimate expectations is a general principle of Union law[196], which confers rights on individuals[197]. In accordance with settled case-law, the right to rely on the principle of the protection of legitimate

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192 Judgment of 12 July 1973, *Commission* v *Germany*, C-70/72, EU:C:1973:87, paragraph 13.

193 Judgment of 21 March 1990, *Belgium* v *Commission*, C-142/87, EU:C:1990:125, paragraph 66; judgment of 15 September 2022, *Fossil* v *Commissioner of Income Tax*, Case-705/20, paragraph 42.

194 Judgment of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraphs 64 and 65, judgment of 8 December 2011, *Residex Capital IV* v *Gemeente Rotterdam* ,Case C-275/10, EU:C:2011:814, paragraph 34.

195 Judgment of the Court of Justice of 24 November 1987, *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV* v *Commission*, 223/85, EU:C:1987:502.

196 Judgment of the Court of Justice of 3 May 1978, *August Töpfer & Co. GmbH* v *Commission*, 112/77, EU:C:1978:94, paragraph 19.

197 Judgment of the Court of Justice of 19 May 1992, *Mulder and Others* v *Council and Commission*, Joint Cases C-104/89 and C-37/90, EU:C:1992:217, paragraph 15.

expectations extends to any person in a situation where a Union institution has caused him or her to have justified expectations[198].

(494) Three cumulative conditions must be satisfied for a claim of entitlement to the protection of legitimate expectations to be well founded. First, precise, unconditional, and consistent assurances originating from authorised and reliable sources must have been given to the person concerned. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules[199].

(495) The Court has consistently held that the right to rely on the principle of the protection of legitimate expectations extends to any person to whom an institution has given rise to justified hopes. In addition, the Court has accepted that legitimate expectations can arise only where an institution itself has given precise assurances that the measure in question does not constitute State aid[200]. In principle, there is also no right to legitimate expectations on the part of recipients of aid unlawfully implemented[201].

(496) The Commission recalls that it has previously found[202] that – at least up until the date of the *Aéroports de Paris* judgment, of 12 December 2000 – Denmark, Sweden, and the Consortium had legitimate expectations that measures in relation to the Fixed Link did not constitute State aid. This was confirmed by the General Court in the *Øresund* judgment[203].

(497) The Commission notes that it is the position of the Complainant and Scandlines et al. that the *Øresund* judgment excluded the existence of legitimate expectations for the Consortium and the States, as from the *Aéroports de Paris* judgment (recitals (213) and (214)). The Commission disagrees with this position.

(498) At paragraph 322 of the *Øresund* judgment, the General Court dismissed the action against the 2014 decision insofar as it concerned the Commission's finding that the Consortium and the States could claim the benefit of legitimate expectations for the period before the *Aéroports de Paris* judgment. With respect to the period thereafter,

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198 Judgment of the Court of Justice of 11 March 1987, *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *Commission of the European Communities*, 265/85, EU:C:1987:121, paragraph 44 and the case-law cited therein.

199 Judgment of the General Court of 30 June 2005, *Branco* v *Commission*, T-347/03, EU:T:2005:265, paragraph 102 and the case-law cited therein; judgment of the General Court of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 77; judgment of the General Court of 30 June 2009, *CPEM* v *Commission*, T-444/07, EU:T:2009:227, paragraph 126.

200 See judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187 ASBL* v *Commission*, Joint Cases C-182/03 and C-217/03, EU:C:2006:416, para 147; judgment of the Court of Justice of 24 November 2005, *Germany* v *Commission*, C-506/03, EU:C:2005:715, paragraph 58.

201 Judgment of the Court of Justice of 11 November 2004, *Daewoo Electronics Manufacturing España SA (Demesa) and Territorio Histórico de Álava – Diputación Foral de Álava* v *Commission*, Joined Cases C-183/02 P and C-187/02 P, EU:C:2004:701, paragraphs 44 and 45, and the case law cited therein.

202 2014 decision, recitals 140 to 153, and Opening decision, recitals 169 to 179.

203 *Øresund* judgment, paragraphs 297-328.

at paragraphs 327 and 328, the General Court noted that the 2014 decision did not make a conclusive finding. The General Court found that it was not necessary for it to give a ruling on the arguments, in that regard.

(499) In those circumstances, the Commission considers that the General Court has left the question of the point until which the protection of legitimate expectations applied, in this case, to the examination of the Commission. Accordingly, in Section 6 (the conclusion of the Opening decision), the Commission noted that it would look at the precise period during which the beneficiary, Sweden and/or Denmark could invoke legitimate expectations, should the measures be found to constitute incompatible State aid.

(500) As found at recitals (454), (460), (465) and (472), the aid deriving from the 2013-2015 LCF, the 2008-2015 DEP and the 1999-2007 DEP constitutes unlawful, new State aid, which is incompatible with the internal market (recital (488)). The Commission must, therefore, determine until when the parties could have relied upon legitimate expectations in respect of that aid.

(501) Prior to the *Aéroports de Paris* judgment, it was clear Commission practice to find that the construction and operation of transport infrastructure did not constitute economic activity[204]. In the *Aéroports de Paris* judgment, however, the General Court acknowledged that the operation of an airport could be seen as an economic activity.

(502) Therefore, as stated in the Notice on the Notion of State aid, the traditional view that the public funding of the construction and operation of much infrastructure fell outside of State aid rules changed with the *Aéroports de Paris* judgment. Paragraph 209 of that Notice states:

> '[d]ue to the uncertainty that existed prior to the Aéroports de Paris judgment, public authorities could legitimately consider that the public funding of infrastructure granted prior to that judgment did not constitute State aid and that, accordingly, such measures did not need to be notified to the Commission. It follows that the Commission cannot put such funding measures definitively adopted before the Aéroports de Paris judgment into question on the basis of State aid rules. This does not imply any presumption as regards the presence or absence of State aid or legitimate expectations as regards funding measures not definitively adopted before the Aéroports de Paris judgment, which will have to be verified on a case-by-case basis.'

(503) As noted at recitals (418) and (429), the aid deriving from the 2013-2015 LCF, the 1999-2007 DEP, and the 2008-2015 DEP concerns aid that was not definitively granted before 12 December 2000. It must, therefore, be verified whether the legitimate expectations enjoyed by Denmark, Sweden, and the Consortium extended beyond that date in this case.

(504) In order to carry out that verification, the Commission recalls, in the first place, the circumstances that led it to conclude, in the 2014 decision and in the Opening

[204] See the *Øresund* judgment, paragraph 308.

decision, that legitimate expectations arose in this case, as set out at recitals 144 to 153 of the 2014 decision and recitals 170 to 179 of the Opening decision:

(a) prior to the *Aéroports de Paris* judgment, when the Fixed Link project was being planned and constructed, the Commission's position was to consider the public financing of infrastructure as public goods, and not an economic activity. This position was clearly set out in various soft law instruments[205], as well as certain Commission decisions[206] (see recital 144 of the 2014 decision and recital 170 of the Opening decision);

(b) on 1 August 1995, the Consortium wrote to the Commission, asking for clarification as to whether the guarantees would constitute State aid. In that context, as noted at recital 148 of the 2014 decision and recital 174 of the Opening decision, the Commission found it relevant to note that the Consortium's letter was submitted to the Commission prior to the entry into force of Regulation 659/99 and Regulation (EC) No 794/2004[207], which introduced new formalities for State aid notifications, including notification forms, and electronic submission through the SANI system, with validation by Member States' Permanent Representations[208];

(c) by the 1995 letters to Denmark and Sweden, the Commission services confirmed that the construction of the Fixed Link did not fall under the scope of State aid rules, and did not need to be notified to the Commission. This was fully consistent with the Commission practice, at the time (see 2014 decision, recital 150 and Opening decision, recital 176). Even if the Consortium's letter

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[205] See, for instance, Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10.12.1994, p. 5. Paragraph12 refers explicitly to bridges: 'The construction of enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aid.'; Commission White Paper of 22 July 1998 on Fair payment for infrastructure use: A phased approach to a common transport infrastructure charging in the framework in the EU (COM (1998) 466 final), paragraph 43; Green Paper of 10 December 1997 on Sea Ports and Maritime Infrastructure (COM (97) 678 final), paragraph 42; Communication from the Commission to the Council and to the European Parliament of 13 February 2001: Reinforcing Quality Services in Sea Ports: A key for European transport, (COM (2001) 35 final).

[206] See, Commission decisions of 14 September 2000, on State aid N 208/2000 – Netherlands – Subsidy Scheme for Public Inland Terminals (SOIT), OJ C 315, 4.11.2000, p. 22; Commission decision of 17 July2002, on State aid N 356/2002 – United Kingdom - Network Rail, OJ C 232, 28.09.2002, p. 2; Commission decision of 20 December 2001, on State aid N 649/2001 – United Kingdom – Freight Facilities Grant, paragraph 45, OJ C 45, 19.02.2002, p. 2; Commission decision of 8 March 2006, on State aid N 284/2005 – Ireland – Regional Broadband Programme: Metropolitan Area Networks ("MANs"), phases II and III, paragraph 34, OJ C 207, 30.8.2006, p. 2; Commission decision of 2 August 2002 on State aid C 42/2001 – Spain – Terra Mitica SA, paragraphs 64 and 65, OJ L 91, 8.4.2003, p. 23; Commission decision of 20 April 2005, on State aid N 355/2004 – Belgium – PPP Antwerp International Airport, paragraph 34, OJ C 176, 16.7.2005, p. 11; Commission decision of 11 December 2001, on State aid N 550/2001 – Belgium - Partenariat public privé pour la construction d'installations de chargement et de déchargement, paragraph 24, OJ C 24, 26.1.2002, p. 2,; Commission decision of 20 December 2001, on State aid N 649/2001 – United Kingdom – Freight Facilities Grant (FFG), OJ C 045, 19.02.2002, p. 2. See also paragraph 201 of the Notice on the Notion of State aid.

[207] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p.1.

[208] Ibid., Articles 2 and 3.

of 1 August 1995 only concerned the guarantees, the response gave rise to legitimate expectations with respect to the special Danish rules on loss carry-forward and depreciation and the operational phase of the project, as it was the entire activity of the Consortium, that is, both the construction and operation, which fell outside of State aid rules, independent of the form that the State financing took (2014 decision, recital 152, and Opening decision, recital 177, confirmed by the General Court in the *Øresund* judgment, paragraph 313); and

(d) in addition, the Fixed Link was approved as a TEN-T project, and received Union funding, further indicating that the Commission had been duly informed that the measure in the form of State guarantees would be implemented (recitals (58) and (442)) (2014 decision, recital 151).

(505) The Commission recalls that, as noted at recitals (371) and (399), the State aid deriving from the State guarantee model and the 1991-2001 LCF was granted to support the investment in the planning and construction of the Fixed Link. The State aid deriving from the 2013-2015 LCF, 1999-2007 DEP, and 2008-2015 DEP should be considered as supporting the operation of the Fixed Link (recitals (416) and (426)).

(506) The Commission notes that the reasons for which it originally found that legitimate expectations arose in relation to the Fixed Link project (recital (504)) were rooted in the fact that the 1995 letters explicitly confirmed the practice of the time of considering that infrastructure projects did not fall within the ambit of State aid rules. Those letters were sent in response to the Consortium's letter to the Commission of 1 August 1995, requesting clarity as to whether the State guarantee model to support the construction of the Fixed Link would qualify as State aid.

(507) In the *Aéroports de Paris* judgment, the General Court confirmed that the operation of public infrastructure could constitute State aid[209].

(508) As noted at recital (471), the Commission does not consider that the Consortium's letter of 1 August 1995 could have been considered as constituting a notification of the new aid measures, which were first granted almost ten years after that letter was sent and for which it cannot be reasonably assumed that the Consortium could have included them in their letter, since all three measures find their origin in a future amendment of the normal tax rules, which was not applicable to A/S Øresund. Similarly, the Commission does not consider that the 1995 letter, confirming the non-application of State aid rules to the investment taken at that time, can properly be deemed to also cover aid for day-to-day operations that was granted after the *Aéroports de Paris* judgment, and after the construction had been completed.

(509) Apart from the 1995 letters, the Commission is not aware of the Consortium or the States having received any assurances that would fulfil the three cumulative conditions necessary to give rise to legitimate expectations (recital (494)).

(510) The Commission, therefore, does not find any reason to consider that the States or the Consortium could have held legitimate expectations that the new aid measures,

[209] Paragraph 123.

covering the day-to-day operations of the Fixed Link, granted after the *Aéroports de Paris* judgment, would not have constituted State aid.

(511) The Commission, therefore, finds that, as from 12 December 2000 – the date of the *Aéroports de Paris* judgment – the States and the Consortium could no longer hold legitimate expectations that support for the day-to-day operations of the project did not constitute State aid.

(512) The Commission notes that the situation of the aid deriving from the State guarantee model and the 1991-2001 LCF may not necessarily be the same as that of the aid deriving from the 2013-2015 LCF, the 1999-2007 DEP, and the 2008-2015 DEP, given that the State aid deriving from the State guarantee model and the 1991-2001 LCF was definitively granted to the Consortium on 13 February 1992 to enable the investment into the Fixed Link (recitals (388) and (404), and recitals (371) and (399)), before the 1995 letters were issued. Given, however, that the aid deriving from the State guarantee model and the 1991-2001 LCF constitutes existing aid that is not subject to recovery (recitals (473) to (475)), the Commission is not required to make a determination as to whether the Consortium or the States could have maintained legitimate expectations beyond the *Aéroports de Paris* judgment in relation to the aid to support the investment into the construction of the Fixed Link.

(513) The Commission, therefore, concludes that the new aid deriving from the 2013-2015 LCF, the 1999-2007 DEP, and the 2008-2015 DEP, since it was granted after 12 December 2000, is not precluded from recovery by virtue of the application of the principle of legitimate expectations. That aid must, therefore, be recovered.

7.2. Methodology for recovery

(514) When ordering the recovery of aid declared incompatible with the internal market, the Commission's decision should include information that enables the addressee of the decision to calculate the amount of aid to be recovered without overmuch difficulty[210]. In order to re-establish the situation that existed on the internal market prior to their granting, recovery shall cover the period starting on the date when the aid was put at the disposal of the beneficiary until effective recovery. The amount to be recovered shall bear interest until effective recovery.

(515) Unlawful aid found to be incompatible with the internal market must be recovered from the recipients of the aid[211]. To restore the situation that existed on the internal market prior to the granting of the aid, the recipient needs to repay the aid to forfeit the advantage which it has enjoyed over its competitors on the market. The Commission noted at recitals (314) to (319) that A/S Øresund and the Consortium form a single undertaking for the purposes of the economic activity of the Fixed Link; that any advantage assigned to the single undertaking for that economic activity also benefits the Consortium as part of the undertaking; and that any reduction in the costs connected to the activity of the Fixed Link is of benefit to the

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210 See, to that effect, judgment of the Court of Justice of 18 October 2007*,* *Commission* v *France*, C-441/06, EU:C:2007:616, paragraph 29 and case-law cited.

211 Judgment of the Court of Justice of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 75.

Consortium, as it is the income of the Consortium that is used to discharge the liabilities of the Consortium. In light of those circumstances, and in order to re-establish the situation that existed on the internal market prior to the granting of the aid measures, the aid could be recovered either from the Consortium or from A/S Øresund, as part of the single undertaking, since it is the Consortium that bears any reduction or increase in the costs related to the Fixed Link.

(516) The aid deriving from the 2013-2015 LCF was granted on an annual basis, at the time when the authorities accepted A/S Øresund's tax returns. The aid deriving from the 1999-2007 DEP and 2008-2015 DEP was granted at the moment of the authorities' acceptance of A/S Øresund's tax returns, in which it applied a depreciation rate beyond the rate provided for in the Danish Tax Depreciation Act. To quantify the amount to be recovered, a comparison needs to be made between the tax A/S Øresund actually paid, and the amount of tax it should have paid if the generally applicable loss carry-forward and depreciation rules had been applied, calculated on the dates the tax saved would have been due in each tax year. This comparison, between the tax actually paid and the amount of tax that should have been paid, is required for each tax return submitted[212] and accepted by the tax authorities after 21 February 2004.

(517) The Commission, further, notes that the effect of the special Danish rules on loss carry-forward and the special Danish rules on depreciation cannot be considered in isolation, since depreciation has an impact on the taxable income of a taxpayer, and can have an impact on the losses carried forward. Moreover, the entire period, from the first acceptance of a tax return since 21 February 2004 until the date of recovery, needs to be taken into account, as losses carried forward can have an impact on the taxes actually paid in future years.

(518) Regarding the 2008-2015 DEP, in particular, the Commission notes that A/S Øresund could, with each tax return, decide whether or not it would depreciate part of its assets. It is those actual choices that need to be taken into account when comparing the tax paid by A/S Øresund with the tax that it should have paid, if the general depreciation rules had been applicable and applied ('the counterfactual tax return'). If A/S Øresund, in a certain year, depreciated at a higher rate than permitted under the generally applicable rules, that surplus depreciation should be taken into account in the counterfactual tax return of the first year for which A/S Øresund chose not to depreciate its Fixed Link assets (or only did so at a rate lower than the generally applicable rule), and only up to the depreciation rate allowed under the general rules. Each depreciation surplus remaining should, for calculation purposes, be considered in the counterfactual tax return of the following year until the cumulative depreciated amount in A/S Øresund's tax returns and in the counterfactual tax returns are equal.

8. CONCLUSION

(519) The Commission concludes that the State guarantee model put in place by the States for the loans taken up by the Consortium for financing the planning and construction

[212] Where applicable, a correction by the Danish tax administration in the context of a tax audit should be taken into account.

costs of the Fixed Link constitutes State aid, within the meaning of Article 107(1) TFEU, to the Consortium.

(520) The State guarantee model was granted as one individual ad hoc aid on 13 February 1992, when the Consortium was established. That measure constitutes existing aid. Nevertheless, the Commission notes that the States committed to ensure that the Consortium will finance new debt and refinance existing debt on market terms. Therefore, the aid to the Consortium deriving from the State guarantee model will be phased out as the Consortium's outstanding debt instruments expire.

(521) The Commission concludes that the 2002-2012 LCF and the 1991-1998 DEP do not constitute State aid, within the meaning of Article 107(1) TFEU.

(522) The Commission concludes that the advantages deriving from the 1991-2001 LCF, the 2013-2015 LCF, the 1999-2007 DEP, and the 2008-2015 DEP constitute State aid, within the meaning of Article 107(1) TFEU, granted by Denmark to the single undertaking of A/S Øresund and the Consortium, and therefore the Consortium, on an individual ad hoc basis. The aid deriving from the 1991-2001 LCF constitutes one individual ad hoc aid, which qualifies as existing aid. The aid deriving from the 1999-2007 DEP constitutes grants of individual ad hoc aid, which would qualify as existing aid if it were granted before 21 February 2004, and which qualifies as new, unlawful aid insofar as it was granted as from 21 February 2004. The aid deriving from the 2013-2015 LCF, and the aid deriving from the 2008-2015 DEP, constitute individual ad hoc aids, which qualify as new aid, which Denmark implemented unlawfully. Those aid measures that qualify as new aid are not compatible with the internal market. As no aid under those measures was granted before 12 December 2000, recovery is not precluded by the application of the principle of the protection of legitimate expectations. Denmark must recover the unlawful and incompatible aid granted under the 2013-2015 LCF, 1999-2007 DEP, and 2008-2015 DEP.

HAS ADOPTED THIS DECISION:

Article 1

The 2002-2012 LCF and the 1991-1998 DEP do not constitute State aid, within the meaning of Article 107(1) the Treaty on the Functioning of the European Union.

Article 2

The State guarantee model, granted by the States, as well as the 1991-2001 LCF, granted by Denmark, constitute State aid, within the meaning of Article 107(1) the Treaty on the Functioning of the European Union, to the single undertaking of A/S Øresund and the Consortium, and, therefore, to the Consortium. That aid constitutes existing aid.

Article 3

The advantages deriving from the 1999-2007 DEP granted by Denmark constitute State aid, within the meaning of Article 107(1) the Treaty on the Functioning of the European Union, to the single undertaking of A/S Øresund and the Consortium, and, therefore, to the Consortium. That aid constitutes existing aid to the extent that it was granted before 21 February 2004.

Article 4

The advantages deriving from the 1999-2007 DEP, insofar as they were granted as from 21 February 2004, the advantages deriving from the 2008-2015 DEP, and the advantages deriving from the 2013-2015 LCF constitute State aid, within the meaning of Article 107(1) the Treaty on the Functioning of the European Union, to the single undertaking of A/S Øresund and the Consortium, and therefore to the Consortium. That aid constitutes new aid that was unlawfully put into effect by Denmark in breach of Article 108(3) of the Treaty on the Functioning of the European Union, and is incompatible with the internal market.

Article 5

(1) Denmark shall recover the aid referred to in Article 4 from the single undertaking of A/S Øresund and the Consortium.

(2) The sums to be recovered shall bear interest from the date on which they were put at the disposal of the single undertaking of A/S Øresund and the Consortium until their actual recovery.

(3) The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

Article 6

(1) Recovery of the aid granted referred to in Article 4 shall be immediate and effective.

(2) Denmark shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 7

(1) Within two months following notification of this Decision, Denmark shall submit the following information:

(a) the total amount of aid, referred to in Article 4, received by the single undertaking of A/S Øresund and the Consortium;

(b) the total amount (principal and recovery interest) to be recovered from the single undertaking of A/S Øresund and the Consortium;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documentation demonstrating that the single undertaking of A/S Øresund and the Consortium has been ordered to repay the aid.

(2) Denmark shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted referred to in Article 4 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the single undertaking of A/S Øresund and the Consortium.

Article 8

This Decision is addressed to the Kingdom of Denmark and the Kingdom of Sweden.

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent electronically to the following address:

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

Done at Brussels, 13.2.2024

For the Commission

Margrethe VESTAGER
Executive Vice-President