Modtaget den : 29/02/2024

CVRIA
LUXEMBOURG

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

28 February 2024 *

(State aid – Public financing of the Fehmarn Belt fixed rail-road link project – Aid granted by Denmark to Femern and Femern Landanlæg – Decision finding that certain measures do not constitute unlawful aid – Decision not to raise any objections – Partial withdrawal of the contested act – No need to adjudicate in part – Scope of Article 107(1) TFEU – Failure to initiate the formal investigation procedure – Obligation to state reasons)

In Case T-7/19,

Scandlines Danmark ApS, established in Copenhagen (Denmark),

Scandlines Deutschland GmbH, established in Hamburg (Germany),

represented by L. Sandberg-Mørch, lawyer,

applicants,

supported by

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

by

Naturschutzbund Deutschland eV (NABU), established in Stuttgart (Germany), represented by L. Sandberg-Mørch and T. Hohmuth, lawyers,

by

Trelleborg Hamn AB, established in Trelleborg (Sweden), represented by L. Sandberg-Mørch, lawyer,

* Language of the case: English.

and by

Föreningen Svensk Sjöfart (FSS), established in Gothenburg (Sweden), represented by L. Sandberg-Mørch, lawyer,

interveners,

v

European Commission, represented by V. Bottka, C. Georgieva and S. Noë, acting as Agents,

defendant,

supported by

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

intervener,

THE GENERAL COURT (First Chamber),

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

Registrar: V. Di Bucci,

having regard to the written part of the procedure, in particular:

– the decision of 4 October 2019 to suspend the proceedings pending the decision closing the proceedings in Case C-174/19 P, *Scandlines Danmark and Scandlines Deutschland* v *Commission*,

– the measure of organisation of procedure of 30 November 2021 inviting the parties to submit their observations on the consequences which they drew, for the present case, from the judgment of 6 October 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (C-174/19 P and C-175/19 P, EU:C:2021:801), with which only the Commission complied,

– the orders of 18 May 2022, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-7/19, not published, EU:T:2022:333); of 18 May 2022, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-7/19, not published, EU:T:2022:334); of 18 May 2022, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-7/19, not published, EU:T:2022:336); and of 18 May 2022, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-7/19, not published, EU:T:2022:337), granting, respectively, Aktionsbündnis gegen eine feste

Fehmarnbeltquerung, Trelleborg Hamn, FSS and NABU leave to intervene in support of the form of order sought by the applicants,

– the order of 18 May 2022, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-7/19, not published, EU:T:2022:335), rejecting Grimaldi Group SpA's application for leave to intervene;

having regard to the fact that no request for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

Judgment

1 By their action based on Article 263 TFEU, the applicants, Scandlines Danmark ApS and Scandlines Deutschland GmbH, seek the annulment of Commission Decision C(2018) 6268 final of 28 September 2018 on State aid SA.51981 (2018/FC), by which the Commission found that the measures adopted by the Kingdom of Denmark in respect of Femern A/S and Femern Landanlæg A/S did not constitute unlawful State aid and that there was no need to raise any objections concerning the capital injection in favour of Femern, since that injection was, in any event, compatible with the internal market under Article 107(3)(b) TFEU ('the contested decision').

Background to the dispute

2 The applicants are part of a ferry operator group which provides, inter alia, maritime links between Denmark and Germany.

3 The present case concerns the Fehmarn Belt link project between Denmark and Germany ('the project'), which consists of, on the one hand, a rail and road tunnel ('the Fixed Link') and, on the other hand, road hinterland connections in Denmark and rail hinterland connections in Denmark ('the road and rail hinterland connections').

4 In accordance with Article 6 of the treaty between the Kingdom of Denmark and the Federal Republic of Germany concerning the Fehmarn Belt fixed link, signed on 3 September 2008 and ratified in 2009, and the Lov nr 575 om anlæg og drift af en fast forbindelse over Femern Bælt med tilhørende landanlæg i Danmark (Law No 575 on the construction and operation of the Fehmarn Belt Fixed Link and Danish hinterland connections) of 4 May 2015, two public undertakings were entrusted with the execution of the project. First, Femern (formerly Femern Baelt

A/S) is responsible for the financing, construction and operation of the Fixed Link. Second, Femern Landanlæg is responsible for the financing, construction and operation of the road and rail hinterland connections.

Administrative procedure

5 By its decision of 13 July 2009 in Case N 157/09 – Financing of the planning phase of the Fehmarn Belt fixed link (OJ 2009 C 202, p. 2; 'the Planning Decision'), the European Commission decided not to raise objections to the measures notified by the Danish authorities for the financing of the planning of the project, assessed at 1 445 million Danish kroner (DKK) (approximately EUR 194 million). The notified measures consisted in a capital injection and guarantees for the loans taken out by Femern Baelt to finance the planning of the project. In that decision, the Commission concluded, first, that the measures relating to the financing of the planning of the project may not constitute State aid, since Femern Baelt had acted as a public authority and, second, that even if those measures were capable of benefiting the future operator of the Fixed Link, they would in any event be compatible with the internal market.

6 On 5 June 2014, the applicants lodged a complaint with the Commission ('the 2014 complaint'), in which they claimed that Femern and Femern Landanlæg had received unlawful and incompatible aid granted in breach of the Planning Decision and that the public financing that would be granted during the construction phase would involve the payment of aid that was incompatible with the internal market.

7 On 23 July 2015, following the notification by the Danish authorities of the financing measures for the construction of the project, the Commission adopted Decision C(2015) 5023 final on State aid SA.39078 (2014/N) (Denmark) concerning the financing of the Fehmarn Belt Fixed Link project and referred to in the *Official Journal of the European Union* of 2 October 2015 (OJ 2015 C 325, p. 5; 'the Construction Decision'), by which the Commission decided not to raise any objections. The notified measures concerned all of the costs for the construction of the project, including the planning costs. Those measures included capital injections made in 2005 and 2009 as well as State guarantees and State loans granted to Femern and Femern Landanlæg. In that decision, first, the Commission concluded that the measures granted to Femern Landanlæg for the planning, construction and operation of the road and rail hinterland connections did not constitute State aid within the meaning of Article 107(1) TFEU. Second, the Commission concluded that, even if the measures granted to Femern for the planning, construction and operation of the Fixed Link constituted State aid within the meaning of Article 107(1) TFEU, they were compatible with the internal market under Article 107(3)(b) TFEU.

8 On 2 August 2016, the applicants sent a letter of formal notice to the Commission inviting it to act with regard to certain measures granted to Femern and Femern

Landanlæg, referred to in the 2014 complaint. In the applicants' view, those measures had not been examined in the Construction Decision.

9 By letter of 30 September 2016 ('the Commission letter of 30 September 2016'), the Commission replied to the applicants. First, the Commission stated that the applicants' allegations concerning the railway charges and the use of State-owned assets had already been addressed by the Construction Decision. Second, the Commission stated that the evidence put forward by the applicants as regards the tax measures and the alleged misuse of aid during the planning phase was not sufficient to demonstrate, prima facie, that there was unlawful aid, and requested the applicants to submit their observations within one month.

10 On 30 October 2016, the applicants sent another letter to the Commission in which they maintained certain allegations of unlawful aid, set out in their formal notice of 2 August 2016. In particular, in the first place, as regards the planning phase, the applicants argued that the Planning Decision had not authorised the grant of State loans to Femern or the grant of State guarantees to Femern Landanlæg. They also considered that Femern had obtained a capital injection exceeding by DKK 10 million the amount authorised by the Planning Decision and that Femern and Femern Landanlæg had received State loans amounting to DKK 4 billion, exceeding the DKK 1 445 million authorised by that decision. In their letter, the applicants argued that those measures to finance the planning had not subsequently been authorised by the Construction Decision. Furthermore, the applicants considered that, during the planning phase, Femern and Femern Landanlæg had benefited from tax advantages not authorised by the Planning Decision. In the second place, as regards the project's construction phase, the applicants argued that the Construction Decision had not examined the possibility that the railway fees and the use of State-owned assets constitute State aid within the meaning of Article 107(1) TFEU.

11 On 10 January 2017, the Commission invited the Danish authorities to submit observations on the allegations contained in the applicants' letters of 2 August and 30 October 2016. The Danish authorities replied by letter registered by the Commission on 10 February 2017.

12 By letter of 26 July 2018, registered by the Commission on 30 July 2018 under reference SA.51981, the applicants alleged that the Commission had failed to take a decision on certain unlawful aid and gave it formal notice to act.

Contested decision

13 On 28 September 2018, the Commission adopted the contested decision in which it concluded that the following did not constitute unlawful aid:

– the guarantees granted to Femern Landanlæg;

– the loans granted to Femern and Femern Landanlæg;

– the sums allegedly paid in excess of the Planning Decision; and

– the tax advantages granted to Femern and Femern Landanlæg.

14 In addition, by that decision, the Commission decided not to raise any objections to the additional capital increase granted to Femern on the ground that, in so far as it was an aid measure not covered by the Planning Decision, that aid was compatible with the internal market on the basis of Article 107(3)(b) TFEU.

Facts subsequent to the dispute

The consequences of the actions for annulment of the Construction Decision

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

16 First of all, as regards the public financing granted to Femern Landanlæg for the financing of the planning, construction and operation of the rail hinterland connections in Denmark, the Court rejected as unfounded the applicant's pleas alleging that the Commission had made an error of fact and of law by concluding that those measures did not constitute State aid on the basis that they were not liable to distort competition or to affect trade between Member States within the meaning of Article 107(1) TFEU. By its judgment of 6 October 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (C-174/19 P and C-175/19 P, EU:C:2021:801), the Court of Justice dismissed the appeals brought by the applicants.

17 Second, as regards the public financing granted to Femern for the planning and construction of the Fixed Link, the General Court, as confirmed by the Court of Justice which dismissed the appeals, by contrast upheld the applicants' actions on the ground that the Commission had failed to fulfil its obligation under Article 108(3) TFEU to initiate the formal investigation procedure on account of the existence of serious difficulties in the examination of the compatibility with the internal market of the measures granted to Femern.

18 Consequently, following the partial annulment of the Construction Decision, the Commission, by letter of 14 June 2019, notified the Kingdom of Denmark of its decision to initiate the procedure laid down in Article 108(2) TFEU ('the Opening Decision') in respect of the measures relating to the financing of the Fehmarn Belt Fixed Link project. In that letter, the Commission concluded, inter alia, that the contested decision should be withdrawn in so far as it concerned the alleged unlawful aid granted to Femern, namely the measures granted to that entity which are examined in Sections 4.2, 4.3, 4.4 and 4.5 of that decision. On 5 July 2019, in the context of the case on the State aid SA.39078 (2019/C) (ex 2014/N) which

Denmark implemented for Femern, the Commission published in the Official Journal an invitation to interested parties to submit their comments pursuant to Article 108(2) [TFEU] (OJ 2019 C 226, p. 5).

19 Following the formal investigation procedure, the Commission adopted Decision (EU) 2020/1472 of 20 March 2020 on the State aid SA.39078 – 2019/C (ex 2014/N) which Denmark implemented for Femern (OJ 2020 L 339, p. 1). In that decision, first, the Commission considered that the measures consisting of the depreciation of assets, the fiscal loss carry forward, the joint taxation regime, the railway fees, the use of State property free of charge and the State guarantees for the derivatives do not constitute State aid in favour of Femern within the meaning of Article 107(1) TFEU. Second, it concluded that the measures consisting of capital injections and a combination of State loans and State guarantees in favour of that undertaking, which the Danish authorities had at least partially put into effect unlawfully, constituted State aid within the meaning of Article 107(1) TFEU that was compatible with the internal market on the basis of Article 107(3)(b) TFEU.

The actions for annulment of the Commission's letter of 30 September 2016

20 By order of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-890/16, not published, EU:T:2018:1004), the General Court dismissed as inadmissible the action for annulment of the Commission's letter of 30 September 2016 on the ground that it was not a challengeable act for the purposes of Article 263 TFEU. In that order, first, the General Court held that, in so far as it concerned the railway fees and the use of State property free of charge, that letter constituted a confirmatory measure. Second, as regards the measures contested by the applicants in relation to the planning phase, it held that that letter constituted a preparatory measure. By order of 3 September 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (C-173/19 P, not published, EU:C:2021:699), the Court of Justice dismissed the appeal brought against the order of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-890/16, not published, EU:T:2018:1004), as manifestly unfounded.

Forms of order sought

21 The applicants, supported by Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV ('Aktionsbündnis'), Naturschutzbund Deutschland eV (NABU), Trelleborg Hamn AB and Föreningen Svensk Sjöfart (FSS), claim that the General Court should:

– annul the contested decision;

– order the Commission to pay the costs.

22 The Commission, supported by the Kingdom of Denmark, contends, in the final version of the form of order sought, that the Court should:

– declare that there is no need to adjudicate on the measures granted to Femern;

– dismiss the action as inadmissible or, in the alternative, unfounded in so far as it concerns the measures granted to Femern Landanlæg;

– order the applicants to pay the costs.

Law

23 In support of their action, the applicants rely on seven pleas in law, alleging, first, that the Commission erred in law in finding that the guarantees granted to Femern Landanlæg had been authorised by the Construction Decision and that they did not constitute State aid; second, that the Commission erred in law in finding that the aid granted to Femern in the form of a capital injection exceeding by DKK 10 million the amount authorised by the Planning Decision was compatible with the internal market; third, that the State loans granted to Femern and Femern Landanlæg were not authorised by the Construction Decision, that those granted to Femern Landanlæg constitute State aid and that those granted to Femern constitute State aid that is incompatible with the internal market; fourth, that the State loans granted for the planning phase in excess of the DKK 1 445 million authorised by the Planning Decision were not authorised by the Construction Decision and constitute State aid that is incompatible with the internal market; fifth, that the Commission erred in law in finding that the tax advantages do not constitute unlawful State aid; sixth, that the Commission infringed Article 108(2) TFEU by failing to initiate the formal investigation procedure; and, seventh, that the Commission infringed Article 296 TFEU.

Subject matter of the dispute

24 The Commission submits that, by the adoption of the Opening Decision on 14 June 2019, after the present action was brought, the contested decision was withdrawn in so far as it concerns the measures granted to Femern. Therefore, the Commission and the Kingdom of Denmark submit that there is no longer any need to adjudicate on the head of claim seeking annulment of the contested decision in so far as it concerns those measures.

25 The applicants submit that the contested decision was not withdrawn as regards the measures granted to Femern. According to the applicants, Aktionsbündnis and Trelleborg Hamn, the decision closing the formal investigation procedure, namely Decision 2020/1472, did not examine the loans granted to Femern that were in excess of the amount set out in the Planning Decision. Therefore, there is no new decision concerning those loans.

26 In that regard, it should be noted that, according to the Court's settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 55 and the case-law cited). An applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible, and continue until the final decision, failing which there will be no need to adjudicate (judgments of 20 June 2013, *Cañas* v *Commission*, C-269/12 P, not published, EU:C:2013:415, paragraph 15, and of 15 December 2021, *Oltchim* v *Commission*, T-565/19, EU:T:2021:904, paragraph 72).

27 It should also be noted that the disappearance of the subject matter of the proceedings can inter alia result from the withdrawal or replacement of the contested act in the course of the proceedings (see, to that effect, judgment of 1 June 1961, *Meroni and Others* v *High Authority*, 5/60, 7/60 and 8/60, EU:C:1961:10, p. 110; orders of 17 September 1997, *Antillean Rice Mills* v *Commission*, T-26/97, EU:T:1997:131, paragraphs 15 and 16, and of 12 January 2011, *Terezakis* v *Commission*, T-411/09, EU:T:2011:4, paragraph 15).

28 An act which is withdrawn and replaced disappears from the legal order of the European Union, so that annulment of the withdrawn act would entail no more far-reaching legal consequences than the withdrawal itself (see, to that effect, orders of 28 May 1997, *Proderec* v *Commission*, T-145/95, EU:T:1997:74, paragraph 26; of 6 December 1999, *Elder* v *Commission*, T-178/99, EU:T:1999:307, paragraph 20; and of 9 September 2010, *Phoenix-Reisen and DRV* v *Commission*, T-120/09, not published, EU:T:2010:381, paragraph 23).

29 It follows that, in principle, in the event of withdrawal of the contested act, the applicant retains no interest in having it annulled and that the action against that act becomes devoid of purpose, with the result that there is no longer any need to adjudicate (see, to that effect, judgment of 1 June 1961, *Meroni and Others* v *High Authority*, 5/60, 7/60 and 8/60, EU:C:1961:10, p. 111; orders of 9 September 2010, *Phoenix-Reisen and DRV* v *Commission*, T-120/09, not published, EU:T:2010:381, paragraphs 24 to 26, and of 24 March 2011, *Internationaler Hilfsfonds* v *Commission*, T-36/10, EU:T:2011:124, paragraphs 46, 50 and 51).

30 In the present case, it should be noted that, by the Opening Decision, the Commission, on 14 June 2019, withdrew the contested decision in so far as it concerns the measures granted to Femern and initiated the formal investigation procedure in respect of those measures (see paragraph 18 above).

31 It must be stated that, as regards the measures granted to Femern, the annulment of the contested decision would entail no more far-reaching legal consequences

than the withdrawal. By the contested decision, the Commission, at the end of the preliminary examination stage, rejected the applicants' complaint and refused to initiate the formal investigation procedure in respect of those measures. Annulment of the contested decision, concerning those measures, would entail an obligation on the Commission to initiate the formal investigation procedure, which it had already done by way of the Opening Decision.

32 In addition, it should be noted that, by their arguments, the applicants, Aktionsbündnis and Trelleborg Hamn seek to call into question the adequacy of the examination carried out by the Commission in Decision 2020/1472. It must be stated that such arguments have no bearing on the finding that the subject matter of the dispute has ceased to exist as regards the contested decision in so far as it concerns the measures granted to Femern. Moreover, Decision 2020/1472 has been the subject of an action brought by the applicants which has been dismissed (judgment delivered today, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, T-390/20).

33 It follows from the foregoing that the action has become devoid of purpose in so far as it is directed against the contested decision to the extent that the latter concerns the measures granted to Femern, with the result that there is no longer any need to adjudicate on the action to that extent.

The head of claim directed against the contested decision in so far as the latter concerns the measures granted to Femern Landanlæg

34 Without raising an objection of inadmissibility by separate document on the basis of Article 130 of the Rules of Procedure of the General Court, the Commission submits that, as regards the measures granted to Femern Landanlæg, the contested decision is essentially not a challengeable act and that the applicants do not have standing to bring proceedings.

35 The applicants dispute that line of argument.

36 In the present case, the Court considers it appropriate, in the interests of the proper administration of justice and procedural economy, to examine at the outset the pleas put forward by the applicants seeking to challenge the legality of the contested decision in so far as it concerns the measures granted to Femern Landanlæg, without first ruling on the admissibility of the present action (see, to that effect, judgments of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraph 52, and of 5 October 2020, *Hermann Albers* v *Commission*, T-597/18, not published, EU:T:2020:467, paragraph 21).

The seventh plea in law, alleging breach of the obligation to state reasons

37 The applicants submit that the Commission infringed Article 296 TFEU in that it failed to set out in detail the reasons why the measures at issue do not constitute unlawful aid.

38 The Commission contends that the decision contains an adequate statement of reasons.

39 It should be noted that the statement of reasons required by Article 296 TFEU is an essential procedural requirement (judgment of 18 June 2015, *Ipatau* v *Council*, C-535/14 P, EU:C:2015:407, paragraph 37) and must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements laid down by that article must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 22 June 2004, *Portugal* v *Commission*, C-42/01, EU:C:2004:379, paragraph 66; of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 79; and of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 125).

40 In addition, in accordance with settled case-law, the question whether the statement of reasons for a decision meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context. In particular, the reasons given for a measure adversely affecting persons are sufficient if that measure was adopted in a context which was known to them (judgments of 14 April 2015, *Council* v *Commission*, C-409/13, EU:C:2015:217, paragraph 79, and of 11 June 2020, *Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa*, C-262/18 P and C-271/18 P, EU:C:2020:450, paragraph 67). In that regard, it must be held that a statement of reasons by reference to another measure may be accepted if that measure is known to the person concerned and enables him or her to ascertain to a sufficient degree the reasons for the contested decision (see, to that effect, judgment of 26 January 2022, *Kedrion* v *EMA*, T-570/20, not published, EU:T:2022:20, paragraph 74).

41 In the present case, it must be noted that, in paragraph 16 of the contested decision, on the basis of the conclusions which it had reached in the Construction Decision, the Commission set out the reasons why the measures granted to Femern Landanlæg did not fall within the scope of Article 107(1) TFEU. First, it stated that Femern Landanlæg was not engaged in economic activities for its activities relating to the planning, construction and operation of the road hinterland connections in Denmark. Second, it stated that the public financing granted to Femern Landanlæg for its planning, construction and operation of the rail hinterland connections in Denmark did not constitute State aid in so far as it was not liable to distort competition or affect trade between Member States.

42 In addition, it must be noted that the contested decision was adopted in a context well known to the applicants, which, moreover, brought several complaints and a number of legal proceedings concerning the measures granted for the completion of the Fixed Link and the road and rail hinterland connections.

43 It follows that it must be held that the Commission stated to the requisite legal standard the reasons for the contested decision.

44 Consequently, the seventh plea must be rejected.

The first plea in law, the second part of the third plea in law and the second part of the fourth plea in law, alleging, in essence, that the Commission erred in law in concluding that the measures granted to Femern Landanlæg did not constitute State aid within the meaning of Article 107(1) TFEU

45 By the first part of the first plea, the applicants submit that the Commission erred in law in finding that the State guarantees granted to Femern Landanlæg had been authorised in the Construction Decision.

46 In the second part of the first plea, to which the second part of the third plea and the second part of the fourth plea refer, the applicants submit that the Commission erred in law in finding that the measures granted to Femern Landanlæg for the rail hinterland connections in Denmark did not constitute State aid on the ground that those measures were not liable to distort competition or affect trade between Member States within the meaning of Article 107(1) TFEU.

47 In support of that line of argument, first, the applicants submit, in essence, that, given that the rail hinterland connections in Denmark and the Fixed Link constitute a single integrated project and that the Commission found that the measures granted to Femern are liable to distort competition and affect trade, the measures granted to Femern Landanlæg are also liable to distort competition and affect trade.

48 Second, as regards the existence of distortion of competition, the applicants submit that the measures granted to Femern Landanlæg affect the markets for the operation and management of the Danish railway infrastructure and that those markets are, *de lege* and de facto, open to competition.

49 Third, as regards the effect on trade between Member States, the applicants argue that the measures granted to Femern Landanlæg may prevent infrastructure operators established in other Member States from entering the Danish market.

50 The Commission disputes that line of argument.

51 In that regard, it should be noted, first of all, that, in paragraph 37 of the contested decision, the Commission stated that it was apparent from the Construction Decision that the measures granted to Femern Landanlæg for the planning, construction and operation of the road and rail hinterland connections did not

constitute State aid within the meaning of Article 107(1) TFEU. Consequently, it considered that the grant of State guarantees to that entity could not constitute unlawful State aid. Next, in paragraph 38 of the contested decision, the Commission stated that it had no indication that the State guarantees granted to Femern Landanlæg would have been used for purposes other than those relating to the financing of the road and rail hinterland connections. Finally, in paragraph 39 of the contested decision, without it being necessary to take a view on whether the measures granted to Femern Landanlæg were covered by the Planning Decision, the Commission concluded that the grant of State guarantees to Femern Landanlæg could not be considered to constitute unlawful aid.

52 It must be stated that the arguments raised in the second part of the first plea in order to demonstrate that the Commission erred in law in concluding that the measures granted to Femern Landanlæg for the rail hinterland connections in Denmark did not constitute State aid within the meaning of Article 107(1) TFEU are the same arguments which were already relied on by the applicants before the Court and rejected in the case which gave rise to the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942). In particular, it should be noted that the applicants and the interveners have not put forward any argument that has not already been examined by the Court in that case. In addition, it must be noted that, by the judgment of 6 October 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (C-174/19 P and C-175/19 P, EU:C:2021:801), the Court of Justice dismissed the applicants' appeals, by which they claimed, inter alia, that the General Court had infringed Article 107(1) TFEU and Article 108(2) TFEU. The Court of Justice thus held that the Commission had not erred in law or encountered any serious difficulty in finding that the measures granted to Femern Landanlæg were not liable to distort competition or affect trade between Member States.

53 Consequently, the second part of the first plea must be rejected for the same reasons as those set out in paragraphs 78 to 129 of the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, not published, EU:T:2018:942), to which reference should be made. It follows that the second part of the third plea and the second part of the fourth plea, alleging, in essence, that the loans granted to Femern Landanlæg constitute State aid within the meaning of Article 107(1) TFEU, must also be rejected. The arguments set out in support of those parts merely refer to the arguments set out in the second part of the first plea.

54 It follows from the foregoing that the Commission did not err in law in concluding that the State guarantees granted to Femern Landanlæg did not constitute State aid within the meaning of Article 107(1) TFEU. Therefore, it cannot be required that such measures be authorised by the Commission. It follows that the first part of the first plea, by which the applicants submit that those guarantees are aid which was not authorised in the Construction Decision, must also be rejected.

55 It follows from the foregoing considerations that the first plea, the second part of the third plea and the second part of the fourth plea must be rejected.

The fifth plea in law, alleging that the Commission erred in law in concluding that the tax measures granted to Femern Landanlæg did not constitute unlawful aid

56 According to the applicants, Femern Landanlæg enjoys a tax advantage consisting in the possibility of carrying forward its losses without restriction under the special provisions of the Lov nr 285 om projektering af fast forbindelse over Femern Bælt med tilhørende landanlæg i Danmark (Law No 285 on the planning of the Fehmarn Belt Fixed Link and Danish hinterland connections) of 15 April 2009, whereas undertakings established in Denmark may deduct only losses carried forward in order to reduce their taxable income by 60% per annum above the standard allowance of DKK 7.5 million (approximately EUR 1 million).

57 The applicants, Aktionsbündnis and NABU submit that the mere fact that Femern Landanlæg benefits from specific tax advantages is sufficient to confer an economic advantage on it, with the result that it is not necessary to determine whether or not that entity made use of it.

58 The applicants therefore submit that the Commission erred in law in finding that the tax advantages granted to Femern Landanlæg do not constitute unlawful aid.

59 The Commission disputes those arguments.

60 In that regard, it must be noted that, in paragraph 55 of the contested decision, the Commission found that, since Femern Landanlæg does not carry out an economic activity, even if that entity has received a tax advantage, that advantage cannot constitute State aid within the meaning of Article 107(1) TFEU.

61 According to the case-law, it follows from the wording of Article 107(1) TFEU that the prohibition of State aid set out therein concerns only the activities of undertakings, since the concept of an ‘undertaking’ covers, in the context of EU competition law, any entity engaged in an economic activity, irrespective of that entity’s legal status and the way in which it is financed (see, to that effect, judgment of 11 June 2020, *Commission and Slovak Republic* v *Dôvera zdravotná poist’ovňa*, C-262/18 P and C-271/18 P, EU:C:2020:450, paragraphs 27 and 28).

62 In the present case, it must be stated that the applicants, Aktionsbündnis and NABU do not dispute that Femern Landanlæg does not carry out an economic activity and cannot therefore be regarded as a beneficiary of aid under Article 107(1) TFEU.

63 In addition, as follows from paragraphs 52 and 53 above, the applicants have also failed to demonstrate that the Commission erred in law in concluding that the measures granted to that entity in relation to the rail hinterland connections in Denmark were not liable to distort competition or affect trade between Member States within the meaning of Article 107(1) TFEU.

64 It follows that the Commission cannot be criticised for having concluded that the alleged tax advantages granted to Femern Landanlæg were not capable of constituting unlawful State aid.

65 Consequently, the fifth plea must be rejected.

The sixth plea in law, alleging infringement of the obligation to initiate the formal investigation procedure

66 The applicants submit that, by adopting the contested decision without initiating the formal investigation procedure, the Commission infringed the procedural rights conferred on them by Article 108(2) TFEU. In that regard, they argue that a body of objective and consistent evidence, deriving from the excessive length and circumstances of the preliminary examination procedure, and the incomplete and insufficient content of the contested decision, show that the Commission adopted the contested decision despite the existence of serious difficulties.

67 The Commission disputes that line of argument.

68 In that regard, it should be noted that, according to settled case-law, the procedure under Article 108(2) TFEU is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the internal market. The Commission may therefore confine itself to the preliminary examination under Article 108(3) TFEU when taking a decision in favour of aid only if it is able to satisfy itself after the preliminary examination that that aid is compatible with the internal market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether that aid is compatible with the internal market, it is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 108(2) TFEU (see judgment of 6 October 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, C-174/19 P and C-175/19 P, EU:C:2021:801, paragraph 65 and the case-law cited).

69 Although it has no discretion in relation to the decision to initiate the formal investigation procedure where it finds that such difficulties exist, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether they present serious difficulties (see judgment of 27 September 2011, *3F* v *Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 54 and the case-law cited).

70 In accordance with the case-law, since the concept of ‘serious difficulties’ is objective in nature, proof of the existence of such difficulties, which requires investigation of both the circumstances in which the decision taken following the preliminary examination was adopted and its content, must be furnished by the applicant seeking annulment of that decision, by reference to a body of consistent evidence (see, to that effect, judgments of 21 December 2016, *Club Hotel*

Loutraki and Others v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 31, and of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraph 82).

71 Accordingly, it is for the EU judicature, when hearing an application for annulment of such a decision, to determine whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary investigation phase of the national measure at issue should objectively have raised doubts as to the classification of that measure as aid, given that such doubts must lead to the initiation of a formal investigation procedure (see, to that effect, judgment of 6 October 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, C-174/19 P and C-175/19 P, EU:C:2021:801, paragraph 67 and the case-law cited).

72 In the present case, it should be noted that the applicants merely set out in the abstract the existence of objective and consistent evidence based on the excessive length and circumstances of the preliminary examination procedure and based on the insufficient and incomplete content of the contested decision.

73 In particular, the applicants have not explained why the length of the procedure should be regarded as excessive and have not stated whether the allegedly excessive length should have been assessed taking into account their letter of 26 July 2018, the letter of 30 October 2016, their letter of formal notice of 2 August 2016, or the 2014 complaint. In that regard, it should be noted that a period which exceeds what is normally required in order to examine the preliminary phase cannot in itself constitute strong evidence of the existence of serious difficulties unless that evidence is supported by other factors (judgment of 7 July 2021, *Irish Wind Farmers' Association and Others* v *Commission*, T-680/19, not published, EU:T:2021:412, paragraph 62).

74 It must be stated that the applicants, which have the burden of proving the existence of serious difficulties during the preliminary stage, have not put forward any other argument, relating to the circumstances in which the contested decision was adopted or to its content, that would be capable of demonstrating that the Commission encountered such difficulties in the circumstances of the present case. Similarly, the applicants have failed to explain how the contested decision is insufficient and incomplete.

75 Moreover, as regards their argument that the existence of serious difficulties stems from the error of law made by the Commission in its assessment of the existence of aid, it follows from the examination of the first plea, the second part of the third plea, the second part of the fourth plea and the fifth plea that the applicants have not demonstrated that the Commission erred in law in concluding that the measures granted to Femern Landanlæg did not fall within the scope of Article 107(1) TFEU.

76 Accordingly, the sixth plea must be rejected.

77 It follows from all of the foregoing considerations that the action must be dismissed in its entirety.

Costs

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

79 Furthermore, under Article 137 of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court. In the present case, having regard to the considerations which led the Court to find that there was no need to adjudicate in part, it would be fair for the applicants also to bear the costs relating to that part of the case.

80 Under Article 138(1) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. In the present case, the Kingdom of Denmark must bear its own costs.

81 Article 138(3) of the Rules of Procedure provides that the Court may order that an intervener other than those referred to in paragraphs 1 and 2 of that article is to bear its own costs. In the present case, Aktionsbündnis, NABU, Trelleborg Hamn and FSS must bear their own costs.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. Declares that there is no longer any need to adjudicate on the head of claim seeking annulment of Commission Decision C(2018) 6268 final of 28 September 2018 on State aid SA.51981 (2018/FC), in so far as it concerns the measures granted to Femern A/S;

2. Dismisses the action as to the remainder;

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

4. Orders the Kingdom of Denmark to bear its own costs;

5. Orders Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV, Naturschutzbund Deutschland eV (NABU), Trelleborg Hamn AB and Föreningen Svensk Sjöfart (FSS) to bear their own costs.

Spielmann Brkan Gâlea

Delivered in open court in Luxembourg on 28 February 2024.

V. Di Bucci M. van der Woude

Registrar President

Certified copy of an original signed by qualified electronic signature

Registry of the General Court

28 February 2024