Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

6 October 2021 *

(Appeal – Action for annulment – State aid – Public financing of the Fehmarn Belt fixed rail-road link – Individual aid – Notified aid declared compatible with the internal market – Execution of an important project of common European interest – Decision not to raise any objections – Monopoly – Distortion of competition and effect on trade)

In Joined Cases C-174/19 P and C-175/19 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 February 2019,

Scandlines Danmark ApS, established in Copenhagen (Denmark),

Scandlines Deutschland GmbH, established in Hamburg (Germany),

represented by L. Sandberg-Mørch, advokat,

appellants in Case C-174/19 P,

supported by:

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

Rederi Nordö-Link AB, established in Malmö (Sweden), represented by L. Sandberg-Mørch and A. Godsk Fallesen, advokater,

Trelleborg Hamn AB, established in Trelleborg (Sweden), represented by L. Sandberg-Mørch, advokat, and J.L. Buendía Sierra, abogado,

interveners in the appeal,

the other parties to the proceedings being:

European Commission, represented by V. Bottka, S. Noë and L. Armati, acting as Agents,

defendant at first instance,

* Language of the case: English.

Kingdom of Denmark, represented initially by J. Nymann-Lindegren, and subsequently by V. Jørgensen, acting as Agents, and R. Holdgaard, advokat,

Föreningen Svensk Sjöfart, established in Gothenburg (Sweden), represented by J.L. Buendía Sierra, abogado,

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

interveners at first instance,

and

Stena Line Scandinavia AB, established in Gothenburg, represented by L. Sandberg-Mørch, advokat, and P. Alexiadis, Solicitor,

appellant in Case C-175/19 P,

supported by:

Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV, established in Fehmarn, represented by L. Sandberg-Mørch, advokat, and W. Mecklenburg, Rechtsanwalt,

Rederi Nordö-Link AB, established in Malmö, represented by L. Sandberg-Mørch and A. Godsk Fallesen, advokater,

Trelleborg Hamn AB, established in Trelleborg, represented by L. Sandberg-Mørch, advokat, and J.L. Buendía Sierra, abogado,

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Kingdom of Denmark, represented initially by J. Nymann-Lindegren, and subsequently by V. Jørgensen, acting as Agents, and by R. Holdgaard, advokat,

Föreningen Svensk Sjöfart, established in Gothenburg, represented by J.L. Buendía Sierra, abogado,

interveners at first instance,

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: G. Pitruzzella,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 26 November 2020,

after hearing the Opinion of the Advocate General at the sitting on 11 March 2021,

gives the following

Judgment

1 By their respective appeals, Scandlines Danmark ApS and Scandlines Deutschland GmbH, on the one hand, and Stena Line Scandinavia AB, on the other, seek to have set aside, in the case of the former, the judgment of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-630/15, EU:T:2018:942; 'the first judgment under appeal') and, in the case of the latter, the judgment of 13 December 2018, *Stena Line Scandinavia* v *Commission* (T-631/15, not published, EU:T:2018:944; 'the second judgment under appeal') (together, 'the judgments under appeal'), by which the General Court annulled Commission Decision C(2015) 5023 final of 23 July 2015 on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt fixed link project (OJ 2015 C 325, p. 5) ('the decision at issue') in so far as the European Commission had decided not to raise any objections to the measures granted by the Kingdom of Denmark to Femern A/S for the planning, construction and operation of the Fehmarn Belt fixed link.

2 By its cross-appeals, the Commission seeks to have set aside the judgments under appeal in so far as they declared the action brought by Scandlines Danmark and Scandlines Deutschland and the action brought by Stena Line Scandinavia admissible inasmuch as those actions concern the measures granted by the Kingdom of Denmark to Femern Landanlæg for the planning, construction and operation of the rail and road hinterland connections in Denmark.

I. Legal context

3 In accordance with Article 1(h) 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 concept of 'interested party' is to mean, inter alia, any undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

4 Article 4(1) to (4) of that regulation states:

'1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the [internal] market of a notified measure, in so far as it falls within the

scope of Article [107(1) TFEU], it shall decide that the measure is compatible with the [internal] market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the [internal] market of a notified measure, it shall decide to initiate proceedings pursuant to Article [108(2) TFEU] (hereinafter referred to as a "decision to initiate the formal investigation procedure").'

5 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9), which repealed Regulation No 659/1999 with effect from 14 October 2015, lays down provisions identical to those cited in the preceding paragraph.

II. Background to the dispute

A. The project

6 The dispute concerns the financing of the project for the Fehmarn Belt link between Denmark and Germany, north of Lübeck (Germany) ('the project'). The project consists, first, in the construction of an immersed tunnel between Rødby on the island of Lolland in Denmark and Puttgarden on the island of Fehmarn in Germany, approximately 19 km in length, equipped with an electrified railway line and a motorway ('the fixed link') and, second, in the expansion and upgrade of the road and rail hinterland connections in Denmark, in particular of the existing rail link of approximately 120 km between Ringsted (Denmark) and Rødby. The project was approved by a treaty, signed on 3 September 2008 and ratified in 2009, between the Kingdom of Denmark and the Federal Republic of Germany.

7 The total estimated cost of the project, in fixed 2014 prices, is 64.4 thousand million Danish kroner (DKK) (approximately EUR 8.7 thousand million): DKK 54.9 thousand million (approximately EUR 7.4 thousand million) for the planning and construction of the fixed link, and DKK 9.5 thousand million (approximately EUR 1.3 thousand million) for the planning and construction of the upgrading of the road and rail hinterland connections in Denmark.

8 Pursuant to that treaty signed on 3 September 2008 and the Lov nr. 575 om anlæg og drift af en fast forbindelse over Femern Bælt med tilhørende landanlæg i Danmark (Law No 575 on the construction and operation of the Fehmarn Belt fixed link and Danish hinterland connections) of 4 May 2015, two Danish public undertakings have been entrusted with the implementation of the project. The first, Femern A/S, established in 2005, is responsible for the financing, construction and operation of the fixed link. The second, Femern Landanlæg A/S, established in 2009, is responsible for the financing, construction and operation of the road and rail hinterland connections in Denmark. Femern Landanlæg is a subsidiary of Sund & Bælt Holding A/S, which is owned by the Danish State. Femern became a subsidiary of Femern Landanlæg following the latter's establishment.

9 Ownership of the rail connections concerned is to be shared between Banedanmark (20%), the Danish State public rail infrastructure manager, and Femern Landanlæg (80%).

10 The project is financed by Femern and Femern Landanlæg by means of loans raised on the international financial markets and covered by the Danish State's guarantee, or by means of subsidiary loans from the National Bank of Denmark. However, those companies will be unable to obtain loans for activities other than the financing, planning, construction and operation of the fixed link and the road and rail hinterland connections in Denmark. Those two undertakings also received a capital contribution from the Danish State.

11 Femern will receive the fees paid by users of the fixed link in order to discharge its debt and will pay dividends to Femern Landanlæg, which the latter will use to discharge its own debt.

12 Femern Landanlæg will receive 80% of the amount of the fees paid by the rail operators to Banedanmark for use of the rail connections, in line with the ownership of those rail connections, which is shared between Femern Landanlæg and that manager.

13 Banedanmark will be responsible for all of the costs relating to the operation of the rail hinterland connections in Denmark, whereas the costs relating to their maintenance will be divided between Femern Landanlæg and Banedanmark on a pro rata basis according to their respective ownership shares.

B. Events prior to the dispute

14 The project was preceded by a planning phase, the financing of which was notified to the Commission by the Danish authorities.

15 By decision of 13 July 2009 relating to State aid N 157/2009 – Financing of the planning phase of the Fehmarn Belt fixed link (OJ 2009 C 202, p. 2), the Commission concluded, first, that the measures relating to the financing of the planning of the project may not constitute State aid and, second, that they would in any event be compatible with the internal market. It therefore decided not to raise any objections within the meaning of Article 4(2) and (3) of Regulation No 659/1999.

16 On 22 December 2014, the Danish authorities gave the Commission notification of the arrangements for public financing of the project, consisting of contributions to the share capital of the two undertakings and State guarantees and loans.

17 The Commission approved those measures by the decision at issue. It found, inter alia, that the public funding measures granted to Femern Landanlæg for the financing of the rail hinterland connections in Denmark did not constitute State aid, on the ground that those measures would not give rise to any distortion of competition, since there was no competition 'on' or 'for' the market for the operation and management of the national railway network and the rail connections owned by that undertaking would be upgraded and operated by Banedanmark under the same conditions as the other parts of the Danish national railway network.

18 The Commission also found that those measures were not liable to affect trade between Member States, as the management and operation of the railway network in question were carried out on a national, separate and geographically closed market, which was not open to competition.

19 As regards the measures granted to Femern for the financing of the fixed link, the Commission stated that, if they were to constitute State aid, they would, in any event, be compatible with the internal market under Article 107(3)(b) TFEU.

III. The procedures before the General Court and the judgments under appeal

A. Case T-630/15

20 By application lodged at the Registry of the General Court on 10 November 2015, Scandlines Danmark and Scandlines Deutschland brought an action seeking annulment of the decision at issue.

21 By document lodged at the General Court Registry on 6 April 2016, the Kingdom of Denmark sought leave to intervene in the proceedings in support of the form of order sought by the Commission. By order of 29 June 2016, the President of the Ninth Chamber of the General Court granted such leave and allowed the application for confidential treatment made by the appellants in relation to the Kingdom of Denmark.

22 By documents lodged at the General Court Registry on 7 April 2016, Föreningen Svensk Sjöfart ('FSS'), a shipowners' association established in Sweden, and Naturschutzbund Deutschland (NABU) eV, an environmental protection organisation established in Germany, sought leave to intervene in support of the form of order sought by the appellants. By order of 30 November 2016, the President of the Fifth Chamber of the General Court granted those parties leave to intervene and allowed the application for confidential treatment made by the appellants in relation to FSS and NABU.

23 By the first judgment under appeal, the General Court annulled the decision at issue in so far as the Commission had decided not to raise any objections to the measures granted by the Kingdom of Denmark to Femern for the planning, construction and operation of the fixed link and dismissed the action as to the remainder.

B. Case T-631/15

24 By application lodged at the Registry of the General Court on 11 November 2015, Stena Line Scandinavia brought an action seeking annulment of the decision at issue.

25 By document lodged at the General Court Registry on 6 April 2016, the Kingdom of Denmark sought leave to intervene in the proceedings in support of the form of order sought by the Commission. By order of 29 June 2016, the President of the Ninth Chamber of the General Court granted such leave.

26 By documents lodged at the General Court Registry on 7 April 2016, FSS sought leave to intervene in support of the form of order sought by the appellant. By order of 30 November 2016, the President of the Fifth Chamber of the General Court granted such leave.

27 By the second judgment under appeal, the General Court annulled the decision at issue in so far as the Commission had decided not to raise any objections to the measures granted by the Kingdom of Denmark to Femern for the planning, construction and operation of the fixed link, based on grounds identical to those set out in the first judgment under appeal, subject to further clarifications in paragraphs 162 to 165 of the second judgment under appeal. It dismissed the action as to the remainder.

IV. The procedure before the Court of Justice

28 By order of the President of the Court of 22 October 2019, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (C-174/19 P, not published, EU:C:2019:1096), Rederi Nordö-Link AB, Trelleborg Hamn AB and Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV ('Aktionsbündnis') were granted leave to intervene in support of the forms of order sought by Scandlines Danmark and Scandlines Deutschland.

29 By order of the President of the Court of 22 October 2019, *Stena Line Scandinavia* v *Commission* (C-175/19 P, not published, EU:C:2019:1095), Rederi Nordö-Link, Trelleborg Hamn and Aktionsbündnis were granted leave to intervene in support of the form of order sought by Stena Line Scandinavia.

30 By decision of the President of the Court of 2 September 2020, Cases C-174/19 P and C-175/19 P were joined for the purposes of the oral procedure and the judgment.

V. Forms of order sought by the parties

A. Case C-174/19 P

31 Scandlines Danmark and Scandlines Deutschland claim that the Court should:

– set aside the first judgment under appeal in so far as it concerns the financing measures granted to Femern Landanlæg;

– declare the cross-appeal inadmissible or, in any case, unfounded;

– order the Commission to pay, in addition to its own costs, the costs incurred by the appellants.

32 The Commission contends that the Court should:

– dismiss the main appeal;

– set aside the implied decision of the General Court declaring the appellants' action admissible in so far as it concerns the financing measures granted to Femern Landanlæg; and

– order the appellants to pay the costs of the proceedings before the General Court and the Court of Justice.

33 The Kingdom of Denmark asks the Court to dismiss the main appeal and to allow the cross-appeal.

34 FSS claims that the Court should:

– set aside the first judgment under appeal in so far as it rejected the pleas raised by Scandlines Danmark and Scandlines Deutschland;

– annul the decision at issue in its entirety;

– order the Commission to initiate a formal investigation procedure in respect of all the aid measures linked to the project;

– declare the cross-appeal inadmissible or, in any case, unfounded; and

– order the Commission to pay, in addition to its own costs, the costs incurred by Scandlines Danmark, Scandlines Deutschland and FSS in the proceedings before the General Court and the Court of Justice.

35 NABU claims that the Court should:

– allow the main appeal and set aside the first judgment under appeal;

– declare the cross-appeal inadmissible or, in any case, unfounded;

– annul the decision at issue in its entirety; and

– order the Commission to pay, in addition to its own costs, the costs incurred by NABU.

36 Rederi Nordö-Link, Trelleborg Hamn and Aktionsbündnis claim that the Court should:

– allow the main appeal and set aside in part the first judgment under appeal; and

– order the Commission to pay the costs, including those incurred by the interveners in the appeal.

B. Case C-175/19 P

37 Stena Line Scandinavia claims that the Court should:

– set aside the second judgment under appeal in so far as it concerns the financing measures granted to Femern Landanlæg;

– declare the cross-appeal inadmissible or, in any case, unfounded;

– order the Commission to pay, in addition to its own costs, the costs incurred by the appellant.

38 The Commission contends that the Court should:

– dismiss the main appeal;

– allow its cross-appeal and set aside the implied decision of the General Court declaring the appellant's action admissible in so far as it concerns the financing measures granted to Femern Landanlæg;

– declare the action inadmissible in so far as it relates to those measures; and

– order the appellant to pay the costs of the proceedings before the General Court and the Court of Justice.

39 The Kingdom of Denmark asks the Court to dismiss the main appeal and to allow the Commission's cross-appeal.

40 FSS claims that the Court should:

– set aside the second judgment under appeal;

– annul the decision at issue in its entirety;

– order the Commission to initiate a formal investigation procedure in respect of all the aid measures linked to the project;

– declare the cross-appeal inadmissible or unfounded; and

– order the Commission to pay, in addition to its own costs, the costs incurred by the appellant and FSS in the proceedings before the General Court and the Court of Justice.

41 Rederi Nordö-Link, Trelleborg Hamn and Aktionsbündnis claim that the Court should:

– allow the main appeal and set aside in part the second judgment under appeal, and

– order the Commission to pay, in addition its own costs, those incurred by the interveners in the appeal.

VI. The main appeals

42 In Case C-174/19 P, Scandlines Danmark and Scandlines Deutschland raise seven grounds in support of their appeal. The first and second grounds of appeal are directed against the General Court's assessment of the financing of the part of the project relating to the rail hinterland connections in Denmark, while the other grounds of appeal concern the General Court's assessment of the financing of the fixed link. In Case C-175/19 P, Stena Line Scandinavia raises six grounds in support of its appeal, which are in essence identical to the first six grounds of appeal raised by the appellants in Case C-174/19 P.

A. The admissibility of the third to sixth grounds of appeal in Cases C-174/19 P and C-175/19 P

1. Arguments of the parties

43 The Commission and the Kingdom of Denmark plead, as a preliminary point, that the appellants' third to sixth grounds of appeal, alleging that the General Court erred in law as regards the incentive effect, the eligibility of the costs of the Danish hinterland connections and the distortion of competition resulting from the measures granted to Femern, are inadmissible. They rely on Article 169(1) of the Rules of Procedure of the Court of Justice and on the case-law relating to that provision in order to claim that those grounds of appeal are inadmissible inasmuch as they are directed against the grounds and not against the operative part of the judgments under appeal.

44 The appellants state that they have an interest in bringing proceedings and that those grounds of appeal are admissible, in particular in so far as they make it possible to avoid that the grounds of the judgments under appeal which are thus being challenged acquire the force of *res judicata*. NABU and FSS concur, in essence, with the appellants' arguments.

2. Findings of the Court

45 Under Article 169(1) of the Rules of Procedure, an appeal is to seek to have set aside, in whole or in part, the decision of the General Court as set out in the operative part of that decision.

46 By the judgments under appeal, the General Court annulled the grounds of the decision at issue relating to the measures granted to Femern for the fixed link.

47 By their third to sixth grounds of appeal, the appellants submit that the General Court erred in law in assessing the incentive effect of those measures, the eligibility of the costs of the Danish hinterland connections and the distortion of competition caused by those measures.

48 It must therefore be held that, by those grounds of appeal, the appellants are seeking to call into question not the operative part of the judgments under appeal but their grounds, and that upholding those grounds of appeal would not permit the operative part of each of those judgments to be set aside, in whole or in part.

49 It follows that those grounds of appeal must be rejected as inadmissible.

50 That assessment cannot be called into question by the argument of NABU and FSS, invoking the force of *res judicata* of the grounds of the judgments under appeal which are referred to in those grounds of appeal.

51 It must be borne in mind in that regard that it follows from the case-law of the Court of Justice that the force of *res judicata* extends only to the grounds of a judgment which constitute the necessary support of its operative part and are, therefore, inseparable from it (judgment of 25 July 2018, *Société des produits Nestlé and Others* v *Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraph 52 and the case-law cited).

52 When a decision of the Commission is annulled by the General Court, the grounds on the basis of which that court dismissed certain arguments relied upon by the parties cannot therefore be considered to have gained the force of *res judicata* (see, to that effect, judgment of 25 July 2018, *Société des produits Nestlé and Others* v *Mondelez UK Holdings & Services*, C-84/17 P, C-85/17 P and C-95/17 P, EU:C:2018:596, paragraph 53).

53 The third to sixth grounds of appeal in Cases C-174/19 P and C-175/19 P relate to arguments which were relied on at first instance and were rejected by the General Court in the judgments under appeal. In those circumstances, the arguments relied on by the appellants in their third to sixth grounds of appeal cannot procure an advantage for them or be capable of having an influence on the part of the operative part of the judgments under appeal that annuls the grounds of the decision at issue relating to the measures granted to Femern.

54 It follows that the third to sixth grounds of appeal in Cases C-174/19 P and C-175/19 P must be rejected as inadmissible.

B. The seventh ground of appeal in Case C-174/19 P

55 By their seventh ground of appeal in Case C-174/19 P, the appellants, supported by Rederi Nordö-Link and Aktionsbündnis, assert that the General Court erred in law, in paragraphs 40 to 52 of the first judgment under appeal, by rejecting as inadmissible their pleas relating to aid measures consisting in railway fees and the use of property owned by the Danish State, on the ground that those measures were not covered by the decision at issue. NABU and FSS concur, in essence, with those arguments.

56 The appellants allege, in that regard, that there is a contradiction between that judgment and the order of 13 December 2018, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-890/16, not published, EU:T:2018:1004), in which, in their view, the General Court found that those measures were covered by that decision. They submit that that contradiction infringes the first and fourth paragraphs of Article 263 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union.

57 The Commission and the Kingdom of Denmark submit that the seventh ground of appeal should be rejected as unfounded; the Commission takes the view, in addition, that that ground of appeal is, in any case, ineffective.

58 In that regard, it should be noted that the General Court did not rule, in the first judgment under appeal, in the manner alleged by the appellants.

59 First, the General Court, in paragraph 48 of that judgment, rejected the appellants' arguments relating to those measures as being new and, therefore, inadmissible. Second, and for the sake of completeness, the General Court did not find, in paragraph 52 of that judgment, that the railway fees and the free use of property owned by the Danish State were not covered by the 2015 construction decision, but merely rejected the appellants' argument alleging failure to state reasons in that decision as regards those measures, taking the view that that argument did not concern, in the strict sense, a failure to state reasons in that decision. Moreover, the General Court referred, in that paragraph 52, solely to the appellants' claims, without carrying out any assessment as to whether that decision actually related to those measures (order of 3 September 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, C-173/19 P, not published, EU:C:2021:699, paragraph 53).

60 It follows that the seventh ground of appeal in Case C-174/19 P must be rejected as unfounded.

C. The first and second grounds of appeal in Cases C-174/19 P and C-175/19 P

61 By their first ground of appeal, which consists of four parts, the appellants submit that the General Court infringed Article 107(1) TFEU and Article 108(2) TFEU by finding that the Commission had not erred in law or encountered serious difficulties in taking the view that the measures granted to Femern Landanlæg were not liable to distort competition. By their second ground of appeal, they submit that the General Court committed the same errors of law when it held that those measures were not liable to affect trade between Member States.

1. Preliminary observations

62 It must be borne in mind that, under Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

63 Furthermore, since the appellants' first and second grounds of appeal concern the alleged infringement of their procedural rights, it is also important to bear in mind that Article 4 of Regulation No 659/1999 provides for a stage at which the aid measures notified undergo a preliminary examination, the purpose of which is to enable the Commission to form an initial view as to whether the aid at issue is compatible with the internal market. On completion of that stage, the Commission may make a finding either that the measure does not constitute aid or that it falls within the scope of Article 107(1) TFEU. In the latter case, if the measure does not raise any doubts as to its compatibility with the internal market, the Commission is to declare it compatible with that market by adopting a decision not to raise objections. Failing that, the Commission must initiate the formal investigation procedure (see, to that effect, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 43, 44 and 46).

64 Where the Commission adopts a decision not to raise objections, it declares not only that the measure is compatible with the internal market, but it also, implicitly but necessarily, refuses to initiate the formal investigation procedure laid down in Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 (see, to that effect, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 45).

65 The procedure under Article 108(2) TFEU is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the internal market. The Commission may therefore confine itself to the preliminary examination under Article 108(3) TFEU when taking a decision in favour of aid only if it is able to satisfy itself after the preliminary examination that that aid is compatible with the internal market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether that aid is compatible with the internal market, it is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 108(2) TFEU (judgment of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission*, C-431/07 P, EU:C:2009:223, paragraph 61 and the case-law cited).

66 As the criterion of 'serious difficulties' is objective in nature, the existence of such difficulties must be looked for not only in the circumstances in which the Commission's decision was adopted after the preliminary examination but also in the assessments upon which it relied (judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 31 and the case-law cited).

67 That analysis therefore involves determining whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary investigation phase of the measure notified should objectively have raised doubts as to the compatibility of that measure with the internal market given that such doubts must lead to the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of Regulation No 659/1999 may participate; the same principles apply where the Commission entertains

doubts as to the actual classification of the measure under examination as aid, within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraphs 32 and 33 and the case-law cited).

2. The first part of the first ground of appeal in Cases C-174/19 P and C-175/19 P

(a) Arguments of the parties

68 By the first part of their first ground of appeal in Cases C-174/19 P and C-175/19 P, the appellants, supported by the interveners, claim that the General Court erred in law by holding that the measures granted to Femern Landanlæg are not liable to affect competition even though the fixed link and the rail connections constitute an overall project, in the context of which it is not disputed that the measures granted to Femern are liable to distort competition. FSS and NABU concur, in essence, with those arguments.

69 According to the appellants, the General Court erred in finding that Femern Landanlæg's activities do not include the provision of transport services across the Fehmarn Belt, even though those connections and the fixed link constitute one integrated project and have been put in place with the very aim of providing transport services across the Fehmarn Belt. They assert that the purpose of the measures granted to Femern, on the one hand, and those granted to Femern Landanlæg, on the other, is therefore the same and consists in the provision of transport services across the Fehmarn Belt.

70 They state that, in addition and in any event, the measures granted solely for the rail connections distort competition in the same way as those intended for the railway infrastructure of the fixed link.

71 Consequently, in their view, the General Court wrongly held, in paragraph 88 of the first judgment under appeal and in paragraph 63 of the second judgment under appeal, that the measures granted to Femern and Femern Landanlæg concern the same project but have a different purpose and different beneficiaries.

72 The appellants also submit that the plea of inadmissibility raised by the Commission and the Kingdom of Denmark is unfounded.

73 FSS states that the fact that the project is implemented by two separate companies does not justify a separate examination of the financing measures granted and takes the view that the analysis of the effects on competition should have been carried out at the level of the project as a whole. It asserts that the part of the project relating to the rail hinterland connections in Denmark is linked to the existence of the fixed link and that the former are financed, moreover, by the dividends paid by Femern to Femern Landanlæg.

74 Rederi Nordö-Link submits that the measures granted to Femern Landanlæg affect, in any event, the market for transport services across the Fehmarn Belt and competition on the upstream markets, such as the market for the supply of construction materials, and the downstream markets, such as the markets for rail transport services in Denmark.

75 The Commission claims that the appellants have failed to identify precisely the paragraphs in the grounds of the judgments under appeal which are being challenged.

76 It adds that the first part of the first ground of appeal in Cases C-174/19 P and C-175/19 P is, in any event, unfounded.

77 The Kingdom of Denmark states, as a preliminary point, that the Commission did not adopt a final position, in the decision at issue, on whether the measures granted to Femern are liable to distort competition or even on whether it is an undertaking for the purpose of applying Article 107(1) TFEU. It submits that neither Femern nor Femern Landanlæg can be classified as such.

78 In addition, it states that the appellants are relying before the Court of Justice on the same arguments as those which were rejected by the General Court.

79 It also pleads that they are inadmissible on the ground that the appellants have not precisely referred to the paragraphs in the grounds of the judgments under appeal which are being challenged and that they are also calling into question the General Court's assessment of the facts as regards the purpose and function of the hinterland connections, without alleging distortion on its part.

80 Lastly, it submits that the first part of the first ground of appeal in both cases is, in any event, unfounded.

(b) Findings of the Court

81 As regards the plea of inadmissibility raised by the Commission and the Kingdom of Denmark, alleging failure to identify with sufficient precision the paragraphs in the grounds of the judgments under appeal which are being challenged, it is apparent that those paragraphs are clearly identified by the appellants.

82 It is sufficient to note that Scandlines Danmark and Scandlines Deutschland have expressly referred, in support of their line of argument set out in support of the first part of the first ground of appeal in Case C-174/19 P, to paragraphs 87 to 93 of the first judgment under appeal and in particular to paragraph 88 of that judgment; in those paragraphs, the General Court ruled on the relevance of the fact that the measures examined were part of the same project for the purpose of applying Article 107(1) TFEU. Stena Line Scandinavia has referred, in support of the first part of the first ground of appeal in Case C-175/19 P, to paragraphs 62 to 71 of the second judgment under appeal and in particular to paragraph 63 thereof.

83 That plea of inadmissibility must therefore be rejected.

84 Similarly, the plea of inadmissibility raised by the Kingdom of Denmark, alleging that the appellants have merely reiterated, in the context of the first part of their first ground of appeal, the arguments put forward at first instance, cannot be upheld, since the appellants are challenging, by those arguments, the General Court's assessment, in paragraphs 87 to 93 of the first judgment under appeal and in paragraphs 62 to 71 of the second judgment under appeal, by which it rejected their arguments.

85 It follows from settled case-law of the Court of Justice that the points of law examined at first instance may be discussed again in the course of an appeal. If a party could not base its appeal on pleas in law and arguments already relied on before the General Court, the appeal procedure would be deprived of part of its purpose (see, inter alia, judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 26).

86 By contrast, as the Kingdom of Denmark submits, the arguments relied on by the appellants to claim that Femern Landanlæg's activities include the provision of transport services across the Fehmarn Belt are inadmissible, since, by those arguments, they are asking the Court of Justice to carry out a new assessment of the facts, without alleging distortion of those facts on the part of the General Court. The assessment of the facts and evidence does not, save where the facts or evidence are distorted, constitute a point of law, which is subject, as such, to review by the Court of Justice on appeal (see, to that effect, judgment of 2 March 2021, *Commission* v *Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 52 and the case-law cited).

87 Moreover, as the Advocate General stated in point 92 of his Opinion, the arguments relating to the integrated nature of the project, in particular those relating to the purpose and the means of financing of the project, in no way imply that Femern Landanlæg's activities extend to the supply of transport services across the Fehmarn Belt.

88 Furthermore, the arguments raised by Rederi Nordö-Link that the measures granted to Femern Landanlæg also affect competition on the upstream markets, such as the market for the supply of construction materials, and the downstream markets, such as the markets for rail transport services in Denmark, concern, in reality, paragraph 91 of the first judgment under appeal and paragraph 66 of the second judgment under appeal, by which the General Court referred to the paragraphs of the judgments under appeal relating to the existence of competition. Such arguments are thus irrelevant as regards the legal consequences to be drawn from the fact that the various measures examined belong to the same project and cannot, consequently, be usefully relied on in support of the first part of the first ground of appeal.

89 The question whether Femern and Femern Landanlæg are undertakings within the meaning of Article 107(1) TFEU is also irrelevant for the purpose of assessing the first part of the first ground of appeal.

90 Lastly, the nature of the objectives pursued by State measures and their grounds of justification have no bearing whatsoever on whether such measures are to be classified as State aid. Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects (judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 61 and the case-law cited).

91 It follows that, even though the measures granted to Femern Landanlæg form part of a project which, as a whole, has the objective, as the Advocate General states in point 99 of his Opinion, of improving the conditions for the transportation of passengers and goods between Nordic countries and Central Europe, the fact remains that they cannot, for that sole reason, be assessed as a whole with the measures granted to Femern in the light of Article 107(1) TFEU, since the activities of the two undertakings are separate. It is common ground that, as soon as the project is completed, Femern Landanlæg's activities will be limited to the management and operation of the rail connections, whereas Femern's activities will relate only to the fixed link, since those different infrastructures may, in addition, be used independently of each other.

92 It follows from the foregoing that the General Court was entitled, without erring in law, to find, in paragraph 88 of the first judgment under appeal and in paragraph 63 of the second judgment under appeal, that the measures granted to Femern Landanlæg, adopted in connection with the same project which granted measures for Femern in respect of the fixed link and categorised as State aid by the Commission, cannot, for that 'sole reason', constitute State aid, since those two types of measures have a different purpose and different beneficiaries. The General Court was therefore also right to draw a distinction, in paragraphs 90 to 92 of the first judgment under appeal and in paragraphs 65 to 67 of the second judgment under appeal, between the effects on competition of the measures granted to each of the undertakings.

93 It follows that the first part of the appellants' first ground of appeal in Cases C-174/19 P and C-175/19 P is in part inadmissible and in part unfounded and must therefore be rejected.

3. The second and third parts of the first ground of appeal in Cases C-174/19 P and C-175/19 P

(a) Arguments of the parties

94 By the second and third parts of their first ground of appeal in Cases C-174/19 P and C-175/19 P, which it is appropriate to examine together, the appellants, supported by the interveners, assert that the General Court erred in law by holding that the market for the management of the railway infrastructure in Denmark was not open to competition. In their view, the General Court was wrong to reject, in paragraphs 108 to 120 of the first judgment under appeal and in paragraphs 83 to 95 of the second judgment under appeal, their arguments alleging that there is competition both in fact and in law for the management and operation of the Danish railway infrastructure. NABU and FSS concur, in essence, with those arguments.

95 As a preliminary point, the appellants submit that their arguments are also seeking to challenge the General Court's assessment, in paragraphs 94 to 96 of the first judgment under appeal and in paragraphs 69 to 71 of the second judgment under appeal, that the rail hinterland connections form part of the national railway network.

96 As regards the existence of competition in law, the appellants submit that the licensing system for the operation, management and maintenance of the Danish railway infrastructure, established by the Danish legislation, which requires a licence to be obtained from the national transport authority in order to be able to manage railway infrastructure and which was replaced in 2015 by a safety approval system, means that those activities are open to competition, at least as regards competition 'for' the market for the management of railway infrastructure. They state that any company which obtains a licence and a safety approval can thus operate railway infrastructure. Moreover, there are several railway infrastructure operators in Denmark.

97 The appellants refer to the 'analytical grid' mentioned by the Commission in a document on railway, metro and local transport infrastructure ('Infrastructure Analytical Grid for Railway, Metro and Local Transport Infrastructure'), which states that the management of railway infrastructure is closed to competition only where the management and operation are subject to a legal monopoly, which presupposes that a service is reserved by law to an exclusive provider and that it is clearly prohibited for any other operator to provide that service.

98 In their view, however, that is not the case in Denmark and the licensing system allows undertakings to compete both in order to construct infrastructure and operate it and in order to provide services on existing infrastructures in the event that Femern Landanlæg or Banedanmark tender out their activities.

99 The appellants moreover refer to other sectors of the economy in which an activity also depends on the use of a network, such as telecommunications, electricity or gas, in order to argue that the finding that a market is open to competition depends solely on the system put in place to allow competing operators access to the infrastructure, irrespective of whether they are actually present on the market.

100 The appellants state that, similarly, the General Court erred in law, in paragraph 112 of the first judgment under appeal and in paragraph 87 of the second judgment under appeal, in finding that the fact that undertakings other than Banedanmark have obtained licences and carry out their management and operation activities on sections of the railway network which form a kind of 'natural monopoly' was not sufficient to show that there is competition 'on' or 'for' the market for the operation and management of the national railway.

101 Furthermore, in their view, the fact that EU law does not require the management of the railway infrastructure to be opened up to competition, as the General Court noted in paragraph 111 of the first judgment under appeal and in paragraph 86 of the second judgment under appeal, and that operators from other Member States could rely in Denmark on permits issued by their countries of origin, as the General Court stated in paragraph 113 of the first judgment under appeal and in paragraph 88 of the second judgment under appeal, is irrelevant.

102 In any event, according to them, the measures granted to Femern Landanlæg distort competition on the upstream markets, such as the market for the supply of construction materials, and on the downstream markets, such as the market for the provision of transport services in Denmark.

103 The appellants then submit, by means of similar arguments, that the General Court also erred in law by failing to find that there was competition in fact on the market on which Femern Landanlæg is active, having regard in particular to the presence of companies authorised to manage local railway networks, separate from the national network.

104 They refer also to the Communication from the Commission on the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ 2013 C 25, p. 1), concerning aid which may be granted to operators for the construction and operation of infrastructure, in order to argue that the relevant criterion for the purpose of determining whether the aid granted to Femern Landanlaeg is State aid is whether or not that operator received financing on conditions which correspond to market conditions. In the present case, they take the view that that was not the case.

105 In their reply, they submit that the pleas of inadmissibility raised by the Commission and the Kingdom of Denmark are unfounded.

106 FSS draws attention to the unprecedented nature of the Commission's analysis in the decision at issue, stating that the rare cases in which the Commission has thus far concluded that there was no distortion of competition in essence related to activities of minor importance, most often carried out far from borders and having purely local effects.

107 FSS submits that, in view of the licensing system applied in Denmark, the General Court wrongly held that there was no competition 'for' the railway infrastructure market since any interested operator could have been awarded the contract for the operation of the hinterland connections. In its view, even if each railway infrastructure presents characteristics of a natural monopoly, that does not mean that operators cannot compete 'for' that market, with the result that financial support granted to only one of them will distort competition.

108 Even if those markets were closed to competition by virtue of a legal monopoly, financial support has, according to FSS, an impact on competition in the transport sector. FSS states that public financing of the construction of the infrastructure would therefore have significant consequences for the competitiveness of the sector, to the detriment of other modes of transport, by reducing, in particular, the chances for undertakings established in other Member States to provide their transport services in the market of that State. FSS refers in particular to paragraphs 77 and 78 of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), and to the judgment of 30 April 2019, *UPF* v *Commission* (T-747/17, EU:T:2019:271).

109 FSS also states that the financing of the rail hinterland connections in Denmark will have a major competitive impact on the upstream markets, in particular in the construction sector, since the undertakings carrying out the works will see their sales increase.

110 In its view, the financing of the hinterland connections is as likely to affect competition as that of any other infrastructure in a network industry which has the characteristics of a natural monopoly. It states that the Commission has thus examined no less carefully, on each occasion, the financing of such infrastructures in the light of State aid rules. FSS refers in that regard to paragraph 214 et seq. of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1).

111 NABU, Rederi Nordö-Link, Trelleborg Hamn and Aktionsbündnis concur with those arguments. Rederi Nordö-Link also argues that the existence of a legal monopoly is not sufficient for a finding that there is no competition, since railway infrastructure competes with other transport infrastructure, such as ports.

112 The Commission contends that the appellants' arguments are inadmissible, since, in its view, the General Court did not find, in the judgments under appeal, that there was no competition from a legal point of view.

113 Furthermore, it states that the appellants' arguments relating to potential competition in fact do not refer with sufficient precision to the paragraphs in the grounds of the judgments under appeal which are being challenged, and are consequently inadmissible.

114 It also maintains that the argument that competition on the upstream and downstream markets has been distorted was not raised before the General Court and, accordingly, constitutes a new plea.

115 Lastly, in its view, the arguments by which the appellants are challenging the General Court's interpretation of Danish law, in particular in paragraphs 110 and 112 of the first judgment under appeal and in paragraphs 85 and 87 of the second judgment under appeal, should be rejected as inadmissible, inasmuch as they relate to the assessment of the facts.

116 In the alternative, the Commission submits that the second and third parts of the first ground of appeal in both cases are unfounded.

117 The Kingdom of Denmark states that those two parts of the first ground of appeal are inadmissible on the ground that they merely reproduce the arguments raised at first instance and relate to the General Court's assessment of the facts, even though no distortion of those facts has been alleged.

118 It also states that the second and third parts of the first ground of appeal in both cases are unfounded.

(b) Findings of the Court

(1) Admissibility

119 Contrary to what the Commission and the Kingdom of Denmark state, the appellants have identified with sufficient precision the paragraphs in the grounds of the judgments under appeal which they are challenging.

120 In Case C-174/19 P, paragraph 35 of the main appeal concerns the General Court's analysis relating to the lack of '*de lege*' competition set out in paragraphs 108 to 116 of the first judgment under appeal, more specifically in paragraph 110 thereof. Similarly, paragraph 47 of that appeal concerns paragraphs 117 to 120 of that judgment, in which the General Court ruled on the question whether the same market was '*de facto*' open to competition. Similar statements can be made with regard to the main appeal lodged in Case C-175/19 P, as Stena Line Scandinavia has precisely identified paragraphs 83 to 91 of the second judgment under appeal, in particular paragraph 85 thereof, and paragraphs 92 to 95 of that judgment.

121 It is important to note, moreover, that the appellants cannot be criticised for not having specifically referred to the paragraphs in the grounds of the judgments under appeal in which the General Court held that the Commission had been right to take the view that the measures at issue did not give rise to any distortion of competition, since the General Court drew the legal consequences of its assessment of the distortion of competition and the effect on trade as a whole in paragraphs 133 and 134 of the first judgment under appeal and in paragraphs 108 and 109 of the second judgment under appeal.

122 The plea of inadmissibility raised by the Commission alleging that the General Court did not find, in the judgments under appeal, that there was no competition from a legal point of view must also be rejected. It is explicitly clear from paragraphs 97, 98 and 108 to 116 of the first judgment under appeal, and from the heading 'The opening "*de lege*" of the relevant markets by Law No 1249', set out before paragraph 108 of that judgment, that the General Court examined the measures at issue in the light of the criterion of distortion of competition. Those findings are also set out in paragraphs 72 and 73 and 83 to 91 of the second judgment under appeal.

123 The plea of inadmissibility raised by the Kingdom of Denmark, alleging that the appellants' arguments merely reproduce arguments relied on at first instance, is, moreover, formulated in a manner that is too general and imprecise to be upheld.

124 By contrast, the plea of inadmissibility raised by the Commission and the Kingdom of Denmark, alleging that the appellants are challenging the General Court's assessment of the facts, without claiming or demonstrating distortion, must be upheld in part.

125 It should be borne in mind in that regard that the alleged distortion must be obvious from the documents in the case file in order to be established, without there being any need to carry out a new assessment of the facts and evidence (see, to that effect, inter alia, judgments of 2 March 2021, *Commission* v *Italy and Others*, C-425/19 P, EU:C:2021:154, paragraph 52 and the case-law cited, and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori and Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 107).

126 It follows from this that the appellants cannot challenge the General Court's assessment, set out in paragraphs 94 to 96 of the first judgment under appeal and in paragraphs 69 to 71 of the second judgment under appeal, that the rail hinterland connections in Denmark which are covered by the project form part of the Danish national railway network, whereas they have not alleged distortion in order to challenge that assessment, which is based, in essence, on the finding, set out in paragraph 95 of the first judgment under appeal and in paragraph 70 of the second judgment under appeal, that the rail connections entailing the expansion and upgrading of the existing rail link between Ringsted and Rødby, which belongs to Banedanmark, will be managed by the latter in accordance with rules applicable to the entire national network, and, therefore, simply connect the fixed link to the existing national network, thus forming an integral part of the latter.

127 In addition, it follows from this that the appellants also cannot challenge the General Court's analysis of the markets on which the measures granted to Femern Landanlæg would be liable to distort competition by claiming, in their respective appeals, that competition on other markets, situated upstream and downstream of those analysed by the General Court, is distorted.

128 However, contrary to what the Commission in particular claims, the appellants, by their arguments directed against the General Court's assessment, in paragraphs 110 and 112 of the first judgment under appeal and in paragraphs 85 and 87 of the second judgment under appeal, according to which the Danish licensing system does not imply that the market for the operation and management of the national railway infrastructure is open to competition, do not confine themselves to challenging the assessment of the facts by the General Court, but address also the latter's legal assessment of that system, as regards whether there is competition 'for' the market concerned, in a context where a part of the operation of the infrastructure is also subject to a monopoly, with the result that those arguments must be considered to be admissible at the appeal stage.

(2) Substance

129 As has been stated in paragraph 62 of the present judgment, classification as 'State aid', within the meaning of Article 107(1) TFEU, requires, inter alia, that the measure at issue distorts or threatens to distort competition within the meaning of that provision.

130 As the Commission states, in essence, in paragraphs 188 and 219 of its Notice on the notion of State aid as referred to in Article 107(1) TFEU, the fact that a Member State assigns a public service subject to a legal monopoly to a public undertaking does not, in certain circumstances, entail a distortion of competition, and an advantage granted to the operator of an infrastructure

subject to a legal monopoly cannot, in such circumstances, distort competition. However, as the Commission also states, in paragraph 188(b) of that notice, it is necessary, for such a distortion to be able to be excluded in such circumstances, that the legal monopoly not only excludes competition 'on' the market, but also 'for' the market, in that it excludes any possible competition to become the exclusive provider of the service in question (see, to that effect, judgment of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 57).

131 In the present case, the appellants have not challenged the General Court's finding, in paragraph 112 of the first judgment under appeal and in paragraph 87 of the second judgment under appeal, that Banedanmark manages the national railway network under a statutory monopoly.

132 It is therefore common ground that Banedanmark has such a statutory monopoly to manage and operate the national railway infrastructure it holds and that the rail hinterland connections form part of it.

133 It also follows from the judgments under appeal that Banedanmark will remain responsible for the management and operation of the rail connections after the project has been completed, including those which will be owned by Femern Landanlæg.

134 Furthermore, although it follows in particular from paragraph 112 of the first judgment under appeal and from paragraph 87 of the second judgment under appeal that the Danish legislation allows undertakings meeting certain conditions to obtain a licence to manage and operate sections of the railway network, those are parts of that network that are separate from the national railway network.

135 In that regard, it has not been demonstrated, or even alleged, that the grant of licences or, subsequently, the grant of safety approvals would allow undertakings other than Banedanmark to carry out their activities on or for the market for the management and operation of the national railway infrastructure.

136 It is important to add that the fact that Banedanmark enjoys a statutory monopoly for the management and operation of the national railway infrastructure supports the finding that the Kingdom of Denmark is required, by legislative measures, to award the management and operation of that national infrastructure exclusively to that operator in the sense required by the case-law of the Court of Justice (see, to that effect, judgment of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 58 and the case-law cited).

137 In addition, the General Court, after finding, in paragraph 113 of the first judgment under appeal and in paragraph 88 of the second judgment under appeal, that the Danish legislation allowed operators established in other EU Member States to rely on permits issued in their country of origin, inferred from that, without erring in law, that the market for the management and operation of railway infrastructure in Denmark was not, for that reason alone, open to competition.

138 As regards the argument put forward by FSS in order to claim that it is necessary, even where there is such a monopoly, to examine whether there is potential competition with other modes of transport, relying on paragraph 97 of the judgment of 30 April 2019, *UPF* v *Commission* (T-747/17, EU:T:2019:271), it is apparent from paragraph 97 of that judgment that that case

concerned a different situation as compared to the present cases; in that situation, potential competition had been established by the Commission not for port services offered under a monopoly, but for transport services offered by ports which were, to a certain extent, in competition with those offered by other ports or by other transport providers.

139 Lastly, contrary to what the appellants claim, the finding made by the General Court, in paragraph 111 of the first judgment under appeal and in paragraph 86 of the second judgment under appeal, that EU law recognises that railway infrastructure is a natural monopoly is relevant for the purpose of ascertaining whether, irrespective of what is provided for by Danish law, EU law precludes Banedanmark's statutory monopoly.

140 It follows from the foregoing that the General Court was right to find, in paragraphs 110 and 112 of the first judgment under appeal and in paragraphs 85 and 87 of the second judgment under appeal, that the Danish legislation establishing the licensing system for the management of railway infrastructure did not imply that there was '*de lege*' competition 'on' or 'for' the market for the operation and management of the national infrastructure for which Banedanmark holds a statutory monopoly.

141 It should be added that granting the measures at issue to another undertaking, such as Femern Landanlæg, established by the Danish legislature in order to ensure the financing of the part of the project relating to the rail hinterland connections in Denmark and which will also be responsible for the operation and maintenance of those connections, is not such as to alter that finding.

142 In particular, it must be pointed out that the General Court found, in paragraph 119 of the first judgment under appeal and in paragraph 94 of the second judgment under appeal, without this being challenged, that it is not apparent from the Danish legislation relating to Femern Landanlæg or from that company's articles of association that it carries out or may carry out tasks other than those entrusted to it for the completion of the project.

143 The General Court's finding in paragraph 132 of the first judgment under appeal and in paragraph 107 of the second judgment under appeal, during the assessment of whether trade between Member States could be affected by the aid measures at issue, is also relevant, namely the finding that the claim that Banedanmark maintains the Danish railway network in competition with other companies and may penetrate other national markets, even if established, does not show, first, that the measures granted to Femern Landanlæg, but not to Banedanmark, constitute indirect aid for the benefit of Banedanmark or, second, that such measures are liable to distort competition on a market on which Femern Landanlæg operates.

144 It follows from the foregoing that the General Court was right to reject the arguments put forward by the appellants in the context of the second part of their first ground of appeal relating to whether there is '*de lege*' competition on the market on which Femern Landanlæg operates.

145 For the same reasons, the arguments relied on by the appellants in the context of the third part of their first ground of appeal, relating to the market being '*de facto*' open to competition, which are analogous to those relied on in relation to that market being '*de lege*' open to competition, are not capable of invalidating that analysis.

146 As regards the appellants' argument that the relevant criterion for the purposes of the analysis is in reality whether or not Femern Landanlæg received financing on conditions which correspond to market conditions, it must be borne in mind that this is a separate condition, necessary for classification as State aid within the meaning of Article 107(1) TFEU, which is irrelevant to the question whether the market on which the undertaking operates is open to competition.

147 It follows that the second and third parts of the first ground of appeal in Cases C-174/19 P and C-175/19 P must be rejected as in part inadmissible and in part unfounded.

4. The fourth part of the first ground of appeal in Cases C-174/19 P and C-175/19 P

(a) Arguments of the parties

148 By the fourth part of their first ground of appeal in Cases C-174/19 P and C-175/19 P, the appellants, supported by the interveners, submit that the General Court erred in law, in paragraphs 121 to 127 of the first judgment under appeal and in paragraphs 96 to 102 of the second judgment under appeal, by distinguishing, for the purpose of assessing the effects on competition of the measures granted to Femern Landanlæg, between the activities of constructing and maintaining the railway infrastructure, on the one hand, and those of managing and operating that infrastructure, on the other. NABU and FSS concur, in essence, with those arguments.

149 The appellants assert that the Danish licensing system, subsequently replaced by the safety approval system, covers, without distinction, all those activities. They state that Danish law defines the infrastructure manager as any entity responsible for those activities.

150 They add that the grounds on which the General Court distinguishes between those activities are not apparent from the judgments under appeal, since that distinction does not follow from Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32), which is however referred to in paragraphs 101 to 104 of the first judgment under appeal and in paragraphs 76 to 79 of the second judgment under appeal. They refer, in particular, to Article 3(2) of that directive, which defines 'infrastructure manager' as any body or firm responsible in particular for 'managing and maintaining' railway infrastructure, and to Article 7(1) thereof, which refers, without further clarification, to the 'essential functions' of an infrastructure manager.

151 They submit that the General Court erred in law and distorted the evidence, in paragraphs 125 and 127 of the first judgment under appeal and in paragraphs 100 and 102 of the second judgment under appeal, in finding that it is not apparent from the Danish legislation, from the decision at issue or from Femern Landanlæg's articles of association that that undertaking is responsible for carrying out the tasks of constructing and maintaining the railway network in competition with other operators.

152 They add that, contrary to what the Kingdom of Denmark submits, the arguments directed against paragraph 125 of the first judgment under appeal and paragraph 100 of the second judgment under appeal, by which the General Court held that Femern Landanlæg is not in a position to carry out those tasks, cannot be regarded as a new plea, and therefore as inadmissible, since the assessment set out in those paragraphs does not follow from the decision at issue and could not, for that reason, be challenged before the General Court.

153 Rederi Nordö-Link, Trelleborg Hamn and Aktionsbündnis also submit that the General Court distorted, in paragraphs 122 and 127 of the first judgment under appeal and in paragraphs 97 and 102 of the second judgment under appeal, the evidence, including the decision at issue, by holding that Femern Landanlæg's activities of managing and operating the railway network do not go so far as to include the construction and maintenance of that network.

154 The Commission and the Kingdom of Denmark contend that the fourth part of the first ground of appeal is unfounded.

155 The Kingdom of Denmark adds that the arguments by which the appellants are challenging the General Court's interpretation of the Danish legislation are new and must, in any event, be rejected as inadmissible.

(b) Findings of the Court

156 It is important to note, first of all, that the General Court, after setting out, in paragraphs 122 to 124 of the first judgment under appeal and in paragraphs 98 to 100 of the second judgment under appeal respectively, the relevant national provisions, held, in paragraph 125 of the first judgment under appeal and in paragraph 100 of the second judgment under appeal, that Femern Landanlæg is responsible for ensuring that the rail connections are constructed and operated, but is not in a position to carry out itself the tasks relating to the construction and maintenance of the network in competition with other operators. Thus, contrary to what the appellants claim, that assessment is not vitiated by a failure to state adequate reasons.

157 Next, without there being any need to rule on the plea of inadmissibility raised by the Kingdom of Denmark, it is important to note that the arguments relied on by the appellants to demonstrate that the General Court distorted the evidence in finding that Femern Landanlæg is not entrusted with the construction and maintenance of railway infrastructure must, in any event, be rejected as ineffective.

158 As both the Commission and the Kingdom of Denmark state, it does not follow from paragraph 125 of the first judgment under appeal or from paragraph 100 of the second judgment under appeal that Femern Landanlæg is not responsible for the construction and maintenance of the rail connections. The General Court merely stated that that undertaking is not 'in a position to carry out [those tasks] itself' or, as it noted, in paragraph 127 of the first judgment under appeal and paragraph 102 of the second judgment under appeal respectively, that that undertaking 'does not directly perform' those activities, without that assessment of the facts having been challenged.

159 In paragraph 9 of the judgments under appeal, the General Court also noted, in the description of the project, that Femern Landanlæg will be 'responsible' for the construction and management, 'including maintenance', of the rail hinterland connections, and that it will bear the costs on a pro rata basis according to its respective ownership share, the other part being borne by Banedanmark. Furthermore, it follows in particular from paragraph 124 of the first judgment under appeal and from paragraph 99 of the second judgment under appeal that Banedanmark will be responsible for the implementation of those activities.

160 It follows that the distinction drawn by the General Court, in paragraph 122 of the first judgment under appeal and in paragraph 97 of the second judgment under appeal, between the markets for the construction and maintenance of the railway infrastructure, on which Femern Landanlæg is

not 'active', and the markets for the management and operation, 'in the strict sense', of the railway infrastructure is based solely on the distinction between whether or not those different activities are actually performed by that undertaking.

161 As the Commission states, it is necessary, for the purpose of assessing the effect on competition of the measures granted to Femern Landanlæg, to take account of the activities of which that undertaking is itself specifically and actually in charge.

162 Since Femern Landanlæg is not capable of carrying out the activities of constructing or maintaining the rail connections itself, the General Court was right to find, in paragraph 126 of the first judgment under appeal and in paragraph 101 of the second judgment under appeal, that the existence of companies carrying out those activities on the Danish railway network, including following a competitive tendering procedure for the award of a contract, does not demonstrate that the activities of managing or operating the railway infrastructure performed by Femern Landanlæg in that sector are also open to competition.

163 As regards the arguments that the activities of that undertaking are nevertheless carried out in a market open to competition, as resulting in particular from the licensing system in place in Denmark, it must be noted that they relate in reality to the effect on competition of the measures granted to Femern Landanlæg, which is the subject of the second and third parts of the first ground of appeal.

164 It follows that the General Court did not err in law in distinguishing Femern Landanlæg's activities relating to constructing and maintaining the railway network from those relating to operating, in the strict sense, that network.

165 Accordingly, the fourth part of the first ground of appeal in Cases C-174/19 P and C-175/19 P must be rejected as unfounded.

166 Since all the parts of the first ground of appeal must be rejected, it is necessary to reject that ground of appeal in its entirety.

D. The second ground of appeal in Cases C-174/19 P and C-175/19 P

1. Arguments of the parties

167 By their second ground of appeal in Cases C-174/19 P and C-175/19 P, the appellants, FSS and Rederi Nordö-Link claim that the measures granted to Femern Landanlæg are such as to affect trade between Member States within the meaning of Article 107(1) TFEU, since they are liable to affect competition both on the market for the management of railway infrastructure and on the market for transport across the Fehmarn Belt. They state that account should also be taken of the cross-border nature of the project, which connects two Member States.

168 The Commission and the Kingdom of Denmark submit that the second ground of appeal is inadmissible on the ground that the appellants have not precisely identified the paragraphs in the grounds of the judgments under appeal which they are challenging and that it is, in any event, unfounded.

169 The Kingdom of Denmark adds that the arguments by which the appellants are challenging paragraphs 129 to 132 of the first judgment under appeal and paragraphs 104 to 107 of the second judgment under appeal, without alleging distortion of the facts or the evidence on the part of the General Court, are inadmissible since they relate to the General Court's assessment of the facts.

2. Findings of the Court

170 Contrary to what the Commission and the Kingdom of Denmark claim, the second ground of appeal relied on in Cases C-174/19 P and C-175/19 P has identified with sufficient precision the paragraphs of the judgments under appeal which are being challenged, inasmuch as the appellants refer in particular to paragraphs 128 to 132 of the former judgment and to paragraphs 103 to 107 of the latter by which the General Court ruled on the appellants' arguments relating to whether the aid measures at issue affected trade between Member States.

171 It is also important to note that the appellants cannot be criticised for not having specifically referred to the paragraphs of the judgments under appeal in which the General Court concluded that the measures at issue were not liable to affect trade, since, in paragraphs 133 and 134 of the first judgment under appeal and in paragraphs 108 and 109 of the second judgment under appeal, the General Court rejected as a whole the first plea in law and the first complaint in the second part of the third plea in law of the appellants, alleging infringement of Article 107(1) TFEU and infringement of the obligation to initiate the formal investigation procedure, as regards the analysis of the measures granted to Femern Landanlæg for the planning, construction and operation of the rail connections.

172 Next, it must be borne in mind that it follows from the examination of the second and third parts of the first ground of appeal that the General Court did not err in law in taking the view that the Commission had been right to find that there is no competition on the market for the management and operation of the national railway infrastructure.

173 It follows that the General Court was also right to find, without erring in law, in paragraphs 129 and 130 of the first judgment under appeal and in paragraphs 104 and 105 of the second judgment under appeal, first, that the fact that there is no competition on that market prevents companies established in other Member States from penetrating that market and, second, that the Planning Law referred to in recital 13 of the decision at issue and the Construction Law, referred to in recital 50 of that decision, do not allow Femern Landanlæg to engage in activities other than the planning, construction and operation of the rail connections.

174 The General Court was thus entitled to conclude, in paragraph 131 of the first judgment under appeal and in paragraph 106 of the second judgment under appeal, that the appellants had not succeeded in showing that Femern Landanlæg had been authorised to carry out activities other than those relating to the project and that it could therefore penetrate markets in other Member States.

175 As the Kingdom of Denmark states, those paragraphs are part of the General Court's assessment of the facts in respect of which no distortion has been expressly alleged or demonstrated.

176 As regards the appellants' argument alleging that the project is cross-border in nature, inasmuch as it will make it possible to connect two Member States, it must be noted that the measures examined in the context of the present ground of appeal concern in any event only the rail

hinterland connections in Denmark, which are not 'cross-border' in nature in the sense in which the appellants rely on. Moreover, their financing is the subject of an assessment that is separate from that of the financing of the fixed link, as follows, in particular, from paragraph 88 of the first judgment under appeal and from paragraph 63 of the second judgment under appeal.

177 It follows from the foregoing that the General Court did not err in law in finding, in paragraph 133 of the first judgment under appeal and in paragraph 108 of the second judgment under appeal, that, as regards the criterion of effect on trade between Member States, the Commission's examination was not vitiated by an error of law and that the Commission had also not encountered serious difficulties such as to prompt it to initiate the formal investigation procedure.

178 It follows that the second ground of appeal in Cases C-174/19 P and C-175/19 P is unfounded.

179 Consequently, since all the grounds of appeal raised by the appellants in support of their main appeals have been rejected, those appeals must be dismissed in their entirety.

VII. The cross-appeals

180 In its cross-appeals, the Commission raises a single ground of appeal, alleging that the General Court was wrong to accept implicitly that the appellants had standing to bring proceedings against the decision at issue in so far as it relates to the measures adopted in favour of Femern Landanlæg.

181 The appellants, NABU and FSS have pleaded that the cross-appeals are inadmissible.

182 In that regard, without it being necessary to rule on that plea of inadmissibility as regards the cross-appeals, it must be noted, first, that the General Court did not, in the judgments under appeal, as the Advocate General stated in point 43 of his Opinion, take a decision as to the admissibility of the actions brought before it by the appellants against the decision at issue in so far as it relates to the measures adopted in favour of Femern Landanlæg, and second, that it was entitled to do so as it did not err in law by dismissing those actions on the merits.

183 It follows that the cross-appeals must be dismissed.

VIII. Costs

184 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

185 Under Article 138(1) of those rules, applicable to the procedure on an appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

186 Since the Commission has applied for costs and the appellants have been unsuccessful, the appellants are to be ordered to pay, in addition to their own costs, those incurred by the Commission in connection with the main appeals.

187 Since the Commission has been unsuccessful in its submissions in the cross-appeals, it is to be ordered to bear its own costs in connection with those appeals.

188 Article 184(4) of the Rules of Procedure provides that, where the appeal has not been brought by an intervener at first instance, he or she may not be ordered to pay costs in the appeal proceedings unless he or she participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court may decide that he or she shall bear his or her own costs.

189 In accordance with those provisions, the Kingdom of Denmark, FSS and NABU, interveners at first instance, which took part in the proceedings before the Court of Justice, are to bear their own costs in the cases in which they intervened.

190 Lastly, under Article 140(3) of the Rules of Procedure, applicable to the procedure on an appeal by virtue of Article 184(1) thereof, the Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article to bear his or her own costs.

191 In accordance with those provisions, Rederi Nordö-Link, Trelleborg Hamn and Aktionsbündnis are to bear their own costs in the two cases.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the main appeals and the cross-appeals;**

2. **Orders Scandlines Danmark ApS, Scandlines Deutschland GmbH and Stena Line Scandinavia AB to pay, in addition to their own costs, those incurred by the European Commission in connection with the main appeals;**

3. **Orders the European Commission to bear its own costs in connection with the cross-appeals;**

4. **Orders the Kingdom of Denmark, Föreningen Svensk Sjöfart and Naturschutzbund Deutschland (NABU) eV to bear their own costs;**

5. **Orders Nordö-Link AB, Trelleborg Hamn AB and Aktionsbündnis gegen eine feste Fehmarnbeltquerung eV to bear their own costs.**

Bonichot Bay Larsen Toader

Safjan Jääskinen

Delivered in open court in Luxembourg on 6 October 2021.

A. Calot Escobar
Registrar

J.-C. Bonichot
President of the First Chamber