Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

5 May 2021 *

(State aid – Postal sector – Compensation for the discharge of the universal service obligation – Decision not to raise any objections – Calculation of the compensation – Net avoided cost methodology – Taking into account the intangible benefits of the universal service – Use of funds granted as compensation – State guarantee of redundancy payments in the event of bankruptcy – VAT exemption for certain transactions carried out by the universal service provider – Accounting allocation of common costs between universal service activities and non-universal service activities – Capital contribution from a public undertaking in order to avoid the bankruptcy of its subsidiary – Complaint from a competitor – Decision finding no State aid after the preliminary examination stage – Existing aid – Advantages granted on a periodic basis – Whether imputable to the State – Private investor test)

In Case T-561/18,

ITD, Brancheorganisation for den danske vejgodstransport A/S, established in Padborg (Denmark),

Danske Fragtmænd A/S, established in Åbyhøj (Denmark),

represented by L. Sandberg-Mørch, lawyer,

applicants,

supported by

Jørgen Jensen Distribution A/S, established in Ikast (Denmark), represented by L. Sandberg-Mørch and M. Honoré, lawyers,

and by

Dansk Distribution A/S, established in Karlslunde (Denmark), represented by L. Sandberg-Mørch and J. Buendía Sierra, lawyers,

interveners,

v

European Commission, represented by K. Blanck and D. Recchia, acting as Agents,

defendant,

supported by

* Language of the case: English.

Kingdom of Denmark, represented by J. Nymann-Lindegren and M. Wolff, acting as Agents, and by R. Holdgaard, lawyer,

intervener,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2018) 3169 final of 28 May 2018, State aid SA.47707 (2018/N) on State compensations granted to PostNord for the provision of the universal postal service – Denmark,

THE GENERAL COURT (Seventh Chamber),

composed of R. da Silva Passos (Rapporteur), President, V. Valančius and L. Truchot, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 22 October 2020,

gives the following

Judgment

I. Background to the dispute

1 ITD, Brancheorganisation for den danske vejgodstransport A/S ('ITD'), is a trade association of companies incorporated under Danish law which are active on the national and international markets for road transport of goods and logistics services.

2 Danske Fragtmænd A/S is a company incorporated under Danish law and active, inter alia, on the Danish market for road transport of goods and parcel distribution services.

3 The postloven, lov nr. 1536 (Postal Law No 1536) of 21 December 2010 (*Lovtidende* 2010 A), as amended, designated Post Danmark A/S as universal postal service provider in Denmark. On the basis of that law, on 30 May 2016, the Danish Ministry of Transport adopted a public service entrustment act under which Post Danmark was entrusted with a universal service obligation ('the USO') for the period from 1 July 2016 to 31 December 2019 ('the universal service entrustment'). Post Danmark is 100% owned by PostNord AB, whose share capital is itself 40% owned by the Kingdom of Denmark and 60% owned by the Kingdom of Sweden, with each of the two shareholder States having 50% of the voting rights in the board of directors.

4 According to Point 2 of the universal service entrustment, that service must be provided both at national and international level and must be guaranteed at least five working days per week. It must include the following services:

– the clearance, sorting, transport and distribution of postal consignments of letters, periodicals (daily, weekly and monthly) and advertising mail (catalogues and brochures) up to 2 kilograms;

– the clearance, sorting, transport and distribution of parcels of up to 20 kilograms with home delivery or delivery to a self-service point, whereas the sending of parcels between professionals covered by a distribution contract is not included in the universal service;

– services for registered items and insured items;

– a free postal service for blind persons, for items weighing up to 7 kilograms;

5 As regards, in particular, the USO for items sent from and to international destinations, the universal service entrustment act specifies that they are to be governed by the Universal Postal Convention.

6 From the early 2000s, the generalised use of electronic communications resulted in a decrease in postal letters, to such an extent that, mainly for that reason, Post Danmark's turnover fell by 38% between 2009 and 2016. It was in that context that, on 23 February 2017, PostNord increased the share capital of Post Danmark in the amount of one billion Danish kroner (DKK) (approximately EUR 134 million) ('the capital increase of 23 February 2017').

7 Considering the consequences of the digitalisation of communications, the Kingdom of Denmark and the Kingdom of Sweden also concluded, on 20 October 2017, an agreement relating to the transformation of Post Danmark's production model ('the agreement of 20 October 2017'), as developed by PostNord and formalised in a proposal from its board of directors of 29 September 2017.

8 Under the agreement of 20 October 2017, the contracting parties agreed on the need to adopt that new production model in order to 'meet the challenges of digitalisation in Denmark' and ensure Post Danmark's economic viability. Under that agreement, PostNord's new production model was to be based on increases in Post Danmark's capital and on a reduction in staff of approximately 4 000 employees, with an overall estimated cost of approximately 5 billion Swedish kronor (SEK) (approximately EUR 491 million).

9 In particular, the implementation of Post Danmark's new production model included the cost of special redundancy payments for former civil servants at Post Danmark who had become employees at the time of Post Danmark's transformation from an independent public enterprise to a limited liability company. In that regard, the agreement of 20 October 2017 stated that the Kingdom of Denmark was to offset those costs by way of a capital contribution to PostNord of SEK 1.533 billion (approximately EUR 150 million).

10 Post Danmark's new production model was to be implemented by three separate measures, namely:

– compensation for the provision of the universal service in Denmark, paid by the Danish authorities to Post Danmark, through PostNord, the amount of which would be used to finance part of the special redundancy payments for former Post Danmark civil servants;

– a capital increase in PostNord of SEK 667 million (approximately EUR 65 million) by the Kingdom of Denmark and the Kingdom of Sweden;

– an internal contribution of PostNord to Post Danmark of approximately DKK 2.3 billion (approximately EUR 309 million).

11 On 3 November 2017, the Danish authorities pre-notified the European Commission of the first of those three measures, namely the grant of compensation in the amount of SEK 1.533 billion paid to Post Danmark, through PostNord, for the provision of the universal postal service in Denmark between 2017 and 2019, with that sum being allocated to fund part of the redundancy costs described in paragraph 9 above.

12 On 27 November 2017, ITD lodged a complaint with the Commission alleging that, by a number of past or future measures, the Danish and Swedish authorities had granted or would grant unlawful State aid to Post Danmark.

13 According to the complaint, that aid resulted from:

– first, the existence of a guarantee under which, in the event of Post Danmark's bankruptcy, the Kingdom of Denmark undertook to pay to Post Danmark, without any consideration in return, the costs relating to the redundancy payments for former civil servants, corresponding to three years' wages for each civil servant ('the guarantee at issue');

– secondly, a Danish administrative practice that allowed exemption from value added tax (VAT) for customers of mail-order companies when those companies chose to purchase a transport service from Post Danmark, resulting in an increase in demand for Post Danmark;

– thirdly, misallocation, between 2006 and 2013, of the common costs between USO and non-USO activities, resulting in an artificial increase in the cost of the USO and an artificial reduction in the cost of Post Danmark's commercial activities, thus constituting cross-subsidisation of Post Danmark's commercial activities by the USO;

– fourthly, the capital increase of 23 February 2017, in so far as it was imputable to the Danish and Swedish States and such a measure did not satisfy the private investor in a market economy test;

– fifthly, the compensation measure pre-notified by the Kingdom of Denmark on 3 November 2017 (see paragraph 11 above);

– sixthly, increases in Post Danmark's capital by the Kingdom of Denmark, the Kingdom of Sweden and PostNord, as provided for in the agreement of 20 October 2017.

14 On 30 November 2017, the Commission forwarded ITD's complaint to the Danish and Swedish authorities, which submitted their joint comments on certain claims in that complaint on 20 December 2017. On 21 December 2017, the Danish authorities submitted their comments on the other claims in that complaint.

15 On 8 February 2018, the Danish authorities notified the Commission of the award to Post Danmark of compensation in the amount of SEK 1.533 billion for the provision of the universal postal service during the period from 2017 to 2019 ('the compensation at issue').

16 On 7 May 2018, the Danish authorities stated that the compensation at issue would ultimately be up to a maximum amount of SEK 1.683 billion (approximately EUR 160 million).

17 On 28 May 2018, the Commission adopted Decision C(2018) 3169 final on State Aid SA.47707 (2018/N) – State compensations granted to PostNord for the provision of the universal postal service – Denmark ('the contested decision').

18 In the contested decision, in the first place, the Commission stated that its assessment related, first, to the compensation at issue and, secondly, to the claims put forward by ITD in its complaint, with the exception, however, of the capital increases provided for in the agreement of 20 October 2017 (paragraph 73 of the contested decision), which were to be assessed in a separate decision.

19 In the second place, as regards the compensation at issue, the Commission considered, first of all, that that compensation did not satisfy the fourth criterion of those set out in the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), since it had not been awarded in the context of a public procurement procedure and the amount had not been determined on the basis of the costs of a typical well-run undertaking. On this basis, the Commission concluded that that measure constituted State aid, within the meaning of Article 107(1) TFEU, and that it was

necessary to assess the compatibility of that aid in the light of Article 106(2) TFEU, as implemented in the Communication from the Commission on the European Union framework for State aid in the form of public service compensation (2011) (OJ 2012 C 8, p. 15; 'the SGEI Framework').

20 Next, in assessing the compatibility of the compensation at issue with the internal market, the Commission examined, inter alia, the calculation by the Danish authorities of the net cost necessary to discharge the USO, using the net avoided cost ('the NAC') methodology. In their calculation method, the Danish authorities assumed a factual scenario according to which, by providing the USO for the period from 2017 to 2019, Post Danmark expected, first, substantial growth in the business-to-consumer market due to increased e-commerce, secondly, continuing decreases in letter volumes following increased digitalisation, thirdly, significant decreases in mail volumes for newspapers and magazines and, fourthly, the implementation of a new production model involving the redundancy of employees. According to the counterfactual scenario proposed by the Danish authorities, if Post Danmark had not been entrusted with the USO for that period, it would have resulted in, first, the discontinuation of unprofitable activities, such as the delivery of newspapers and magazines, non-addressed items and international postal items, secondly, the optimisation of the distribution of business letters by offering home delivery only in larger cities, thirdly, the discontinuation of the home delivery of parcels in certain rural areas and, fourthly, a reduction in the number of postal service outlets.

21 The Danish authorities deducted therefrom the costs that would have been avoided in the absence of the USO, calculated on the basis of, inter alia, personnel costs, in connection with, first, maintaining a network of mailboxes covering the whole national territory and the production of stamps, secondly, the operation of the international mail and parcel centre in Copenhagen (Denmark), that would be closed after the discontinuation of international postal items, thirdly, letters sorting centres and distribution hubs closed after optimisation of the distribution of business letters, fourthly, home delivery of postal items in certain areas, and fifthly, the operation of postal outlets that would be closed.

22 However, the Danish authorities deducted from the avoided costs, first, the revenue from the services that would have been discontinued or optimised by Post Danmark in the absence of the USO and, secondly, the profit from an increase in demand as a result of the VAT exemption from which it had benefited as a universal service provider and intellectual property assets related to the USO, in particular publicity benefits relating to its visibility on contact points and mailboxes.

23 The Commission considered that the method proposed by the Danish authorities was reliable and noted that, according to that method, the NAC for the discharge of the USO was DKK 2.571 billion (approximately EUR 345 million), which was considerably higher than the compensation at issue, set at a maximum of DKK 1.192 billion (approximately EUR 160 million).

24 Lastly, having rejected the claims put forward by ITD in its complaint and specifically directed against the compensation at issue, the Commission concluded that that compensation was compatible with the internal market.

25 In the third place, as regards the other claims raised in ITD's complaint, first, the Commission found that the guarantee at issue might constitute State aid. In that regard, the Commission considered that that guarantee might have given rise to an advantage, albeit very indirect, in so far as it had allowed Post Danmark, at the time of its transformation into a limited liability company, in 2002, to retain a part of its staff. Nevertheless, the Commission considered that, even if the guarantee at issue did constitute State aid, that aid had been granted in 2002, since it applied only to the employees who had renounced their status as civil servants at that time. Thus, the guarantee at issue was granted more than 10 years before the Commission was informed of that measure, by means of ITD's complaint, and therefore constitutes existing aid pursuant to Article 1(b)(iv) and Article 17(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9).

26 Secondly, as regards the Danish administrative practice which resulted in a VAT exemption for Post Danmark's clients, the Commission considered that that measure was capable of conferring an indirect advantage on Post Danmark. However, the Commission considered that the exemption at issue resulted from Article 132(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT (OJ 2006 L 347, p. 1) ('the VAT Directive'), under which the exemption of services covered by the USO is mandatory. Thus, according to the contested decision, the VAT exemption in favour of Post Danmark was not imputable to the Danish State and could not therefore constitute State aid.

27 Thirdly, as regards the allocation of costs relating to Post Danmark's activities and their possible cross-subsidisation, the Commission accepted the Danish authorities' explanations and concluded that the allocation of common costs between Post Danmark's USO and non-USO activities was appropriate. The Commission added that, in any event, the misallocation of costs alleged by ITD did not seem, first of all, to involve the transfer of any State resources. Next, according to the contested decision, such an allocation would not have been imputable to the Danish authorities, since, although it was true that they had adopted the accounting regulation applicable to Post Danmark, ITD had not, however, shown how they had been involved in Post Danmark's setting of prices for non-USO activities. Lastly, the Commission found that the alleged cross-subsidisation of Post Danmark's commercial activities by funds received in respect of the USO did not constitute an advantage, since Post Danmark had never received any compensation for the discharge of the USO, calculated on the basis of the cost allocation alleged by ITD.

28 Fourthly, as regards the capital increase of 23 February 2017, the Commission considered that, indeed, in the light of PostNord's ownership structure and the rules of appointment for members of its board of directors, the Kingdom of Denmark and the Kingdom of Sweden might be in a position to exercise a dominant influence over that company. However, according to the Commission, the evidence put forward by ITD in support of its complaint did not establish that the Kingdom of Denmark or the Kingdom of Sweden were actually involved in that capital increase. On this basis, the Commission concluded that that capital increase was not imputable to a State and, accordingly, did not constitute State aid.

29 Moreover, the Commission considered that, in circumstances such as those faced by PostNord, a private investor would have decided to make the capital increase of 23 February 2017 rather than letting its subsidiary, in the present case Post Danmark, go bankrupt.

30 Lastly, the concluding paragraphs of the contested decision read as follows:

'(205) The Commission has … decided to consider the notified aid measure for USO compensation over the 2017-2019 period to be compatible with the internal market on the basis of Article 106(2) TFEU and to raise no objections to [that measure].

(206) The Commission has decided further that:
(i) the [guarantee at issue is] existing aid;
(ii) the VAT exemption does not constitute State aid;
(iii) the cross-subsidisation of commercial services is not factually confirmed and in any event does not constitute State aid; and
(iv) the [capital increase of 23 February 2017] does not constitute State aid.'

II. Procedure and forms of order sought

31 By application lodged at the Court Registry on 20 September 2018, the applicants, ITD and Danske Fragtmænd, brought the present action.

32 The Commission lodged its defence on 7 December 2018.

33 The applicants lodged their reply on 15 February 2019. The Commission lodged a rejoinder on 17 April 2019.

34 By document lodged at the Court Registry on 16 January 2019, the Kingdom of Denmark applied for leave to intervene in support of the form of order sought by the Commission. By decision of 11 April 2019, the President of the Ninth Chamber of the Court granted that application.

35 By documents lodged at the Court Registry on 17 January and 21 January 2019, respectively, Dansk Distribution A/S and Jørgen Jensen Distribution A/S sought leave to intervene in support of the form of order sought by the applicants. By orders of 12 April 2019, the President of the Ninth Chamber of the Court granted those applications.

36 The Kingdom of Denmark lodged its statement in intervention on 1 July 2019. Jørgen Jensen Distribution and Dansk Distribution lodged their statements in intervention on 3 July 2019. The Commission and the applicants lodged their observations on the statements in intervention on 15 November and 18 November 2019, respectively.

37 As a result of changes to the composition of the chambers of the General Court, in accordance with Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was transferred to the Seventh Chamber, to which, on 17 October 2019, this case was accordingly assigned.

38 The applicants claim that the Court should:

– declare the arguments put forward by the Kingdom of Denmark inadmissible and, in any event, unfounded;

– declare the application admissible and well founded;

– annul the contested decision;

– order the Commission and the Kingdom of Denmark to pay the costs.

39 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

40 The Kingdom of Denmark contends that the Court should:

– dismiss the action.

41 Jørgen Jensen Distribution and Dansk Distribution claim that the Court should:

– declare the application admissible and well founded and annul the contested decision;

– order the Commission to pay the costs.

III. Law

42 In support of their action, the applicants raise a single plea in law, alleging that the Commission failed to initiate the formal investigation procedure provided for in Article 108(2) TFEU, despite the serious difficulties raised by the assessment of the compensation at issue and of the other measures challenged in ITD's complaint.

43 As a preliminary point, it should be noted that the stage of preliminary examination of notified aid measures, as provided for in Article 108(3) TFEU and governed by Article 4 of Regulation 2015/1589, is intended to enable the Commission to form an initial view on those measures (see, to that effect, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 43).

44 On completion of that stage, the Commission is to make a finding either that a notified measure does not constitute aid, in which case it is to adopt a decision not to raise objections under Article 4(2) of Regulation 2015/1589, or that it falls within the scope of Article 107(1) TFEU. If, following the preliminary examination, the Commission finds that, notwithstanding the fact that the measure notified falls within the scope of Article 107(1) TFEU, it does not raise any doubts as to its compatibility with the internal market, the Commission is to adopt a decision not to raise objections under Article 4(3) of Regulation 2015/1589 (see, to that effect, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 43 and 44).

45 Where the Commission adopts a decision not to raise objections, it declares not only that the measure at issue does not constitute aid or constitutes aid compatible with the internal market, but also – by implication – that it refuses to initiate the formal investigation procedure laid down in Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589 (see, to that effect, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 45).

46 If, following the preliminary examination, it finds that the measure notified raises doubts as to its compatibility with the internal market, the Commission is required to adopt, on the basis of Article 4(4) of Regulation 2015/1589, a decision initiating the formal investigation procedure under Article 108(2) TFEU and Article 6(1) of that regulation (see, to that effect, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 46).

47 Furthermore, the first sentence of Article 24(2) of Regulation 2015/1589 grants any interested party the right to lodge a complaint to inform the Commission of any allegedly unlawful aid, which, in accordance with the first sentence of Article 15(1) of that regulation, triggers the initiation of the preliminary examination stage provided for in Article 108(3) TFEU, entailing the adoption, by the Commission, of a decision under Article 4(2), (3) or (4) of Regulation 2015/1589.

48 The existence of doubts such as to justify initiating the formal investigation procedure laid down in Article 108(2) TFEU is reflected in the objective existence of serious difficulties which the Commission encountered when examining whether the measure at issue constituted aid or whether it was compatible with the internal market. It is apparent from the case-law that the concept of serious difficulties is an objective one (judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 31). The existence of such difficulties must be sought both in the circumstances in which the contested act was adopted and in its content, in an objective manner, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market (see judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 77 and the case-law cited), bearing in mind that the information 'available' to the Commission includes that which seemed relevant for the assessment to be carried out and which could have been obtained, upon request by the Commission, during the preliminary investigation stage (judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 71).

49 It follows that judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond simple consideration of whether or not there has been a manifest error of assessment (see judgments of 27 September 2011, *3F* v *Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 55 and the case-law cited, and of 10 July 2012, *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2012:351, paragraph 80 and the case-law cited). A decision adopted by the Commission without initiating the formal investigation procedure may be annulled on that ground alone, because of the failure to initiate the *inter partes* and detailed examination laid down in the FEU Treaty, even if it has not been established that the Commission's assessments as to substance were wrong in law or in fact (see, to that effect, judgment of 9 September 2010, *British Aggregates and Others* v *Commission*, T-359/04, EU:T:2010:366, paragraph 58).

50 It should be recalled that, in accordance with the objective of Article 108(3) TFEU and its duty of sound administration, the Commission may, amongst other things, engage in a dialogue with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered. That power presupposes that the Commission may adjust its position in accordance with the results of the dialogue in which it engages, without that adjustment having to be interpreted, a priori, as establishing the existence of serious difficulties (judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 35). It is only if those difficulties could not be overcome that they are found to be serious and that they must lead the Commission to have doubts, thus prompting it to initiate the formal investigation procedure (judgments of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission*, C-431/07 P, EU:C:2009:223, paragraph 61, and of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 70).

51 The onus is on the applicant to prove the existence of serious difficulties, proof that can take the form of a consistent body of evidence (see judgment of 19 September 2018, *HH Ferries and Others* v *Commission*, T-68/15, EU:T:2018:563, paragraph 63 and the case-law cited).

52 It is in the light of the foregoing considerations that the applicants' arguments seeking to establish the existence of serious difficulties that should have led the Commission to initiate the formal investigation procedure must be examined.

53 In the present case, the applicants rely on a body of evidence demonstrating, in their view, the existence of serious difficulties resulting, first, from the length of the preliminary examination stage and the circumstances in which that stage was conducted and, secondly, from the content of the contested decision and the Commission's assessment of the various measures examined in that decision.

A. Evidence relating to the duration and conduct of the preliminary examination stage

54 First, the applicants, supported by Jørgen Jensen Distribution and Dansk Distribution, claim that the duration of the preliminary examination stage demonstrates that the Commission encountered serious difficulties. In that regard, they note that the Danish authorities notified the compensation at issue on 8 February 2018 and that the contested decision was adopted on 28 May 2018, that is to say, after the two-month period laid down in Article 4(5) of Regulation 2015/1589 for the adoption of a decision on whether or not to initiate a formal investigation procedure.

55 The applicants add that the fact that the time limit was exceeded is all the more striking in view of the date of pre-notification of the compensation at issue, namely 3 November 2017. In that regard, in the first place, they submit that, in the judgment of 15 November 2018, *Tempus Energy and Tempus Energy Technology* v *Commission* (T-793/14, under appeal, EU:T:2018:790), the Court established that the pre-notification phase must be taken into account for the purposes of assessing the existence of serious difficulties. In the second place, the applicants claim that the fact that the pre-notification

phase lasted over three months is a breach of the two-month duration provided for in paragraph 14 of the Best Practices Code on the conduct of State aid control proceedings (OJ 2009 C 136, p. 13; 'the Best Practices Code'). In their view, such a duration results from the fact that the Commission began its assessment of the compatibility of the compensation at issue during the pre-notification phase.

56 Moreover, the Commission exceeded the relevant time limit by adopting the contested decision six months after ITD lodged its complaint.

57 Secondly, the applicants submit that the exchanges between the Commission and the Danish and Swedish authorities, both during the pre-notification phase and during the preliminary examination stage, lend support to the existence of serious difficulties. They ask the Court to adopt a measure of organisation of procedure requesting that those exchanges be produced.

58 The Commission, supported by the Kingdom of Denmark, contests the applicants' arguments.

59 In the first place, as regards the applicants' argument concerning the excessive duration of the preliminary examination, it should be recalled that, according to settled case-law, such duration can, alongside other factors, constitute evidence that the Commission has encountered serious difficulties if it considerably exceeds the time usually taken for the preliminary examination of a measure (see judgment of 3 December 2014, *Castelnou Energía* v *Commission*, T-57/11, EU:T:2014:1021, paragraph 58 and the case-law cited).

60 In that regard, a distinction must be drawn between the procedure following a notification by a Member State and that in the course of which the Commission examines, following the lodging of a complaint, information, from whatever source, concerning alleged unlawful aid. Article 4(5) of Regulation 2015/1589 provides that the duration of the first must not exceed two months from the day following the receipt of a complete notification. By contrast, EU law does not lay down a time limit for the completion of the second, with Article 12(1) of Regulation 2015/1589 merely stating that the Commission 'shall examine without undue delay any complaint' (judgment of 6 May 2019, *Scor* v *Commission*, T-135/17, not published, EU:T:2019:287, paragraph 106).

61 In the present case, the Commission, first, received ITD's complaint of 27 November 2017 and, secondly, received the complete notification, from the Kingdom of Denmark, of the measure concerning the grant of the compensation at issue, which took place on 8 February 2018. The Commission adopted the contested decision, which concerns both procedures, on 28 May 2018.

62 The preliminary examination stage therefore lasted 3 months and 19 days if the day following notification by the Danish authorities is taken as the starting point or 6 months and 1 day if ITD's complaint is taken as the starting point.

63 Thus, first, as regards the period of 3 months and 19 days which elapsed between the lodging of the notification by the Danish authorities and the adoption of the contested decision, the two-month period laid down in Article 4(5) of Regulation 2015/1589 was exceeded by more than one month. However, such a failure to comply with the time limit laid down in that provision can easily be explained by the fact that, as is apparent from paragraph 72 of the contested decision, the Commission simultaneously examined the measure notified by the Danish authorities and four of the five measures which the Danish authorities had implemented in favour of Post Danmark, referred to in ITD's complaint (see paragraph 13 above). The Commission therefore had to examine a significant amount of information submitted by the parties. Furthermore, two days before the expiry of the two-month period laid down in Article 4(5) of Regulation 2015/1589, the Danish authorities informed the Commission that they intended to alter the amount of the compensation at issue, from a fixed compensation of SEK 1.533 billion to a maximum compensation of SEK 1.683 billion.

64 Accordingly, the fact that the duration of the preliminary examination stage was 1 month and 19 days longer than the period laid down in Article 4(5) of Regulation 2015/1589 does not constitute evidence of the existence of serious difficulties.

65 Secondly, as regards the period of six months and one day that elapsed between the lodging of ITD's complaint and the contested decision, the applicants merely assert, without providing further details, that such a period 'manifestly exceeds the [time limit] during which the Commission is required to complete its preliminary examination'. As was noted in paragraph 60 above, the relevant provisions do not lay down a binding time limit for dealing with a complaint to the Commission concerning State aid.

66 Moreover, it has already been held that, for the purposes of assessing whether the duration of the examination amounts to evidence of serious difficulties, it is appropriate to refer to the Commission's internal rules (see, to that effect, judgments of 15 March 2001, *Prayon-Rupel* v *Commission*, T-73/98, EU:T:2001:94, paragraph 94, and of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T-162/13, not published, EU:T:2016:341, paragraph 146). In that regard, paragraph 47 of the Best Practices Code provides that 'the Commission will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt', that 'that time limit does not constitute a binding commitment' and that 'depending on the circumstances of the individual case, the possible need to request complementary information from the complainant, the Member State or interested parties may extend the investigation of a complaint'.

67 In the present case, by adopting the contested decision six months and one day after ITD's complaint was lodged, the Commission complied with the principles laid down in its internal rules.

68 The judgment of 10 February 2009, *Deutsche Post and DHL International* v *Commission* (T-388/03, EU:T:2009:30), cannot be relied on effectively by the applicants since it is apparent from paragraphs 96 to 98 of that judgment that the Court held that a period of seven months following the notification of a measure by a Member State, and not following a complaint, considerably exceeded the two-month period that the Commission was, in principle, required to comply with in completing its preliminary examination, pursuant to Article 4(5) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), the content of which was identical to that of Article 4(5) of Regulation 2015/1589. Nor is that judgment relevant to the assessment, in the present case, of the duration of the preliminary examination stage from the notification of the compensation at issue by the Danish authorities, since that duration, of three months and one day, was considered reasonable for the reasons set out in paragraph 63 above.

69 In those circumstances, the duration of the preliminary examination does not constitute evidence of the existence of serious difficulties.

70 In the second place, as regards the circumstances surrounding the preliminary examination stage, the applicants rely on numerous alleged exchanges between the Commission and the Danish and Swedish authorities.

71 In that regard, it should be noted that the mere fact that discussions took place between the Commission and the Member State concerned during the preliminary examination stage, and that, in that context, the Commission asked for additional information about the measures submitted for its review, cannot in itself be regarded as evidence that the Commission was confronted with serious difficulties of assessment (see, to that effect, judgment of 15 March 2018, *Naviera Armas* v *Commission*, T-108/16, EU:T:2018:145, paragraph 69 and the case-law cited). However, it cannot be ruled out that the content of the discussions between the Commission and the notifying Member State during that phase of the procedure may, in certain circumstances, prove the existence of such difficulties, as may a high number of requests for information to the notifying Member State by the

Commission (see, to that effect, judgments of 9 December 2014, *Netherlands Maritime Technology Association* v *Commission*, T-140/13, not published, EU:T:2014:1029, paragraph 74, and of 8 January 2015, *Club Hotel Loutraki and Others* v *Commission*, T-58/13, not published, EU:T:2015:1, paragraph 47).

72 In the present case, it is apparent from paragraphs 1 to 10 of the contested decision that, first, the Commission sent ITD's complaint to the Danish and Swedish authorities on 30 November 2017, in respect of which the latter submitted their observations on 20 and 21 December 2017. Subsequently, on 5 February 2018, the Commission sent a request for information to the Danish authorities concerning an additional complaint sent by ITD on 2 February 2018. The Danish authorities replied on 13 February 2018. Lastly, following the complete notification of the compensation at issue, on 8 February 2018, the Danish authorities informed the Commission on 7 May 2018 that they had altered the maximum amount of that compensation.

73 Such exchanges cannot be considered to be particularly frequent or intense, since the Commission approached the Danish authorities only in order to obtain their observations on ITD's complaint. They do not therefore constitute evidence of the existence of serious difficulties.

74 In the third and last place, contrary to what the applicants claim, the pre-notification phase is not, in principle, relevant for the purposes of assessing the existence of serious difficulties, since the existence of such difficulties is assessed in view of the preliminary examination stage, which begins on the date of complete notification of the measure, as is apparent from Article 4(5) of Regulation 2015/1589 (see, to that effect, judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 168).

75 It is only in specific circumstances, such as the pre-notified measure being of a complex or unprecedented nature, the duration of the pre-notification phase and the assessment of the compatibility of such a measure during that phase, that the Court held, in the judgment of 15 November 2018, *Tempus Energy and Tempus Energy Technology* v *Commission* (T-793/14, under appeal, EU:T:2018:790), that the conduct of the pre-notification phase could constitute evidence of the existence of serious difficulties.

76 In the present case, the applicants cannot establish the existence of special circumstances of that kind.

77 First, although they base their argument on the pre-notification phase lasting longer than three months, that duration cannot be regarded as excessive, even though it exceeds the two-month period mentioned in the Best Practices Code. During the pre-notification phase, the Commission also requested that the Danish and Swedish authorities submit observations on ITD's complaint as well as on ITD's additional observations (see paragraph 14 above).

78 Secondly, as regards the content of the exchanges between the Commission and the Danish and Swedish authorities, the applicants merely assume that the compatibility of the compensation at issue was discussed during the pre-notification phase, without adducing any concrete evidence to that effect.

79 Consequently, even taking into account the pre-notification phase, the length and circumstances surrounding the preliminary examination stage do not, in themselves, reveal serious difficulties obliging the Commission to initiate the formal investigation procedure provided for in Article 108(2) TFEU.

80 Since the Court has been in a position to rule on the applicants' arguments concerning the duration and circumstances surrounding the preliminary examination stage, there is no need to grant their request for a measure of organisation of procedure requiring that all the exchanges that took place, during the preliminary examination stage and the phase preceding it, between, on the one hand, the

Commission and, on the other hand, the Danish and Swedish authorities, be presented before the Court. In any event, the applicants have not provided, in support of their request for a measure of organisation of procedure, any evidence that such a measure would be useful for the purposes of the proceedings (see, to that effect, judgment of 11 July 2018, *Europa Terra Nostra* v *Parliament*, T-13/17, not published, EU:T:2018:428, paragraph 103 and the case-law cited).

81 It is therefore appropriate to examine the other arguments put forward by the applicants in support of the single plea in law and seeking to establish that the very contents of the contested decision provides evidence that the examination of the measures at issue raised serious difficulties which should have led the Commission to initiate the formal investigation procedure.

B. Evidence relating to the contents of the contested decision

82 In support of the second part of the single plea, the applicants claim, in essence, that the Commission made a number of errors proving the existence of serious difficulties, by finding, in the contested decision, that:

– the compensation at issue was compatible with the internal market;

– the guarantee at issue constituted existing aid;

– the VAT exemption in favour of Post Danmark was not imputable to the State;

– the error in the allocation, by Post Danmark's accounting department, of costs relating to USO and non-USO activities was not established, did not involve a transfer of State resources and was not imputable to the State;

– the capital increase of 23 February 2017 was not imputable to the State and did not constitute an economic advantage.

1. The compensation at issue

83 The applicants, supported by Jørgen Jensen Distribution and Dansk Distribution, claim that, in finding that the compensation at issue was compatible with the internal market, the Commission committed several errors demonstrating that it was faced with serious difficulties in that regard.

84 First of all, the applicants submit that the Commission was wrong to take the view that, in the absence of the USO, Post Danmark would have discontinued the provision of certain activities.

85 First, as regards the distribution of letters and parcels that are single piece, registered or insured, and the free service for the blind, the applicants note that those services are profitable in urban areas, as is apparent from a report by the company BDO, which was produced in support of the application ('the BDO report'). In its assessment of the counterfactual scenario necessary for the NAC calculation, the Commission did not make any distinctions between urban areas and rural areas in respect of those services.

86 In the reply, the applicants state that the decision to discontinue or maintain the provision of certain services should be based on a long-term scenario and that the services referred to in paragraph 85 above are profitable in the long term. Nevertheless, according to the applicants, in view of Post Danmark's economic situation and the costs borne by Post Danmark in relation to its restructuring, the services in question cannot be regarded as being profitable in the short term. Thus, since the calculation of the compensation relates to a short-term period, namely from 2017 to 2019, the

Commission should have considered that Post Danmark would continue to provide such services even in the absence of the USO, even though, over the period in question, those services would have resulted in losses.

87 Secondly, the applicants criticise the Commission for having found that, in the absence of the USO, Post Danmark would end international letter and parcel delivery services. In that regard, they note that a brochure from PostNord refers to strategic objectives aimed at 'global' and 'international foothold' through the provision of 'complete logistics solutions'. Therefore, even in the absence of the USO, it is unlikely that Post Danmark would discontinue the international services in question.

88 Next, the applicants submit that the Commission failed to take into account certain intangible benefits enjoyed by Post Danmark by virtue of the USO.

89 First, the Commission was wrong not to take account of the enhancement of Post Danmark's reputation as a result of providing the USO. The USO confers on Post Danmark a monopoly on postal services and authorises it to print stamps bearing the word 'Danmark' and to use the symbol of the golden crowned post horn in public post offices. According to the applicants, it is apparent from the BDO report, which cites a study carried out in 2010 by WIK Consult at the request of the Autorité de régulation des communications électroniques et des postes (Authority for the Regulation of Electronic Communications and Postal Services; 'ARCEP', France) ('the 2010 WIK Study'), that the value of that intangible benefit could amount to 81% of the amount of the USO.

90 In the reply, the applicants add that it is generally considered that the provision of postal services improves the reputation of the undertaking entrusted with them and that this is the case even where that undertaking faces financial difficulties. In support of that argument, they produce, in Annex C.2, a report of 28 January 2015 from the United States Postal Service Office of Inspector General on the value of the brand of the operator US Postal ('the US Postal report'), in Annex C.3, the 2010 WIK study, and in Annex C.4, a report from the Commission for Communications Regulation (Ireland) of 20 December 2017 on the postal strategy of the operator An Post for the period 2018 to 2020. The same documents are produced by Jørgen Jensen Distribution and Dansk Distribution as annexes to their respective statements in intervention.

91 Secondly, according to the applicants, the ubiquity of Post Danmark, whose services cover the whole of Denmark, confers on it a significant advantage and constitutes a selling factor, in particular in relation to e-commerce companies. The existence of such an advantage was recognised in PostNord's annual and sustainability report for 2017. In the NAC calculation accepted by the Commission, no amount was deducted in connection with such ubiquity.

92 In the reply, the applicants state that the US Postal report is also relevant as regards ubiquity, as is a document prepared in 2014 by the Economic and Social Research Council ('ESRC', United Kingdom), in the context of public consultation on competition in the UK postal sector, produced as Annex C.5 to the reply and also produced by Jørgen Jensen Distribution and Dansk Distribution as an annex to their respective statements in intervention. In addition, Jørgen Jensen Distribution and Dansk Distribution note that any provider responsible for the USO has a brand value associated with ubiquity since 'the USO requires complete universal service everywhere'.

93 Furthermore, according to the applicants, the compensation at issue does not take account of efficiency incentives, in breach of paragraphs 39 to 43 of the SGEI Framework. In that regard, the applicants emphasise that the Commission calculated the USO costs on the basis of Post Danmark's actual costs and estimated costs. However, Post Danmark was on the brink of bankruptcy during the period covered by the compensation at issue and required major transformation in order to become efficient. Accordingly, the calculation of that compensation was not carried out on the basis of an efficient service provider. The applicants add that that compensation, which concerns the USO for the period from 2017 to 2019, was granted '*ex post*' in respect of the first half of that period, from 2017 to the

adoption of the contested decision on 28 May 2018. Thus, for that first half of the period at issue, compliance with the quality standards set out in the universal service entrustment act could not be verified.

94 Lastly, the applicants claim that the Commission committed an 'error of law' in finding the compensation at issue to be compatible with the internal market while expressly accepting that it was used to fund part of the costs connected with the dismissal of certain employees of Post Danmark not assigned to the USO, even though that compensation should have been allocated only to the performance of the USO. The Commission is required to verify the compatibility of aid in the light of the objective it pursues, which it failed to do in the present case by not examining whether the objective of dismissing Post Danmark's employees was compatible with the internal market. In those circumstances, according to the applicants, the Commission approved the misuse of the compensation at issue.

95 The applicants further submit that the Commission was wrong to allow the costs relating to the dismissal of Post Danmark's employees to be taken into account in calculating the NAC, without it having been established that the employees in question were assigned to the USO. Their arguments are corroborated by a report of August 2012 by the European Regulators Group for Postal Services (ERGP) on the NAC calculation ('the ERGP report').

96 In their observations on the statement in intervention of the Kingdom of Denmark, the applicants submit that the Commission should have relied on the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; 'the Guidelines on State aid for rescuing and restructuring') for the purposes of authorising the allocation of the compensation at issue to the dismissal of former Post Danmark civil servants. That argument was repeated at the hearing by both the applicants and Dansk Distribution.

97 The Commission, supported by the Kingdom of Denmark, contests the applicants' arguments.

98 In particular, first, the Commission disputes the admissibility of Annexes C.2 to C.5 on the basis that their presentation, for the first time, at the stage of the reply, was not justified by the applicants.

99 Secondly, the Commission contends that the various arguments raised after the first exchange of pleadings are inadmissible under Article 84 of the Rules of Procedure. That applies, first, with regard to the argument by which the applicants note, at the stage of the reply, that the counterfactual scenario must be established on the basis of the long-term profitability of certain activities. Secondly, in response to a question put by the Court in the context of a measure of organisation of procedure, the Commission disputed the admissibility of the argument that the allocation to the USO of Post Danmark's employees who were to be made redundant had not been established, on the ground that such an argument was put forward by the applicants only at the stage of the reply and then in their observations on the statement in intervention submitted by the Kingdom of Denmark. Thirdly and lastly, at the hearing, the Commission disputed the admissibility of the argument summarised in paragraph 96 above relating to the assessment of the compensation at issue in the light of the Guidelines on State aid for rescuing and restructuring.

(a) The admissibility of Annexes C.2 to C.5

100 In accordance with Article 76(f) of the Rules of Procedure, an application is to contain, where appropriate, any evidence produced or offered.

101 In addition, Article 85(1) of the Rules of Procedure provides that evidence produced or offered is to be submitted in the first exchange of pleadings. Article 85(2) of the Rules of Procedure adds that in reply or rejoinder a party may produce or offer further evidence in support of his arguments, provided that the delay in the submission of such evidence is justified.

102 In that regard, it is apparent from case-law that evidence in rebuttal and the amplification of previous evidence, submitted in response to evidence in rebuttal put forward by the opposing party in his defence, are not covered by the time-bar rule in Article 85(1) of the Rules of Procedure. Indeed, that provision concerns fresh evidence and must be read in the light of Article 92(7) of those rules, which expressly provides that evidence may be submitted in rebuttal and previous evidence may be amplified (see judgment of 22 June 2017, *Biogena Naturprodukte* v *EUIPO (ZUM wohl)*, T-236/16, EU:T:2017:416, paragraph 17 and the case-law cited).

103 In the present case, the applicants presented various documents in Annexes C.2 to C.5 to the reply, the admissibility of which is disputed by the Commission on the ground that they were out of time.

104 In that regard, it should be noted that, in the defence, the Commission contends, first, that, as a general rule, postal operators entrusted with the USO do not, as a result, benefit from an enhanced reputation and, secondly, that those operators may enjoy benefits linked to ubiquity where they offer a wide range of commercial activities in addition to the postal activity itself. The documents presented in Annexes C.2 to C.5 seek, in essence, to establish that, contrary to what is claimed by the Commission, the enhancement of reputation and ubiquity constitute intangible benefits related to the USO which are generally recognised in the postal sector. Accordingly, as the applicants explained in reply to a question put by the Court in the context of a measure of organisation of procedure, the presentation of those annexes at the stage of the reply may be justified for the purposes of ensuring observance of the *inter partes* principle with respect to certain arguments developed in the defence, in accordance with the case-law referred to in paragraph 102 above.

105 In those circumstances, Annexes C.2 to C.5 are admissible.

(b) The existence of serious difficulties in relation to the compensation at issue

106 Article 106(2) TFEU provides that undertakings entrusted with the operation of a service of general economic interest (SGEI) are to be subject to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, subject to the proviso, however, that the development of trade must not be affected to such an extent as would be contrary to the interests of the Union (see judgment of 1 July 2010, *M6 and TF1* v *Commission*, T-568/08 and T-573/08, EU:T:2010:272, paragraph 136 and the case-law cited).

107 In allowing derogations to be made from the general rules of the Treaty in certain circumstances, Article 106(2) TFEU seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the EU's interest in ensuring compliance with the rules on competition and preserving the unity of the internal market. What Article 106(2) TFEU seeks to prevent, through the assessment of the proportionality of the aid, is that the operator responsible for the public service benefits from funding which exceeds the net costs of the public service (judgments of 7 November 2012, *CBI* v *Commission*, T-137/10, EU:T:2012:584, paragraph 293; of 16 October 2013, *TF1* v *Commission*, T-275/11, not published, EU:T:2013:535, paragraph 131; and of 24 September 2015, *Viasat Broadcasting UK* v *Commission*, T-125/12, EU:T:2015:687, paragraph 87).

108 Thus, as part of the review of proportionality inherent in Article 106(2) TFEU, the Commission is required to compare the amount of the planned State aid with the net costs of the public service missions performed by the beneficiary of that aid (see, by analogy, judgment of 10 July 2012, *TF1 and Others* v *Commission*, T-520/09, not published, EU:T:2012:352, paragraph 121).

109 That is the objective pursued by the NAC methodology, under which, according to the first sentence of paragraph 25 of the SGEI Framework, 'the net cost necessary, or expected to be necessary, to discharge the public service obligations is calculated as the difference between the net cost for the provider of operating with the public service obligation and the net cost or profit for the same provider of operating without that obligation'. Accordingly, the NAC methodology involves developing a counterfactual scenario, that is to say, a hypothetical situation in which the provider of the universal service is no longer responsible for it, and to compare that scenario with the factual scenario in which that provider is entrusted with the USO.

110 It is in the light of those considerations that the Court must examine the applicants' various arguments alleging that the Commission encountered serious difficulties when assessing the compatibility of the compensation at issue with the internal market.

111 In the present case, the applicants put forward four bodies of evidence for the purpose of establishing the existence of serious difficulties, alleging, first, the incorrect discontinuation of certain activities in the counterfactual scenario used as a basis for calculating the NAC; secondly, the failure to deduct certain intangible benefits when calculating the NAC; thirdly, failure to take into account, when calculating the NAC, efficiency incentives within the meaning of paragraphs 39 to 43 of the SGEI Framework; and, fourthly, the use of the compensation at issue for purposes other than the performance of the USO.

(1) The counterfactual scenario

112 The applicants challenge the creation of the counterfactual scenario in so far as it fails to take account of certain activities. In that regard, they criticise the Commission for accepting the counterfactual scenario sent to them by the Danish authorities even though that scenario included the discontinuation of certain activities which, in reality, would probably have been pursued by Post Danmark in the absence of the USO.

113 As a preliminary point, it should be recalled that, paragraphs 21 to 23 of the SGEI Framework, included in point 2.8, entitled 'Amount of compensation', read as follows:

'21. The amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.

22. The amount of compensation can be established on the basis of either the expected costs and revenues, or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide from the outset, in accordance with paragraphs 40 and 41.

23. Where the compensation is based, in whole or in part, on expected costs and revenues, they must be specified in the entrustment act. They must be based on plausible and observable parameters concerning the economic environment in which the SGEI is being provided. They must rely, where appropriate, on the expertise of sector regulators or of other entities independent from the undertaking. Member States must indicate the sources on which these expectations are based (public sources of information, cost levels incurred by the SGEI provider in the past, cost levels of competitors, business plans, industry reports, etc.). The cost estimation must reflect the expectations of efficiency gains achieved by the SGEI provider over the lifetime of the entrustment.'

114 It follows from paragraphs 21 to 23 of the SGEI Framework, that the Member States, who are required to notify the Commission of their plans to grant aid, have a certain margin of discretion in choosing the data relevant to calculating the NAC and that, where such a calculation is based on provisional data, the Commission is to review its plausibility and ensure that it does not exceed what is necessary to cover the net cost of performing the public service, taking into account a reasonable profit.

115 In that regard, it should be noted that provisional data, by its very nature, includes a margin of error and that that fact alone cannot constitute an indication of serious difficulties encountered by the Commission during the preliminary examination of State aid (see, to that effect, judgment of 10 July 2012, *TF1 and Others* v *Commission*, T-520/09, not published, EU:T:2012:352, paragraphs 103 and 139).

116 In the present case, in paragraph 148 of the contested decision, the Commission stated that the factual scenario was based on projected costs and revenues for the period from 2017 to 2019, on the basis of Post Danmark's financial accounts for the first 10 months of 2017, on projections for the last 2 months of 2017, and on Post Danmark's business plan for 2018 and 2019. In paragraph 151 of the contested decision, the Commission stated that the counterfactual scenario was based on estimated costs and revenues of Post Danmark's business activity in a scenario where it was not entrusted with the USO.

117 It is apparent from paragraphs 151 and 160 of the contested decision that the Danish authorities took the view that, in the absence of USO, Post Danmark would have discontinued the distribution of single-piece letters or parcels, defined in paragraph 3 of the universal service entrustment act as 'stamped letters encompassed by the USO and parcels encompassed by the USO posted occasionally and/or in small numbers and which [were] not covered by a contract with Post Danmark', of registered or insured items, of the free service for the blind, of newspapers, magazines and catalogues, and of international letter post and parcel post items.

118 In the first place, the applicants emphasise that the distribution of single-piece letters or parcels, of registered or insured items, of the free service for the blind, of newspapers and magazines, and of international letter post and parcel post items are profitable in urban areas and that, accordingly, even if it was no longer entrusted with the USO, Post Danmark would have continued those activities in such areas.

119 First of all, it should be noted that the alleged profitability of the activities in question is based on the BDO report.

120 In that regard, first, in accordance with settled case-law, the activity of the Court of Justice and of the General Court is governed by the principle of the unfettered assessment of the evidence, and it is only the reliability of the evidence before the Court which is decisive when it comes to the assessment of its value. In order to assess the probative value of a document, regard should be had to the credibility of the account it contains, taking account in particular of the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (see judgment of 15 September 2016, *Ferracci* v *Commission*, T-219/13, EU:T:2016:485, paragraph 42 and the case-law cited).

121 Secondly, as was noted in paragraph 48 above, the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted.

122 In the present case, the BDO report was drawn up after the adoption of the contested decision and at ITD's request. Thus, the probative value of such a report for the purposes of demonstrating the existence of serious difficulties, which the applicants are required to establish, must be regarded as severely limited.

123 Next, as the Commission points out, the inclusion of profitable activities in the counterfactual scenario would have had the effect of increasing Post Danmark's profits in such a scenario and thus of increasing the difference, necessary for calculating the NAC, between the revenue derived from the USO and that which Post Danmark would have generated in the absence of the USO. Therefore, if the counterfactual scenario had included the continuation of other profitable activities, the possibility that the NAC calculation would have resulted in over-compensation would have been reduced, as would, consequently, the risk of the compensation at issue being incompatible with the internal market.

124 That conclusion is not called into question by the argument put forward by the applicants in the reply that the activities which they allege to be profitable are in fact profitable only in the long term, with the result that, for the creation of the counterfactual scenario, established in relation to the short-term period from 2017 to 2019, such activities would lead to losses.

125 Even if such an argument were admissible, it is based on a false premiss. In that regard, it must be borne in mind that the NAC calculation, which seeks to isolate the cost of providing the universal service, requires the development of a counterfactual scenario, that is to say, a hypothetical situation in which the provider of such a service is no longer responsible for it. That methodology consists, first of all, in assessing whether, in the absence of the USO, the operator initially responsible for that USO would change behaviour and cease to provide the loss-making services or would change the way in which the loss-making services are provided and, subsequently, in assessing the impact of that change of behaviour on its costs and revenues in order to deduct from them, and calculate, any NAC. In other words, it is a question of estimating the USO's net cost by assessing the extent to which the operator responsible for the USO would increase its profits if it were not obliged to provide the universal service (see, to that effect, judgment of 15 October 2020, *První novinová společnost* v *Commission*, T-316/18, not published, EU:T:2020:489, paragraphs 272 and 273).

126 To this end, it is therefore necessary, as the Commission states, that the counterfactual scenario describe a stable situation that does not take account of the costs inherent in the transition, for the universal service provider, to the situation in which it is no longer entrusted with the USO. The applicants' argument cannot be accepted since it is based on the premiss that the pursuit of profitable activities entails more losses than profit.

127 In the second place, the applicants submit that the counterfactual scenario proposed by the Danish authorities was not realistic in so far as it assumed that Post Danmark would, in the absence of the USO, discontinue distribution of international letter post and parcel post items, even though Post Danmark's stated strategic objectives refer to a 'solid international foothold' and the provision of complete logistics solutions for the delivery of goods from abroad to the end customer.

128 However, as the Kingdom of Denmark rightly argues, the counterfactual scenario concerns only the discontinuation, by Post Danmark, of the activities included in the universal service entrustment act in the absence of the USO, namely, in accordance with the Universal Postal Convention, which is referred to in point 2 of the universal service entrustment act (see paragraph 5 above), 'letter post' and 'parcel post' items to private individuals up to 20 kg.

129 Accordingly, it is not apparent from the counterfactual scenario that the Danish authorities considered that, if it was no longer entrusted with the USO, Post Danmark would weaken its international foothold or would no longer be able to deliver goods internationally. It follows that the counterfactual scenario does not conflict with Post Danmark's objectives relating to a strengthening of its international foothold and the offer of complete logistics solutions to the end customer.

130 In the light of the foregoing, the applicants' criticisms concerning the creation of the counterfactual scenario do not demonstrate that the Commission encountered serious difficulties.

(2) Deduction of intangible profits

131 According to the last sentence of paragraph 25 of the SGEI Framework, 'the net cost calculation should assess the benefits, including intangible benefits as far as possible, to the SGEI provider'.

132 As regards, more specifically, the universal postal service, Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ 2008 L 52, p. 3), introduced into Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), Annex I, entitled 'Guidance on calculating the net cost, if any, of universal service'. The third and fourth paragraphs of Part B of that annex provide for the taking into account of intangible benefits when calculating the net cost of the universal service.

133 Thus, in principle, any calculation of the NAC must deduct the intangible benefits attributable to the USO (see, to that effect, judgment of 25 March 2015, *Slovenská pošta* v *Commission*, T-556/08, not published, EU:T:2015:189, paragraph 373), even though it must be stated that there is no provision listing the types of intangible benefits that are, in general, attributable to an SGEI or, in particular, attributable to the USO in the postal sector.

134 In the present case, in paragraph 157 of the contested decision, the Commission noted that intangible benefits in the postal sector include economies of scale and scope, advertising effects from intellectual property, demand effects due to the VAT exemption, advantages linked to full territorial coverage, bargaining power and better customer acquisition.

135 In paragraph 158 of the contested decision, the Commission stated that the NAC calculation proposed by the Danish authorities included two categories of intangible benefits. First, that calculation took account of the increase in demand enjoyed by Post Danmark as regards customers subject to VAT and who cannot deduct it, on account of the VAT exemption for services falling within the USO. Secondly, the Commission noted that the Danish authorities had deducted the intellectual property assets related to the USO, in particular those resulting from the publicity benefits of visible contact points such as mailboxes and installations for customers' self-service collection of parcels.

136 In paragraph 159 of the contested decision, the Commission stated that the Danish authorities had, however, excluded from the calculation of the net cost of the USO three categories of intangible benefits, related, respectively, to economies of scale, increased bargaining power and full territorial coverage on the market for the postal distribution of newspapers, magazines and catalogues.

137 In essence, the applicants criticise the Commission for accepting a method of calculating the NAC which did not make any deductions for intangible benefits linked to the enhancement of Post Danmark's reputation and to Post Danmark's ubiquity on Danish territory.

(i) The enhancement of Post Danmark's reputation

138 The applicants submit that the enhancement of the reputation of the universal service provider is always regarded as an intangible benefit in the postal sector and that it may be up to 81% of the cost of the USO. In the case of Post Danmark, the USO allows it to print stamps bearing the word 'Danmark' and to use the golden crowned post horn in public post offices, thus enhancing the value of the company's brand, which was created when it held a monopoly.

139 As a preliminary point, it should be noted, as observed by the Commission, that the figure of 81% of the cost of the USO, put forward by the applicants, was taken from a study on telecommunications carried out by WIK Consult in 1997 and reproduced in section 2.2 of the 2010 WIK study, entitled 'Intangible benefits in the electronic communications sector'. It cannot therefore be inferred from such a figure, which does not relate to the universal postal service, that the Commission faced serious difficulties due to the failure to take account of the impact of the USO on Post Danmark's reputation.

140 However, it is apparent from the various items of evidence furnished by the applicants that the enhancement of the reputation of the universal service provider may be regarded as an intangible benefit attributable to the USO in the postal sector. In particular, the 2010 WIK study and the ERGP report state as follows, using identical wording:

'Most incumbents/[universal service providers] provide high-quality postal services, throughout the entire country. This results in a high corporate reputation and an accordingly high brand value. Customers perceiving this high-quality (and recognizing that the [universal service provider] offers some unprofitable services) may buy other (non-USO) services from the [universal service provider] instead of choosing another operator. Reducing the quality below USO levels may lead to a reduction of the company's reputation and the brand value, respectively.'

141 In that regard, it should be noted that that quotation appears in the parts of the 2010 WIK study and the ERGP report focused on the literature available in relation to the benefits enjoyed by the universal service provider in the postal sector. Those documents state that identification of the benefit relating to the enhancement of the reputation of the universal service provider is based on studies dating from 2001, 2002 and 2008.

142 In the present case, the applicants are unable to explain how the considerations set out in paragraph 140 above, which are relevant in demonstrating that the USO enhances the reputation of the operator entrusted with it, are applicable to Post Danmark, for whom the generalised use of electronic communications led to a 38% drop in turnover between 2009 and 2016. On that latter point, as noted by the Commission, the financial difficulties encountered by Post Danmark during that period led, first, to a reduction in the provision of services offered under the USO and, secondly, to the increase in the price of those services, which excludes the existence of serious difficulties as regards the failure to deduct profits linked to the enhancement of Post Danmark's reputation in the NAC calculation.

143 That conclusion is not called into question by the US Postal report, from which it is apparent that, despite financial difficulties, the corporate brand of the operator US Postal, which is entrusted with the USO in the United States, has remained at a very high level equivalent to the cost of the USO. In that regard, even if it were to be assumed that the context in which US Postal operates is analogous to that of Post Danmark, the significance of the value of its corporate brand and its comparison with the cost of the USO are irrelevant for the purpose of establishing that the reputation of the company would be affected by not being entrusted with the USO. For the purposes of deducting intangible benefits in the context of the NAC calculation, it is necessary not to assess the value of the corporate brand of the universal service provider but rather to determine whether the reputation of a universal service provider is enhanced by the fact that it provides such a service.

144 Moreover, the fact, cited by the applicants, that the USO allows Post Danmark to print stamps bearing the word 'Danmark' and to use the logo of the golden crowned post horn cannot be regarded as evidence of serious difficulties connected to the failure to take into account intangible benefits related to the enhancement of Post Danmark's reputation. While that fact is capable of establishing a link between the Danish State and Post Danmark, the applicants do not establish that such a link would be severed in the absence of the USO. In view of the fact that the word 'Danmark' is part of the trade name of Post Danmark, which is the incumbent Danish operator and has, in that capacity, held a

monopoly in the national territory, and that the Danish State is one of the two shareholders of Post Danmark's parent company, it is likely that, even if that operator were no longer entrusted with the USO, its image would continue to be associated with the Danish State.

145 Lastly, the applicants cannot validly invoke arguments based on the 2010 WIK study on the French operator La Poste and a report on the Irish operator An Post.

146 First, although the 2010 WIK study concluded that the fact that La Poste provides universal service was likely to enhance its reputation, that conclusion was linked to circumstances that were specific to the provider concerned, as is apparent from the statement that 'postal customers perceive La Poste as a good corporate citizen', that 'all aspects of the "*Service Public*" traditionally play a very important role in France and are cherished by the population', and that 'people trust in postal and financial services provided by La Poste and are very sensitive in changes of service provision'. The applicants have not established, or even maintained, that such circumstances can be applied to Post Danmark.

147 Secondly, as regards the report on An Post, the passage cited by the applicants, according to which the provision of universal service offers corporate reputation enhancements, is included in a section relating to the 'sending of correspondence'. It is only with regard to that service that an enhancement in reputation on account of the USO can be inferred from that passage.

148 It is apparent from paragraphs 151 and 160 of the contested decision that, in the absence of the USO, Post Danmark would discontinue the distribution of letters since that service is unprofitable. Therefore, any loss of reputation limited to the letter post sector would not impact Post Danmark's situation in the absence of the USO since Post Danmark would no longer be active in that sector.

149 It follows from the foregoing that none of the points put forward by the applicants are capable of establishing that the fact that the Danish authorities did not take into account the enhancement of the brand image as a result of the USO in the NAC calculation should have incited doubts on the part of the Commission when assessing the compatibility of the compensation at issue with the internal market.

(ii) Ubiquity

150 According to the applicants, the Commission was also wrong to accept the NAC calculation proposed by the Danish authorities since that calculation did not make any deductions relating to ubiquity.

151 In that regard, it is apparent from various documents furnished by the applicants, in particular from the 2010 WIK study and the ERGP report, that, in the postal sector, ubiquity attracts customers and increases the loyalty of customers, who are more inclined to choose the universal service provider than its competitors, since they know that, as a result of the USO, that provider offers services covering the full territory.

152 Thus, it should be noted at the outset that, first, contrary to what the Commission maintains, the advantage resulting from ubiquity does not benefit only operators offering banking or insurance services, although such an advantage may be all the more important where numerous and varied services are offered. Secondly, contrary to what is claimed by the Kingdom of Denmark, the advantage linked to ubiquity is distinct from advertising efficiency, which refers to the fact that the territorial presence linked to the USO offers the universal service provider visibility throughout the territory of the country, whereas any other operator would need to incur advertising expenses in order to obtain equivalent visibility.

153 That said, the fact that ubiquity may be regarded as an intangible benefit related to the universal postal service does not conflict with the content of the contested decision since the Commission stated, in paragraph 157 thereof, that intangible and market benefits typically included 'benefits [linked to] universal coverage' and 'better customer acquisition'.

154 Furthermore, as the Kingdom of Denmark notes, an intangible benefit linked to ubiquity is not systematically deducted from the NAC calculation, as evidenced by the 2010 WIK study, furnished by the applicants, which found that the USO did not confer on the French operator La Poste any intangible benefit linked to ubiquity.

155 In the present case, in paragraph 159(iii) of the contested decision, the Commission stated that distributors of catalogues, magazines and newspapers were, according to the Danish authorities, fully prepared to select distributors that do not offer universal territorial coverage. That finding, which the applicants do not dispute, tends to establish that Post Danmark does not enjoy, by virtue of its status as a universal service provider, an intangible benefit linked to ubiquity.

156 As regards the evidence submitted by the applicants seeking to establish that the USO confers on Post Danmark an intangible benefit relating to its ubiquity, it should be noted that, admittedly, in its annual and sustainability report for 2017, PostNord stated that accepting the USO in Sweden and Denmark enabled it to reach all households in those two States, which constituted a factor of strength with regard to the growth in e-commerce.

157 However, that extract does not contradict the content of the contested decision regarding no deductions being made for intangible benefits relating to ubiquity. First, in paragraph 149(i) of the contested decision, the Commission stated that Post Danmark assumed, for the period from 2017 to 2019, a substantial growth in business-to-consumer deliveries due to increased e-commerce. Secondly, it is apparent from paragraph 151 of the contested decision that, in the absence of the USO, Post Danmark would have continued to distribute parcels other than single-piece parcels, subject to certain adjustments related to home delivery, which would have ceased in certain particularly sparsely populated rural areas. Therefore, as the Commission and the Kingdom of Denmark have noted, even in the absence of the USO, Post Danmark's ubiquity would not have been fundamentally altered with regard to services connected with e-commerce given that Post Danmark would have continued to offer, over the entire Danish territory, distribution of parcels other than single-piece parcels, with or without home delivery depending on the area.

158 Moreover, as the Commission rightly points out, the extracts from the US Postal report and the document drawn up by the ESRC to which the applicants referred concern the ubiquity of the corporate brand of a universal service provider, that is to say, the impact of total coverage of the territory on the reputation of that provider. As has been pointed out in paragraphs 142 to 149 above, Post Danmark's situation was such that the Commission could rule out the possibility that the USO would enhance its reputation.

159 In those circumstances, the evidence furnished by the applicants does not establish that the fact that no specific deductions were made for intangible benefit linked to ubiquity, in the NAC calculation submitted by the Danish authorities, should have resulted in the Commission being faced with serious difficulties regarding the compatibility of the compensation at issue with the internal market.

(3) Taking into account of efficiency incentives

160 The applicants criticise the Commission for finding that the compensation at issue was compatible with the internal market whereas, in their view, the NAC calculation which formed the basis for that compensation breached, in two respects, paragraphs 39 to 43 of the SGEI Framework, relating to

efficiency incentives. First, the NAC calculation was not carried out on the basis of an efficient service provider and, secondly, it would not have been possible to verify the quality of the universal service since the compensation at issue was, in part, paid *ex post*.

161 Paragraphs 39 to 43 of the SGEI Framework reads as follows:

'39. In devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.

40. Efficiency incentives can be designed in different ways to best suit the specificity of each case or sector. For instance, Member States can define upfront a fixed compensation level which anticipates and incorporates the efficiency gains that the undertaking can be expected to make over the lifetime of the entrustment act.

41. Alternatively, Member States can define productive efficiency targets in the entrustment act whereby the level of compensation is made dependent upon the extent to which the targets have been met. If the undertaking does not meet the objectives, the compensation should be reduced following a calculation method specified in the entrustment act. Rewards linked to productive efficiency gains are to be set at a level such as to allow balanced sharing of those gains between the undertaking and the Member State and/or the users.

42. Any such mechanism for incentivising efficiency improvements must be based on objective and measurable criteria set out in the entrustment act and subject to transparent *ex post* assessment carried out by an entity independent from the SGEI provider.

43. Efficiency gains should be achieved without prejudice to the quality of the service provided and should meet the standards laid down in Union legislation.'

162 In the present case, in paragraphs 166 to 169 and 181(iv) of the contested decision, the Commission found that the Danish authorities had introduced sufficient incentives for the efficient provision of the universal service. First, the Commission found that a significant efficiency incentive could be inferred from the fact that the compensation at issue would be paid upfront and that it represented 46% of the NAC, which allowed Post Danmark to retain all efficiency gains on condition that it did not lead to overcompensation. Secondly, the Commission noted that the quality standards laid down in relation to Post Danmark in the universal service entrustment act and the penance system established in the event of non-compliance with those standards were such as to ensure that those efficiency gains would not prejudice the quality of the universal service provided.

163 The arguments put forward by the applicants do not support the conclusion that such considerations constitute evidence of the existence of serious difficulties as regards the assessment of the compatibility of the compensation at issue.

164 First, the applicants are wrong to claim that the compensation at issue did not contain any efficiency incentives on the ground that its beneficiary, Post Danmark, was on the brink of bankruptcy and, therefore, could not be regarded as an efficient service provider. Such an argument is based on confusion between, first, efficiency incentives as required under paragraphs 39 to 43 of the SGEI Framework, which seek to ensure that the provision of an SGEI provides efficiency gains while ensuring quality service and, secondly, the idea that the NAC is calculated on the basis of an efficient service provider.

165 In that regard, the question whether the level of compensation needed must be determined on the basis of an analysis of the costs that an efficient service provider would have incurred in performing the USO is not relevant when assessing the compatibility of the aid in the context of the application of

Article 106(2) TFEU. Taking into account the economic efficiency of the universal service provider would be tantamount to requiring that such a service always be provided under normal market conditions, which could potentially obstruct the fulfilment, in law or in fact, of the particular task assigned to undertakings entrusted with the operation of an SGEI. Article 106(2) TFEU is specifically intended to prevent such a situation (see, to that effect, judgment of 24 September 2015, *Viasat Broadcasting UK* v *Commission*, T-125/12, EU:T:2015:687, paragraph 90 and case-law cited).

166 Secondly, the applicants' argument that part of the compensation at issue was paid without it having been possible to verify compliance with the quality standards of the universal service has no factual basis. Such quality standards, as well as the control and sanctions mechanism, were laid down in the universal service entrustment act, of 30 May 2016, that is to say, before the start of the period concerned by the compensation at issue.

(4) Use of the compensation at issue

167 In the first place, the applicants claim that the Commission erred in law in finding that the compensation at issue was compatible with the internal market, on the basis of the SGEI Framework, while expressly authorising that such compensation be used not for the discharge of the USO but to pay the costs arising from the dismissal of former civil servants.

168 In that regard, it is common ground that, as the Commission noted in paragraph 23 of the contested decision, the compensation at issue is a component of Post Danmark's new production model. In particular, the Danish authorities planned that the amount corresponding to the compensation at issue was to serve to finance part of the special redundancy payments for former civil servants at Post Danmark.

169 According to the case-law referred to in paragraphs 106 to 108 above, the objective underlying Article 106(2) TFEU is to prevent the competition rules obstructing undertakings entrusted with a public service from performing their tasks by allowing Member States to grant them financing, provided that it does not exceed the net costs attributable to that public service, taking into account a reasonable profit.

170 Accordingly, an assessment by the Commission as to whether public service compensation is compatible with the internal market consists in verifying, irrespective of whether the corresponding amount is actually allocated to it, whether such a public service exists and imposes a net cost on the undertaking responsible for providing it.

171 That conclusion is supported by the fact that public service compensation may take into account a reasonable profit and, therefore, exceed the strict amount of the net costs of the public service.

172 That applies all the more in the case of postal services since the first paragraph of Part C of Annex I to Directive 97/67 provides that 'recovery or financing of any net costs of universal service obligations may require designated universal service providers to be compensated for the services that they provide under non-commercial conditions'. The expression 'recovery or financing' used in that provision excludes any requirement that the transfer of funds corresponding to compensation for the universal service actually be used for the performance of such a service.

173 Consequently, the fact that the sum granted by way of the compensation at issue may be used for a purpose other than the USO does not in itself demonstrate that the Commission encountered serious difficulties in assessing the compatibility of such a measure (see, to that effect, judgment of 15 October 2020, *První novinová společnost* v *Commission*, T-316/18, not published, EU:T:2020:489, paragraph 187).

174 That conclusion cannot be called into question by the applicants' argument based on the legal rules prohibiting the misuse of State aid.

175 In that regard, it is apparent from Article 1(g) of Regulation 2015/1589 that misused aid means aid used by the beneficiary in contravention of a Commission decision.

176 In the present case, the purpose of the contested decision is to assess the compatibility of the compensation at issue, granted for the purposes of covering the net costs incurred by the USO as set out in the universal service entrustment act. It is not disputed that, in Denmark, the USO is provided by Post Danmark. Thus, only if it were established that Post Danmark had not fulfilled its obligations under the USO could it be found that the compensation at issue had been misused.

177 In the second place, the applicants submit, in essence, that the Commission should not have accepted that the calculation of the compensation at issue included the amount of the redundancy costs for former civil servants at Post Danmark. In particular, it has not been established that former civil servants whose redundancy payments were covered by the compensation at issue actually worked in connection with the USO (see paragraph 95 above).

178 In that regard, first of all, as has already been stated in paragraph 114 above, the Member States have a margin of discretion in choosing the data relevant to calculating the NAC and there is nothing to prevent them from relying, as the Danish authorities did in the present case, on the costs previously borne by the universal service provider or on the latter's business plan. Next, as is apparent from paragraphs 1 and 10 of the agreement of 20 October 2017 and from paragraph 2(2) of the contested decision, first, the creation of a new production model within Post Danmark was made necessary by the change in the nature of the postal market due to the increased use of electronic communications in Denmark and, secondly, the new model in question is largely focused on the rationalisation of certain personnel costs associated with mail delivery. It has therefore been established that, contrary to what is claimed by the applicants, the former civil servants at Post Danmark whose dismissal was planned were intrinsically linked to the distribution of mail, the central activity of the USO. Lastly, as noted by the Commission, without being challenged by the applicants in that regard, the Danish authorities adopted a cautious approach in considering, in the counterfactual scenario, that, even if it were not entrusted with the USO, Post Danmark would still have to pay the costs of dismissing former civil servants in the same amount as that provided for in the factual scenario, which reduces the impact of those redundancy costs on the amount of the NAC.

179 For all the foregoing reasons, it must be concluded that the taking into account of the costs of dismissal of former civil servants at Post Danmark in the calculation of the NAC does not demonstrate that the Commission encountered serious difficulties in that regard.

180 Such a conclusion cannot be called into question by the ERGP report. Indeed, as stated in the extract from that report relied on by the applicants, 'restrictions on downsizing … should not be defined as part of the postal USO'. In the present case, as noted by the Commission, Post Danmark was not subject to any restriction regarding staff reductions on account of the USO. On the contrary, that undertaking planned to reduce its workforce in the factual scenario.

181 The complaint relating to the taking into account of the redundancy costs in the NAC calculation must therefore be rejected, without it being necessary to rule on its admissibility, which was disputed by the Commission in its reply to a question put by the Court in the context of a measure of organisation of procedure.

182 In the third place, the applicants and Dansk Distribution claim that the Commission erred in so far as it did not assess the compatibility of the compensation at issue on the basis of the Guidelines on State aid for rescuing and restructuring.

183 In that regard, it is appropriate to recall that, under Article 84(1) of the Rules of Procedure, 'no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'. However, a plea which constitutes an amplification of a plea previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible. To be regarded as an amplification of a plea or a head of claim previously advanced, a new line of argumentation must, in relation to the pleas or heads of claim initially set out in the application, present a sufficiently close connection with the pleas or heads of claim initially put forward in order to be considered as forming part of the normal evolution of debate in proceedings before the Court (see judgment of 20 November 2017, *Petrov and Others* v *Parliament*, T-452/15, EU:T:2017:822, paragraphs 46 and 27).

184 It must be noted that it was only at the stage of their observations on the statement in intervention of the Kingdom of Denmark that the applicants submitted, for the first time, that the Commission should have applied the Guidelines on State aid for rescuing and restructuring and that the application contains no reference to those guidelines. Thus, contrary to what the applicants maintained at the hearing, such an argument cannot be linked to the complaint in the part of the application entitled 'Use of proceeds', in which they criticised the Commission for having wrongly declared the compensation at issue compatible with the internal market on the basis of the SGEI Framework, while authorising that part of that compensation be used to cover the redundancy costs for former civil servants at Post Danmark.

185 Accordingly, the argument based on the failure to apply the guidelines on State aid for rescuing and restructuring cannot be regarded as elaborating on the plea in law raised in the application for the purposes of Article 84(1) of the Rules of Procedure and must therefore be regarded as a new plea within the meaning of that provision. In so far as that plea is not based on matters that came to light after the present action was brought, it must be regarded as being raised out of time and, consequently, must be dismissed as inadmissible. The repetition of that argument by Dansk Distribution at the hearing cannot be accepted either, since Dansk Distribution had not raised it in its statement in intervention.

(5) Conclusion

186 It follows from all the considerations examined above that the applicants have failed to furnish evidence of the existence of serious difficulties as regards the compatibility of the compensation at issue with the internal market.

187 That conclusion is supported by the fact, noted in paragraph 160 of the contested decision, that the NAC amount calculated, namely DKK 2.571 billion (approximately EUR 345 million), was significantly higher than the maximum amount of the compensation at issue, of DKK 1.192 billion (approximately EUR 160 million). This is particularly relevant since the applicants have not challenged those amounts, which are included in the public version of the contested decision. Likewise, although the Commission highlighted in the defence the difference between the amount of the compensation at issue and the amount of the NAC, the applicants did not dispute such a discrepancy in the reply.

2. The guarantee at issue

188 The applicants, supported by Jørgen Jensen Distribution and Dansk Distribution, claim that the guarantee at issue, under which the Danish State undertook to pay the redundancy payments for former civil servants at Post Danmark in the event of the latter's bankruptcy, cannot be regarded as having been granted at the time of its adoption, in 2002. Accordingly, such a guarantee does not constitute existing aid within the meaning of Article 17 of Regulation 2015/1589.

189 First, according to the applicants, the aid does not consist in the advantage conferred by the existence of the guarantee itself, but in the fact that Post Danmark did not pay a premium to the State in return for the benefit obtained by the guarantee at issue. In that regard, they point out that it is apparent from point 2.2 of the Commission Notice on the application of Articles [107] and [108 TFEU] to State aid in the form of guarantees (OJ 2008 C 155, p. 10; 'the Notice on guarantees'), that any guarantee should be remunerated by an appropriate premium, failing which the beneficiary of the guarantee, namely, in the present case, Post Danmark, obtains an advantage.

190 Since a guarantee premium was, in general, invoiced on a recurring basis and, at the very least, on an annual basis, the aid measure complained of by the applicants has been granted at least annually, since 2002, to Post Danmark. The repeated failure to make annual payments of an appropriate premium in return for the guarantee at issue therefore amounts to advantages granted on a periodic basis, within the meaning of the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 82).

191 In response to a question put by the Court in the context of a measure of organisation of procedure, the applicants stated that, in their view, the guarantee at issue constituted an aid scheme and that, even if that were not the case, the considerations set out by the Court of Justice in the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811), would still be relevant.

192 Secondly, the applicants note that the mere fact that the Commission expressed doubts as to the existence of an advantage is sufficient to establish that it encountered serious difficulties in relation to whether the aid granted to Post Danmark in the form of guarantees constituted new or existing aid.

193 Thirdly, Jørgen Jensen Distribution and Dansk Distribution submit that, in accordance with the principle of a private investor in a market economy, the grant of a guarantee without the payment of a premium constitutes an economic advantage which an operator would not have obtained under normal market conditions. That conclusion applies regardless of the reason for which the guarantee was granted, even if it did not benefit any creditors. In that regard, Jørgen Jensen Distribution and Dansk Distribution state that any exemption from operating costs normally borne by an undertaking constitutes, according to the case-law, an advantage.

194 The Commission, supported by the Kingdom of Denmark, contests those arguments.

195 According to settled case-law, the examination of existing aid may only be the subject, should the situation arise, of a decision of incompatibility producing effects for the future (judgments of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 166, and of 15 November 2018, *Stichting Woonlinie and Others* v *Commission*, T-202/10 RENV II and T-203/10 RENV II, EU:T:2018:795, paragraph 120).

196 In that regard, Article 1(b)(iv) of Regulation 2015/1589 provides that existing aid means aid which is deemed to be existing aid pursuant to Article 17 of that regulation.

197 Under Article 17(3) of Regulation 2015/1589, any aid with regard to which the 10-year limitation period has expired is to be deemed to be existing aid. Paragraphs 1 and 2 of that article state that the powers of the Commission to recover aid are to be subject to a limitation period of 10 years and that that period begins to run on the day on which the unlawful aid is awarded to the beneficiary, either as individual aid or as aid under an aid scheme.

198 It is apparent from those provisions that classification as existing aid depends on the expiry of the limitation period referred to in Article 17 of Regulation 2015/1589, which starts to run on the date on which that aid was granted.

199 According to the case-law, aid is considered to be granted at the time that the right to receive it is conferred on the beneficiary under the applicable national rules (see, to that effect, judgments of 21 March 2013, *Magdeburger Mühlenwerke*, C-129/12, EU:C:2013:200, paragraphs 40 and 41, and of 29 November 2018, *ARFEA* v *Commission*, T-720/16, not published, EU:T:2018:853, paragraphs 177 and 178).

200 In the present case, the right to receive the guarantee at issue, by which the Danish State undertook to cover, in the event of Post Danmark's bankruptcy, the redundancy payments of its employees who retained their status as a civil servants on 1 January 2002, the date of its transformation into a limited liability company, was granted by Article 9 of lov nr. 409 om Post Danmark A/S (Law No 409 on Post Danmark) of 6 June 2002 (*Lovtidende* 2002 A).

201 In the contested decision, the Commission considered that it was on that date that the only advantage that could have resulted from that guarantee, consisting in preventing Post Danmark from losing staff members when it was converted into a limited liability company (paragraph 187 of that decision). The Commission concluded that, since ITD sent its complaint regarding the guarantee at issue on 27 November 2017, any aid that might have been granted by that guarantee would constitute existing aid within the meaning of Article 1(b)(iv) of Regulation 2015/1589 (paragraphs 189 to 192 of the contested decision).

202 The applicants dispute that the date of adoption of Law No 409 on Post Danmark constitutes the starting point for the limitation period for recovery of the aid in relation to the guarantee at issue. According to the applicants, the guarantee at issue improves Post Danmark's financial situation by exempting it from payment, at least annually, of a guarantee premium, which constitutes advantages granted on a periodic basis and should cause the limitation period to restart at each such exemption.

203 In that regard, as noted by the applicants, the determination of the date on which aid was granted may vary depending on the nature of the aid in question (see, to that effect, judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 82, and order of 5 October 2016, *Diputación Foral de Bizkaia* v *Commission*, C-426/15 P, not published, EU:C:2016:757, paragraph 29). Thus, in the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraphs 80 to 84), as relied on by the applicants, the Court of Justice held that, in the case of multiannual aid schemes, entailing payments or advantages granted on a periodic basis, the aid must be regarded as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary. Accordingly, the limitation period starts to run afresh each time an advantage is actually granted, which may be on an annual basis.

204 Such an approach is justified by the fact that, in the context of aid schemes, in particular tax aid schemes, the date on which an aid scheme was established and the date on which individual aid is granted under that scheme may be a considerable period of time apart. Consequently, the limitation period may start to run afresh each time new individual aid is granted under an aid scheme, which, in the context of a tax aid scheme, corresponds to each exemption granted when the tax is due, that is to say, as a general rule, annually.

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

206 In the present case, the guarantee at issue merely grants, without the payment of a premium, to a given legal person, Post Danmark, the benefit of a State guarantee for the payment of redundancy costs in relation to certain of its employees in the event of bankruptcy. It is therefore an individual measure which is not part of a multiannual aid scheme.

207 Irrespective of whether the guarantee in question is classified as an aid scheme or as individual aid, the situation in the present case is not comparable to that which led the Court of Justice to hold, in the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811), that the starting point of the limitation period started to run afresh each year. In that case, the advantage in question depended, each year, on specific circumstances, since the advantage resulted, if any, from the tax differential between, on the one hand, the amount that France Télécom should have paid in business tax, the level and rate of which was voted annually by each French local authority, and, on the other hand, the amount which it was actually charged under a special scheme (see, to that effect, judgment of 30 November 2009, *France and France Télécom* v *Commission*, T-427/04 and T-17/05, EU:T:2009:474, paragraphs 200 to 203 and 321 to 324, upheld on appeal by judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811). In the present case, the applicants have not put forward any evidence capable of establishing that the amount of the premium that Post Danmark should have paid each year, in return for the guarantee at issue, should be determined periodically on the basis of circumstances specific to each period, or even that that would be the case, in general, as regards the amount of a guarantee premium.

208 The applicants' argument is thus based on confusion between, on the one hand, advantages granted on a periodic basis, pursuant to the repeated individual application of an aid scheme and, on the other hand, the grant of an individual guarantee which may have the effect of continuously improving the situation of the beneficiary. In the latter case, the date on which the aid was granted is the date on which it was adopted and, in the event that that measure constitutes existing aid, it could be the subject of a Commission decision producing effects for the future, in accordance with the case-law cited in paragraph 195 above.

209 Moreover, in the Notice on guarantees, on which the applicants rely, the Commission stated, at the end of point 2.1, as follows:

'The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment when the guarantee is given.'

210 Thus, the Commission could, without giving rise to the existence of serious difficulties, determine that the date on which the guarantee at issue was granted and, accordingly, the starting point of the limitation period relating to any aid that may have been granted by means of that guarantee, was the date of its adoption, namely 6 June 2002 (see paragraph 201 above).

211 In any event, the applicants' argument set out in paragraph 202 above is based on the incorrect premiss that the guarantee at issue provides Post Danmark with an advantage derived exclusively from the non-payment, at least annually, of a guarantee premium.

212 In that regard, it is true that, as noted by the applicants and as is apparent from points 2.1 and 2.2 of the Notice on guarantees, the non-payment of an appropriate premium in return for a State guarantee is a necessary condition for a guarantee to confer an advantage on the beneficiary.

213 However, in order to establish that a payment in return for the grant of a guarantee would have been necessary in order for such a grant to not be classified as State aid, it is first necessary to examine whether that guarantee confers an advantage by improving the situation of the beneficiary. Thus, the Court of Justice held that the General Court did not err in finding that the advantage conferred on the French publicly owned establishment La Poste by an unlimited State guarantee was based, first, on the non-payment of a premium in return for that guarantee and, secondly, on improved credit conditions for that public institution (judgment of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 102).

214 Thus, contrary to the submissions of the applicants, Jørgen Jensen Distribution and Dansk Distribution, the purpose of a public guarantee may not be disregarded when assessing its impact on the situation of the beneficiary.

215 That conclusion is supported by point 2.2 of the Notice on guarantees, relied on by the applicants, from which it is apparent that identifying the existence of an advantage granted by a public guarantee without the payment of a premium in return, requires an assessment of the actual impact of the guarantee at issue on the situation of the beneficiary compared with that of its competitors.

216 In the present case, it should be pointed out, first, that the guarantee at issue requires the Danish State to cover the cost of special redundancy payments for former civil servants who became employees of Post Danmark on 1 January 2002, only in the event of the latter's bankruptcy. It is not apparent that such a guarantee improves Post Danmark's situation since it could be implemented only in the event that that undertaking ceases to exist. In other words, as long as Post Danmark is solvent, it is required to pay the special redundancy payments relating to the dismissal of former civil servants.

217 Secondly, it is also important to point out that the guarantee at issue concerns only Post Danmark's former civil servants who, at the time that undertaking was converted into a limited liability company, on 1 January 2002, agreed to become its employees. Thus, that guarantee cannot benefit staff recruited after that date and, accordingly, it cannot be considered that that guarantee enhances the appeal of Post Danmark to potential new employees.

218 Thirdly, it is true that, as noted by Jørgen Jensen Distribution and Dansk Distribution, measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking, including costs linked to the remuneration of employees, are considered to be aid (judgment of 12 December 2002, *Belgium* v *Commission*, C-5/01, EU:C:2002:754, paragraphs 32 and 39). However, in the present case, it is not alleged by Jørgen Jensen Distribution, Dansk Distribution or the applicants, nor is it apparent from the documents before the Court, that the guarantee at issue exempts Post Danmark from regular contributions which its competitors are required to pay in order to ensure redundancy payments in the event of bankruptcy, or even that its regular personnel costs are reduced as a result of that guarantee.

219 In those circumstances, the Court considers, as rightly highlighted by the Commission, that the guarantee at issue confers, above all, an advantage on the former civil servants who became employees of Post Danmark at the time of its transformation into a limited liability company, since such employees have the assurance, in the event of Post Danmark's bankruptcy, of receiving their full special redundancy payments.

220 It follows from the foregoing that, contrary to what they claim, the applicants have not established that the guarantee at issue continuously improves Post Danmark's situation. For the same reasons, nor can Jørgen Jensen Distribution and Dansk Distribution succeed in their argument that, applying the private investor in a market economy test, any guarantor would have required payment of a regular premium in return for the guarantee at issue and there is, therefore, no need to rule on the admissibility of such an argument, which is contested by the Commission.

221 Lastly, the applicants' argument that the Commission expressed doubts as to the existence of an advantage arising from the guarantee at issue is also unfounded. The Commission rejected the complaint in so far as it concerned the guarantee at issue on the ground that the existence of an advantage as a result of such a guarantee was highly uncertain and that, in any event, even if such a benefit had existed, the associated aid would have constituted existing aid which could no longer be recovered.

222 It follows from all of the foregoing that none of the evidence relating to the content of the contested decision furnished by the applicants demonstrates the existence of serious difficulties that would have justified the initiation of a formal investigation procedure in relation to the guarantee at issue.

3. The VAT exemption

223 The applicants, supported by Jørgen Jensen Distribution and Dansk Distribution, dispute the Commission's conclusion that the VAT exemption on the supply of goods carried out by Post Danmark in transactions between mail-order companies and end customers ('the administrative practice at issue') did not constitute State aid, on the ground that it was imputable to Article 132(1)(a) of the VAT Directive and not to the Danish State. They claim, in that regard, that the assessment carried out by the Commission was insufficient or incomplete, thereby giving rise to serious difficulties.

224 At the outset, the applicants note that, in the contested decision, the Commission did not dispute that the administrative practice at issue conferred an economic advantage on Post Danmark as a result of an increase in demand and stated that the fact that Post Danmark benefited only indirectly from that practice was sufficient for it to be classified as an advantage for the purposes of the rules on State aid. The applicants thus concentrate their argument on the question of the imputability of the exemption arising from the administrative practice at issue.

225 In that regard, the applicants note that it was the Danish administration that introduced the administrative practice at issue, by means of Administrative Decision No 1306/90 and Administrative Regulation F 6742/90 of 1990, before abolishing it, with effect from 1 January 2017, by means of Instruction No 14-2926872/SKM2016.306.SKAT of 30 June 2016.

226 The applicants also stress that the legal basis of the administrative practice at issue was not Article 13(13)(a) of the lov om merværdiafgift (momsloven) nr. 106 (Law No 106 on VAT) of 23 January 2013 (*Lovtidende* 2013 A) ('the Danish VAT Law'), which transposed into national law the exemption provided for in Article 132(1)(a) of the VAT Directive, but rather Article 27(3)(3) of the Danish VAT Law, which transposed point (c) of the first paragraph of Article 79 of the VAT Directive, allowing for the exclusion from the taxable amount for VAT purposes, amounts received by a company from its customer as reimbursement for costs incurred in the name and on behalf of the customer. They therefore argue that it was on the basis of the latter provisions that the administrative practice at issue allowed mail-order companies to treat payments which they made to companies transporting goods, including Post Danmark, as expenses incurred in the name and on behalf of their end customers. Thus, according to the applicants, as a result of the administrative practice at issue, a transaction relating to the transport of goods was presumed to have been carried out between the end customers of mail-order companies and the transport operator, even though there was no legal relationship between them.

227 In such a situation, the transport services provided by Post Danmark were exempt from VAT, on the basis of the mandatory VAT exemption relating to activities carried out by the public postal services, laid down in Article 132(1)(a) of the VAT Directive, as transposed by Article 13(13) of the Danish VAT Law. Accordingly, requests from mail-order companies were automatically transferred to the transport service provided by Post Danmark. By contrast, without the administrative practice at issue, a transport service ordered from Post Danmark by a mail-order company would have been exempt from VAT, whereas VAT would have been applied to the transport costs invoiced by that company to the end customer.

228 According to the applicants, it is clear that the administrative practice at issue did not implement and had no connection with Article 13(13)(a) of the Danish VAT Law, transposing Article 132(1)(a) of the VAT Directive. The applicants claim that, by establishing such a link, the Commission confused the

VAT exemption specifically granted by the administrative practice at issue, for transactions of mail-order companies, with the distinct mandatory VAT exemption for services supplied by public postal services.

229 The applicants add that the administrative practice at issue was introduced by an administrative decision and an administrative regulation but was then abolished by an instruction. They submit that that practice thus results from a legal instrument adopted directly by the Danish tax authorities and that it is therefore imputable to the Danish State.

230 Lastly, the applicants note that the administrative practice at issue was indeed based on the rule laid down in point (c) of the first paragraph of Article 79 of the VAT Directive, but did not interpret, clarify or apply that rule. In that regard, they state that the Danish tax authorities themselves acknowledged that the reason for the abolition of the administrative practice at issue was the lack of a legal basis for that practice in either the Danish VAT Law or the VAT Directive.

231 Accordingly, the applicants claim that Post Danmark was the indirect beneficiary of the VAT exemption of the transport services ordered from it by mail-order companies and that that exemption was imputable solely to the administrative practice at issue and, thus, to the Danish State. Consequently, they consider that the assessment of that measure, which is capable of constituting State aid to Post Danmark, was carried out by the Commission in an insufficient or incomplete manner, thereby giving rise to serious difficulties.

232 The Commission, supported by the Kingdom of Denmark, contests those arguments.

233 First, it states that the VAT exemption in favour of Post Danmark in respect of its USO services follows directly from Article 132(1)(a) of the VAT Directive. That VAT exemption is imputable not to the Danish State, but to that directive. In that regard, the Kingdom of Denmark adds that, irrespective of the administrative practice at issue, Post Danmark was not required to charge VAT to mail-order companies for any post covered by the USO.

234 Secondly, the Commission submits that the administrative practice at issue was a measure that targeted mail-order companies and consumers as main beneficiaries, not Post Danmark. Similarly, the Kingdom of Denmark states, relying on the preparatory material which preceded the adoption of the administrative practice at issue, that that practice was not intended to secure more customers for Post Danmark, but rather to implement the VAT Directive's objective of ensuring cheaper mailing prices for consumers. Thus, that practice made it possible for consumers and mail-order companies to benefit from the advantage of the exemption provided for by the VAT Directive for post covered by the USO.

235 The Commission notes that, although mail-order companies were able to offer their customers lower transport costs when they chose for that service to be carried out by Post Danmark, it was only because Post Danmark already benefited from the VAT exemption related to the USO on account of its status as a universal service provider.

236 Therefore, according to the Commission and the Kingdom of Denmark, the 'incidental indirect' advantage from which Post Danmark benefited, namely an increase in demand for its services, was a mere secondary effect stemming from the combination of the administrative practice at issue and the USO VAT exemption, which is imputable to the VAT Directive and, thus, to the European Union.

237 Lastly, the Kingdom of Denmark states, first, that Post Danmark was not the actual beneficiary of the administrative practice at issue, in so far as that practice had not released it from burdens normally included in its budget. Secondly, according to the Kingdom of Denmark, the administrative practice at issue did not lead it to waive resources, given the small effect of that practice on Post Danmark's turnover.

238 According to the settled case-law of the Court of Justice, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer a selective advantage on the beneficiary. Fourthly, it must distort or threaten to distort competition (see judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 31 and the case-law cited; judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40; and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

239 In that regard, where the Commission is able to rule out prima facie categorising the measures in question as State aid after having found that one of the essential conditions for the application of Article 107(1) TFEU is not satisfied, the Commission is free to decide to take no action on a complaint at the end of the preliminary investigation (see judgment of 15 March 2018, *Naviera Armas* v *Commission*, T-108/16, EU:T:2018:145, paragraph 113 and the case-law cited).

240 As regards, in particular, the first condition referred to in paragraph 238 above, it should be noted that, in order for it to be possible to categorise advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State, with these two conditions being distinct and cumulative (see judgment of 16 January 2020, *Iberpotash* v *Commission*, T-257/18, EU:T:2020:1, paragraph 50 and case-law cited).

241 As regards the condition that a measure of aid be imputable to the State, this requires an examination of whether the public authorities must be regarded as having been involved in the adoption of the measure at issue (judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 17; of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 21; and of 11 December 2014, *Austria* v *Commission*, T-251/11, EU:T:2014:1060, paragraph 86).

242 In that regard, where an advantage is provided for under national law, the requirement that it be imputable to the State must be regarded as satisfied (see, to that effect, judgments of 19 December 2013, *Association Vent De Colère! and Others*, C-262/12, EU:C:2013:851, paragraph 18; of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 22). Similarly, that requirement is satisfied where a tax system is adopted by the government of a State (see, to that effect, judgment of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 128).

243 In particular, as regards a national measure adopted to transpose into national law an obligation under a directive, it cannot, a priori, be excluded that such a measure is imputable to the State. It has already been held that a decision of an institution authorising a Member State to introduce, in accordance with a directive, a tax exemption could not have the effect of preventing the Commission from exercising the powers conferred on it by the Treaty and, consequently, setting in motion the procedure laid down in Article 108 TFEU in order to review whether that exemption constituted State aid (see, to that effect, judgment of 10 December 2013, *Commission* v Ireland and Others, C-272/12 P, EU:C:2013:812, paragraph 49).

244 However, the situation is different in the case of a tax exemption provided for by a national measure which implements a provision of a directive imposing on Member States a clear and precise obligation not to levy tax on a particular transaction. In such a case, the transposition of the exemption into national law merely fulfils the obligations incumbent on States under the Treaties. It follows that a measure adopted pursuant to a clear and precise obligation laid down in a directive is not imputable to the Member State, but arises, in actual fact, from an act on the part of the EU legislature.(see, to that effect, judgment of 5 April 2006, *Deutsche Bahn* v *Commission*, T-351/02, EU:T:2006:104, paragraph 102).

245 In short, a national administrative practice establishing a tax exemption must be imputed to the European Union where it merely fulfils a clear and precise obligation laid down in a directive, whereas it must be regarded as imputable to the State, within the meaning of Article 107(1) TFEU, where that State adopted it by making use of its discretion in the transposition of a directive.

246 In the present case, the parties accept that the administrative practice at issue was adopted by the Danish tax authorities on the basis of Article 27(3)(3) of the Danish VAT Law, which was itself adopted in order to transpose into national law point (c) of the first paragraph of Article 79 of the VAT Directive. It is equally common ground that the purpose of that administrative practice was to treat costs paid by mail-order companies to transport operators, in respect of transport services, as expenses incurred in the name and on behalf of the end customers of those companies. Thus, none of the parties dispute that that mechanism enabled mail-order companies to pass on to their end customers the VAT exemption from which they had benefited, under Article 132(1)(a) of the VAT Directive, when they requested the services of Post Danmark to transport goods to those customers, provided that such transport fell within the scope of the USO.

247 In the contested decision, the Commission found, first, in paragraph 193, that it was likely that such a practice provided Post Danmark with an indirect advantage resulting from an increase in demand, given that, owing to that practice, the end customers of mail-order companies had benefited from no VAT being charged on transport costs when the transport service was provided by Post Danmark.

248 In the second place, in paragraph 194 of the contested decision, the Commission took the view that that indirect advantage arose mainly from the VAT exemption that Post Danmark benefited from in relation to services covered by the USO, pursuant to Article 132(1)(a) of the VAT Directive. The Commission thus found that the VAT exemption on the transport, by Post Danmark, of goods ordered by end customers from mail-order companies was not imputable to the Danish State and concluded, in paragraph 195 of the contested decision, that the administrative practice at issue did not constitute State aid.

249 As a preliminary point, it should be noted that, since, in the contested decision, the Commission ruled out the existence of State aid on the ground that the effects of the administrative practice at issue were not imputable to the Danish State, the Kingdom of Denmark cannot validly claim, in essence, for the purposes of dismissing the action, that that practice did not confer an advantage on Post Danmark and did not entail a waiver of resources by the Danish State. Such arguments, if accepted, would lead the Court to amend the grounds of the contested decision, in disregard of the settled case-law according to which, in the context of an action for annulment, the Court may not substitute its own reasoning for that of the author of the contested act (see, to that effect, judgment of 26 October 2016, *PT Musim Mas* v *Council*, C-468/15 P, EU:C:2016:803, paragraph 64 and the case-law cited).

250 The applicants contest the conclusion reached by the Commission in the contested decision with regard to the administrative practice at issue and claim that that practice did indeed confer on Post Danmark an advantage imputable to the Danish State.

251 In that regard, in the first place, it should be noted that the administrative practice at issue was introduced in 1990 by Administrative Decision No 1306/90 and by Administrative Regulation F 6742/90, adopted by the Danish tax authorities, and that that practice was abolished by Instruction No 14-2926872/SKM2016.306.SKAT, issued by that tax authority, with effect from 1 January 2017. Thus, pursuant to what has been stated in paragraphs 241 and 242 above, it is apparent that the administrative practice at issue is, from a formal point of view, imputable to the Danish State.

252 It is necessary to examine, in the second place, whether the Commission was entitled to take the view that the VAT exemption on transport services provided by Post Danmark was, from a substantive point of view, imputable to the European Union in so far as such an exemption followed from the VAT Directive, without that demonstrating the existence of serious difficulties.

253 First, it must be borne in mind that Article 132(1)(a) of the VAT Directive, on which the Commission based its analysis in paragraph 194 of the contested decision, requires that services supplied by public postal services be exempt from VAT.

254 In that regard, first, the Court of Justice has already held that the concept of 'public postal services' within the meaning of Article 132(1)(a) of the VAT Directive refers to the actual organisations which engage in the supply of the services to be exempted and that, in order to be covered by the wording of that provision, the services must be performed by a body which may be described as 'the public postal service' in the organic sense of that expression (see, to that effect, judgment of 23 April 2009, *TNT Post UK*, C-357/07, EU:C:2009:248, paragraph 27 and the case-law cited). The Court of Justice has also held that services covered by Article 132(1)(a) of the VAT Directive are those that the public postal services carry out as such, that is, by virtue of their status as public postal services (see, to that effect, judgment of 23 April 2009, *TNT Post UK*, C-357/07, EU:C:2009:248, paragraph 44).

255 The wording of Article 132(1)(a) of the VAT Directive is thus clear and precise in establishing a VAT exemption for transactions carried out by a universal service provider and which fall within the scope of the USO, by way of exception to the general rule that VAT is to be levied on all services supplied for consideration by a taxable person.

256 That is why, as acknowledged by the parties, where a mail-order company uses Post Danmark's services for the transport of goods, Post Danmark, as the universal service provider in Denmark, should not invoice VAT to that company if the service requested falls within the scope of the USO.

257 However, where that transport of the goods in question is subsequently invoiced by the mail-order company to its end customer, that service is ancillary to the principal transaction consisting of the sale of goods by that company and cannot be regarded as a service performed by a 'public postal service' within the meaning of Article 132(1)(a) of the VAT Directive.

258 In other words, in accordance with Article 132(1)(a) of the VAT Directive, a mail-order company is not required to pay VAT to Post Danmark for the service of transporting goods to its end customer, where that service is covered by the USO. Nevertheless, where that service is subsequently invoiced by the mail-order company to its end customer, it no longer comes within the scope of the exemption laid down in that provision, meaning that the end customer is indeed liable to pay VAT on transport costs paid to that company.

259 Thus, contrary to what is stated in the contested decision and to what is suggested by the Commission and the Kingdom of Denmark in the context of the present dispute, the VAT exemption under the administrative practice at issue for the service of transporting goods carried out by Post Danmark, but invoiced by mail-order companies to their end customers, cannot be regarded as directly following from Article 132(1)(a) of the VAT Directive.

260 Secondly, it is necessary to examine the applicants' argument that the VAT exemption for the service of transporting goods invoiced by mail-order companies to their end customers, where those services were supplied by Post Danmark, cannot be regarded as imputable to the European Union under point (c) of the first paragraph of Article 79 of the VAT Directive.

261 Pursuant to point (c) of the first paragraph of Article 79 of the VAT Directive, amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account, are not to be included in the taxable amount.

262 Point (c) of the first paragraph of Article 79 of the VAT Directive thus requires that amounts which correspond not to the price of a service proposed by a taxable person, but rather to a reimbursement for a payment made by the latter in the name and on behalf of his customer to be excluded from the

taxable amount for VAT purposes. In that regard, it should be noted, as the parties have done, that that clear and precise obligation was transposed into Danish law by Article 27(3)(3) of the Danish VAT Law.

263 However, contrary to what is claimed, in essence, by the Commission and the Kingdom of Denmark, it does not follow from point (c) of the first paragraph of Article 79 of the VAT Directive that the Member States must consider that the transport costs invoiced by a mail-order company to its end customer constitute, in any event, a reimbursement of costs incurred by that company in the name and on behalf of that customer and must, therefore, be excluded from the taxable amount for VAT purposes.

264 On the contrary, point (b) of the first paragraph of Article 78 of the VAT Directive requires the inclusion in the taxable amount for VAT of incidental expenses, such as commission, packing, transport and insurance costs charged by the supplier to the purchaser of goods.

265 Moreover, as rightly noted by the applicants and as the Kingdom of Denmark acknowledged in response to a question put by the Court in the context of a measure of organisation of procedure, the Danish tax authorities took the view, in its instruction No 14 2926872/SKM2016.306.SKAT of 30 June 2016, which abolished the administrative practice at issue, that that practice '[did] not have a legal basis in the [Danish VAT Law] or in the [VAT Directive]', and concluded that 'it [was] not possible to maintain the existing administrative practice'. As is apparent from paragraph 49 of the contested decision, the Commission was aware that that practice had been abolished since ITD had included this fact in its complaint.

266 In those circumstances, it cannot be ruled out that, by allowing, by means of the administrative practice at issue, the transport costs invoiced by mail-order companies to their end customers to be treated as reimbursements of sums paid by those companies in the name and on behalf of those customers, the Danish tax authorities did not merely reproduce a clear and precise requirement imposed under EU law, but rather exercised their discretion in transposing a directive. That fact tends to establish the imputability of that measure to the Danish State, and not to the European Union, pursuant to the principles set out in paragraphs 243 to 245 above. That conclusion is supported by the written pleadings of the Commission and the Kingdom of Denmark, from which it is apparent that the administrative practice at issue resulted from the Danish authorities' 'interpretation' of the rule laid down in point (c) of the first paragraph of Article 79 of the VAT Directive (see paragraph 86 of the defence, paragraph 65 of the statement in intervention of the Kingdom of Denmark and paragraph 28 of the Kingdom of Denmark's replies to the questions put by the Court in the context of a measure of organisation of procedure).

267 It was indeed due to the application of the administrative practice at issue that mail-order companies were authorised to pass on to their end customers the VAT exemption on transport services provided by Post Danmark, from which those companies had benefited under Article 132(1)(a) of the VAT Directive. Moreover, in paragraph 89 of the defence and in paragraph 67 of the rejoinder, the Commission states that the increase in demand from which Post Danmark indirectly benefited was made possible by the 'combination', first, of the VAT exemption provided for in Article 132(1)(a) of the VAT Directive and, secondly, the fact that that exemption was passed on to the end customers of mail-order companies as authorised by the administrative practice at issue. In other words, as the applicants rightly submit, in the absence of the administrative practice at issue, mail-order companies would have been required to apply VAT to transport costs invoiced to their end customers, irrespective of the operator selected to provide such transport. Therefore, in such a case, the mail-order companies would not have been encouraged to request Post Danmark's services and, thus, it is not likely that Post Danmark would have benefited from an increase in demand.

268 In the light of the foregoing, the Commission could not exclude the existence of serious difficulties as regards the imputability to the Danish State of the effects of the administrative practice at issue in increasing demand for Post Danmark's services, by confining itself to recalling the VAT exemption for services supplied by public postal services laid down in Article 132(1)(a) of the VAT Directive. In particular since it has been established that that exemption was not applicable to the transport costs of goods where those services were invoiced by a mail-order company to its end customers (see paragraph 257 above). In so doing, when assessing whether the effects of the administrative practice at issue were attributable to the European Union or to the Danish State, the Commission failed to examine the links between that practice and the rule laid down in point (c) of the first paragraph of Article 79 of the VAT Directive, on which it was based. Similarly, the Commission failed to take account of the abolishment of that practice by the Danish tax authorities on the ground that it had no basis in EU law, even though that abolishment had been mentioned in ITD's complaint.

269 That conclusion cannot be called into question by the argument put forward by the Kingdom of Denmark that, in any event, the purpose of the administrative practice at issue was to ensure cheaper postal services for consumers and not to increase demand for Post Danmark. Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, with the concept of aid being objective (see, to that effect, judgment of 15 March 2018, *Naviera Armas* v *Commission*, T-108/16, EU:T:2018:145, paragraph 86 and the case-law cited). Thus, the purpose of the objectives pursued by State measures have no bearing whatsoever on whether such measures are to be classified as State aid (see, to that effect, judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 17 and case-law cited).

270 Consequently, it must be concluded that the applicants are correct in claiming that the Commission did not conduct a complete and sufficient examination of whether the increase in demand from which Post Danmark indirectly benefited, through the application of the administrative practice at issue, was imputable to the Danish State.

271 It follows that the present action must be upheld in so far as it is directed at the part of the contested decision in which the Commission, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, concluded that the administrative practice at issue was not imputable to the Danish State and, therefore, that that practice did not constitute State aid.

4. The accounting allocation of common costs between Post Danmark's USO and non-USO activities

272 According to the applicants, supported by Jørgen Jensen Distribution and Dansk Distribution, the Commission erred in concluding, first, that the allocation of costs between Post Danmark's commercial activities and USO activities was adequate and, secondly, that that allocation did not, in any event, demonstrate the imputability of the State, the transfer of State resources or the grant of an advantage.

273 In support of those claims, the applicants state, in the first place, that the reasoning on the basis of which the Commission reached that conclusion is not included in the contested decision and that, in the absence of publication of such reasoning, it should be held that the accounting regulation applicable to Post Danmark between 2006 and 2013 obliged it to misallocate common costs between its USO and non-USO services ('the common costs').

274 In the second place, the applicants submit, in essence, that the accounting regulation applicable between 2006 and 2013 allowed Post Danmark to allocate all common costs to the USO, regardless of whether a part of the costs was shared by non-USO services. Consequently, according to the applicants, it is impossible to conclude that the common costs were allocated, in practice, on the basis

of a direct analysis of their origin, in breach of Article 14(3)(b)(i) of Directive 97/67, which provides that 'whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves'. In particular, the accounting regulation applicable to Post Danmark was amended in 2014 with the specific aim of ending the incompatibility of the previous versions with Directive 97/67.

275 The applicants add that the Commission's arguments seeking to demonstrate that Post Danmark's accounting regulation was lawful are based, incorrectly, on the version applicable from 2014. In its complaint, ITD criticised the two accounting regulations applicable successively from 2006 to 2011 ('the 2006 accounting regulation') and from 2011 to 2013 ('the 2011 accounting regulation'), which were revoked when a new accounting regulation was adopted in 2014.

276 In the third place, according to the applicants, the allocation of costs relating to Post Danmark's various activities, arising from the accounting regulation applicable between 2006 and 2013, conferred an advantage on Post Danmark by allowing it to artificially reduce the costs of its non-USO commercial activities and thus to charge predatory prices for those activities. In that regard, that cost allocation of Post Danmark's activities resulted in an increase in the prices for postal services covered by the USO of DKK 280 million (approximately EUR 37.5 million) per year. In addition, an analysis of the accounting year following the adoption of the new accounting regulations, in 2014, showed that 4.2% of the costs formerly attributed to the USO were shifted to costs attributed to non-USO activities.

277 In the fourth place, the applicants claim that the misallocation of common costs involved the transfer of State resources to Post Danmark. The Danish State was in a position to give instructions on and direct the use of Post Danmark's resources. In that regard, the applicants note that internal transfers to a legal entity may constitute State aid.

278 In addition, the applicants claim that the misallocation of common costs enabled Post Danmark to benefit from an increase in revenues from stamp taxes. In that regard, the applicants note that Post Danmark, as the universal service provider, issues postage stamps the price of which is pre-defined in order to cover the costs of the USO and that it may only keep the revenue from the sale of postage stamps to the extent that they are necessary to cover the costs incurred by fulfilling the USO, with any surplus having to be repaid to the Danish State. Thus, by overestimating such costs, Post Danmark benefited from an overpayment of stamp taxes, constituting a loss of revenue for the Danish State and the provision of State resources to Post Danmark. In their observations on the statement in intervention of the Kingdom of Denmark, the applicants state that the Minister for Transport must approve the prices for stamps for domestic stamped letters, thereby qualifying the revenue from the sale of those postage stamps as State resources.

279 In the fifth place, the applicants claim that the Commission should have carried out a more detailed examination of whether the measure was imputable to the State. In that regard, the Commission did not assess any of the relevant indicators identified in the case-law for the purpose of determining whether a decision taken by a public undertaking is imputable to the State. In addition, the applicants note that it was the Danish authorities that adopted the accounting regulations of 2006 and 2011 and that those accounting regulations obliged Post Danmark to apply an allocation method that included common costs in the costs relating to the USO.

280 Thus, according to the applicants, those errors mean that the examination carried out by the Commission during the preliminary investigation procedure was insufficient or incomplete and constitute evidence of the existence of serious difficulties, in the presence of which the Commission should have initiated the formal investigation procedure.

281 The Commission, supported by the Kingdom of Denmark, contests the applicants' arguments.

282 First of all, it should be noted that, in paragraph 196 of the contested decision, the Commission found that the accounting rules applicable to Post Danmark allowed for an adequate separation between the USO and non-USO activities. In that regard, it referred to the part of the contested decision relating to its assessment of the compliance of such rules with its Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17), carried out in the context of assessing the compatibility of the compensation at issue with the internal market. In paragraph 197 of that decision, the Commission stated that, between 2006 and 2013, Post Danmark's regulatory accounts had been subject to an annual review of their compliance with the accounting regulation by a State-authorised public accountant, to regular auditing by the national regulatory authority and to an audit by an independent firm, whose report, published on 4 December 2014, found that there was well-founded reasoning behind the choice of allocation keys in Post Danmark's accounting practices.

283 Next, in a section of the contested decision entitled 'Imputability and State resources', the Commission found, in paragraph 198, first, that the alleged misallocation of costs did not seem to involve the transfer of any State resources; secondly, that the Danish authorities' involvement in setting the prices of non-USO services had not been established and, thirdly, that the alleged cross-subsidisation did not seem to have conferred an advantage on Post Danmark, given, in particular, that the latter had not received any compensation on the basis of the contested cost allocation during the relevant period. The Commission concluded, in paragraph 199 of the contested decision, that the alleged misallocation of common costs under Post Danmark's accounting practices did not constitute State aid.

284 Lastly, in paragraph 206(iii) of the contested decision, the Commission concluded that the cross-subsidisation of commercial services was not factually confirmed and that, in any event, it did not constitute State aid (see paragraph 30 above).

285 It is therefore apparent from the contested decision that the Commission based its conclusion, principally, on the erroneous nature of the claim that the accounting rules applicable to Post Danmark had led to a misallocation of common costs and, in any event, on the fact that a number of the criteria laid down in Article 107(1) TFEU had not been met.

286 Thus, the applicants cannot accuse the Commission of failing to state the reasons for its conclusion and the applicants were in a position to challenge the various elements of that conclusion in their application.

287 As regards the allegation that the examination carried out by the Commission was insufficient and incomplete, it is appropriate to recall, as a preliminary point, the wording of Article 14(2) to (4) of Directive 97/67, which reads as follows:

'2. The universal service provider(s) shall keep separate accounts within their internal accounting systems in order to clearly distinguish between each of the services and products which are part of the universal service and those which are not. This accounting separation shall be used as an input when Member States calculate the net cost of the universal service. Such internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles.

3. The accounting systems referred to in paragraph 2 shall, without prejudice to paragraph 4, allocate costs in the following manner:

(a) costs which can be directly assigned to a particular service or product shall be so assigned;

(b) common costs, that is costs which cannot be directly assigned to a particular service or product, shall be allocated as follows:
   (i) whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;

(ii) when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;

(iii) when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the universal services and, on the other hand, to the other services;

(iv) common costs, which are necessary for the provision of both universal services and non-universal services, shall be allocated appropriately; the same cost drivers must be applied to both universal services and non-universal services.

4. Other cost accounting systems may be applied only if they are compatible with paragraph 2 and have been approved by the national regulatory authority. The Commission shall be informed prior to their application.'

288 Article 4(3) of the 2011 accounting regulation provided as follows:

'(a) Costs that are incremental in relation to a specific service shall be allocated to that service. This applies to both variable and fixed costs.

(b) Costs that cannot be attributed to a specific service shall, whenever possible, be allocated to a group of services based on a direct analysis of the origin of the costs themselves (attributable common costs).

(c) When determining the cost allocation under 4(3)(a) and (b), the costs necessary to provide the universal service obligation shall be allocated to each of the services covered by the universal service obligation or to a group of services covered by the universal service obligation.

(d) Costs that cannot be allocated on the basis of a direct analysis (non-attributable common costs) shall be allocated to the groups of services concerned on the basis of an indirect link with another cost category or another group of cost categories for which it is possible to carry out direct orientation or separation. Such an indirect link must be based on comparable cost structures.

(e) In the case of non-attributable common costs for which there is no direct or indirect method for allocating costs, the cost categories shall be allocated on the basis of a general allocation key calculated by using the ratio of all costs directly or indirectly assigned or allocated, on the one hand, to each of the services covered by the universal services and, on the other hand, to the other services.

(f) The common costs that are necessary for the provision of both universal and non-universal services (non-attributable common costs), shall be appropriately distributed. The same costs drivers must be applied to both universal services and non-universal services.'

289 Article 4(3)(a) to (e) of the 2011 accounting regulation was identical to Article 4(4)(a) to (e) of the 2006 accounting regulation.

290 It should be noted at the outset that it is common ground that Article 4(3)(c) of the 2011 accounting regulation was not worded in the same way as the part of Article 14(3) of Directive 97/67 that sets out the accounting principles which universal service providers designated by Member States are required to comply with.

291 However, that difference alone is not sufficient to establish that the 2006 and 2011 accounting regulations breached the accounting principles laid down in Directive 97/67. Moreover, under Article 14(4) of Directive 97/67 Member States may apply to universal service providers cost accounting systems other than those provided for in paragraph 3 of that article.

292 In particular, contrary to the applicants' contention, which is limited to a mere assertion on their part, it is not apparent from the wording of Article 4(4)(c) of the 2006 accounting regulation and Article 4(3)(c) of the 2011 accounting regulation, set out in paragraph 288 above, that those provisions required or even allowed Post Danmark to allocate all common costs to the costs incurred for the provision of the USO. As regards the common costs, the principle established in those provisions was allocation on the basis of a direct analysis of their origin.

293 In that regard, the Kingdom of Denmark rightly states that those provisions constituted a clarification of the manner in which the costs were to be recorded in Post Danmark's internal accounts after they had been allocated to the USO. In particular, it is apparent from the clarifications provided by the Kingdom of Denmark, in response to a question put by the Court in the context of a measure of organisation of procedure, that Post Danmark's cost allocation was based on a method relating to 'incremental costs', which are defined in the annexes to the accounting regulation as 'fixed and variable costs which lapse in the short or medium term (three to five years), provided that a service lapses'. Costs which were thus considered incremental costs were deemed to be costs that could be directly assigned to the specific service to which they related. Article 4(4)(c) of the 2006 accounting regulation and Article 4(3)(c) of the 2011 accounting regulation, which have been challenged by the applicants, merely stated that when costs were allocated to the USO on the basis of the incremental cost method, those costs had to be attributed, within the USO, to the relevant service, in accordance with the rule laid down in subparagraph (a), or to the relevant group of services, in accordance with the rule laid down in subparagraph (b). In other words, Article 4(4)(c) of the 2006 accounting regulation and Article 4(3)(c) of the 2011 accounting regulation simply constituted a specific application to the USO of the principles laid down in subparagraphs (a) and (b) of those provisions.

294 The appropriateness of the accounting allocation of common costs is supported by the fact noted by the Commission in paragraph 197 of the contested decision, that Post Danmark's accounts had been subject to regular audits by a State-authorised public accountant and the national regulatory authority (see, by analogy, judgment of 15 October 2020, *První novinová společnost* v *Commission*, T-316/18, not published, EU:T:2020:489, paragraph 253).

295 Similarly, the applicants, who bear the burden of proving the existence of serious difficulties (see paragraph 51 above), have not furnished any evidence to support their claim that, in practice, Post Danmark systematically allocated common costs to the costs associated with the USO. In that regard, the applicants merely submit that, following the adoption, in 2014, of a new accounting regulation which included the exact wording of Article 14(3) of Directive 97/67, the costs associated with the USO decreased in comparison with the previous year, whereas the costs associated with Post Danmark's other activities increased. However, first, that argument is based on an assertion which has not been substantiated. Secondly, even if it were established, the existence of a variation in the allocation of the various costs from one year to the next, noted by the applicants, cannot, in itself, be sufficient for it to be presumed that, during the preceding period, common costs were systematically allocated to the costs associated with the USO.

296 In those circumstances, the Commission was entitled to take the view that the allocation of common costs to the USO costs had not been established and that the accounting regulation applicable to Post Danmark between 2006 and 2013 resulted in an appropriate allocation of the different types of costs.

297 Consequently, it must be concluded that the applicants have not established that the Commission was faced with serious difficulties that it was not able to overcome, when it ruled out the possibility that the accounting rules applicable to Post Danmark between 2006 and 2013 resulted in the existence of

State aid, on the basis, principally, that there was no evidence of any irregularity in the allocation of common costs. Accordingly, it is not necessary to examine the claims directed against the Commission's alternative reasoning relating to the absence, in any event, of State aid resulting from the allocation of costs in Post Danmark's accounting practices.

5. The capital increase of 23 February 2017

298 The applicants, supported by Jørgen Jensen Distribution and Dansk Distribution, claim that the conclusion that the increase in capital of 23 February 2017 does not constitute State aid demonstrates that the Commission's examination of that measure was insufficient and incomplete.

299 In the first place, the applicants dispute the Commission's conclusion that the capital increase of 23 February 2017 is not imputable to the Danish State.

300 To that effect, first of all, they note that ITD stated in its complaint that the Danish and Swedish authorities had encouraged PostNord to make that increase in capital for the same reasons as those set out in the agreement of 20 October 2017. Furthermore, ITD furnished, during the preliminary examination stage, two presentations prepared by the Danish Ministry of Transport, dated 9 and 22 February 2017, according to which Post Danmark's viability was subject to increases in capital by PostNord, which suggests that the Danish authorities were informed of the capital increase of 23 February 2017 and accordingly constitutes evidence that that measure is imputable to the State.

301 Next, the applicants complain that the Commission wrongly concluded that the capital increase of 23 February 2017 was not imputable to the State by simply stating that the mere fact that PostNord was a public undertaking under State control was not sufficient for measures taken by that undertaking to be imputed to the shareholder States. The Commission should have assessed the possible imputability to the State of the capital increase of 23 February 2017 in the light of the criteria identified in the case-law and, in particular, in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294).

302 Lastly, the applicants complain that the Commission failed to inform ITD of its position on the absence of evidence capable of demonstrating that the capital increase of 23 February 2017 was imputable to the State and did not invite ITD to submit observations in that regard, thus infringing Article 24(2) of Regulation 2015/1589.

303 Secondly, the applicants challenge the notion that a private investor would have made the capital increase of 23 February 2017.

304 In that regard, first, the applicants claim that the Commission was wrong to conclude that the capital increase of 23 February 2017 had avoided Post Danmark's bankruptcy, since such bankruptcy was merely deferred by a few years.

305 Secondly, as regards the negative effects allegedly avoided by the capital increase of 23 February 2017, the applicants first challenge the note from PostNord's board of directors ('the board of directors' note'), of which they were not informed and on which the Commission relied. In particular, there is no evidence of the date, relevance or reliability of the data used for the assessment contained in that note. The applicants thus request the Court to adopt a measure of organisation of procedure requesting production of that note.

306 Next, the applicants state that the negative effects allegedly avoided by the capital increase of 23 February 2017 are summarised in very general terms in the contested decision and are not sufficient to support the conclusion that a private investor would have chosen to avoid such effects by making that increase in capital. The Commission did not carry out an overall assessment of all the

relevant factors in order to determine whether the State took the measure in question in its capacity as shareholder or as a public authority, since it relied solely on the explanations provided by the Swedish and Danish authorities.

307 The applicants also emphasise that the Commission's assessment cannot be based on an economic rationale, unless the view is taken that the private investor principle applies to any increase in capital from a parent company to its subsidiary when on the verge of bankruptcy. That is particularly so given that, in the light of Post Danmark's significant economic difficulties during the years preceding the capital increase of 23 February 2017, there was no urgency following the publication of Post Danmark's year-end report.

308 Moreover, in relation to the negative effects as summarised in the contested decision, the applicants note that the Commission disregarded the case-law relating to the private investor in a market economy test, which requires that objective and verifiable elements be taken into account. The Commission merely made general statements and failed to identify, first, the actors whose trust in the PostNord group would have been affected by Post Danmark's bankruptcy, secondly, the financial agreements of the PostNord group which would probably have been terminated in the event of Post Danmark's bankruptcy, thirdly, the agreements entered into by PostNord with property owners or suppliers who would have been affected by Post Danmark's bankruptcy, and the guarantees that PostNord would have triggered in such a situation, and fourthly, the assignments that could have been lost by the remaining Danish part of the PostNord group. The applicants add that none of those alleged losses were quantified and, accordingly, they could not be used to establish the losses that would be incurred by the PostNord group in the event of Post Danmark's bankruptcy.

309 In addition, the applicants maintain that the negative effects allegedly avoided by the capital increase of 23 February 2017 are closely related to the deterioration of the brand image of the PostNord group as a whole as a result of Post Danmark's bankruptcy. It is clear from the case-law that it is only in exceptional cases, under specific circumstances, that harm to the brand image of the State in the event of the bankruptcy of a public undertaking may justify an increase in capital intended to avoid bankruptcy. In that regard, the applicants stress that it is common knowledge that the Kingdom of Denmark and the Kingdom of Sweden are PostNord's two shareholders and, accordingly, that it was indeed the protection of their brand image which justified the capital increase of 23 February 2017.

310 Lastly, the applicants complain that the Commission failed to assess whether any of the costs that would result from a possible bankruptcy of Post Danmark had arisen from the grant of State aid. The applicants argue that that is the case, in particular, with regard to the loans or guarantees provided by PostNord, which, in view of Post Danmark's financial difficulties, would probably not have been granted by a prudent operator in a market economy.

311 The Commission, supported by the Kingdom of Denmark, contests the applicants' arguments.

312 In the first place, the Commission notes that it stated its preliminary position on ITD's complaint at a meeting held on 19 January 2018 and that that preliminary position was also discussed with the applicants' representative during a subsequent telephone conversation. Thus, the Commission cannot be criticised for failing to fulfil an obligation to provide information under Article 24(2) of Regulation 2015/1589.

313 In the second place, it points out that it complied with its obligation to conduct a diligent examination of ITD's complaint by requesting from the Danish authorities the information necessary for the assessment not only of the elements put forward in that complaint, but also in ITD's supplementary submissions. The Commission adds that the mere fact that the applicants call into question the outcome of that assessment cannot constitute evidence of the existence of serious difficulties.

314 In the third place, the Commission refutes the evidence put forward by the applicants seeking to demonstrate the imputability to the State of the capital increase of 23 February 2017. In particular, the presentations of the Danish Ministry of Transport show that the Danish State was a 'passive spectator' of that measure. Those presentations are silent as to Post Danmark's imminent risk of bankruptcy and consider only long-term solutions for that company, which do not relate to the capital increase of 23 February 2017. The Commission also relies on the principle of sincere cooperation to support its assertion that the Member States are required to send it all the information necessary to enable it to verify whether a measure constitutes aid and, if so, whether it is compatible with the internal market. Thus, the Commission, which argues that initiation of the formal investigation procedure would not have enabled it to obtain further information, was entitled to rely on the statements made by the Danish and Swedish authorities that the capital increase of 23 February 2017 could not be imputed to them for the purposes of concluding, in the absence of evidence to the contrary, that that was indeed the case.

315 For its part, the Kingdom of Denmark, confirming that it did not become aware of the capital increase of 23 February 2017 until after it had been completed, submits that there is nothing to indicate that PostNord's operations should be generally imputed to the Danish or Swedish authorities. In that regard, it notes that that company acts on the market independently and with a large degree of autonomy, that it is managed in accordance with commercial principles and operates in competition with private operators on a fully liberalised market, that it is not under any obligation to have certain transactions approved by its owners and that all its transactions are based entirely on financial considerations.

316 In the fourth place, as regards the applicants' arguments relating to the private investor in a market economy test, the Commission maintains that the capital increase of 23 February 2017 was a direct consequence of PostNord's year-end report, published on 10 February 2017, which highlighted that Post Danmark was at imminent risk of bankruptcy. Thus, many reasons, such as gaining time with a view to restructuring the subsidiary – which was the position of PostNord in relation to Post Danmark – as well as maintaining business relations and financing conditions on the financial markets, could justify a private investor, faced with such a risk to its subsidiary, increasing its capital therein, by a limited amount, within a short period of time.

317 The Commission therefore disputes that its line of argument leads to the conclusion that any increase in capital from a parent company to its subsidiary is justified.

318 In that regard, invoking the judgment of 25 June 2015, *SACE and Sace BT* v *Commission* (T-305/13, EU:T:2015:435), the Commission notes that, in order to assess whether a Member State acted like a private operator, it is necessary to assess the economic rationality of the measure at issue by reference to the context in which it was adopted. In order to do so, the Commission should have at its disposal the most complete and reliable information possible, with the information thus required depending on the circumstances of the case and on the nature and complexity of the measure in question.

319 Therefore, according to the Commission, the mere fact that PostNord did not commission a thorough economic analysis by independent experts before the capital increase of 23 February 2017 is not sufficient to conclude that it did not act like a private investor, since no company faced with a sudden and imminent risk of bankruptcy of its subsidiary would have had time to act in that way.

320 The Commission thus concludes that, in finding that the capital increase of 23 February 2017 did not confer an advantage on Post Danmark, it assessed the information provided by the Danish and Swedish authorities, and, the information submitted by ITD in the light of economic rationality and logic. More specifically, the Commission considered that that increase in capital amounted to reasonable conduct on the part of a parent company in view of the cost it would have had to bear if it allowed Post Danmark to go bankrupt and the possibility of transforming it into an efficient undertaking in the

future. It is therefore incorrect to allege that the Commission blindly followed the argument of the Danish and Swedish authorities and, in particular, the elements set out in the board of directors' note and described in paragraph 80 of the contested decision.

321 In that regard, the Kingdom of Denmark states that, between the end of 2016 and the beginning of 2017, Post Danmark's assets were significantly written down, leading to a worsening of the year's results by DKK 733 million, which, combined with its operating losses, led Post Danmark to suddenly lose more than half of its equity capital. Secondly, the Kingdom of Denmark submits that the capital increase of 23 February 2017 was carried out in view of the fact that Post Danmark's transformation should enable the company to make efficiency gains, even though the arrangements for financing that transformation were not finalised until after the conclusion of the agreement of 20 October 2017.

322 Lastly, the Commission claims there is an incorrect premiss underlying the applicants' argument that the Commission considered and accepted that PostNord had made the capital increase of 23 February 2017 in order to preserve its brand image. In any event, the analogies with the case-law relating to the preservation of a Member State's brand image as an economic operator cannot be transposed to PostNord's situation since the latter is an operator with its own brand name.

(a) The existence of an infringement of Article 24(2) of Regulation 2015/1589

323 The applicants submit that the Commission infringed Article 24(2) of Regulation 2015/1589 in so far as it did not inform ITD of its intention to reject the complaint on the ground that there was no evidence capable of establishing that the capital increase of 23 February 2017 was imputable to the State, and in so far as it did not invite ITD to submit further observations in that regard.

324 According to the second subparagraph of Article 24(2) of Regulation 2015/1589, 'where the Commission considers that the interested party does not comply with the compulsory complaint form, or that the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful aid or misuse of aid, it shall inform the interested party thereof and call upon it to submit comments within a prescribed period which shall not normally exceed one month'.

325 Furthermore, the third subparagraph of Article 24(2) of that regulation states that 'the Commission shall send a copy of the decision on a case concerning the subject matter of the complaint to the complainant'.

326 It follows from the second and third subparagraphs of Article 24(2) of Regulation 2015/1589, which governs the rights of interested parties, that the Commission, after obtaining from an interested party information concerning alleged unlawful aid, will either consider that there are insufficient grounds for taking a view on the case and inform the interested party thereof or take a decision on the case concerning the subject matter of the information supplied (see, to that effect, judgment of 18 November 2010, *NDSHT* v *Commission*, C-322/09 P, EU:C:2010:701, paragraph 55).

327 In the present case, as regards the question of the imputability to the State of the capital increase of 23 February 2017, the Commission adopted a decision after examining ITD's complaint and taking the view that it was not possible to establish such imputability.

328 In those circumstances, the Commission was not required to inform ITD of its intention to reject the complaint before adopting the contested decision. The complaint alleging an infringement of Article 24(2) of Regulation 2015/1589 must therefore be rejected.

(b) The imputability of the capital increase of 23 February 2017

329 As is apparent from the case-law referred to in paragraphs 239 and 240 above, the imputability of a measure to a Member State is an independent condition for a measure to be classified as State aid within the meaning of Article 107(1) TFEU and, where the Commission is able to rule out such imputability in respect of a measure it has received a complaint about, it may adopt a decision not to raise objections.

330 In that regard, according to the case-law of the Court of Justice, the imputability of a measure to the State cannot be inferred from the mere fact that the measure at issue was taken by a public undertaking (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 51 and 57).

331 Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 52).

332 On that point, it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. In the first place, having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty. Moreover, it will, as a general rule, be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to demonstrate in a particular case that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 53 and 54).

333 For those reasons, in paragraph 55 of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), the Court of Justice held that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. In that respect, the Court noted that it had already taken into consideration the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities (see, to that effect, judgment of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission*, 67/85, 68/85 and 70/85, EU:C:1988:38, paragraph 37) or the fact that, apart from factors of an organic nature which linked the public undertakings to the State, those undertakings, through the intermediary of which aid had been granted, had to take account of directives issued by a government (see, to that effect, judgments of 21 March 1991, *Italy* v *Commission*, C-303/88, EU:C:1991:136, paragraphs 11 and 12, and of 21 March 1991, *Italy* v *Commission*, C-305/89, EU:C:1991:142, paragraphs 13 and 14).

334 In addition, other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public

authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 56).

335 However, the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot, having regard to the autonomy which that legal form is capable of conferring upon it, be regarded as sufficient to exclude the possibility of an aid measure taken by such a company being imputable to the State. The existence of a situation of control and the real possibilities of exercising a dominant influence which that situation involves in practice makes it impossible to exclude from the outset any imputability to the State of a measure taken by such a company, and hence the risk of an infringement of the Treaty rules on State aid, notwithstanding the relevance, as such, of the legal form of the public undertaking as one indicator, amongst others, enabling it to be determined in a given case whether or not the State is involved (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 57 and the case-law cited).

336 In the present case, in paragraphs 200 to 202 of the contested decision, having reproduced paragraph 52 of the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294), referred to in paragraph 331 above, the Commission first of all observed that PostNord's ownership structure and the rules of appointment for members of its board of directors showed that the Danish and Swedish States might have been in a position to exercise a dominant influence over that company. Next, the Commission considered that those factors did not establish that those States had effective control over PostNord at the time of the capital increase of 23 February 2017 or that the public authorities were involved, in any way, in the adoption of that measure. Lastly, the Commission took the view that ITD had not adduced any evidence to establish that the capital increase of 23 February 2017 was imputable to the Danish State or the Swedish State.

337 The applicants claim that that assessment shows that the examination carried out by the Commission was insufficient and incomplete.

338 In that regard, it should be noted that the Commission was correct to state that the mere fact that a company is publicly owned is not sufficient to give rise to a presumption that any decision taken by that company is imputable to the shareholder State, in accordance with the principles laid down by the Court of Justice in the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294) (see paragraphs 330 and 331 above).

339 However, it is also clear from the judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002: 294), that, in the case of an undertaking over which a Member State might exercise a dominant influence, the Commission must establish, on the basis of a set of sufficiently precise and convergent indicators, that the involvement of the State in the decision made by that undertaking was specific or that the absence of such involvement was unlikely having regard to the circumstances and the context of the case (see paragraph 334 above) (see, to that effect, judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraphs 51 and 52).

340 Thus, in the present case, since it found that PostNord was an undertaking over which the Danish and Swedish States might exercise a dominant influence, the Commission could not merely conclude that it was not in a position to presume that the capital increase of 23 February 2017 was imputable to the State. In accordance with the principle referred to in paragraph 339 above, it was for the Commission, as the case may be, to establish specifically, on the basis of indicators which it was to identify according to the information available to it, whether or not it was likely that the capital increase of 23 February 2017 was imputable to the Danish and Swedish States.

341 It follows that, by merely stating that PostNord was a public undertaking, the Commission carried out an insufficient analysis of the State's involvement in the adoption of the contested act. That approach amounts, in effect, to excluding the imputability to the State of the increase in capital of 23 February 2017 on the sole ground that PostNord was incorporated as a commercial company, in breach of the principle established by the Court of Justice and recalled in paragraph 335 above.

342 Furthermore, it should be noted that, in support of its complaint, ITD had mentioned two presentations by the Danish Ministry of Transport dated 9 and 22 February 2017.

343 It is true that, as noted by the Commission and the Kingdom of Denmark, those presentations considered long-term solutions which would allow a new production model to be implemented at Post Danmark, without mentioning an immediate increase in capital, such as that of 23 February 2017. However, it is apparent from those presentations that, contrary to what the Commission maintains, the Danish Government was aware of the scale of the financial difficulties faced by Post Danmark in 2016 as well as those forecasts for 2017, of the undertaking's risk of bankruptcy, and of the cost of such bankruptcy for the State. As the Commission expressed both in the contested decision and in its written pleadings, it was those factors which justified the capital increase of 23 February 2017.

344 Consequently, the Danish State's knowledge of those factors also justified the Commission carrying out a more detailed examination of the imputability of the capital increase of 23 February 2017, since, having regard to the fact that relations between the State and public undertakings are close, it was not necessary to establish that the public authorities had, on the basis of a precise inquiry, specifically incited PostNord to take that measure (see paragraph 332 above).

345 In that regard, it should also be recalled that the Commission may, in certain circumstances, be required to investigate a complaint by going beyond merely examining the matters of fact and law brought to its knowledge by the complainant. The Commission is required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the complaint, which may make it necessary for it to examine matters not expressly raised by the complainant (see judgment of 15 March 2018, *Naviera Armas* v *Commission*, T-108/16, EU:T:2018:145, paragraph 101 and the case-law cited).

346 It is apparent from the documents before the Court that the Commission confined itself to forwarding ITD's complaint to the Danish and Swedish authorities and that it merely accepted their reply of 20 December 2017 stating that they had not become aware of the capital increase of 23 February 2017 until after it had been completed, in their capacity as shareholders.

347 In that regard, the Commission cannot successfully rely on the principle of sincere cooperation, as interpreted in the judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission* (C-131/15 P, EU:C:2016:989, paragraph 34). In that judgment, the Court of Justice held that, by virtue of the principle of sincere cooperation between Member States and institutions, as embodied in Article 4(3) TEU, and in order not to delay the procedure, it is the responsibility of a Member State which considers that the measures in question do not constitute aid to provide the Commission, at the earliest possible moment after the Commission has drawn its attention to those measures, with the information on which its position is based. It is true that the statements provided by the Member States are not, in themselves, irrelevant in the context of State aid control proceedings (see, to that effect, judgment of 26 June 2008, *SIC* v *Commission*, T-442/03, EU:T:2008:228, paragraph 104). However, in the present case, it cannot be inferred from the principle of sincere cooperation, as interpreted by the Court of Justice, that the Commission was entitled to rely predominantly, at the stage of the preliminary examination stage, on statements made by the Danish and Swedish authorities in order to conclude that the capital increase of 23 February 2017 was not imputable to the State, even though that measure had been taken by PostNord, which the Commission had found to be a public undertaking over which the Danish and Swedish States might have exercised a dominant influence.

348 In the light of the foregoing, it must be concluded that the applicants are correct in claiming that the Commission did not conduct a complete and sufficient examination of whether the capital increase of 23 February 2017 was imputable to the Danish and Swedish States.

349 That conclusion cannot be called into question by the Kingdom of Denmark's argument that PostNord's operations are based entirely on financial considerations and do not need to be approved by the shareholder States, as is the case with any private undertaking. The Commission took no account of that fact when it found that the capital increase of 23 February 2017 was not imputable to the State since it merely stated that PostNord's ownership structure and the rules of appointment for members of its board of directors were not sufficient to establish that its shareholder States were involved in that capital increase. In any event, the Kingdom of Denmark's argument concerning the basis on which PostNord carries out its operations is not supported by any evidence.

350 In the light of the foregoing, it is necessary to examine the second ground relied on by the Commission in support of its conclusion that the capital increase of 23 February 2017 does not constitute State aid, which is based on no advantage resulting from that measure in so far as it complies with the private investor in a market economy test.

(c) The private investor in a market economy test

351 According to the case-law, the question whether the Commission misapplied the private investor in a market economy test is not to be confused with the question whether there were serious difficulties which required the formal investigation procedure to be initiated. The examination of the existence of serious difficulties is designed not to determine whether the Commission correctly applies Article 107 TFEU, but to establish whether it had, at the time it adopted the contested decision, sufficiently full information in order to assess the existence of State aid and, where appropriate, the compatibility of that aid with the internal market (see judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 129 and the case-law cited; judgment of 12 June 2014, *Sarc* v *Commission*, T-488/11, not published, EU:T:2014:497, paragraph 93).

352 The principles identified by the Courts of the European Union in its case-law on the application of the private investor in a market economy test are nonetheless useful for the purposes of assessing whether, during the preliminary examination stage, the Commission was faced with serious difficulties that it had not been able to overcome when it considered that the capital increase of 23 February 2017 did not confer an advantage on Post Danmark.

353 As a preliminary point, it should be borne in mind that, according to settled case-law, the conditions which a measure must meet in order to be treated as aid for the purposes of Article 107 TFEU are not met if the beneficiary undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources, that assessment being made by applying, in principle, the private investor in a market economy test (see judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 70 and the case-law cited; judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 71).

354 Thus, when applying the private investor in a market economy test, it is necessary to assess whether, in similar circumstances, a private investor operating in normal conditions of a market economy, of a comparable size to that of the public sector entity, could have been prompted to make capital contributions of the same size and under the same conditions (see, to that effect, judgment of 4 September 2014, *SNCM and France* v *Corsica Ferries France*, C-533/12 P and C-536/12 P, EU:C:2014:2142, paragraph 32 and case-law cited).

355 In that regard, it is important to note that the conduct of a private investor with which the conduct of a public investor must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, but must, at least, be that of a private holding company or a private group of undertakings pursuing a structural policy, whether general or sectorial, and be guided by prospects of profitability in the longer term (judgments of 21 March 1991, *Italy* v *Commission*, C-305/89, EU:C:1991:142, paragraph 20, and of 24 September 2008, *Kahla/Thüringen Porzellan* v *Commission*, T-20/03, EU:T:2008:395, paragraph 238). Thus, when contributions of capital by a public investor disregard any prospect of profitability, even in the long term, such contributions must be regarded as aid within the meaning of Article 107 TFEU, and their compatibility with the internal market must be assessed on the basis solely of the criteria laid down in that provision (see judgment of 4 September 2014, *SNCM and France* v *Corsica Ferries France*, C-533/12 P and C-536/12 P, EU:C:2014:2142, paragraph 39 and the case-law cited).

356 In particular, the Court of Justice has held that a private shareholder may reasonably provide the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after restructuring. Accordingly, a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions (judgments of 21 March 1991, *Italy* v *Commission*, C-303/88, EU:C:1991:136, paragraphs 21 and 22; of 18 December 2008, *Componenta* v *Commission*, T-455/05, not published, EU:T:2008:597, paragraph 87; and of 28 January 2016, *Slovenia* v *Commission*, T-507/12, not published, EU:T:2016:35, paragraph 221).

357 In that regard, it is for the Member State or the public body concerned to communicate to the Commission objective and verifiable evidence showing that its decision to act in relation to the capital of an undertaking is based on economic evaluations comparable to those which, in the circumstances, a rational private operator in a situation as close as possible to that of that State or of that body would have had carried out, before adopting the measure in question, in order to determine its future profitability. However, the prior economic assessment factors required on the part of the Member State must be varied depending on the nature and the complexity of the operation in question, the value of the assets, goods or services concerned, and the circumstances of the case (judgments of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraphs 97 and 98, and of 11 December 2018, *BTB Holding Investments and Duferco Participations Holding* v *Commission*, T-100/17, not published, EU:T:2018:900, paragraphs 79 and 80).

358 Thus, the content and the degree of accuracy of such prior economic evaluations may depend in particular on the circumstances of the case, the market situation and the economic climate. Accordingly, in certain cases, it cannot be concluded from the mere absence of a detailed business plan for the subsidiary, containing accurate, full estimations of its future profitability and detailed cost/profit analyses, that the public investor did not act as a private investor would have done (judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraphs 178 and 179).

359 That being so, the Court has held that even a rational private investor which is unable to make detailed, full projections would not decide to inject additional capital into one of its subsidiaries which has recorded significant losses without conducting prior evaluations, even general evaluations, showing that there are reasonable probabilities of future profit, and without analysing various scenarios and various options, including, if necessary, the possible sale or liquidation of the subsidiary. Thus, the inability to make detailed, full projections cannot relieve a public investor of its task of carrying out an appropriate prior evaluation of the profitability of its investment, comparable to that which a private investor would have had carried out in a similar situation, having regard to the available and foreseeable information (judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraphs 180 to 182).

360 In particular, it follows from the case-law that, when faced with a number of alternatives before carrying out a transaction, a rational private investor must weigh up the advantages and disadvantages of each of them in order to choose the most advantageous option (see, to that effect and by analogy, judgments of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraphs 79 and 80, and of 21 March 2013, *Commission* v *Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraphs 56 to 58).

361 In the light of those considerations it must be assessed whether, in the present case, the Commission carried out a complete and sufficient examination of whether a private investor would have made the capital increase of 23 February 2017 and, thus, whether, in that regard, the Commission faced serious difficulties which it was not able to overcome.

362 In the contested decision, the Commission considered, in paragraph 203, that a private investor in PostNord's situation would most likely have made the capital increase of 23 February 2017 instead of letting its subsidiary go bankrupt. In support of that finding, it noted, first, that there was little doubt that Post Danmark would have gone bankrupt without that increase in capital since the company's equity had fallen from DKK 1.29 billion at the end of 2015, to DKK 108 million at the end of the following year, with a further loss forecast for 2017. Secondly, referring to the explanations provided by the Danish and Swedish authorities, as described in section 5.1 of the contested decision, the Commission stated that the cost of Post Danmark's bankruptcy would have been much higher for the PostNord group than the cost of the capital increase of 23 February 2017.

363 It is apparent from section 5.1 of the contested decision and, in particular, from paragraph 80 thereof, that, during the administrative procedure, the Danish and Swedish authorities claimed, with reference to the board of directors' note, that Post Danmark's bankruptcy would have had the following negative effects:

– the loss of trust of credit and capitals markets, customers, suppliers, property owners, employees and other stakeholders in the whole group;

– the termination of existing financing agreements for the PostNord group, making it difficult for the group to refinance and raise capital;

– a deterioration in the conditions under which PostNord could rent property and suppliers are willing to supply, as well as a deterioration in the requirements for various forms of guarantees from PostNord;

– jeopardisation of PostNord's position and name on the Nordic logistics markets, where most of its customers operate in several countries;

– a negative cash flow effect within the PostNord group and an accounting loss.

364 The Commission therefore based its conclusion on the fact that Post Danmark's bankruptcy would have had a number of negative consequences for the PostNord group.

365 In that regard, it cannot be ruled out that the negative consequences of the bankruptcy of a subsidiary may lead a private investor, acting on the basis of economic rationale, to make capital contributions to ensure the survival of that subsidiary.

366 Nevertheless, in order to reject, at the stage of the preliminary examination, the classification as State aid of a public investment intended to ensure the survival of a subsidiary, on the ground that that investment is consistent with the conduct of a rational private investor, the Commission must, in accordance with the case-law referred to in paragraphs 355 to 360 above, be able to establish that that investment was preferable to any of the alternative measures, such as the bankruptcy of that subsidiary.

In order to do so, as is apparent from the same case-law, the Commission must carry out a meticulous examination, on the basis of reliable evidence available to it, of the advantages and disadvantages, first, of the option of filing for the bankruptcy of the subsidiary and, secondly, of the option of making a public investment in order to ensure the survival of the undertaking, examining, in particular, in the latter case, the prospects of profitability for the public investor.

367 In the present case, even though the Commission found that the cost of the capital increase of 23 February 2017 was lower for PostNord than Post Danmark's bankruptcy, it is apparent from the contested decision that it in fact relied exclusively on the negative consequences of the bankruptcy of Post Danmark, without excluding the possibility that such bankruptcy could, in spite of everything, be more advantageous than a capital increase which, for example, offered no prospects of profitability, even in the long term.

368 In that regard, the Commission cannot validly maintain that its conclusion that the capital increase of 23 February 2017 was consistent with the conduct of a private investor was not based on the board of directors' note and on the evidence referred to in paragraph 363 above, but on economic logic, from which it follows that a parent company, when faced with the sudden and imminent bankruptcy of one of its subsidiaries, would decide to ensure the survival of the latter by bearing its losses.

369 First, with that argument, the Commission contradicts its assessment in paragraph 203 of the contested decision, which is the only part in which it assesses the existence of an advantage resulting from the capital increase of 23 February 2017, and in which it referred to the arguments put forward by the Danish and Swedish authorities, as set out in section 5.1 of that decision.

370 Secondly, it is not apparent from the contested decision that the Commission took account of the urgency in relation to Post Danmark's risk of bankruptcy, which arose following the publication, on 10 February 2017, of PostNord's year-end report. Moreover, even supposing that it could be inferred from the contested decision that the Commission relied on the urgency of the situation, it has not been established that that situation arose from the publication of the abovementioned year-end report. In that regard, in the introduction to that report, PostNord's chief executive officer stated that PostNord's results '[continued] to be impacted by sharply declining mail volumes, above all in Denmark' and that 'the rapid pace of digitization [had] led to a dramatic downward trend in volume and income in the Danish business', before announcing the adoption of a decision to introduce a new financially sustainable production model for the future. Therefore, as noted by the applicants, Post Danmark's risk of bankruptcy was simply the consequence of the financial difficulties that Post Danmark had been experiencing for a long time as a result of declining mail volumes owing to the generalised use of electronic communications (see paragraph 6 above).

371 Thirdly, in any event, the fact that PostNord was faced with an urgent situation did not exempt the Commission from examining whether the capital increase of 23 February 2017 could, even in the long term, constitute a profitable operation. It is apparent from the case-law referred to in paragraphs 355 to 359 above that a rational private investor must, in principle, before making a capital contribution to a company, assess the profitability of such a transaction, even where it cannot be preceded by detailed, full projections.

372 In that regard, the Commission implicitly admitted that it disregarded considerations relating to the profitability of the capital increase of 23 February 2017 when it acknowledged, in the defence, that, faced with the sudden and impending bankruptcy of a subsidiary, a private investor may ensure the survival of the subsidiary, 'at least so as to buy time to properly assess the situation'.

373 Fourthly, even if it were to be considered that the capital increase of 23 February 2017 was a necessary prerequisite for Post Danmark's restructuring, it is not apparent that the Commission assessed, even summarily, the plausibility of the assertion that Post Danmark's new production model would make it possible to restore Post Danmark's economic efficiency.

374 In those circumstances, it cannot be concluded that the Commission carried out a complete and sufficient examination on the basis of which it established that the capital increase of 23 February 2017 was preferable to Post Danmark's bankruptcy.

375 As the applicants claim, the approach adopted by the Commission in the contested decision is analogous to accepting that any capital contribution made by a publicly owned company to its subsidiary faced with a sudden risk of bankruptcy, satisfies in principle, the private investor in a market economy test.

376 Consequently, the present action must be upheld in so far as it is directed at the part of the contested decision in which the Commission, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, concluded that the capital increase of 23 February 2017 did not constitute State aid, since it was not imputable to the Danish and Swedish States and did not entail an advantage.

377 Accordingly, it is not necessary to grant the applicants' application for a measure of organisation of procedure seeking production of the board of directors' note.

IV. Conclusions on the action as a whole

378 Pursuant to the case-law, the General Court may not, merely because it considers a plea relied on by the applicant in support of its action for annulment to be well founded, automatically annul the contested act in its entirety. Annulment of the act in its entirety is not acceptable where it is obvious that that plea, directed only at a specific part of the contested act, is such as to provide a basis only for partial annulment (judgment of 11 December 2008, *Commission* v *Département du Loiret*, C-295/07 P, EU:C:2008:707, paragraph 104).

379 However, partial annulment of a Union act is possible only if the elements of which the annulment is sought may be severed from the remainder of the act. That requirement of severability is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance (judgment of 11 December 2008, *Commission* v *Département du Loiret*, C-295/07 P, EU:C:2008:707, paragraphs 105 and 106 and the case-law cited).

380 In the present case, in the contested decision, the Commission examined five separate measures, namely the compensation at issue, the guarantee at issue, the administrative practice at issue, the allocation of Post Danmark's costs and the capital increase of 23 February 2017. Those measures, each of which the Commission acknowledged to be autonomous at the hearing, were examined separately in the contested decision and each form the subject of a specific conclusion in paragraphs 205 and 206 thereof, which is reproduced in paragraph 30 above.

381 In that regard, in paragraphs 271 and 376 above, it has been held that the present action is well founded in so far as it is directed at the parts of the contested decision in which the Commission, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, concluded that the administrative practice at issue and the capital increase of 23 February 2017 did not constitute State aid. Consequently, the contested decision must be partially annulled to that extent and the remainder of the action must be dismissed.

V. Costs

382 Under Article 134(3) of the Rules of Procedure, where the parties succeed on some and fail on other heads of claim, the General Court may order that each party is to bear their own costs or allocate the costs amongst the parties.

383 As the action has been successful in part, the Court makes an equitable assessment of the circumstances of the case and holds that the applicants should bear half of their own costs, with the rest of their costs being paid by the Commission, and that the Commission should bear its own costs.

384 In accordance with Article 138(1) of the Rules of Procedure, the Kingdom of Denmark shall bear its own costs. In accordance with Article 138(3) of the Rules of Procedure, Jørgen Jensen Distribution and Dansk Distribution shall bear their own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Annuls Commission Decision C(2018) 3169 final of 28 May 2018, State aid SA.47707 (2018/N) on State compensations granted to PostNord for the provision of the universal postal service – Denmark, in so far as it found, at the end of the preliminary examination phase, that, first, the exemption from value added tax (VAT) introduced by Administrative Decision No 1306/90 and Administrative Regulation F 6742/90, adopted by the Danish tax authorities, and, secondly, the capital increase of DKK one billion made to Post Danmark A/S by PostNord AB on 23 February 2017, did not constitute State aid;**

2. **Dismisses the action as to the remainder;**

3. **Orders ITD, Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S to bear half of their own costs, with the rest of their costs being borne by the European Commission;**

4. **Orders the Commission, the Kingdom of Denmark, Jørgen Jensen Distribution A/S and Dansk Distribution A/S to bear their own costs.**

Da Silva Passos Valančius Truchot

Delivered in open court in Luxembourg on 5 May 2021.

E. Coulon
Registrar

S. Papasavvas
President

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