POMOC PAŃSTWA – DANIA

Pomoc państwa SA.52162 (2019/C) (ex 2018/FC) – Pomoc państwa na rzecz konsorcjum mostu nad Sundem (Øresundsbro)

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(2019/C 109/03)

Pismem z dnia 28 lutego 2019 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Danię o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego środków wsparcia, które zostały przyznane na rzecz Øresundsbro Konsortiet („konsorcjum").

Zainteresowane strony mogą zgłaszać uwagi na temat środków wsparcia na rzecz konsorcjum, względem których Komisja wszczyna postępowanie*, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma, kierując je do Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres:

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Uwagi te – które należy przedstawić w terminie zarówno w wersji oryginalnej, jak i w wersji nieopatrzonej klauzulą poufności – zostaną przekazane Danii i Szwecji w wersji nieopatrzonej klauzulą poufności. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

1. PROCEDURA

W dniu 16 kwietnia 2013 r. przedsiębiorstwo Scandlines Øresund I/S ([1]) wniosło do Komisji skargę, w której twierdziło, że gwarancje państwowe przyznane przez Danię i Szwecję na rzecz konsorcjum, na potrzeby w zakresie finansowania dla Øresund Fixed Link („połączenie"), oraz pewne korzyści podatkowe przyznane przez Danię, stanowią niezgodną z prawem pomoc państwa, która jest niezgodna z rynkiem wewnętrznym.

Po wymianie korespondencji, w dniu 15 października 2014 r. Komisja przyjęła decyzję o niewnoszeniu zastrzeżeń, uznając, że gwarancje publiczne udzielone wobec pożyczek konsorcjum oraz pewne środki podatkowe (obniżenie wartości aktywów, przenoszenie straty podatkowej na kolejny okres rozliczeniowy) stanowiły pomoc państwa zgodną z rynkiem wewnętrznym na podstawie art. 107 ust. 3 lit. b) Traktatu. W dniu 19 września 2018 r., w następstwie wniesionej przez skarżącego skargi o stwierdzenie nieważności, Sąd Unii Europejskiej częściowo unieważnił decyzję Komisji z 2014 r. i stwierdził, że Komisja powinna była wszcząć formalne postępowanie wyjaśniające w celu dogłębnego zbadania sprawy ([2]).

2. OPIS PROJEKTU I ŚRODKÓW WSPARCIA

W 1991 r. Dania i Szwecja zawarły umowę międzyrządową ustanawiającą partnerstwo w celu budowy i eksploatacji połączenia (mostu o długości 16 km, po którym przejazd jest płatny, sztucznej wyspy oraz tunelu dla ruchu drogowego i kolejowego między Kopenhagą a Malmo). W tym celu uzgodniono, że każde państwo utworzy spółkę z ograniczoną odpowiedzialnością, A/S Øresund oraz Svensk-Danske Broförbindelsen SVEDAB AB. Spółki te z kolei utworzyły konsorcjum odpowiedzialne za koncepcję projektu i wszelkie inne przygotowania niezbędne do uruchomienia połączenia, a także za jego finansowanie, budowę i eksploatację.

([1]) W listopadzie 2018 r. spółka obsługująca linię Helsingor-Helsingborg zmieniła nazwę na FORSEA.
([2]) Zob. wyrok Sądu z dnia 19 września 2018 r., HH Ferries i inni przeciwko Komisji, T-68/15, ECLI:EU:T:2018:563.

Oba państwa uzgodniły, że będą udzielać gwarancji na wszystkie pożyczki, które konsorcjum zaciągnie w związku z finansowaniem połączenia. Dania przewidziała również specjalne traktowanie pod względem podatkowym, jeśli chodzi o obniżenie wartości aktywów konsorcjum, a także środki umożliwiające przeniesienie strat podatkowych na kolejny okres rozliczeniowy.

Połączenie zostało wybudowane w latach 1995-2000 i jest eksploatowane od czerwca 2000 r. W czasach gdy planowano i budowano połączenie, w ogólnym rozumieniu eksploatacja tego rodzaju infrastruktury nie stanowiła działalności gospodarczej i w związku z tym finansowanie takich projektów ze środków publicznych nie było objęte zasadami pomocy państwa. Komisja potwierdziła takie podejście w odniesieniu do połączenia w pismach do Danii i Szwecji w 1995 r. W międzyczasie, w następstwie szeregu wyroków Sądu, dominować zaczął pogląd, że finansowanie infrastruktury wykorzystywanej do świadczenia usług za wynagrodzeniem stanowi działalność gospodarczą i w związku z tym podlega kontroli pomocy państwa.

3. **OCENA**

Na podstawie dostępnych informacji Komisja wyraża wstępną opinię, że środki stanowią pomoc państwa w rozumieniu art. 107 ust. 1 TFUE. Jednak Komisja zamierza ocenić charakter tych środków jako pomocy indywidualnej lub programu pomocy, jak również daty przyznania tych środków i ich liczbę. Komisja uważa, że środek odnoszący się do przeniesienia strat podatkowych na kolejny okres rozliczeniowy zastosowany do roku 2001 stanowi istniejącą pomoc, natomiast ten sam środek zastosowany od 1 stycznia 2013 r. stanowi nową pomoc. Jeśli chodzi o środek odnoszący się do obniżenia wartości aktywów, ponieważ został on zastosowany w 1991 r. i pozostał niezmieniony aż do momentu jego zniesienia, może on zostać uznany za istniejącą pomoc. Komisja zbada również, czy gwarancje stanowią istniejącą czy nową pomoc.

Komisja zamierza również otrzymać opinie zainteresowanych osób co do zgodności środków pomocy ze wspólnym rynkiem. Chociaż środki można uznać za służące promowaniu ważnego projektu stanowiącego przedmiot wspólnego europejskiego zainteresowania, na obecnym etapie Komisja pragnie dokładniej zbadać takie kwestie jak ich charakter jako pomoc inwestycyjna lub operacyjna, ich konieczność i proporcjonalność, czy pociągają za sobą nadmierne zakłócenia konkurencji, których nie mogą zrównoważyć ich pozytywne skutki, oraz warunki uruchomienia tych gwarancji. Ponadto, chociaż Komisja uważa, że państwa oraz beneficjent mają prawo do uzasadnionych oczekiwań do czasu wydania wyroku w sprawie *Aéroports de Paris* ([3]), zamierza dokładnie zbadać konkretny okres po wydaniu tego wyroku, w którym beneficjent, Szwecja i Dania mogą powoływać się na uzasadnione oczekiwania, gdyby środki zostały uznane za stanowiące pomoc niezgodną z prawem i ze wspólnym rynkiem.

([3]) Wyrok Sądu z dnia 12 grudnia 2000 r. w sprawie T-128/98 Aéroports de Paris przeciwko Komisji, ECLI:EU:T:2000:290.

TEKST PISMA

1. **PROCEDURE**

(1) On 16 April 2013 Scandlines Øresund I/S ([1]) ('the complainant') filed a complaint to the Commission alleging that the State guarantees granted by the Danish and Swedish States in favour of the Øresundsbro Konsortiet (hereinafter the 'Consortium') constitute unlawful State aid and that this aid is incompatible with the internal market ([2]).

The Commission sent a request for information to Denmark and Sweden on 13 May 2013. Denmark and Sweden submitted a joint reply registered on 28 June 2013. The Commission requested both additional information in an email of 15 October 2013, to which the Danish and Swedish authorities replied by letters of 11 December 2013 and 12 March 2014.

(2) On 2 December 2013, the complainant submitted additional information. By letter of 8 January 2014, the complainant submitted additional documentation and alleged that the Consortium, in addition to the guarantees, has also benefited from a favourable taxation regime in Denmark ([3]).

(3) Following the complainants' submission, on 21 February 2014, the Commission sent a request for information to the Danish and Swedish authorities. By letter of 11 March 2014, Sweden informed the Commission that it did not have any comments with regard to the alleged tax advantages. Following two requests for a delay extension on 25 March and 11 April 2014, which the Commission accepted, Denmark submitted information 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) The complainant submitted additional information on 2, 3, 24 and 28 April, on 20 and 30 May, and on 3 June 2014. On 4 June 2014, the Commission services invited Denmark and Sweden to comment on the additional information submitted by the complainant. Denmark and Sweden submitted a joint reply on 26 June 2014.

(6) On 17 and 18 June 2014, the complainant submitted supplementary information. On 27 June 2014, the Commission services forwarded this information to Denmark and Sweden for comments. Sweden and Denmark requested a extension of the time-period for replying on 8 and 11 July 2014 respectively, to which the Commission agreed. By letter of 1 September 2014, Denmark and Sweden submitted a joint reply.

(7) On 27 August, and again on 8 and 9 September 2014, the complainant submitted additional information.

(8) On 15 September 2014, Sweden and Denmark submitted a joint statement and additional information.

(9) On 15 October 2014, the Commission adopted a decision (hereinafter 'the 2014 decision') finding, firstly, that the public financing of the rail and road hinterland connections should not be considered as State aid. Secondly, the Commission decided not to raise objections against the State guarantee and tax measures granted by Denmark in favour of the Consortium and its parent companies, on the ground that those measures constituted State aid, which was compatible with the common market on the basis of article 107(3)(b) of the Treaty for the functioning of the European Union (hereinafter 'TFEU'). In the same decision, the Commission considered that the State guarantee granted by Sweden to the Consortium was an existing aid measure in relation to which there was no reason to initiate the procedure regarding existing aid schemes.

([1]) Scandlines is owned 50 % by Stena Line Øresund AB and 50 % by Scandlines Helsingor-Helsingborg A/S. In January 2015, the company's new name became HH Ferries. On 9 November 2018, HH Ferries announced that the shipping company would change its name to ForSea.

([2]) This complaint was registered as SA.36558 for Denmark and as SA.36662 for Sweden.

([3]) This part of the complaint was registered as SA.38371.

(10) Following the complainant's action for annulment, the General Court partially annulled the 2014 decision by judgment of 19 September 2018 ([4]). The 2014 decision was annulled in so far as the Commission decided not to raise any objection with respect to the aid relating to depreciation of assets and the carrying forward losses granted to the Consortium by Denmark and with respect to guarantees granted to the Consortium by Denmark and Sweden.

(11) The General Court dismissed the action as to the remainder. In particular, it rejected the arguments of the complainant concerning the Commission's finding that the measures for the public financing of the hinterland connections and the Danish joint taxation regime did not constitute State aid within the meaning of Article 107(1) TFEU. The Court also rejected the argument that the Commission had erred in law by finding that the Consortium and Denmark and Sweden could claim the benefit of legitimate expectations that precluded recovery, in the event that the aid granted to the Consortium were to be considered incompatible with the internal market, for the period before the judgment of 12 December 2000 in *Aéroports de Paris* ([5]).

(12) The judgment of 19 September 2018 has not been appealed.

(13) On 10 December 2018, the Commission had a meeting with the complainant, and on 17 December 2018, the Commission had a meeting with the Swedish and Danish public authorities.

(14) Denmark submitted additional information on 17 January 2019.

2. DESCRIPTION OF THE ØRESUND FIXED LINK AND THE ALLEGED SUPPORT MEASURES

2.1. The Øresund Fixed Link and the hinterland connections

(15) The Øresund Fixed Link (hereinafter the 'Link') is composed of a toll-funded 16km long bridge, the artificial island of Peberholm, and a partially immersed tunnel for road and railway traffic between the Swedish coast and the Danish island of Amager. It is the longest combined road and rail bridge in Europe and provides a direct connection between Copenhagen to Malmö.

(16) The Link was constructed between 1995 and 2000 and has been in operation since June 2000. The project was one of the trans-European networks in transport (TEN-T) priority projects approved by the European Council in 1994.

(17) The legal and operational aspects of the construction, management and operation of the Link have been set out in:

— The agreement of 23 March 1991 between the Danish and the Swedish governments (the 'Intergovernmental Agreement');

— The Øresund Construction Act ('Construction Act') ([6]);

— The Swedish Government Bill ('Swedish Act'); ([7])

— The agreement of 27 January 1992 between A/S Øresund ([8]) and Svensk-Danske Broförbindelsen SVEDAB AB, which was approved by the Danish and Swedish governments (the 'Consortium Agreement');

([4]) Judgment of the General Court of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, ECLI:EU:T:2018:563.
([5]) Judgment of the General Court of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, ECLI:EU:T:2000:290.
([6]) Act No 590 of 19 August 1991 on the Fixed Link across Øresund. The Construction Act regulated — among other issues — the ownership structure of the Link, the basic financial terms as well as the overall fiscal matters in terms of tax. In 2005, the Construction Act was incorporated in Act n° 588 of 24 June 2005 on Sund & Bælt Act.
([7]) Swedish bill No 158, 1990:91 approved by the Swedish Parliament on 12 June 1991.
([8]) A/S Øresund is wholly owned by Sund & Bælt Holding A/S, which, in turn, is wholly owned by the Danish State.

(18) In 1991 Denmark and Sweden (hereinafter also 'the States') entered into an Intergovernmental Agreement establishing a partnership to construct and operate the Link. To this end, they agreed to form each a limited liability company, A/S Øresund ([9]) and Svensk-Danske Broförbindelsen SVEDAB AB ([10]). These companies would in turn form a Consortium that would own and would be responsible, on their joint account and as one entity, for the project, design and any other preparations for the Link, as well as for its financing, building and operation. This setup was chosen so that the States stay the ultimate owners of all the companies involved, and, thus, profits and losses generated by the Link ultimately lie with the States.

(19) The Intergovernmental Agreement was implemented by the Consortium Agreement, which established the Consortium and laid down its ownership structure and exclusive tasks to plan, project, finance, construct, operate and maintain the 16 km fixed combined road and railway link between Sweden and Denmark ([11]). The Consortium cannot be engaged in any other activities. Both the profits and the losses derived from the activities of the Consortium are shared equally by the two parent companies. In relation to any third party, A/S Øresund and SVEDAB AB are jointly and severally liable for the Consortium's obligations ([12]).

(20) The Consortium procured the construction works of the Link from third-party undertakings through an open tender procedure, divided in five lots.

(21) In addition, road and rail hinterland connections needed to be constructed in both Sweden and Denmark in order to make the Link functional. These infrastructures connect the Link with the national network of the rail and road systems in Sweden and Denmark. Both States agreed that it was their responsibility to construct these connections ([13]) on their respective territories ([14]). The States delegated this task to the Consortium's parent companies, i.e. A/S Øresund and SVEDAB AB, which would be responsible for the planning, projecting, financing, constructing, operating and maintaining these connections in the respective countries ([15]).

(22) The initial budget estimated that the total costs of projecting, planning and constructing the Link would amount to DKK 11.7 billion (approximately EUR 1.55 billion). The estimated cost of the hinterland connections was DKK 3.2 billion (EUR 0.43 billion) in Denmark and DKK 1.95 million (EUR 0.26 billion) in Sweden. Hence, the total cost of both the Link and the hinterland connections was estimated to be approximately DKK 16.9 billion (EUR 2.25 billion) ([16]).

(23) The Link was partially co-financed by the EU with a grant of EUR 127 million (6 % of the total costs) under the TEN-T Framework.

(24) Following completion of the Link, the Consortium had a debt of DKK 19.6 billion (EUR 2.63 billion). In addition, the liabilities of A/S Øresund and SVEDAB AB amounted respectively to DKK 7.9 billion (EUR 1.06 billion) and DKK 2.6 billion (EUR 0.35 billion).

(25) The costs of planning, projecting, financing, construction, operation and maintenance of the Link should be entirely covered by tolls levied on the users of the Link ([17]). In addition, Trafikverket (The Swedish Transport Administration) and Banedanmark (the Danish State Rail Administration) pay an annual fixed fee to use the railway ([18]).

(26) The revenue from toll and railway payments is intended to cover all of the interests and capital repayments on all loans taken out by the Consortium for the purposes of financing the Link.

(27) Moreover, the revenue from toll and railway payments is also intended to cover interest and capital repayments on the loans taken out by the parent companies (A/S Øresund and SVEDAB AB) for the construction of the rail and road hinterland connections on each side of the Link.

([9]) A/S Øresund is wholly owned by Sund & Bælt Holding A/S, which, in turn, is wholly owned by the Danish State.
([10]) SVEDAB AB is wholly owned by the Swedish State.
([11]) See article 10 of the Intergovernmental Agreement and Section 1 of the Consortium Agreement.
([12]) See article 11 of the Intergovernmental Agreement and Section 3 of the Consortium Agreement.
([13]) The Swedish hinterland connections consist of a 10 km motorway between Lernacken and Yttre Ringvägen in Malmö, and a 20 km railway (Öresundsbanan and Kontinentalbanan), which connects the Link to Malmö Central Station and to the Södra Stambanan (the Swedish south main railway line).
([14]) See Article 8 of the Intergovernmental Agreement.
([15]) See section 2(5) of the Consortium Agreement.
([16]) At 1990 prices.
([17]) See article 14 of the Intergovernmental Agreement and Section 4§ 6 of the Consortium Agreement.
([18]) See paragraph 4 of the additional protocol to the Intergovernmental Agreement.

2.2. **The State guarantees**

(28) Under Article 12 of the Intergovernmental Agreement, Denmark and Sweden undertook to guarantee jointly and severally all loans and other financial instruments used by the Consortium in connection with the financing of the Link.

(29) The Consortium Agreement provides in Section 4 (3) that: *'the Consortium's capital requirements for the planning, project, design and construction of the Øresund Link, including loan servicing costs, and for covering capital requirements arising as a consequence of book losses which are expected to occur for a number of years after the Øresund Link has been opened to traffic, shall, in accordance with that agreed in the Intergovernmental Agreement, be satisfied by obtaining loans or the issuance of financial instruments in the open market with security in the form of Swedish and Danish government guarantees.'*

(30) The State guarantees as set out in the Intergovernmental and Consortium Agreements have been implemented in Swedish ([19]) and Danish law ([20]). In Denmark, the administration of the State guarantee(s) has been delegated from the Ministry of Finance to the Central Bank (Nationalbanken). In Sweden, the administration of the State guarantee(s) lies with the Swedish National Debt Office (Riksgäldskontoret). They define the general framework for the Consortium's financing policy and supervise the implementation of the States' guarantees when the Consortium signs new loan agreements or uses other financial instruments in connection with the financing of the Link. The Consortium does not have to pay any premium for the State guarantees.

2.3. **State loans**

(31) The Construction Act provides for the possibility for the Consortium to get 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.

(32) The complainant argues that Denmark granted State loans at favourable terms and guarantees to A/S Øresund specifically to inject capital into the Consortium.

(33) At the moment of the adoption of the present decision, the Commission has not obtained any information indicating that such loans would have been concluded with the Consortium for the purpose of financing the Link.

2.4. **The special Danish tax measures**

(34) The Consortium is subject to a special tax regime under the Danish tax law, which was originally introduced by the Construction Act. This Act was later incorporated in the Sund & Bælt Act ([21]).

(35) According to the information available at the moment of the adoption of the present decision, the Consortium is a partnership, which, as regards Danish tax rules, is transparent. As the Consortium is 50 % owned by A/S Øresund, the Danish tax rules apply to that Danish parent company in respect of 50 % of the income and costs incurred by the Consortium. Special tax rules apply to the:

i. depreciation of assets and

ii. carry forward of losses.

(36) Moreover, the mandatory joint taxation regime (see below section 2.2.3) would apply to the Consortium through its inclusion in the Sund & Bælt Holding group.

([19]) Swedish bill No 158, 1990:91 approved by the Swedish Parliament on 12 June 1991.
([20]) Danish Act No 590 of 19 August 1991.
([21]) See Sections 12 to 14 of the Act No. 588 of 24 June 2005.

2.4.1. ***Loss carry forward***

(37) For the period 1991 to 2001, under the Danish Tax Assessment Act ([22]), undertakings established in Denmark had the possibility to carry forward losses incurred during a specific tax year and deduct them from their tax base for the five subsequent years. The Consortium was however subject to special rules with respect to loss carry forward. First, the Consortium could carry forward its losses for a longer period in time, i.e. fifteen years instead of five years. Second, the Consortium was allowed to include — in the total amount of losses, which could be carried forward — losses resulting from the deduction of operating expenses incurred prior to the start of the operation of the Link. The Consortium was allowed to carry forward those losses for a maximum period of 30 years ([23]).

(38) In 2002, section 15 in the Tax assessment act was amended ([24]) and the limitation of loss carry forward to 5 years was abolished. For the period 2002-2012, companies subject to Danish corporate tax law, including the Consortium ([25]), could carry forward all their losses without any limits in time or amount.

(39) On 1 January 2013, a new limitation on the amounts of losses carried forward that can be deducted in a single year was introduced into the Danish tax law ([26]). Under this provision, although the right to carry forward losses was not limited in time, the amount of losses that could be carried forward and deducted from profits of subsequent years is limited annually to DKK 7 500 000 ([27]) (approximately EUR 1 006 000) plus an amount corresponding to 60 % of the positive taxable income in excess of DKK 7 500 000. However, this limitation does not apply to the Consortium ([28]).

2.4.2. ***Depreciation of assets***

(40) Pursuant to sections 12 and 13 of the Construction Act ([29]), the annual depreciation rate for the Consortium was set at 6 % of the initial acquisition costs, which are defined as the total construction costs of the Link. This means that a single general rule on depreciation is applied to all assets of the Consortium. The 6 % depreciation rate for the Consortium applies until the income year in which the total sum of the depreciation exceeds 60 % of the initial acquisition costs (i.e. a 10-year period), as from which point the annual depreciation rate is reduced to 2 %.

(41) For the period 1991 to 1998, the depreciation rules established by section 13 of the Construction Act correspond to the normal depreciation rules applicable to buildings and installations pursuant to the Danish Depreciation Act ([30]), which applied to all undertakings established in Denmark during that period.

(42) However, in 1999 the normal depreciation rate for buildings and installations set in the Danish Depreciation Act decreased to 5 % ([31]) and in 2007 it further decreased to 4 % ([32]), while the depreciation rate for the Consortium remained 6 % pursuant to Sections 12 and 13 of the Construction Act ([33]).

(43) According to the Danish authorities, the special tax provisions relevant to depreciation of assets and fiscal loss carry forward have been repealed since 1 January 2016.

2.4.3. ***Joint Taxation regime***

(44) The Consortium is subject to mandatory joint taxation with Sund & Bælt Holding, in accordance with the general joint taxation regime applicable to all Danish undertakings within a group. According to article 31 of the Danish Act on Corporation Tax a 'group', all companies of which are established in Denmark, is to be taxed in accordance with the provisions on mandatory group taxation. No specific rules apply to the Consortium in that respect.

2.5. **Past contacts between the Commission and the Consortium**

(45) By letter dated 1 August 1995, the Consortium informed the Commission of State guarantees granted by the Danish and Swedish States in favour of the Consortium for the financing of the Link and asked the Commission to confirm that the State guarantees did not constitute State aid.

([22]) See section 15 of Act no 660 of 19 October 1989.
([23]) See Section 11 of the Construction Act.
([24]) Danish Act no. 313 of 21 May 2002.
([25]) Section 11 of the Øresund Act was also amended to remove the limitations it contained.
([26]) See section 12, subsection 2 of Act No 591 of 18 June 2012 amending Danish act on Corporation tax.
([27]) 2012 values — the amount is indexed on an annual basis.
([28]) See section 13 of Act no. 591 of 18 June 2012 amending sections 12-12D of the Danish act on Corporation Tax.
([29]) Act n°.590 of 19 August 1991. In 2005, the Construction Act was incorporated in Act n° 588 of 24 June 2005 on Sund & Bælt Act.
([30]) See section 22 of the consolidated act no. 597 of 16 August 1991.
([31]) See section 17 of Act No 433 of 26 June 1998.
([32]) See Act No 540 of 6 June 2007.
([33]) As replaced in 2005 by Sections 13 and 14 of the Sund & Bælt Act.

(46) Following the information received, the Commission confirmed, in letters of 27 October 1995 to the Danish and Swedish authorities, that the State guarantees in question did not constitute State aid within the meaning of Article 87(1) EC (now article 107(1) TFEU), because they were attached to an infrastructure project of common interest. It is explicitly mentioned in the two letters that, as a consequence of this assessment, the Member States should not notify the measure to the Commission.

(47) Following these letters, the Danish and Swedish States did not formally notify to the Commission the financing model of the Link.

3. SCOPE OF THE DECISION

(48) This decision does not concern the measures in favour of SVEDAB AB and A/.S Øresund relevant to the financing of the hinterland connections. The Commission found in its 2014 decision ([34]) that those measures did not constitute State aid within the meaning of Article 107(1) TFEU and the General Court rejected the action for annulment brought by the complainant as regards these measures ([35]). The Commission also notes in this respect that the complainant has not appealed the General Court's judgment.

(49) The present decision also does not concern the measure concerning the Danish joint taxation regime. In its 2014 decision, the Commission found that this measure did not constitute State aid, and the General Court upheld the 2014 Commission decision as regards this measure.

(50) Therefore, this decision covers the measures taken in order to finance the construction and operation of the Link (hereafter 'the project') namely the State guarantees granted by Sweden and Denmark for loans and financial instruments taken out by the Consortium, as well as the following tax measures granted by Denmark:

i. the rules applicable to the Consortium with regards to the depreciation of assets;

ii. the rules applicable to the Consortium with regards to loss carry forward.

(51) This decision does not cover other possible measures granted by Denmark or Sweden to the Consortium, A/S Øresund, SVEDAB AB, the Sund & Bælt Holding A/S or to any other related company.

4. SUMMARY OF THE ARGUMENTATION SUBMITTED BY THE COMPLAINANT, DENMARK AND SWEDEN IN THE PROCEDURE LEADING TO THE 2014 DECISION

4.1. Summary of the argumentation submitted by the complainant

4.1.1. *As regards the (non) economic nature of the Consortium's activity*

(52) According to the complainant, the Consortium is an economic operator that provides transport services across Denmark and Sweden by charging tolls as remuneration. The fact that the Consortium is incorporated is clear evidence of a commercial objective, as well as the fact that it is registered for VAT purposes and charges VAT on its tolls. Moreover, its income is used to finance the project and pay dividends to its parent companies.

(53) The fact that the States decided to construct and operate the Link through a public limited liability company ([36]) demonstrates that they decided to provide transport services on a commercial basis rather than making the services available to the public free of charge. Finally, the Consortium in its reports and publications states that it provides commercial services in a market of and in competition with other transport service providers such as the complainant.

(54) According to the complainant, the Commission has developed a consistent case practice considering the operation of various transport infrastructures as economic activities based on case law from the Union courts. Therefore, it argues that the Consortium conducts an economic activity, as it operates the Link against the payment of tolls, and that the support measures involve State aid. This reasoning applies independently of sector and timing, i.e. before or after the *Aéroports de Paris* judgment, in which the operation of airport infrastructure were found to constitute an economic activity.

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

([35]) Judgment of the General Court of 19 September 2018, *HH Ferries I/S, formerly Scandlines Øresund I/S and Others v. Commission*, T-68/15, ECLI:EU:T:2018:563.

([36]) According to the complainant under Danish and Swedish law, the boards of director of limited liability companies are to promote the interests of the companies themselves and are as such independent of the companies' shareholders.

4.1.2. ***As regards the State guarantees***

(55) According to the complainant, due to the State guarantees the Consortium may obtain loans on very favourable terms, as it enjoys the same credit rating as the Danish and Swedish States (AAA). On this basis, it may obtain financial terms for its loans which are significantly better than those that would otherwise be available on the financial markets. The Consortium does not pay any guarantee premium to the States. In addition, the State guarantees appear to be unlimited in time and amount and appear in effect to prevent the possibility of the Consortium going bankrupt. Moreover, they fulfil none of the conditions mentioned in the Guarantee Notice ([37]) as indications of conditions that could exclude the existence of State aid.

(56) The complainant also argues that every time the Consortium enters into a new loan agreement, a new guarantee is granted, involving a new *ad hoc* aid measure, at least for all loan transactions agreed after 2003.

4.1.3. ***As regards the tax measures***

(57) The complainant argues that the tax measures in favour of the Consortium constitute incompatible State aid, which is unlimited in time and amount, and which provides an advantage separate from the State guarantees and that has to be assessed on its own merits.

4.1.4. ***As regards the compatibility of the alleged aid measures***

(58) As regards the compatibility of the alleged aid measures, the complainant argues that although indeed the project can be considered important at EU level, the aid measures are not necessary and proportionate to the objective pursued, as they are unlimited in time and amount and allow the Consortium to extend artificially the amortisation period of the investment.

4.2. **Summary of the argumentation submitted by Sweden and Denmark**

4.2.1. ***As regards the (non) economic nature of the Consortium's activity***

(59) Both Sweden and Denmark argue that until early 2000s, under a long-standing decision-making practice, the Commission had consistently held that the construction by a public authority of infrastructure — particularly within the transport sector — open to all potential users on equal terms did not constitute an economic activity falling within the scope of EU competition rules. Rather, such activities were considered an exercise of public (planning) authority in order to provide general transport infrastructure ([38]). According to their opinion, the *Aéroports de Paris* and *Leipzig Halle* judgments ([39]) do not necessarily apply to infrastructure projects of the type of the Link, given that the assessment of whether an activity is economic or not must be specific to the infrastructure in question. Contrary to airports, the development and operation of cross-border bridges, which requires the conclusion of international agreements, cannot be implemented by ordinary investors.

(60) Moreover, the Consortium cannot be considered to compete with the complainant's ferry services. While the complainant offers a commercial ferry service, the Consortium offers a public good, i.e. access to a particular road and rail infrastructure. The pricing policy for this public good is the execution of a public policy decision concerning the financing of the project and the rail and road hinterland connections.

(61) For these reasons, the States argue that the Commission's conclusion in its letters of 27 October 1995 is correct, even taking into account subsequent developments in the case law on the notion of State aid.

(62) Finally, even if the Commission's interpretation of the notion of 'economic activity' might have changed in recent years, the States argue that principles of legal certainty and protection of legitimate expectations preclude the Commission from applying a different and broader notion of 'economic activity' in this case.

([37]) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008, p. 10-22.

([38]) To this end they refer to Commission decision of 14.09.2000, on State aid N 208/2000 — Netherlands — Subsidy Scheme for Public Inland Terminals (SOIT, OJ C 315 of 4.11.2000, p. 22;; of 17.07.2002, on State aid N 356/2002 — United Kingdom — Network Rail, OJ C 232 of 28.09.2002, p. 2; (OJ C 232/2002); of 20.12.2001 on State aid N 649/2001 — United Kingdom — Freight Facilities Grant, OJ C 45 of 19.02.2002, p. 2, paragraph 45.They also refer to the Commission Guidelines on the application of Articles 92 and 93 of the EC Treaty and of Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 305, of 10.12.1994, paragraph 12; the 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; 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.

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

4.2.2. ***As regards the State guarantees***

(63) According to Denmark and Sweden, both States, on the basis of the Intergovernmental Agreement, undertook a legal obligation to guarantee all loans and financial instruments taken out by the Consortium in connection to the financing of the project. This legally binding obligation was subsequently implemented in national legislation in both States ([40]). Thus, from the date the Consortium was founded, through the Consortium agreement, it has been enjoying the enforceable legal right to the State guarantees on all the loans it would enter into, to finance the project. As the substantial legal basis remains unaltered, the State guarantees were irrevocably and definitively granted to the Consortium at the time the Consortium achieved a legal right to obtain State guaranteed funding, i.e. from the day of its foundation, which corresponds to the date of the Consortium Agreement, 27 February 1992. The arrangements implementing the State guarantees do not change the fact that those guarantees were granted to the Consortium in February 1992. Thus, they should be considered as one or two measures granted in 1992, and thus as existing aid, if the Commission were to conclude that they constitute State aid.

4.2.3. ***As regards the tax measures***

(64) Denmark indicates that the tax measures were introduced as part of the overall legislative framework of the entire project, which aims at making the infrastructure project viable. In the absence of these measures, the financial profile of the whole project would have been substantially altered. The tax measures, like the State guarantees, do not constitute State aid in favour of the Consortium, since the Consortium is not an undertaking. In any case, even if the Consortium should be considered to be carrying out economic activities, these tax measures apply to the benefit of SVEDAB AB and A/S Øresund and cannot be viewed as conferring any potential separate economic advantage to the Consortium.

4.2.4. ***Legal certainty and legitimate expectations***

(65) Denmark and Sweden argue that even in the case where the Commission's interpretation of the notion of 'economic activity' might have changed in recent years, principles of legal certainty and protection of legitimate expectations preclude the Commission from applying a different and broader notion of 'economic activity' in this case. Any possible aid is existing aid and cannot be recovered. First, the so-called 'Lorenz procedure' (as presently provided for in Article 4(6) of the Procedural Regulation ([41])) can be considered as applied in the case at hand, given the 1995 Commission letters, which entail that the measures, must be considered authorized by the Commission, to the extent that they constituted aid. Second, the State guarantees were granted irrevocably and definitely in 1992, thus the ten-year limitation period for possible recovery of State aid has elapsed. As regards Sweden, any possible aid was definitely granted prior to its accession to the EU and prior to the entry into force of the EEA Agreement on 1 January 1994.

(66) Finally, the States argue that the Commission's letter of 27 October 1995, its subsequent inaction and numerous other statements from the Commission in decisions and guidelines adopted until today have given the States and the Consortium a clear legitimate expectation that the State guarantees were not State aid within the meaning of Article 107(1) TFEU.

4.2.5. ***As regards compatibility of possible aid***

(67) Concerning possible compatibility of the funding measures, insofar as these would constitute State aid, the States argue that the aid measures may be considered compatible with the internal market on the basis of Article 107(3)(b) TFEU. First, the project must be considered a clearly defined sui generis project, which establishes two cross border transport lines (road and rail) and which has received EU funds under the TEN-T framework. The support measures were necessary as no private investor would enter into such a large scale project. Moreover, possible aid involved would be proportionate, as the net value of the guarantees can in no way exceed the net value of a direct grant, which would provide an unconditional and indirect benefit to the beneficiary. On the contrary the guarantees would only be called upon, if the beneficiary had insufficient funds to repay the guaranteed debts.

(68) Finally, as regards the possible impact on competition and trade, arguably the construction and operation of the Link may have repercussions on a number of markets in the proximity of the Link ([42]). However, the Link has strengthened competition and increased trade within various other economic sectors in the region. As the European Union endorsed the Link by awarding it a TEN-T status, the positive effects of the project, both on a regional and EU level, are significant and clearly outweigh the negative effects.

([40]) See 68 of the Danish Act No 590 of 19 August 1991 (now § 11 in Act No 588 of 24 June 2005) and the Swedish bill No 158, 1991:91 approved by the Swedish Parliament on 12 June 1991.

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

([42]) Including on ferry services between Helsingør and Helsingborg and the catamaran ferry line between Copenhagen and Malmö, which was closed in 2002.

(69) On this basis, possible aid measures should be considered compatible with the internal market.

5. **ASSESSMENT**

5.1. **Existence of State aid**

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

5.1.1. ***Notion of undertaking***

(71) The Commission notes that State aid rules only apply where the recipient of an aid is an 'undertaking'. According to settled case law, an undertaking is an entity engaging in an economic activity regardless of its legal status and the way in which it is financed ([43]). Any activity consisting in offering goods and/or services in a given market is an economic activity ([44]).

(72) In the *Aéroports de Paris* judgment ([45]), the General Court ruled that the operation of an airport had to be seen as an economic activity. More recently, the *Leipzig/Halle* judgments ([46]) concluded that as long as an airport runway will be used for economic activities, its construction also constitutes an economic activity and thus its funding may fall within the ambit of State aid rules. While these cases relate specifically to airports, it appears that the principles developed by the Union Courts are also applicable to the construction of other infrastructures that are indissociably linked to an economic activity ([47]) ([48]).

(73) In addition, on the basis of the settled case law, for a certain activity to be classified as an economic activity, it is irrelevant whether a private investor would have carried out the same activity ([49]). 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 TFEU rules on State aid may apply to financial advantages granted by the State or through State resources to that entity ([50]).

(74) In light of this case law, the Consortium, as the owner and manager of the Link, provides a transport service against remuneration to citizens and undertakings using the Link. The Consortium charges a consideration (toll) from the users of the road section of the Link for crossing the Øresund strait. In addition, the Swedish and Danish railways managers pay an annual fixed fee for access to the railway on the Link. The toll revenues from road and rail collected by the Consortium are meant to finance in full the total cost of design, construction and operation of the Link, but also the costs of the hinterland connections through the distribution of dividends to the parent companies.

(75) In the operation of the Link the Consortium decides on its own commercial and pricing policy ([51]) on the basis of the principles fixed by the States in the Intergovernmental Agreement and the Consortium Agreement. According to Article 1 of the Consortium Agreement, the Consortium's activities shall be conducted in accordance with sound commercial principles. This entails that, based on the explanations of Denmark and Sweden, the Consortium should determine its prices based on the overall objective of maximising its long-term profit in order to repay its debt relevant to the project and its parent companies' liabilities relevant to construction of the hinterland connections.

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

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

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

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

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

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

([49]) 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, ECLI:EU:C:2002:98, paragraph 48.

([50]) Judgment of the Court of 17 February 1993, *Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon and Pistre v Cancave*, Joint Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63.

([51]) The Consortium's pricing policy entails differentiated prices to its users depending on the type of customer (e.g. private or business), type of vehicle, frequency of use (e.g. annual pass, 10-trip card or Øresund Business), time of passage and payment method.

(76) Therefore, the Commission considers that, the operation of the Link constitutes an economic activity. It follows from the *Leipzig Halle* judgment that also the construction of the infrastructure operated by the Consortium constitutes an economic activity, and thus its support measures may involve State aid. Thus the Consortium can be considered as an undertaking for the purposes of Article 107 (1) TFEU.

5.1.2. ***State resources and imputability to the State***

(77) With regard to the State origin of the advantages resulting from the application of the measures, it should be recalled that the concept of aid is broader than that of subsidy, because it embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect ([52]).

(78) A measure by which the public authorities grant certain undertakings an exemption from a reduction or a deferral of payment of the tax normally due, although not involving a transfer of state resources, places beneficiaries in a more favourable financial situation than other taxpayers and constitutes State aid within the meaning of Article 107(1) TFEU ([53]). The creation of a risk of imposing an additional burden on the State in the future, by constituting a guarantee or by making a contractual offer, is sufficient for the purposes of Article 107(1) TFEU ([54]). 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. The State thereby foregoes State resources. As the above measures have been granted by the States themselves, they are by definition imputable to them.

(79) As a consequence, the State guarantees, granted by Denmark and Sweden without the payment of any fee, as well as the tax advantages granted to the Consortium by Denmark involve State resources and are imputable to the States.

5.1.3. ***Selective advantage***

(80) According to constant case law, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions, i.e. in the absence of State intervention ([55]). Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention ([56]). To assess this, the financial situation of the undertaking following the measure should be compared with the financial situation if the measure had not been introduced.

5.1.3.1. *The State guarantees*

(81) A public guarantee may grant the borrower an advantage, by enabling it to borrow at an interest rate and cost that would not have been obtainable on the market without the guarantee ([57]).

(82) In this case, by providing the State guarantees without requiring the payment of a premium on market terms, the States conferred an advantage to the Consortium. As said advantage concerns specifically the Consortium, it is de jure selective. Therefore, the States' guarantees constitute a selective advantage in favour of the Consortium within the meaning of Article 107 (1) TFEU.

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

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

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

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

([56]) Judgment of the Court of Justice of 2 July 1974, Italy v. Commission, 173/73, ECLI:EU:C:1974:71, paragraph 13.

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

5.1.3.2. *The Danish tax measures*

(83) For a tax measure to fall within the scope of Article 107(1) TFEU, it has to be established whether under a particular statutory scheme a state measure is such as to favour 'certain undertakings or the production of certain goods' over others, which are in a legal and factual situation that is comparable, in the light of the objective pursued by that scheme ([58]). However, when Member States adopt ad hoc measures benefiting one entity, the identification of an advantage in principle allows to presume its selective nature ([59]), as it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or few undertakings ([60]). In this case, the special tax regime on depreciation and on loss carry forward reduces the tax liability of the Consortium as compared to what it would have been in the absence of those measures and thereby confers an economic advantage to the Consortium. The Consortium is a transparent entity for tax purposes and the specific rules apply to its Danish parent company. It cannot be denied however that these rules apply to half ([61]) of the depreciation costs and losses deriving from the activity of the Consortium. In these circumstances, the Consortium appears to be the direct or indirect beneficiary of the tax measures.

(84) Nevertheless, for reasons of completeness, the Commission will assess the measures of fiscal loss carry forward and of specific depreciation rules under the standard three-step analysis established by the EU Courts ([62]). First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objective intrinsic to the system, are in a comparable factual and legal situation. If the measure constitutes a derogation from the system of reference and thus is prima facie selective, it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the system. In this context, it is for the Member State to demonstrate that the differentiated tax treatment derives directly from the basic or guiding principles of that system ([63]).

a) ***Fiscal loss carry forward***

(85) The Commission notes that as regards the fiscal loss carry forward measure in favour of the Consortium, the system of reference is the normal Danish tax rules on loss carry forward that apply in principle to all undertakings in Denmark, as laid down in the Danish Tax Assessment Act ([64]). According to this system, the normal rule for the period between 1991-2001 was a five-year period. For the same period, the Consortium had the possibility to carry forward losses for 15 years and even 30 years for costs incurred before the operations of the Link started. Thus, this regime clearly derogated from the general system applicable to all other Danish companies.

(86) For the period 2001 to 2012, the general rule for loss carry forward was amended and all companies, including the Consortium, could carry forward their losses without any time limitation. Thus, during this period, the Consortium did not benefit from any derogation from the general tax system.

(87) Since 1 January 2013, the general loss carry forward regime was amended again ([65]). However, the Consortium was excluded from the limitation introduced on the amounts of yearly reduction, and consequently placed in a more favourable position than other undertakings.

(88) The Commission therefore concludes that the special rules on the carry forward of losses that the Consortium enjoyed in the period 1991 to 2001 and since 2013 onwards differentiate(d) between economic operators that appear *prima facie* to be in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned. The rules applicable to the Consortium during those two periods were/are thus *prima facie* selective.

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

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

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

([61]) According to the Danish authorities, the tax measures apply only to the Danish partner of the Consortium, thus only to half of the costs and losses deriving from the activity of the Consortium.

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

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

([64]) Section 15 of Act no 660 of 19 October 1989.

([65]) See paragraph 38 of this decision.

(89) 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 ([66]). On the contrary, external policy objectives, which are not inherent to the general tax system cannot be relied upon for that purpose ([67]). 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 ([68]).

(90) The Danish authorities have argued that the special regime on loss carry forward can be regarded as justified by the logic of the system due to the extraordinary character of the entire project in terms of its size and purpose making it incomparable to any other infrastructure project that has been subject to Danish tax rules. However, the Danish authorities did not sufficiently demonstrate, in the documents provided before the adoption of the 2014 Decision why, and to what extent, the size and the purpose of a project would be sufficient to justify a differential tax treatment i.e. that such tax treatment would be consistent, necessary and proportionate in the light of the guiding principles of the Danish tax system. Therefore, the Commission concludes that the measure entails *prima facie* a selective advantage in favour of the Consortium for the years between 1991 to 2001 and since 2013 onwards.

b) ***Depreciation of assets***

(91) Concerning the measures relevant to depreciation of assets, the Commission considers that the general system of reference corresponds to the Danish depreciation system applicable in principle to all companies in Denmark, as laid down in the Danish Depreciation Act ([69]).

(92) With regard to these rules, since 1999, the depreciation rate applicable to buildings and installations of all Danish companies has been set at a rate lower than the one applicable for the assets of the Consortium (6 % from 1991 to 1998, reduced to 5 % for the period 1999 to 2006 and to 4 % since 2007). Moreover, the Consortium has the right to depreciate at a maximum rate of 6 % the entirety of its assets until the income year in which the total sum of the depreciation has surpassed 60 % (i.e. a 10 year period), from which point an annual depreciation rate of 2 % applies.

(93) The Commission observes that, since 1999, the depreciation rate applicable to the Consortium derogates from the common depreciation regime applicable to all other undertakings in Denmark that are *prima facie* in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned. The rules applicable to the Consortium are therefore *prima facie* selective.

(94) The Danish authorities have argued that the deviation from the general regime on depreciation is justified by the logic of the system, because the Link is not comparable to other Danish infrastructure projects as regards its size, construction cost and purpose.

(95) As mentioned above, the Danish authorities did not sufficiently demonstrate, in the documents provided before the adoption of the 2014 Decision why, and to what extent, the size and the purpose of a project would be sufficient to justify a differential tax treatment i.e. that such tax treatment would be consistent, necessary and proportionate in the light of the guiding principles of the Danish tax system. The Commission considers that the type of considerations invoked by Denmark cannot *prima facie* be taken into account in order to justify a derogation to the tax system. Hence, this differential tax treatment seems the result of an objective that is unrelated to the tax system of which it forms part. Therefore, the Commission concludes that since 1999 the measure entails *prima facie* a selective advantage in favour of the Consortium that cannot prima facie be justified by the logic of the tax system.

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

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

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

([69]) See recitals 37 to 39 of this decision.

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

(96) When aid granted by a Member State strengthens the position of an undertaking as compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by the aid ([70]).

(97) The Consortium is active on the market for construction and operation of (cross border) bridges and on the market for transport services to cross the Øresund straight. 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 aid may strengthen the position of Consortium on the market for transport services to cross the Øresund straight as compared with other undertakings, such as, in particular, ferry operators.

(98) Thus, the measures in question, to the extent that they entail a selective advantage in favour of the Consortium, may be considered as affecting intra-Union trade.

(99) Similarly, as the aid is liable to improve the competitive position of the Consortium, the Commission considers that that the measures are liable to distort competition.

5.1.5. ***Conclusion on the existence of aid***

(100) On the basis of this assessment, the Commission's preliminary view is that the State guarantees granted by Denmark and Sweden to the Consortium for the financing of the Link, as well as the special tax rules on depreciation of assets and on carry forward of losses that Denmark granted to the Consortium, constitute State aid in the sense of 107(1) TFEU.

5.2. **Classification of the measures as individual aid or scheme and granting date**

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

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

(103) The Commission considers that the first situation included in the definition of an aid scheme cannot be considered applicable to the support measures under examination, as the measures are not aimed at '*undertakings defined within the act in a general and abstract manner*' but are aimed specifically at the Consortium. Thus, the assessment as regards the aid scheme nature of the measures has to be conducted in light of the second situation envisaged by the definition.

(104) In this respect, the complainant argues that each time a new financial transaction (loan, credit facility) is implemented/confirmed by the Danish Central Bank and the Swedish National Debt Office, an individual aid is granted to the Consortium. On the other hand, Sweden and Denmark argue that the State guarantees do not constitute an aid scheme, as they were granted irrevocably and definitely in 1992, and that each time their authorities approve a specific financial transaction of the Consortium they are merely taking a measure necessary to implement the State guarantees . However, both the complainant and the Member States appear to consider that the measures were granted for a 'specific project' within the meaning of Article 1(d) of the Procedural Regulation and consequently cannot be considered as an aid scheme.

(105) According to Article 12 of the Intergovernmental Agreement, Denmark and Sweden jointly and severally guaranteed the obligations in respect of the Consortium's loans and other financial instruments used in connection with the financing of the project. Moreover, Section 4.3 of the Consortium Agreement states that: '*the State guarantees are meant to cover the Consortium's capital requirements for the planning, project design and construction of the 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 Link has been opened to traffic*'. In addition, Articles 1 and 2 of the Intergovernmental

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

Agreement and Annex 1 thereto identify precisely the geographical location of the Link and its specific technical characteristics. These elements would appear to indicate that the State guarantees relate to a precisely determined specific project ([71]), the construction and operation of the Link.

(106) As to the question whether the State guarantees involve aid for an indefinite period of time or an indefinite amount, the Commission notes that the guarantees seem to be open-ended, but that according to Article 17 of the Consortium agreement the duration of said agreement and thus of the Consortium, has been limited to 2050 with a possibility of a 30 year extension;.

(107) Moreover, the position argued by the complainant that individual aid is granted each time a Consortium concludes a financial transaction for the financing of the project, has to be balanced out against the argument of the States that those authorities are giving effect to the State guarantees as set out in the Intergovernmental Agreement, the Consortium Agreement, and their national law. The Commission considers, at this stage, that the administration of guarantees in relation to specific financial transactions cannot be considered in isolation from the State guarantees granted in 1992.

(108) Consequently, at this stage, the Commission has doubts whether the State guarantees should be considered as an a 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.

(109) As regards the tax measures under assessment, their definition in the relevant legal acts, seems to be open-ended ([72]) in terms of amount and duration, but specifically related to the Consortium's activity with respect to the project. As these measures seem to be granted within the same purpose and scope as the State guarantees, the Commission's considerations mentioned above as regards their preliminary qualification as individual aids are also to be applied as regards the tax measures.

(110) The Commission notes that, in the absence of a definite conclusion on the question whether the support measures constitute a scheme or individual aid measures, it cannot reach a conclusion on the date at which the guarantees and the tax measures were granted, as well as regards their number.

5.3. **New aid or existing aid**

(111) Article 1(b) of the Procedural Regulation defines the measures, which should be considered as existing aid measures. According to point (i) of said Article, existing aid means: *'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"*. Moreover, according to point (iv), *"aid which is deemed to be existing aid pursuant to Article 17 of this Regulation"*. Moreover, according to Article 17(3) ([73]) of the Regulation, '*Any aid with regard to which the limitation period has expired shall be deemed to be existing aid*'.

(112) As mentioned previously, the complainant argues that the measures in question constitute new aid measures, at least as regards the period after 2003, as the 10-year limitation period was interrupted in May 2013, when the Commission sent a request for information to Denmark and Sweden. According to the complainant, any individual aid measure granted by the States after 2003 should be considered as new aid. On the contrary, Denmark and Sweden consider that at least the State guarantees should be considered as individual existing aid, given that the limitation period had expired already in 2002, i.e. 10 years after the right to the guarantees was granted to the beneficiary.

(113) According to Article 1(b) (i) of the Procedural Regulation, all aid, which existed prior to the entry into force of the TFEU in the respective Member State, is considered as existing aid. However, this is without prejudice to Articles 144 and 172 of the Treaty of Accession of Sweden ([74]). According to Article 144 of this Treaty, '*…(a) among the aids applied in the new Member States prior to accession only those communicated to the Commission by 30 April 1995 will be*

([71]) See also paragraph 80 of the judgment of the General Court of 19 September 2018, HH Ferries and Others v. Commission, T-68/15, ECLI:EU:T:2018:563.

([72]) See Section 5.1.3.2 of this decision.

([73]) According to Article 17 of the Procedural Regulation, '1. *The powers of the Commission to recover aid shall be subject to a limitation period of 10 years. 2. The limitation period shall begin on the day on which unlawful aid is awarded to the beneficiary either as individual aid or as an aid scheme. Any action taken by the Commission or the Member State, acting on the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period…3. Any aid with regard to which the limitation period had expired shall be deemed to be existing aid.*'

([74]) Treaty of Accession of Austria, Finland and Sweden (1994), OJ C 241, 29.8.1994.

deemed to be "existing" aids…' Thus, concerning the State guarantee(s) granted by Sweden to the Consortium, should it/they be considered as granted in 1992, as the measure(s) were not communicated to the Commission at the time, they could not be considered as existing aid on the basis of this Article.

(114) However, on the basis of Article 1 (b) (iv) of the Procedural Regulation ([75]), the Commission's conclusion as regards the new or existing aid nature of the guarantee(s) would depend on whether the measure(s) should be considered as individual aid granted in 1992, or as several individual aid measures granted each time a new loan or credit facility transaction was agreed, or as an aid scheme. In the first and third scenario, the State guarantee(s) granted by Sweden would be considered as existing aid, as the limitation period would have expired in 2002. However, in the second scenario there would be different measures, which could be existing aid, if granted before 2003, i.e. 10 years before the Commission sent a request for information to Sweden for the first time, and other measures, which could be new individual aid, if granted after 2003.

(115) With respect to the State guarantee(s) granted by Denmark, the Commission's considerations as regards the new or existing aid nature, which would be based on the definition set out in Article 1(b)(iv) of the Procedural Regulation, would be the same as for Sweden.

(116) As regards the tax measures under assessment, the Commission's conclusion on their new or existing aid character, in the meaning of Article 1(b)(iv) of the Procedural Regulation, is different for each of them. In particular, the Commission is in a position to conclude that as regards the measure relevant to fiscal loss carry forward as applied up to 2001, it can be considered as existing aid, given that it was applicable in a period prior to 2002, as explained above. As regards the same measure as applied since 1 January 2013, it can be considered as a new measure, given that it was granted after 2003. Concerning the measure relevant to the depreciation of assets, as it was put in place in 1991 and remained unchanged up to the time it was abolished, it can be considered that it constitutes existing aid.

(117) The Commission concludes therefore that *prima facie* the determination of whether the guarantees are new or existing aid depends on whether they constitute schemes or individual aid(s) granted in 1992 (or until 2003 at the latest) or as several individual aid measures granted over the lifetime/repayment period of the project. Thus, the Commission will conclude on whether the guarantees constitute new aid or existing aid, on the basis of the more extensive information it will receive in the context of the formal investigation procedure.

5.4. **Compatibility assessment**

(118) Denmark and Sweden argue that should the Commission consider the support measures to constitute State aid, it should assess their compatibility on the basis of Article 107(3)(b) TFEU, which allows aid to promote the execution of an important project of common European interest.

(119) The Commission Communication relevant to the compatibility analysis of aid for important projects of common European interest ('IPCEI Communication') ([76]), sets out the principles according to which the Commission assesses the public financing of such projects. According to paragraph 52 of the Communication, '*in line with the de Notice on the determination of the applicable rules for the assessment of unlawful State aid* ([77]), *in the case of non-notified aid, the Commission will apply the 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*'.

(120) Although at this stage, the Commission has not yet concluded on the granting date of the measures under assessment, it is obvious that the State guarantees and the Danish tax measures were put in place before the entry into force of this Communication. Thus, the Commission considers at this stage, that the Communication is not applicable as such, but that any aid would have to be assessed on the basis of the rules applicable at the time the aid

([75]) Article 1 (b) (iv) of the Procedural Regulation states: For the purposes of this Regulation, the following definitions shall apply […] b) | 'existing aid' means […] aid which is deemed to be existing aid pursuant to Article 17 of this Regulation.

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

([77]) Commission Notice on the determination of the applicable rules for the assessment of unlawful State aid, OJ C 119, 22.05.2002, p. 22.

was granted. However, given that at this stage this date (or dates) has not been established, and that the Communication consolidates the Commission practice as regards the compatibility assessment of aid on the basis of Article 107(3)(b) TFEU ([78]), the basic guiding principles set out therein will be of use for the Commission's assessment.

5.4.1. ***Important project of common European interest***

(121) Any project to be supported with aid in line with Article 107(3)(b) TFEU should, at least, possess the following features:

— it must be specific, precise and clearly defined;

— it must be 'of common European interest';

— it must be important both quantitatively and qualitatively.

5.4.1.1. *The project must be specific, precise and clearly defined*

(122) The project in this case can be defined as the construction and operation of the Link. This project can be considered a *sui generis* project, which establishes two cross border transport lines (road and rail). As its objectives, terms of implementation, including its funding have been specifically laid down in the Intergovernmental Agreement and the Consortium Agreement, the Commission considers that the project can prima facie be considered as a specific, precise and clearly defined project. Moreover, it is also a major project of European transport infrastructure, which was realised through a unique partnership between Sweden and Denmark. The two States involved also underline in a credible manner that the project significantly improves the mobility of people and provides a physical connection of people and businesses in the cross-border Øresund Region inhabited by more than 3.5 million people.

5.4.1.2. *The project must be of common European interest*

(123) The Commission considers that the project can also be considered prima facie of a common European interest in the sense of Article 107(3)(b) TFEU, as it contributes in a concrete, clear and identifiable manner to one of the Union's objectives and has a significant impact on sustainable growth and value creation in a large part of the Union. In particular, this project was included in the first list of TEN-T priority projects endorsed by the European Council in 1994. Since the start of its operation the project has also contributed to a better connection of the Nordic countries to Central Europe. In addition, it connects also the Nordic Triangle road and rail links (TEN-T priority project 12) via Denmark, to the upcoming Fehmarn Belt (priority project 20). The project therefore represents an important contribution in common European transport policy. It is also generally acknowledged that the TEN-T projects generally also contribute to attaining other overall Union objectives such as the smooth functioning of the internal market and the strengthening of economic and social cohesion, as this type of projects have effects on multiple levels of the economy in the region, in addition to the effects on the transport sector. In addition, the project has received co-financing by the TEN-T Framework as mentioned in section 2.1.

5.4.1.3. *The project must be important quantitatively and as well as qualitatively*

(124) The project is a major European transport infrastructure project. According to Denmark and Sweden, it costed approximately DKK 20 billion (EUR 2.7 billion). When including the costs of the construction of the connecting land infrastructures, the total costs of the project has been approximately DKK 30 billion (EUR 4 billion) (NPV in 2000 prices). Moreover, its financing entailed important risks taking into account in particular the significant construction costs, an unknown operation date and continued and operational and traffic risks involved for a very long period.

(125) The project was realised by a partnership between Sweden and Denmark and was fully endorsed at Union level as the Link forms an integral part of the trans-European transport network (TEN-T priority project 11). The project significantly improves the mobility of people and provides a physical connection of people and businesses in the cross-border Øresund Region inhabited by more than 3.5 million people.

(126) The Commission considers therefore that the project is *prima facie* quantitatively and qualitatively important, and operates to the benefit of the European Union.

(127) Taking into account the above, the Commission concludes that the project prima facie meets all the criteria of a project that may be promoted with aid based on Article 107(3)(b) TFEU.

([78]) See, for example, Commission Decisions of 17.03.2009, in case N 157/2009 — Denmark — Financing of the planning phase of the Fehmarn Belt fixed link, OJ C 2002 of 27.08.2009, p. 1; of 13.03.1996 concerning fiscal aid given to German airlines in the form of a depreciation facility, OJ L 146 of 20.06.1996, p. 42, of 22.12.1998, N 576/98 of 22 December 1998 in case N 576/98 — United Kingdom — Channel Tunnel Rail Link, OJ C 56 of 26 February 1999, p. 6, and of 13.05.2009 in case N 420/08 — United Kingdom — Restructuring of London & Continental Railways, OJ C 183,5.08.2009, p. 2.

5.4.2. ***Type of aid measures under assessment***

(128) As the measures under examination have been granted by both Denmark and Sweden in view of the substantial financing needs of the project highlighted above, the Commission considers it, also in the light of the judgment of the Court of 19 September 2018 ([79]) appropriate to assess to which extent this financing relates to both the construction and operation phase of the project. This is necessary, in order to establish firstly whether the public financing measures involve investment aid only, or both investment and operating aid. The Commission also aims at better understanding by means of information provided in the context of the formal investigation procedure, the necessity and proportionality of the aid measures at stake.

(129) Article 12 of the Intergovernmental Agreement states that Denmark and Sweden shall jointly and severally guarantee the obligations in respect of the Consortium's loans and other financial instruments used in connection with the financing of the project. Moreover, Article 4(3) of the Consortium Agreement provides that the State guarantees will cover the Consortium's capital requirements' arising as a consequence of book losses which are expected to occur for a number of years after the project has been opened in traffic. On the basis of these provisions, it cannot be excluded that the guarantees may also cover loans taken out in order to meet the Consortium's operating costs. On the other hand, according to both said Agreements ([80]), the cost of project design and other preparations for the project, as well as its construction, operation and maintenance shall be covered entirely by the Consortium by toll charges levied on the users. Moreover, according to Denmark and Sweden, the Consortium is required to operate according to sound business principles and compliance with this requirement is controlled by both States' authorities.

(130) Moreover, although Sweden and Denmark argue that the main function of the State guarantees and the tax measures is to cover the financing needs of the construction and not the subsequent operation, the data submitted by them does not make any distinction between investment and operating needs of the Consortium. Moreover, the data, provided before the adoption of the 2014 Decision does not demonstrate to which extent the measures still being implemented during the operation phase of the project, are covering the financing needs related to: (i) the repayment of the liabilities created during the construction phase of the project, and/or (ii) the payment of operating costs, and/or (iii) the payment of the dividends to the parent companies, which relate to the construction costs of the hinterland connections that the Consortium has the obligation to cover through the operating income of the Link or (iv) all of the above.

(131) The Commission also deems it necessary to look into these parameters in the light of the typical financial and economic setup of such large scale projects. In particular, the Commission intends to clarify doubts as regards the issue whether it is not inherent in the logic of such infrastructure projects to compare ex ante upfront investment costs against future operating costs and income in a funding gap type of analysis. Indeed in such scenario, it may not be straightforward or useful to allocate traditional financial transactions exclusively to investment and/or operating costs. In this respect, the Commission also takes note of the fact that, most prominently in its judgment of 12 July 2018 on the Hinkley Point project ([81]), the General Court has underlined that operating aid is intended to maintain the status quo or to release an undertaking from costs which it would normally have to bear in its' day-to-day management of normal activities. That Court noted that measures which could be considered as necessary to realizing a large-scale project such as the Hinkley Point generation plant could not be regarded as maintaining the status quo, thereby raising doubts as regards its qualification as operating aid ([82]).

(132) It can also be noted that the granting of a hypothetical capital injection at the time of construction of the Link of an amount that corresponds to the expected benefit of the State guarantees would confer, in economic terms, a comparable benefit upon the Consortium as those guarantees. To the extent that such a capital injection could be considered as investment aid, it does not seem straightforward to consider that the State guarantees also involve operating aid merely because they also apply during the period that the Link is operational.

(133) The Commission will take a final position on these matters in the light of the comments that it will receive in the formal investigation procedure;

(134) In view of the absence, at this stage, of indications allowing to conclude on these issues, the Commission considers it appropriate to open the formal investigation as regards the nature of the aid measures concerned.

([79]) See above footnote 5.
([80]) Article 14 of the Intergovernmental Agreement.
([81]) Judgment of the General Court of 12 July 2018. *Republic of Austria v European Commission*. Case T-356/15. ECLI:EU:T:2018:439.
([82]) See in particular points 577 to 586 of the judgment.

5.4.3. ***Necessity***

(135) In order to assess the necessity of the aid, the Commission has to examine whether the aid will not subsidize the costs of a project that an undertaking would anyhow undertake. In particular, it has to assess whether, without the aid the project's realization would have been impossible, or that realization would have been implemented on a smaller or different scale or manner, which would have significantly restricted its expected benefits. The Commission further considers that, in the absence of an alternative project, the aid amount should not exceed the minimum necessary for the aided project to be viable from an *ex ante* project management risk perspective.

(136) Denmark and Sweden argue that both in terms of necessity and proportionality, the Commission assessment should be conducted in the light of the facts at the moment the aid measures were granted, i.e. in 1992, and taking into account the broader context of that time, which excluded the application of State aid rules for infrastructure projects at the time.

(137) The Commission indeed acknowledges that the measures were adopted at a time when it was generally considered that the public financing of such infrastructure was not covered by EU State aid rules.

(138) The possibility of constructing a fixed link between Sweden and Denmark had been on the agenda for more than 35 years prior to the conclusion of the Inter-governmental Agreement. During that period, there were apparently no indications that such a large-scale infrastructure project could be carried out without public support. The project required substantial upfront capital investments that could only be recovered in the very long term. Moreover, numerous uncertainties existed in relation to the revenues that could be expected. Therefore, at this stage of the investigation, the Commission considers that no rational private investor would have engaged in the financing of such a project under normal market conditions, in particular as it involved two different States. Moreover any such investor would have to take into account the obligation to fund through its revenues the debt relevant to the hinterland connections. Hence, without the aid the project would prima facie not have been realised. The States submit that all calculations of the project financing were based on the assumption that the loans obtained by the Consortium to finance the project would be fully covered by State guarantees, as prescribed by the Intergovernmental agreement. The provision of Union funds under the TEN-T framework (EUR 127 million representing 6 % of the total project costs) would be a complementary strong indication of the necessity of public funding for the realisation of the Link.

(139) According to the information provided by Denmark and Sweden, the initial budget estimated that the total costs of planning and constructing the Link would amount to DKK 11,7 billion (EUR 1,55 billion). The estimated cost of the hinterland connections corresponded to DKK 3,2 billion (EUR 0,43 billion) in Denmark and SEK 1,95 billion (EUR 0,26 billion) in Sweden. Hence, the total costs of the project were estimated at approximately EUR 2,24 billion (NPV in year 1990). However, when the Link was completed in 2000, the Consortium had a net debt of DKK 19,6 billion (approx. EUR 2,63 billion). In addition, A/S Øresund and SVEDAB AB liabilities amounted to DKK 7,9 billion (EUR approx. 1,06 billion) and DKK 2,6 billion (EUR approx. 0,35 billion) respectively. So the total costs of the construction project amounted to approximately EUR 4 billion (NPV in year 2000).

(140) Moreover, on the basis of the data available at this stage, it seems that the debt of the Consortium has fluctuated ([83]) after the operation of the Link started. The repayment period for the investment undertaken by the Consortium has also fluctuated as compared to the initial 1991 estimates ([84]). The calculation of the length of the Consortium's debt repayment period was based on a number of forecasts concerning, inter alia, the development of traffic revenues, operational costs, reinvestment costs, financing costs and dividend payments to the parent companies of the Consortium. As highlighted in the 2013 Annual report ([85]), due to the uncertainties concerning future traffic developments, the Consortium has set out three possible scenarios for future traffic developments: a base case scenario with repayment period after 34 years ([86]), a growth scenario with repayment period of 30 years ([87]) and a stagnation scenario with a repayment period of 43 years ([88]). Of those, the crucial parameter related to the forecast concerning road traffic revenues, which accounted for 75 % of the total revenue and which had varied considerably over time ([89]).

([83]) For instance, at the end of 2000, the Consortium's net financial debt, including accumulated interest, amounted to 19.4 billion Danish kroner (DKK), which at the end of 2003 had risen to DKK 20.1 billion, and had fallen at the end of 2013 to DKK 16.6 billion.

([84]) The repayment period is estimated on an annual basis and published in the Consortium's annual reports. This estimate has fluctuated between 30 and 50 years.

([85]) Annual Report — Øresundsbro Konsortiet — 2013

([86]) The base case scenario envisaged a moderate growth of 4 % for the next few years after which growth would decrease gradually towards a long term trend of 1,8 %.

([87]) The growth scenario assumes that the integration of the Øresund Region will result in strong traffic growth as was the case before the global recession. The Danish and Swedish economies are reviving, and annual traffic growth is assumed to increase by approximately 6 %, arriving at 2,5 % in the long run.

([88]) The stagnation scenario assumes negative growth for the next few years followed by moderate growth of approximately 2 % over the medium term and a long-term trend of a little more than 1 per cent.

([89]) In their reply to the Commission's questions of 22 October 2018, Denmark and Sweden indicated that it now expected to take up to 50 years to repay all the debts of the Consortium (including the necessary dividend payments to A/S Øresund and SVEDAB AB) on the assumption, inter alia, that the Consortium maximises its income.

(141) It is the Commission's preliminary view that all the above elements could constitute strong indications of the necessity of the aid as regards the construction of the said infrastructure, given that, at that moment in time, such big infrastructure project would not be realised without any public support. However, given the considerations above, the Commission cannot conclude at this stage on the necessity of the measures.

(142) Moreover, in case the aid measures also cover operating costs of the Consortium during the operational phase of the Link, Denmark and Sweden have not demonstrated, at this stage, whether such aid has also been necessary to attain the objective of common European interest pursued.

(143) In view of the above, the Commission will examine the necessity of the aid measures for both the construction and operating phase on the basis of the expanded information it will receive in the course of the formal investigation procedure.

5.4.4. ***Proportionality***

(144) The principle of proportionality requires that the aid measures do not exceed what is appropriate in order to attain their objectives. Thus, if the construction and operation of the Link could be achieved with less aid, then the aid would not be considered proportionate.

(145) With regard to aid in the form of guarantees, the proportionality of such aid traditionally requires the guarantee to be linked to specific financial transaction, for a fixed maximum amount and limited in time. State guarantees must be limited in time, as unlimited guarantees are in principle incompatible with Article 107 TFEU ([90]). Moreover, tax measures should as a rule be limited to an amount proportionate to the objective pursued.

(146) Denmark and Sweden argue that the assessment of proportionality should not disregard the fact that the States could have chosen to inject capital to the Consortium or take loans themselves in order to finance the project directly. In such a case, the financial burden on the State's budgets would have been higher and, as a consequence, the total costs of the project would have increased. Thus, the financial setup of the project ensured that possible State aid was limited to the minimum necessary. Moreover, the Consortium's activity is specifically circumscribed in the Consortium Agreement, in the sense that its activity is limited to the financing, construction, operation and maintenance of the Link. Thus, in their opinion, the guarantees are limited and proportionate, as, first, they are limited by the repayment period of the loans linked to the project, and, second, they cannot be used by the Consortium to increase its capacity or extend its business on any other markets. Finally, as the construction works were tendered out, this is also an indication that the financing needs were kept to the minimum necessary.

(147) Moreover, the States argue that the cash-flow generated by the Consortium so far indicates that the Consortium's income is large enough to pay all operating expenses and to cover part of the outstanding loan balance. According to them, the established procedures are an appropriate way of controlling that the risk on the State guarantees is minimized, and thus that the aid element flowing from the guarantees is proportionate and strictly limited to the minimum necessary

(148) The Commission considers that the choice of guarantees as aid instrument is indeed a positive indicator as regards the appropriateness and proportionality of the aid. However, it is not sufficient in and of itself to conclude that the measures in favour of the Consortium are proportionate to the objective pursued. Moreover, although the Commission understands that the financial set-up decided at the time indeed limited the State guarantees to the specific project financing needs, this does not necessarily mean that the guarantees were limited in amount or time.

(149) With respect to the concrete effect of the tax measures, the Danish authorities have indicated, in the information submitted before the adoption of the 2014 Decision, that the advantage of the special depreciation rules amounted to about DKK 304 000 (approximately EUR 41 000) for the period 1991 to 2013. According to the Danish authorities, the absence of such rules would have increased the length of the repayment period of the project and would have had negative implications for the financial robustness of the project.

(150) In this respect, the Commission observes that the Danish tax treatment of the Consortium in respect of depreciation and loss carry forward was defined in the context of the different agreements establishing the legal and financial framework for the construction and operation of the Link, including the guarantees. It also appears that the special provisions granted to the Consortium were expected to contribute to the viability of the project thereby rendering the effects of the guarantees and advantage the tax measures interdependent.

([90]) See point (b)of the third subparagraph of Section 4.1 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees Guarantee Notice, OJ C 155, 20.6.2008, p. 10.

(151) However, at this stage, the Commission does not have all elements to determine the limits on the amount and duration of the State guarantees and the tax advantages which could be considered as reasonable. Nor does the Commission have sufficient elements to establish the length of the reasonable repayment periods or the amount of likely borrowing required at the beginning of the project.

(152) In the absence of this type of elements, which would allow a proper quantification method of the aid involved and its limitation, the Commission has doubts as regards the proportionality of the measures under examination.

5.4.5. ***Undue distortions of competition and balancing test***

(153) For the aid measures to be considered compatible, the Commission intends to evaluate considerations that the measures constitute an appropriate policy instrument to attain the objective of the project. In that context it also aims at assessing the extent to which the negative effects of the aid measure in terms of distortion of competition are outweighed by the positive effects in terms of contribution to the objective of the common European interest at stake. .The Commission aims at better understanding to which extent the infrastructure at stake provides open and non-discriminatory access at non-discriminatory prices.

(154) The Commission notes that the guarantee instrument chosen combined with the obligation of the Consortium to cover all costs relevant to the planning, construction, operation and maintenance of the project through its operating revenues, can, in principle, be considered as an appropriate instrument to attain such objective, as compared to direct subsidies. However, the open-ended character of the State guarantees and the tax measures prima facie mitigates such conclusion.

(155) In particular, the open-ended character of the measures has to be assessed in terms of its possible negative effects on competition. In this respect, the complainant argues that the financial set-up chosen by Denmark and Sweden had as a consequence that the Consortium had the possibility to set the toll charges for the Link at a level which is artificially low.

(156) The Commission notes that it can indeed be argued that the aid measures under examination have a negative effect on competition, in particular for companies such as the complainant. However, these negative effects have to be assessed in the light of the positive effects in terms of contribution to the objective of common European interest. In particular, the very purpose of the Link seems to be to offer citizens and undertakings an alternative transport link than the one provided in the past by ferry operators. To this end, Denmark and Sweden and interested parties are invited to provide any further information available.

(157) Thus, the Commission is, at this stage, not in a position to definitively conclude whether possible negative effects of the measures have been outweighed by the positive effects induced.

5.4.6. ***Specific compatibility condition as regards the guarantees — Mobilisation conditions***

(158) According to point 5.3 of the Guarantee Notice, which incorporates existing Commission practice ([91]), *'The Commission will accept guarantees only if their mobilisation is contractually linked to specific conditions, which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure. These conditions will have to be agreed between the parties when the guarantee is initially granted. In the event that a Member State wants to mobilise the guarantee under conditions other than those initially agreed to at the granting stage, then the Commission will regard the mobilisation of the guarantee as creating new aid which has to be notified under Article 88(3) of the Treaty.'*

(159) The complainant argues that the guarantees granted by Denmark and Sweden did not include any conditions relevant to their mobilization and thus they cannot be declared compatible in any case. Denmark and Sweden are invited to submit further information in this respect.

(160) The Commission notes that at this stage it does not dispose of the necessary information to assess the existence and the conditions of the mobilisation of the guarantees.

([91]) See Commission letter to the Member States, reference SG(89) D/4328, of 5 April 1989.

5.5. **Legitimate expectations — Legal certainty**

(161) Article 16(1) of the Procedural Regulation provides 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 beneficiary. However, *[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, the Commission is required to take into consideration, also on its own initiative, exceptional circumstances that provide justification, pursuant to the said Article, for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Union law ([92]).

(162) The principle of protection of legitimate expectations is a general principle of EU law ([93]) which confers rights on individuals ([94]). In accordance with settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where an EU institution has caused him or her to have justified expectations ([95]).

(163) 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 by the authorities. 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 ([96]).

(164) 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 the Commission itself has given precise assurances that the measure in question does not constitute State aid ([97]). It is also right that, in principle, there is no legitimate expectation on the part of recipients of aid unlawfully implemented ([98]).

(165) In the light of the above, it appears that general principles of legal certainty and legitimate expectations prevent the Commission from applying a novel interpretation of Article 107(1) TFEU, when, clearly, the States and the Consortium could legitimately expect that the State guarantees and the Danish tax measures would fall outside the scope of Article 107(1) TFEU.

(166) In this connection, the States submit that the State guarantees have been definitively and irrevocably granted to the Consortium on 27 February 1992, and that the principle in point 81 of the *Munich Airport Terminal 2* ([99]) decision therefore clearly applies to this case. In view of this, the guarantees cannot be considered as 'unlawful aid' which could be recovered on the basis of article 16(1) of the Procedural Regulation.

(167) The States consider the guarantees to constitute existing aid, which cannot be recovered. To this end, they argue that the Commission's lack of inaction after the Consortium notified, on 1 August 1995, the guarantees entails that any possible aid contained in the guarantees must now be considered existing aid, which cannot be recovered. The Consortium's letter and the circumstances of the case, including the fact that the Link was approved as a TEN-T project, entail that the Commission was duly informed that the aid measures would be implemented. Moreover, they argue that as the guarantees were granted definitively and irrevocably in 1992, the 10-year limitation period has been suspended merely at the moment the Commission started the investigation of the case following the complaint.

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

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

([94]) 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.

([95]) 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.

([96]) 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 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.

([97]) 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, ECLI:EU:C:2006:416 , para 147; Judgment of the Court of Justice of 24 November 2005, *Germany v Commission*, C-506/03, ECLI:EU:C:2005:715, paragraph. 58.

([98]) 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, ECLI:EU:C:2004:701, paragraphs 44 and 45, and the case law cited therein.

([99]) Commission Decision of 3 October 2012 on the measure SA.23600 — C 38/08 (ex NN 53/07) — Germany — Financing arrangements for Munich Airport Terminal 2, OJ L 319, 29.11.2013, p. 8.

As regards the Swedish guarantee in particular, given that the guarantee was granted prior to the entry into force of the EEA agreement, it would have been definitively granted before accession. Finally, given the reassurances provided by the Commission in its 1995 letters, any recovery would be contrary to the general principles of Union law relevant to legal certainty and protection of legitimate expectations.

(168) In case the Commission were to conclude that the measures involve unlawful and incompatible aid, it would be necessary to assess whether a general principle of Union law, and in particular the principle of legitimate expectations, precludes recovery of such aid.

(169) In the present case, in view of the combination of the highly specific circumstances described in recitals 46 to 48 of this decision, the Commission is of the opinion that should the measures be considered as having been granted before the 2000 *Aéroports de Paris* judgment ([100]), the Member States concerned and the beneficiary should benefit from the principle of the protection of legitimate expectations.

(170) First, the Commission's position at that time was to consider public financing of the construction and operation of infrastructure projects as public goods and not economic activity. This position was clearly spelt out in various soft law instruments ([101]) as well as certain Commission decisions ([102]). As noted above, the Commission's position has evolved over time, and with the General Court's judgment in *Aéroports de Paris* it has become gradually apparent that the operation of infrastructure may be considered as an economic activity.

(171) Second, in view of these developments, the Commission has adopted a general policy that financing measures for the construction and operation of infrastructure definitively adopted before the judgment in *Aéroports de Paris* can no longer be called into question based on State aid rules. In this regard, the Commission has considered public authorities could legitimately consider that financing measures definitively adopted before the judgment in *Aéroports de Paris* did not constitute State aid and accordingly did not need to be notified to the Commission ([103]).

(172) Third, in line with the Commission's policy at the time, the Commission informed Denmark and Sweden in 1995 that the State guarantees in question did not constitute State aid within the meaning of Article 107(1) TFEU.

(173) Indeed, the Consortium duly informed the Commission of the existence of the State guarantees by its letter of 1 August 1995 and asked for the position of the Commission as regards the qualification as State aid of the two State guarantees.

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

([101]) 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 of 10.12.1994, paragraph 12 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 ea 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.

([102]) See, Commission decisions of 14.09.2000, on State aid N 208/2000 — Netherlands — Subsidy Scheme for Public Inland Terminals (SOIT), OJ C 315 of 4.11.2000, p. 22; of 17.07.2002, on State aid N 356/2002 — United Kingdom — Network Rail, OJ C 232 of 28.09.2002, p. 2; of 20.12.2001, on State aid N 649/2001 — United Kingdom — Freight Facilities Grant, OJ C 45 of 19.02.2002, p. 2, paragraph 45, of 8.03.2006, on State aid N 284/2005 — Ireland — Regional Broadband Programme: Metropolitan Area Networks ('MANs'), phases II and III, paragraph 34, OJ C 207 of 30.8.2006, p. 2; of of 2 August 2002 on State aid C 42/2001 — Spain — Terra Mitica SA, OJ L 91, 8.4.2003, p. 23, paragraphs 64 and 65; of 20.04.2005, on State aid N 355/2004 — Belgium — PPP Antwerp Airport, OJ C 176, of 16.7.2005, p. 11, paragraph 34; of 11.12.2001, on State aid N 550/2001 — Belgium — Partenariat public privé pour la construction d'installations de chargement et de déchargement, OJ C 24, 26.1.2002, p. 2, paragraph 24; of 20.12.2001, on State aid N 649/2001 -United Kingdom — Freight Facilities Grant (FFG), OJ C 045 of 19.02.2002, p. 2;.. See also paragraph 201 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, OJ C 262, 19.7.2016, p. 1.

([103]) See, for instance Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, p. 3, paragraphs 28-29; Commission decision of 3 October 2012, on State aid C 38/2008 — Germany — Munich airport Terminal 2, OJ L 319, 29.11.2013, p. 8, paragraphs 74 to 81.

(174) In that context, it is relevant to note that the letter was submitted to the Commission prior to the entry into force of Regulation No 659/99 and of Commission Regulation (EC) No 794/2004, which introduced new formalities for State aid notifications, including notification forms, and electronic submission through the SANI system with validation by Member State's Permanent Representations (see Article 2 of that regulation) ([104]).

(175) In response to the Consortium's letter of 1 August 1995, on 27 October 1995, the Commission sent two letters to the two Member States concerned but not to the Consortium. In those letters, signed by the Director General for Transport, the Commission informed the two Member States concerned that the State guarantees in question did not constitute State aid within the meaning of Article 107(1) TFEU and that, therefore, the guarantees in question should not be notified to the Commission.

(176) In that regard, it has to be noted that the conclusion in the Commission letters of 27 October 1995 was fully consistent with the decision practice of the Commission at the time. As explained above, the construction and operation of infrastructure was not considered an economic activity by the Commission at the time the said letters were sent and therefore was not subject to State aid rules.

(177) Fourth, even though the Commission was not informed of the tax measures by the Consortium's letter of 1 August 1995, the Commission considers that the conclusion that the State guarantees did not constitute State aid and did not need to be notified, gave Denmark legitimate expectations that the specific tax measures applicable to the Consortium did not constitute State aid either, because they were attached to an infrastructure project the construction and operation of which was considered not to constitute an economic activity.

(178) Last but not least, the judgment of the General Court of 19 September 2018 upheld the Commission's analysis as regards the existence of the legitimate expectations at least until 2000 ([105]).

(179) In view of the above, the Commission considers that the States and the Consortium have legitimate expectations that the Commission would not call into question the State guarantees and the tax measures granted up until the date of the judgment in *Aéroports de Paris,* in the event that aid granted to the Consortium were to be considered incompatible with the internal market.

(180) Should State guarantees and tax measures be considered as granted in the period after the judgment of 12 December 2000, the Commission notes the particular circumstances of this case, as described above, and in particular the specific, precise and unconditional reassurance given in the Commission letters of 1995 stating that the measures concerned would not constitute state aid. Therefore, the Commission considers that, in light of the General Court's case law ([106]), the Consortium could be considered as enjoying, in any case, legitimate expectations, as regards its right to get State guarantees for its financial transactions relevant to the project, as it irrevocably engaged in the project already from the time it was created ([107]), i.e. in 1992, long before the 2014 Commission decision and/or the current decision.

(181) However, the Commission intends to further examine this matter also on the basis of the information it will receive from the Member States and the interested parties within the context of the formal investigation procedure.

6. **CONCLUSION**

On the basis of the above, the Commission considers that at this stage, it is not in a position to make a definitive assessment of the issues related to the nature of the measures as individual aid or as an aid scheme, as well as the date (s) at which the measures were granted and their number. Consequently, the Commission will also further examine whether all or some of the measures constitute existing or new aid.

The Commission will further investigate the compatibility of these aid measures with the Internal Market. Although these measures can be considered as aiming at the promotion of an important project of common European interest, the Commission will look in further depth at the measures in the construction and operational phase, their necessity and proportionality, whether they entail undue distortions of competition that cannot be outweighed by their positive effects, as well as the conditions of mobilisation of these guarantees. Finally, the Commission will 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.

([104]) The Commission would point out that, since the entry into force of Regulation No 659/99 and of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing it (OJ L 140, 30.04.2001, p. 1), such a state of affairs cannot happen again. Both Regulations remind Member States of their obligation to notify in advance any proposal to grant new aid. The practical arrangements for making such notifications, such as the use of standard forms, are set out clearly.

([105]) See recitals 309 to 322 of the judgment.

([106]) Judgment of the General Court of 15 November 2018, *World Duty Free Group, SA, formerly Autogrill España, SA v Commission,* T-219/10 RENV, ECLI:EU:T:2018:784; Judgement of the General Court of 15 November 2018, *Deutsche Telekom AG v Commission,* T-207/10, ECLI:EU:T:2018:786; Judgment of the General Court of 15 November 2018, *Banco Santander, SA v Commission,* Case T-227/10, ECLI:EU:T:2018:785; Judgment of the General Court of 15 November 2018, *Axa Mediterranean Holding, SA v Commission,* T-405/11, ECLI:EU:T:2018:780; Judgment of the General Court of 15 November 2018, *Banco Santander, SA and Santusa Holding, SL v Commission,* Case T-399/11 RENV, ECLI:EU:T:2018:787.

([107]) See among others paragraph 293 of Judgment of the General Court of 15 November 2018, World Duty Free Group, SA, formerly Autogrill España, SA v Commission, T-219/10 RENV, ECLI:EU:T:2018:784.

In the light of the foregoing considerations, the Commission requests Sweden and Denmark to submit their comments and to provide all such information as may help to assess these measures, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

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

By letter of 16 January 2019, the Danish and Swedish authorities agreed to have the present decision adopted and notified in the English language.