V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA

POMOC PAŃSTWA — PAŃSTWO CZŁONKOWSKIE

Pomoc państwa SA.57543 oraz SA.58342 (2020/NN) (ex 2020/N), Dania i Szwecja — COVID-19: Dokapitalizowanie SAS AB

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

(Tekst mający znaczenie dla EOG)

(2023/C 250/08)

Pismem z dnia 4 lipca 2023 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Danię i Szwecję o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat środka, w odniesieniu do którego Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma na następujący adres:

European Commission
Directorate-General for Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Otrzymane uwagi zostaną przekazane władzom duńskim i szwedzkim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie klauzulą poufności ich tożsamości lub fragmentów zgłaszanych uwag.

Tekst streszczenia

Procedura

W dniu 11 sierpnia 2020 r. Królestwo Danii i Królestwo Szwecji powiadomiły Komisję, na podstawie art. 107 ust. 3 lit. b) TFUE i komunikatu Komisji z dnia 19 marca 2020 r. „Tymczasowe ramy środków pomocy państwa w celu wsparcia gospodarki w kontekście trwającej epidemii COVID-19” [1], ostatnio zmienionego w dniu 29 czerwca 2020 r. [2] („tymczasowe ramy pomocy państwa”), o środku pomocy indywidualnej („środek”) w postaci udziału tych dwóch państw członkowskich w planie dokapitalizowania SAS.

[1] (Dz.U. C 91 I z 2020, p. 1).
[2] (Dz.U. C 218 z 2020, p. 3).

W dniu 17 sierpnia 2020 r. Komisja przyjęła decyzję („pierwotna decyzja") o niewnoszeniu zastrzeżeń wobec środka ze względu na jego zgodność z rynkiem wewnętrznym na podstawie art. 107 ust. 3 lit. b) TFUE [3].

W wyroku z dnia 10 maja 2023 r. w sprawie T-238/21 Sąd stwierdził nieważność pierwotnej decyzji, ponieważ naruszała ona pkt 61 i 62 tymczasowych ram pomocy państwa [4]. Sąd stwierdził, że środek zatwierdzony przez Komisję w drodze decyzji nie zawierał mechanizmu progresywnego ani alternatywnego, zgodnie z wymogami pkt 61 i 62 tymczasowych ram pomocy państwa, w celu zachęcenia beneficjenta lub innych inwestorów do odkupienia udziałów nabytych przez Szwecję i Danię w ramach środka.

W następstwie wyżej wymienionego wyroku Komisja w dniach 8, 13 i 15 czerwca 2023 r. zwróciła się o dodatkowe informacje. Dania i Szwecja udzieliły odpowiedzi w dniach 12, 15 i 16 czerwca 2023 r.

Opis środka, w odniesieniu do którego Komisja wszczyna postępowanie

Celem środka było przywrócenie pozycji bilansowej i płynności SAS w wyjątkowej sytuacji spowodowanej pandemią COVID-19.

Beneficjentem środka jest SAS – skandynawskie linie lotnicze obsługujące ruch krajowy w Danii, Szwecji i Norwegii, a także ruch wewnątrz Skandynawii, oraz oferujące bezpośrednie połączenia z głównymi unijnymi i międzynarodowymi centrami biznesowymi.

Środek polegał na dokapitalizowaniu SAS za pomocą dwóch instrumentów: po pierwsze, subskrypcji przez Danię i Szwecję obligacji hybrydowych (hybrydowy instrument kapitałowy); po drugie, subskrypcji przez te dwa państwa członkowskie nowych zwykłych udziałów wyemitowanych przez SAS (instrument kapitałowy).

Całkowita kwota środka wynosi około 11 mld SEK (1,069 mld EUR), z czego Dania wniosła około 6 mld SEK, a Szwecja – 5 mld SEK.

Ocena środka

Po przeanalizowaniu dostępnych jej informacji Komisja uważa, że konieczne jest wszczęcie formalnego postępowania wyjaśniającego w celu zbadania zgodności środka z obowiązującymi zasadami pomocy państwa.

Komisja uważa, że środek stanowi pomoc państwa w rozumieniu art. 107 ust. 1 TFUE.

Komisja oceniła zgodność tej pomocy z sekcją 3.11 tymczasowych ram pomocy państwa, w której określono kryteria, na podstawie których państwa członkowskie mogą udzielać wsparcia publicznego w formie instrumentów kapitałowych lub hybrydowych instrumentów kapitałowych przedsiębiorstwom doświadczającym trudności finansowych w związku z pandemią COVID-19.

Komisja wstępnie zajmuje stanowisko, że środek nie spełnia wszystkich warunków określonych w sekcji 3.11 tymczasowych ram pomocy państwa.

Jeżeli chodzi o instrumenty kapitałowe, w pkt 61 tymczasowych ram pomocy państwa zobowiązano państwa członkowskie do wdrożenia mechanizmu progresywnego obejmującego dwa etapy – cztery i sześć lat po zastosowaniu zastrzyku kapitałowego w związku z COVID-19 – w celu zwiększenia wynagrodzenia dla państwa, aby zachęcić beneficjenta do odkupienia zastrzyków kapitałowych dokonywanych przez państwo. W pkt 62 tymczasowych ram pomocy państwa przewidziano, że Komisja może przyjąć alternatywne mechanizmy, pod warunkiem że doprowadzą one ogólnie do podobnego wyniku w odniesieniu do efektu zachęty do wyjścia państwa oraz podobnego ogólnego wpływu na wynagrodzenie państwa.

W pierwotnej decyzji Komisja stwierdziła, że środek, w odniesieniu do instrumentu kapitałowego, nie zakładał żadnego mechanizmu progresywnego wymaganego na mocy pkt 61 tymczasowych ram pomocy państwa. Uznała jednak, że ogólna struktura środka stanowi alternatywny mechanizm na podstawie pkt 62 tymczasowych ram pomocy państwa, który wystarczy, by zapewnić odpowiednie wynagrodzenie państwom członkowskim i zachęcić beneficjenta do odkupienia zastrzyku kapitałowego dokonanego przez państwo. Aby dojść do tego wniosku, Komisja uznała, że oba elementy środka (tj. instrument kapitałowy i hybrydowy instrument kapitałowy) są na tyle wzajemnie powiązane, że ich połączone skutki zachęcające państwo do wyjścia muszą zostać uwzględnione do celów weryfikacji zgodności z pkt 62 tymczasowych ram pomocy państwa. Ponieważ środek przewidywał m.in. duży rabat, z którym Dania i Szwecja nabyły udziały w SAS, oraz hybrydowy instrument kapitałowy o stopach procentowych rosnących z upływem czasu, co znacznie zwiększyło koszty utrzymania pomocy państwa w SAS, Komisja uznała, że ogólna struktura środka jest zgodna z pkt 62 tymczasowych ram pomocy państwa.

[3] Decyzja Komisji C(2020) 5750 final z dnia 17 sierpnia 2020 r. dotycząca pomocy państwa SA.57543 (2020/N) – Dania oraz SA.58342 (2020/N) – Szwecja – Dokapitalizowanie SAS AB w związku z COVID-19 (Dz.U. C 50 z 12.2.2021, s. 1).

[4] Wyrok Sądu z dnia 10 maja 2023 r., Ryanair/Komisja (SAS II; COVID-19), T-238/21, ECLI:EU:T:2023:247.

W wyroku z dnia 10 maja 2023 r. Sąd uznał jednak, że chociaż hybrydowy instrument kapitałowy środka zapewnia wystarczające zabezpieczenia, aby zapewnić odpowiednie wynagrodzenie państwa i zachęty do wyjścia państwa, to nie dotyczy to instrumentu kapitałowego w ramach środka. W szczególności Sąd stwierdził, że żaden z czynników przywołanych przez Komisję nie świadczy o tym, że instrumentowi kapitałowemu towarzyszy mechanizm progresywny lub jakikolwiek mechanizm alternatywny, zgodnie z wymogami pkt 61 lub 62 tymczasowych ram pomocy państwa.

W świetle tego ustalenia Komisja stwierdziła, że środek budzi poważne wątpliwości, ponieważ nie zawiera mechanizmu progresywnego ani żadnego innego rozwiązania w celu zapewnienia państwom wystarczającego wynagrodzenia i zachęcenia beneficjenta pomocy do odkupienia udziałów nabytych przez państwa.

Pismo

State Aid SA.57543 and SA.58342 (2020/NN) (ex 2020/N), Denmark and Sweden — COVID-19: Recapitalisation of SAS AB

Excellences,

The Commission wishes to inform the Kingdom of Denmark ('Denmark') and the Kingdom of Sweden ('Sweden') that, in order to comply with the judgment of the General Court of 10 May 2023 in Case T-238/21 ([1]), and having examined the information supplied by your authorities on the aid referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU').

1. **The procedure**

(1) Following pre-notification contacts ([2]), by electronic notifications of 11 August 2020, Denmark and Sweden notified to the Commission their plans to participate in the recapitalisation (the 'Measure') of SAS AB ('SAS' or the 'beneficiary'). SAS is the parent company of SAS Danmark A/S, SAS Norge AS, SAS Sverige AB ([3]), SAS Cargo Group, SAS Ground Handling Denmark A/S, SAS Ground Handling Norway AS, SAS Ground Handling Sweden AB and SAS Technical Services ('SAS Group') ([4]).

(2) Denmark and Sweden notified the Measure under Article 107(3)(b) TFEU, as interpreted by section 3.11 of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak ('the Temporary Framework') ([5]).

(3) The Measure aimed at restoring the balance sheet position and liquidity of SAS in the exceptional situation caused by the COVID-19 pandemic. The Measure comprised two recapitalisation instruments, namely, first, subscription by Denmark and Sweden to State hybrid notes ('the hybrid capital instrument') and, second, subscription by those two Member States of new common shares ('the equity instrument'). The total maximum amount of the aid, as notified by Denmark and Sweden on 11 August 2020, was approximately 11 billion Swedish kronor (SEK) (EUR 1 069 million) ([6]), of which approximately SEK 6 billion was provided by Denmark and SEK 5 billion by Sweden. Furthermore, the recapitalisation plan foreseen by SAS also provided for the participation of private actors. To that end, SAS, inter alia, entered into an agreement with the holders of certain existing hybrid notes and the holders of certain bonds to convert, first, those hybrid notes into new common shares and, second, the bonds into either new commercial hybrid notes or common shares.

(4) On 17 August 2020, the Commission adopted a decision, by which it decided not to raise objections to the Measure, as notified on 11 August 2020, on the ground that it was compatible with the internal market on the basis of Article 107(3)(b) TFEU (the 'Initial Decision') ([7]).

(5) Denmark and Sweden granted the aid under the Measure to SAS on 26 October 2020. The amount of aid eventually paid was approximately SEK 9,54 billion (EUR 907 million), which was thus lower than the amount envisaged in the notification and approved by the Commission in the Initial Decision (see recital (3)). Denmark and Sweden granted the aid through agreements on subscription undertakings and underwriting commitments entered into by SAS and each of the Swedish and Danish States (the 'Agreements'). The Agreements concerned both the equity instrument and the hybrid capital instrument.

([1]) Judgment of General Court of 10 May 2023, *Ryanair* v *Commission (SAS II; COVID-19)*, T-238/21, EU:T:2023:247.

([2]) Denmark and Sweden submitted a draft notification form on 12 June 2020. Following informal exchanges with the Commission, Denmark and Sweden submitted additional information on 16 June 2020. The Commission sent Denmark and Sweden requests for information on 16, 19, 23 and 30 June 2020, to which Denmark and Sweden replied on 18, 22, 23 June 2020 and 2 July 2020. The Commission sent further requests for information on 2, 6 and 10 July 2020 to which Denmark and Sweden replied on 3, 8, 13 and 23 July 2020. Further information was submitted by Denmark and Sweden on 24, 27, 30 and 31 July 2020 and 1 and 2 August 2020.

([3]) Those three subsidiaries own a consortium called Scandinavian Airlines System Denmark-Norway-Sweden.

([4]) SAS Group also includes: Gorm Dark Blue Ltd; Gorm Asset Management Ltd; Gorm Deep Blue Ltd; Gorm Light Blue Ltd; Gorm Ocean Blue Ltd; Gorm Sky Blue Ltd; Gorm Warm Red Ltd; SAS Eiendom AS; Flesland Cargo ANS; SAS Individual Holdings AB; SAS Spare Engine AB; SAS Oil Denmark A/S; SAS Oil Norway AS; SAS Oil Sweden AB; SAS Struktur Freja AB; SAS Struktur Göta KB; SAS Struktur Sonja KB; SAS Struktur Tyke KB; Linjeflyg AB; Scandinavian Airlines Ireland Ltd; Scandinavian Airlines System Investment Ltd; Red 1 A/S.

([5]) Communication from the Commission — Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91 I, 20.3.2020, p. 1), as amended by Commission Communication C(2020) 2215 (OJ C 112 I , 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 35), and C(2020) 4509 fin(OJ C 218, 2.7.2020, p. 3). After the adoption of the Initial Decision, the Temporary Framework was amended by Commission Communication C(2020) 7127 (OJ C 340 I, 13.10.2020, p. 1), C(2021) 564 (OJ C 34, 1.2.2021, p. 6), C(2021) 8442 (OJ C 473, 24.11.2021, p. 1) and C(2022) 7902 (OJ C 423, 7.11.2022, p. 9).

([6]) When referring to the Measure as notified on 11 August 2020, the exchange rate of 14 August 2020 is used when the amount of aid in SEK is converted into EUR.

([7]) Commission Decision C(2020) 5750 final of 17 August 2020 on State Aid SA.57543 (2020/N) — Denmark and SA.58342 (2020/N) — Sweden — COVID-19 recapitalisation of SAS AB (OJ C 50, 12.2.2021, p. 1). On 23 August 2020, the Commission adopted a correcting decision amending the Initial Decision.

(6) On 4 May 2021, Ryanair DAC lodged an action seeking the annulment of the Initial Decision. In its judgment of 10 May 2023 in Case T-238/21, the General Court annulled the Initial Decision for an infringement of points 61 and 62 of the Temporary Framework ([8]). The General Court considered that the Commission had failed to require the inclusion of a step-up or an alternative mechanism with regard to the equity instrument, contrary to the requirements set out in those provisions of the Temporary Framework.

(7) Following the annulment of the Initial Decision, the Commission requested additional information from Denmark and Sweden on 8, 13 and 15 June 2023. Denmark and Sweden replied on 12, 15 and 16 June 2023.

(8) By letters dated 15 June 2020 and 14 June 2020 respectively, Denmark and Sweden exceptionally agreed to waive their rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation No 1/1958 ([9]) and to have this Decision adopted and notified in English.

2. **Detailed description of the measure**

(9) In the following section, the Measure and its context are described at the time the Measure was granted (i.e. on 26 October 2020). The assessment of the Measure, following the annulment of the Initial Decision, must be based on the facts and elements prevailing at the moment of granting.

2.1. ***The impact of COVID-19 and the objective of the Measure***

(10) The COVID-19 pandemic resulted in severe travel restrictions and significantly reduced passenger air transport at global level.

(11) To limit the spread of the COVID-19, Member States, including Denmark and Sweden, adopted a wide range of containment measures, such as inter alia requirements to work remotely from home and to avoid public gatherings, the closure of non-essential businesses and the implementation of night curfews. In addition, Member States, such as Denmark and Sweden, drastically limited movements and travels within their territories and to/from foreign countries, including within the Union, with travel restrictions, flight bans and general sanitary measures (quarantine and/or negative COVID-19 test requirements, etc.).

(12) In particular, on 13 March 2020, the Danish Ministry of Foreign Affairs advised against all non-essential travel to all countries. On 29 May 2020, the restrictions were lifted as of 15 June 2020 for travels to Germany, Iceland and Norway. On 25 June 2020, the restrictions were lifted for EU and Schengen countries, except for the United Kingdom, Sweden, Portugal, Romania, Malta, and Ireland ([10]).

(13) Similar travel restrictions were issued by Sweden. On 14 March 2020, the Swedish Ministry for Foreign Affairs advised against non-essential travel to all countries. That advice was extended twice, on 3 April 2020 and on 13 May 2020. On 17 June 2020, the advice was removed for non-essential travel to Belgium, Croatia, France, Greece, Hungary, Iceland, Italy, Luxembourg, Monaco, Portugal, San Marino, Spain, Switzerland and the Vatican City; on 15 July 2020, for Andorra, Germany and Poland; and on 29 July 2020, for Denmark, Norway, and Czech Republic. A temporary ban on entry to the EU via Sweden was in force from 19 March 2020 until 31 August 2020.

(14) According to the Danish and Swedish authorities, the consequences of the COVID-19 pandemic severely damaged the financial position of SAS, as evident from SAS' Interim Report for the second quarter of 2020 ([11]). SAS faced a significant reduction and/or suspension of its services, resulting in high operating losses ([12]) due to the measures taken by Member States and third countries to tackle the COVID-19 pandemic. Those high operating losses were driven by a significant decline in demand. Based on traffic figures, the number of passengers transported by SAS fell by 59,7 % ([13]) in March 2020 and by 96 % in April 2020 compared to the corresponding periods in 2019. At the end of the second quarter of 2020, SAS was primarily operating limited domestic networks in Norway and Sweden, supplemented with a few international repatriation flights. In August 2020, the Danish and Swedish authorities provided the Commission with financial projections for the years 2020-2025. Based on those projections, the equity of SAS would be reduced significantly by the end of 2020 ([14]), as compared to end 2019, and would become negative. Denmark and Sweden further submitted that, based on SAS's assumptions in August 2020, SAS would face technical illiquidity by December 2020, despite the actions implemented immediately after the outbreak of the COVID-19 pandemic to reduce the cash burn and to preserve liquidity.

([8]) Judgment of General Court of 10 May 2023, *Ryanair* v *Commission (SAS II; COVID-19)*, T-238/21, EU:T:2023:247.

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

([10]) See at: https://via.ritzau.dk/pressemeddelelse/ny-model-for-rejsevejledningerne-for-europa-traeder-i-kraft?publisherId=2012662&releaseId=13596062

([11]) SAS' Interim Report Q2 2020, p. 7 and 14, available at: https://www.sasgroup.net/files/mfn/Main/290/3121107/1254810.pdf

([12]) The amount by which the cost of goods sold or services provided plus operating expenses is more than a company's income in a particular period of time.

([13]) https://www.sasgroup.net/newsroom/press-releases/2020/sas-traffic-figures—march-2020/

([14]) The negative results in 2020 would consume SAS's equity in total and lead to a […] by the end of 2020, compared to a book equity value of more than SEK 5,3 billion at the end of 2019.

(15) In March 2020, SAS started reducing its operating costs, notably by stopping most of its traffic operations and grounding the majority of its fleet ([15]); by offering its customers rebooking options including additional vouchers to discourage claims for immediate payment; by optimising maintenance, repair and operations costs; and by suspending marketing or other non-essential activities. As regards personnel, around 10 000 employees, equivalent to 90 % of its staff, were put on temporary lay-off by the company. Other labour-related measures included the reduction of collected overtime and the granting of unpaid leave to certain employees. On the financial side, since the start of the crisis SAS reduced its planned investments by delaying aircraft deliveries and postponing other investments.

(16) In addition to the mitigation measures carried out to reduce its losses, SAS received State aid to limit the impact of the COVID-19 pandemic on its business. At the time of the granting of the Measure, SAS had benefited from several other State aid measures and other State aid measures were envisaged:

— First, on 15 April 2020 ([16]) and 24 April 2020 ([17]), the Commission approved State aid to SAS in the form of State guarantees of up to 90 % of a revolving credit facility of SEK 3,3 billion (EUR 324 million). Those measures were intended to partly compensate the airline for the damage directly suffered due to the COVID-19 pandemic and were notified by Denmark and Sweden under Article 107(2)(b) TFEU. The Danish and Swedish authorities explained that, although those measures provided some liquidity to SAS, which had an expected operating cash burn rate ([18]) in the range of SEK 500-700 million per month until the end of fiscal year 2020, they would not be sufficient in the longer term. In addition, pursuant to the terms of the revolving credit agreement, once the recapitalisation plan would be successfully implemented, SAS would cancel (and repay any amount outstanding of) its SEK 3,3 billion three-year revolving credit facility agreement, guaranteed at 90 % by the Major Shareholders, in accordance with its terms and conditions ([19]).

— Second, SAS also received compensation from Denmark for its fixed costs under the scheme approved by the Commission by decision of 8 April 2020 ([20]). In that context, SAS received SEK 59 375 580 for the Consortium (see footnote 3); SEK 21 126 457 for ground operations; and SEK 11 135 382 for cargo (i.e. a total of SEK 91 637 419 or EUR 8,9 million).

— Third, in August 2020, the Danish authorities communicated a very preliminary estimate of the potential aid for which SAS could be eligible under two schemes in support of airlines that had been pre-notified by Denmark at that time ([21]). According to that estimate, SAS could receive a maximum amount of EUR 800 000 (approximately DKK 6 million) pursuant to the first scheme and approximately EUR 4,7 million (DKK 35 million) under the second scheme ([22]).

— Finally, SAS had received compensation for damage caused by the COVID-19 pandemic from Norway under the scheme approved by ESA on 17 April 2020 in case 85047 ([23]). That compensation amounted to approximately NOK 10 million (EUR 932 723) ([24]). Also, as submitted by Denmark and Sweden, SAS had entered into a public service contract with the Norwegian State. SAS had estimated the contract payments under that contract to be approximately SEK 500 million (EUR 49 million).

(17) Despite the mitigation measures that it undertook, and the State aid that it already received, SAS's impaired financial situation as of March 2020 increased its equity needs, which according to the Danish and Swedish authorities could not be covered on capital markets or by alternative financing options. In its notification of 11 August 2020, Denmark and Sweden indicated that in line with the existing forecasts for the aviation sector, SAS's operations would not return to its pre-COVID-19 pandemic levels at least before 2022. As a consequence, the company projected to accumulate more than SEK 15 billion of losses by the end of 2021, which would in turn severely erode its capital structure. Denmark and Sweden explained that the State aid measures already received by SAS (see recital (16)) were

([15]) In April 2020, the Available Seat Kilometres of SAS decreased by 95 % (source: SAS' presentation to investors).
([16]) Commission Decision C(2020) 2416 final of 15 April 2020 on State Aid SA.56795 (2020/N) — Denmark — Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines (OJ C 220, 3.7.2020, p. 1).
([17]) Commission Decision C(2020) 2784 final of 24 April 2020 on State Aid SA.57061 (2020/N) — Sweden — Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines (OJ C 220, 3.7.2020, p. 1).
([18]) The rate at which a company depletes its cash reserves or cash balance in a loss-generating scenario due to its operating activities.
([19]) The outstanding amount was repaid on 29 October 2020. The guarantee lapsed at the same time.
([20]) See Commission decision C(2020) 2294 final of 8 April 2020 on State aid case SA.56774 (2020/N) — Denmark — Compensation scheme to companies exposed to large turnover decline related to COVID-19. The scheme was approved under Article 107(2)(b) TFEU (OJ C 144, 30.4.2020, p. 1).
([21]) Case SA.58157 — COVID-19 recapitalisation of SAS and Case SA.58088 Compensation to airlines on Danish domestic routes for COVID-19 damage (based respectively on Article 107(3)(b) TFEU as interpreted by section 3.1 of the Temporary Framework and Article 107(2)(b) TFEU).
([22]) Eventually, SAS did not receive aid under any of those two schemes. However, the envisaged amounts at the time of granting are taken into account in the proportionality assessment.
([23]) See at: https://www.eftasurv.int/state-aid/state-aid-register/covid-19-grant-scheme-undertakings-suffering-substantial-loss-turnover
([24]) InforEuro exchange rate August 2020 applied.

either of a low amount or inadequate to address its equity needs, as they aimed at addressing only SAS' immediate liquidity shortage rather than the deterioration of the capital structure of SAS over the medium and long-term. Furthermore, Denmark and Sweden explained that SAS did not find alternative financing to cover its capital needs. For example, at the time it contracted its revolving credit facility with a group of banks ([25]), the discussions proved that financial institutions were not ready to take any unsecured risk without State support: ultimately, that facility had to be backed up at 90 % by Denmark and Sweden in the form of guarantees on the loans (see recital (16), first indent).

(18) More generally, Denmark and Sweden explained that financing in the form of increased debt would not address the capital needs of SAS. The latter needed to raise capital in the form of equity to address its equity needs, which SAS could not find in its entirety on the market. In that regard, Denmark and Sweden explained that the recapitalisation plan notified to the Commission on 11 August 2020 was designed with the objective to cover as much of SAS's capital needs as possible from the market, by attracting private investors and by involving other private shareholders of SAS to share the burden of the recapitalisation with the Major Shareholders, as further explained in section 3.3.1.

(19) Against that background, Denmark and Sweden decided to support SAS with the Measure in order to restore the equity and liquidity position of SAS and to avoid a likely insolvency that could have triggered an uncontrolled and disorderly process potentially leading to the collapse of SAS.

(20) A significant disruption in air transport, such as that which would have been caused by a bankruptcy of SAS, would have most likely produced systemic knock-on effects in the Swedish and Danish economies, notably due to interruptions in the supply chain. The objective of the Measure was thus to address a specific and concrete risk for the Swedish and Danish air transport system, preventing the very negative consequences of a significantly reduced supply of air transport services for the Swedish and Danish businesses and citizens.

2.2. *Outline of the different components of the Measure*

(21) The Measure, as granted on 26 October 2020, comprises several components:

— Directed Hybrid Notes of an amount of SEK 5 billion were placed with Denmark and Sweden (the 'Major Shareholders') and split equally between the two Member States;

— Directed Hybrid Notes of an amount of SEK 1 billion were placed with Denmark;

— New common shares for an amount of approximately SEK 3 billion (split equally between the two States) at a subscription price of SEK 1,16 (EUR 0,11), were subscribed and underwritten in a Rights Issue of approximately SEK 4 billion available to eligible shareholders; and

— Directed Issue of common shares for an amount of approximately SEK 2 billion were placed with Denmark and Sweden (split roughly equally between the two States) at a subscription price of SEK 1,16.

(22) The total amount of the Measure is SEK 11 billion ([26]) with about SEK 6 billion granted by Denmark and SEK 5 billion by Sweden.

(23) In line with the recapitalisation plan, SAS entered into agreements with the holders of certain existing hybrid notes and the holders of certain bonds on:

— The conversion of subordinated perpetual floating rate capital securities (the 'Existing Hybrid Notes'), of an amount of SEK 1,5 billion, into common shares ([27]) and

([25]) Namely SEB, Nordea Bank, Swedbank and Danske Bank.

([26]) As explained in recital (5), the amount of aid eventually paid was approximately SEK 9,54 billion, which was lower than the amount initially granted and notified by Denmark and Sweden to the Commission on 11 August 2020.

([27]) On 2 September 2020, noteholders approved the conversion of the Existing Hybrid Notes to be exchanged at 90 % of par value for common shares in the Company at a subscription price of SEK 1,16 per share, subject to approval by the extraordinary shareholders' meeting.

— The conversion of senior unsecured fixed rate bonds due November 2022 (the 'Bonds'), of an amount of SEK 2,25 billion, into new commercial hybrid notes (the 'New Commercial Hybrid Notes') or common shares at the option of the bondholders ([28]).

2.3. ***Type and form of the Measure***

(24) The Measure takes the form of a recapitalisation for a total amount of SEK 11 billion by means of equity and hybrid capital instruments, as further described in sub-section 2.8.

2.4. ***Legal basis***

(25) The participation of Denmark and Sweden in the recapitalisation of SAS is based on (i) the Swedish Government Bill of 15 June 2020 No 2019/20: 187, concerning compensation to risk groups, capital interventions in state-owned enterprises and other measures relating to COVID-19, which amends the budget for the year 2020, and (ii) a mandate from the Danish Parliament's Financial Committee of 26 June 2020 to contribute to the recapitalisation of SAS on certain conditions.

2.5. ***Granting authority and administration of the Measure***

(26) The Danish Ministry of Finance and the Swedish Government are the granting authorities. The Measure has been administered by the Danish Ministry of Finance and the Swedish Ministry of Enterprise and Innovation. The Measure was financed by the States' budgets.

2.6. ***Budget and duration of the Measure***

(27) The budget of the Measure was up to SEK 11 billion. As explained at recital (5), the amount of aid eventually paid is approximately SEK 9,54 billion.

(28) The Measure was granted by Denmark and Sweden on 26 October 2020.

2.7. ***Beneficiary***

(29) The beneficiary of the measure is SAS, a Scandinavian network airline covering domestic traffic in Denmark, Sweden and Norway, as well as intra-Scandinavian traffic ([29]) and offering direct connections to the main EU and international business centres. ([30]). SAS is a Swedish public limited liability company governed by the Swedish Companies Act ([31]). It is also a member of the global aviation Star Alliance ([32]).

(30) According to the Danish and Swedish authorities, in 2019 SAS carried approximately 28,5 million passengers. SAS operated flights to 233 destinations with a fleet of about 156 aircraft. SAS's main hub is Copenhagen airport, while Stockholm Arlanda airport and Oslo airport are respectively its second and third largest hubs.

(31) At the time of granting of the Measure, SAS was partially owned by the governments of Sweden and Denmark with a 14,82 % and 14,24 % holding, respectively. The remaining 70,92 % was held by private shareholders, among which the Knut and Alice Wallenberg Foundation ('KAW') that owned 6,50 %.

(32) SAS submitted to the Danish and Swedish authorities a formal written request for a capital injection on 8 May 2020.

([28]) On 2 September 2020, noteholders approved the conversion of the Bonds to be exchanged at 100 % of par value for SEK denominated perpetual unsubordinated, unsecured, unguaranteed floating rate callable capital securities in the Company. Alternatively, and subject to approval by the extraordinary shareholders' meeting, eligible holders of the Bonds would prior to the implementation of the conversions be presented with an offer, allowing the holders to subscribe for newly issued common shares in the Company at 100 % of par value at a subscription price of SEK 1,16 per share, by setting off the claim under their Bonds as consideration. However, the aggregate number of new common shares to be issued to holders of the Bonds under the offer would be limited to 969 827 586 shares (corresponding to 50 % of the nominal amount of the Bonds).

([29]) According to the Swedish and Danish authorities, SAS provides two-thirds of intra-Scandinavian air connectivity.

([30]) Intercontinental traffic amounts to 3-5 % of SAS's total traffic. For example, SAS provides direct routes to London Heathrow airport, Frankfurt airport, Munich airport, Paris Charles De Gaulle airport, Newark Liberty International airport, Washington Dulles International airport, San Francisco International airport, Boston Logan International airport, Los Angeles International airport, Chicago O'Hare International airport, Narita International airport, Shanghai Pudong airport, Beijing Capital airport.

([31]) The Swedish Companies Act (2005:551).

([32]) Star Alliance was created by five airlines in 1997 as the first global aviation alliance. Star Alliance has 26 member airlines, which offer connections across a global network. A project company based in Frankfurt, Germany, coordinates Star Alliance's activities, including co-locations at airports, infrastructure, communication initiatives and other services.

(33) Denmark and Sweden confirmed in their notification that SAS was not in difficulty within the meaning of the General Block Exemption Regulation ('GBER') [33] on 31 December 2019 and provided evidence in support of that conclusion. They indicated that (i) the consolidated accounts of SAS AB, as a limited liability company and parent company of the SAS Group, show that it did not lose more than half of its subscribed share capital as a result of accumulated losses (see Article 2(18), point a) GBER), since on 31 December 2019, SAS AB's subscribed share capital was of SEK 7,7 billion whereas its equity was SEK 10,6 billion; (ii) SAS was not subject to collective insolvency proceedings, nor did it fulfil the criteria under domestic law for being placed in such proceedings at the request of creditors (see Article 2(18), point c) GBER); and (iii) on 31 December 2019, SAS AB's book debt/equity ratio was 0,00067, thus far below the 7,5 threshold set out in Article 2(18), point e) GBER.

2.7.1. *Importance of SAS for the Danish and Swedish economies*

(34) Denmark and Sweden explained in their notification that the aviation sector plays a key role for the Danish and Swedish economies.

(35) As regards the Swedish aviation sector, due to the fact that Sweden is a large and fairly sparsely populated peninsula and geographically located in the periphery in relation to the rest of the EU, aviation is the most common mode of transport for international travel to and from Sweden, representing about 70 % of all international travel. It is also very important for domestic travel within Sweden.

(36) In 2017, besides direct employment, the aviation sector in Sweden contributed to approximately 100 000 jobs and SEK 80-100 billion to Swedish GDP by increasing trade, investments and tourism [34]. In 2017, overall 191 000 jobs and 3,7 % of the national GDP were supported by air transport and the flow of tourists arriving by air [35]. Aviation plays also an important role in sustaining start-ups and business even outside major urban areas.

(37) According to the Swedish authorities, in 2019, SAS contributed to 49,2 % of Swedish domestic connectivity and accounted for 24,5 % of its international traffic, with a total of 6,7 million passengers carried annually to and within Sweden (equal to 30 % of all business and leisure flight passengers) [36]. In Sweden, in 2019, SAS employed around 4 000 people. Approximately 40 % of total jobs directly and indirectly created by SAS were located in Sweden. In 2019, SAS directly contributed SEK 5,9 billion to the Swedish GDP, while its indirect contribution amounted to SEK 4,7 billion, plus SEK 6 billion of induced effects. This represented 30 % of the total contribution of the aviation sector to the Swedish economy [37].

(38) The Swedish authorities highlighted that, in 2019, SAS paid approximately SEK 700 million in social security contributions and approximately SEK 415 million in air travel taxes, which accounted for 23 % of total air travel tax revenues in Sweden (SEK 1,77 billion).

(39) As for Denmark, in 2017, the total estimated value of the aviation business and affiliated sectors amounted to about DKK 30 billion [38]. In 2017, a total of 83 000 jobs and 2,7 % of Danish GDP were supported by air transport and the flow of tourists arriving by air [39].

(40) According to the Danish authorities, SAS contributes to Denmark's connectivity to a large extent. In 2019, SAS operated 32 % of Denmark's total domestic and international passenger air traffic and covered 40 % of Danish domestic connectivity [40]. SAS operates as a so-called network carrier, mostly operating a radial network centred on its main hub in Copenhagen airport, which is the most important airport in Denmark [41]. In 2019, SAS was responsible for 33 % of all traffic at Copenhagen airport, almost twice the share of traffic of the next biggest airline at the airport. A study released by Copenhagen Economics in 2019 estimated that the connectivity created by SAS contributes up to DKK 18,4 billion annually to the national GDP [42].

(33) As defined in Article 2(18) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).
(34) Source: Swedish Aviation Strategy, Färdplan-för-fossilfri-konkurrenskraft-flygbranschen.pdf (svensktflyg.se)
(35) https://www.iata.org/en/iata-repository/publications/economic-reports/sweden–value-of-aviation/
(36) Source: Swedish Transport Agency, 2019 Report on Air Traffic in Sweden (www.transportstyrelsen.se).
(37) Source: report by Copenhagen Economics from April 2019, https://www.copenhageneconomics.com/dyn/resources/Filelibrary/file/6/216/1562329592/sas-sweden-report.pdf
(38) https://www.trm.dk/media/so3m3ht4/aviation-strategy-full-version.pdf
(39) https://www.iata.org/en/iata-repository/publications/economic-reports/denmark–value-of-aviation.
(40) SAS also operates from Aalborg, Aarhus, Billund and Faroe Islands airports in Denmark and offers 250 domestic flights per week.
(41) In 2017, Copenhagen airport accounted for about the 74 % of Danish air connectivity measured in number of passengers.
(42) https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/8/498/1562329249/sas-denmark-report.pdf

(41) Moreover, at the time of granting of the Measure, SAS was (and still is) particularly important for business travel which has a significant economic impact on the Danish economy. In 2015, 55 % of passengers carried by SAS at Copenhagen airport were travelling for business.

(42) With about 4 200 employees in 2019 ([43]), SAS contributed DKK 3 billion annually to the Danish GDP. In 2019, SAS paid approximately SEK 100 million in social security contributions and approximately SEK 17,5 million in income tax payments to Denmark.

(43) Denmark and Sweden also pointed out that the high level of connectivity and services provided by SAS would not likely be replaceable by competitors, or at least not to the same extent and in the short term, especially in the context of the COVID-19 pandemic that prevailed in the Summer 2020.

(44) Denmark and Sweden therefore concluded that, absent the State intervention in support of SAS, there would have been a severe risk for the Danish and Swedish economies, including for their recovery after the first lock-down period.

2.8. ***Basic elements of the Measure***

(45) The SEK11 billion Measure consists of (i) an equity component (of SEK 5 billion) and (ii) a hybrid instrument component, namely the Directed Hybrid Notes placed with the States (of SEK 6 billion).

(46) In line with the recapitalisation plan, SAS also agreed with the holders of certain existing hybrid notes and the holders of certain bonds on: (i) the conversion of the Existing Hybrid Notes into common shares (SEK 1,5 billion) and (ii) the conversion of the Bonds into New Commercial Hybrid Notes or common shares at the option of the bondholders (SEK 2,25 billion).

2.8.1. *Equity participation*

(47) The equity component of the Measure includes a (i) Directed Issue and (ii) a Rights Issue.

2.8.1.1. Directed Issue

(48) The recapitalisation plan foresaw a directed issue of common shares in the amount of approximately SEK 2 billion, corresponding to about 1 729 million new shares at a subscription price of SEK 1,16, to the Major Shareholders.

(49) The Directed Issue was granted in line with the recapitalisation plan: Denmark and Sweden subscribed to new shares at a subscription price of SEK 1,16 for a total amount of SEK 2 million (split between approximately SEK 1 016 million for Denmark and approximately SEK 990 million for Sweden).

2.8.1.2. Rights Issue

(50) The recapitalisation plan established that:

— The Rights Issue of new common shares would be available to eligible shareholders ([44]) in an amount of approximately SEK 4 billion and at a subscription price of SEK 1,16. Eligible shareholders would receive 9 subscription rights for each share held on the record date for the Rights Issue.

— The Rights Issue would be covered by subscription undertakings and underwriting commitments corresponding to 81,5 % of the total amount of the Rights Issue, where approximately SEK 3 billion would be covered by pro rata subscription undertakings and underwritings commitments from the Major Shareholders (split equally) and approximately SEK 259 million would be covered by a pro rata subscription undertaking from KAW, subject to certain conditions.

— The final amount of the Rights Issue covered by Sweden and Denmark would depend on the final subscription of shares by other shareholders and could range from a minimum of approximately SEK 1,16 billion by the States (full share subscription) to a maximum of approximately SEK 3 billion (private participation not exceeding SEK 1 billion, including KAW).

(51) In October 2020, the private interest in the Rights Issue of SEK 4 billion proved to be higher than expected. Thus, the Major Shareholders subscribed common shares in the Rights Issue for a total of only SEK 1 540 765 422, rather than the maximum amount envisaged of approximately SEK 3 billion.

([43]) According to a report by Copenhagen Economics from April 2019, SAS creates a total of 6 800 jobs in Denmark when both direct and indirect jobs are included. See https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/8/498/1562329249/sas-denmark-report.pdf

([44]) All shareholders of SAS registered in SAS's shareholders' register on the record date, as defined in the prospectus of the Rights Issue.

2.8.2. *The New State Hybrid Notes*

(52) The SEK denominated capital securities with perpetual tenor (the 'New State Hybrid Notes') as issued to the Major Shareholders include

— one set of hybrid notes ('NSHN1'), which were placed with the Major Shareholders in the total amount of SEK 5 billion, split equally between them, with a floating interest rate of 6M STIBOR plus an initial margin of 340 bps per annum. The planned margin of the NSHN1 thereafter increase to the following: during the 2nd and 3rd years 440 bps p.a.; during the 4th and 5th years 590 bps p.a.; during the 6th and 7th years 790 bps p.a.; and during the 8th year and thereafter 1 040 bps p.a. The NSHN1 is subordinated capital securities and ranked *pari passu* with the NSHN2;

— one set of hybrid notes ('NSHN2'), which were placed with Denmark in the total amount of SEK 1 billion, with a floating interest rate of 6M STIBOR plus an initial margin of 440 bps per annum. The planned margin of the NSHN2 notes thereafter increase to the following: during the 2nd and 3rd years 540 bps p.a.; during the 4th and 5th years 690 bps p.a.; during the 6th and 7th years 890 bps p.a.; and during the 8th year and thereafter 1 140 bps p.a. The NSHN2 is subordinated capital securities and ranked *pari passu* with the NSHN1.

(53) The New State Hybrid Notes are freely transferable but unlisted, do not include the option to convert into shares, are callable by SAS at any time at par value, and are treated as equity in SAS's accounting under International Financial Reporting Standards ('IFRS') rules.

(54) In order to allow equity treatment under IFRS rules, the payment of the New State Hybrid Notes coupons is non-mandatory and at the sole discretion of SAS. However, in case of deferment of coupons, they will accrue compounded interests until the effective coupon payment.

2.8.3. *Conversion of the Existing Hybrid Notes and Bonds*

(55) As part of the recapitalisation plan, upon request of the Danish and Swedish governments, SAS conducted negotiations with certain major holders of the Existing Hybrid Notes and with certain major holders of the SEK 2,25 billion Bonds, resulting in an agreement on:

(i) the conversion terms for the Existing Hybrid Notes, which were proposed to be exchanged for common shares in SAS at 90 % of par value and at a subscription price of SEK 1,16 per share;

(ii) the conversion terms for the Bonds, which were proposed to be exchanged for perpetual unsubordinated, unsecured, unguaranteed floating rate callable capital securities (the 'New Commercial Hybrid Notes') in SAS at 100 % of par value. The New Commercial Hybrid Notes have a floating interest rate of 6M STIBOR plus an initial margin of 340 bps per annum. The margin of the New Commercial Hybrid Notes was planned to increase thereafter as follows: during the 2nd and 3rd years 440 bps p.a., during the 4th and 5th years 590 bps p.a., during the 6th and 7th years 1 090 bps per annum, during the 8th year up to and including the 10th year 1 440 bps p.a., and during the 11th year and thereafter 1 590 bps p.a. ([45])

(56) The New Commercial Hybrid Notes were to be treated as equity in SAS's accounting under IFRS rules, ranked senior to the New State Hybrid Notes, and freely transferable and callable by SAS at any time at par value.

2.8.4. *Governance and prevention of undue distortions of competition*

(57) Denmark and Sweden made the aid conditional upon observance of the elements regarding governance and competition set out in section 3.11.6 of the Temporary Framework.

(58) SAS and all the companies controlled by SAS are subject to a ban on advertising and an acquisition ban. Denmark and Sweden undertook to implement the following commitments:

— SAS and the companies controlled by SAS should not use the Measure for commercial advertising purposes;

([45]) Alternatively, and subject to approval by an extraordinary shareholders' meeting, eligible holders of the Bonds were prior to the implementation of the proposed conversion intended to be presented with an offer, allowing holders of the Bonds to subscribe for newly issued common shares in SAS at 100 % of par value at a subscription price of SEK 1,16 per share by setting off the claim under their Bonds as consideration. However, the aggregate number of new common shares contemplated to be issued to holders of the Bonds was limited to that corresponding to 50 % of the adjusted nominal amount of the Bonds. In case of oversubscription, the allotment would be scaled down on a pro rata basis whereby any remaining claim under the Bonds not converted into common shares would be converted into New Commercial Hybrid Notes as described above.

— SAS and the companies controlled by SAS should not acquire an interest of more than 10 % in competitors or other companies in the same business segment, including upstream and downstream business activities, as long as at least 75 % of the total amount of the Measure has not been redeemed. In exceptional circumstances, without prejudice to merger control and subject to the prior approval of the Commission, SAS and the companies controlled by SAS may acquire a stake of more than 10 % in upstream or downstream companies in its field of business if the acquisition is necessary to maintain the viability of the acquirer.

(59) As long as at least 75 % of the Measure has not been redeemed, Denmark and Sweden committed that: (i) the remuneration of the management of SAS [46] should not go beyond the fixed part of his/her remuneration on 31 December 2019; for persons becoming members of the management on or after the recapitalisation, the applicable limit is the fixed remuneration of the members of the management with the same level of responsibility on 31 December 2019; and (ii) SAS should not pay bonuses, other variable or comparable remuneration elements.

(60) Until the Measure has been fully redeemed, SAS is subject to the obligation not to make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the States or where there is a legal obligation to do so. The dividend ban does not apply to intra-group dividend payments made to SAS by companies that are (directly or indirectly) fully owned by SAS.

(61) However, the ban on non-mandatory coupon payments does not apply to coupon payments on the New Commercial Hybrid Notes resulting from the conversion of existing Bonds. The national authorities explained that payment of such coupons was included in the negotiations with certain bondholders and was expected to be a key consideration for all the bondholders to agree to conversion, which was crucial to SAS's entire recapitalisation plan in order to achieve three positive effects:

(i) to reduce the total amount of State aid needed by SAS: in the absence of conversion, there would have been an outstanding equity gap of SEK 2,25 billion in SAS's balance sheet, which would most likely have been requested to be covered by the States, given the circumstances;

(ii) to improve the capital structure of SAS, as the Bonds (counting as debt) will be converted into New Commercial Hybrid Notes (counting as equity) or common shares. Consequently, relevant financial ratios of SAS (net debt-to-equity; financial solidity; gearing ratio; etc.) would greatly benefit from the conversion; and

(iii) to facilitate and better secure the remuneration of the States' instruments: as the conversion would reduce total cash outflows for SAS in the first most stressful years after the recapitalisation, that would ensure a more secured remuneration for the States.

(62) As regards the New State Hybrid Notes, the Danish and Swedish authorities accepted that the governance restrictions as set out in section 3.11.6 of the Temporary Framework, would continue to apply until full redemption (payment of full nominal amount and accrued coupon payments) or until all New State Hybrid Notes were sold at par value or above par value including accrued coupon payments (including compound interest).

(63) The Danish and Swedish authorities committed that SAS would not cross-subsidise group companies which, on 31 December 2019, were undertakings in difficulty as defined in the GBER, having recourse to separation of accounts.

2.8.5. *Exit strategy of the State*

(64) As regards the Rights Issue, according to the Danish and Swedish authorities, there were two potential exit strategies for Denmark and Sweden: (i) SAS could buy back the shares from the States or (ii) the States could sell their shares on the market.

(65) Under the Swedish Companies Act, however, it is not possible for a company to buy back ordinary shares just from one specific shareholder, but only from all shareholders on the same terms.

(66) Therefore, according to the Danish and Swedish authorities, the second exit strategy (i.e. the sale of ordinary shares to third parties at market price) was the only practically viable option.

[46] It applies in any event to the management of all other companies over which SAS has control.

2.9. *Cumulation*

(67) The aid granted under the Measure could be cumulated with aid under the de minimis Regulation ([47]) or the GBER provided the provisions and cumulation rules of those Regulations are respected.

(68) The aid granted under the Measure could also be cumulated with aid granted under other measures approved by the Commission under Article 107(2)(b) TFEU or other sections of the Temporary Framework provided the provisions in those specific sections are respected.

2.10. *Monitoring and reporting*

(69) The Danish and Swedish authorities confirmed that they would respect the monitoring and reporting obligations laid down in section 4 of the Temporary Framework (including the obligation to publish relevant information on the recapitalisation granted to SAS on the comprehensive State aid website or the Commission's IT tool within three months from the moment of granting) ([48]).

(70) Denmark and Sweden also confirmed that they would ensure that:

— SAS submit reports to Denmark and Sweden based on the schedule laid out in point 82 of the Temporary Framework on the progress in the implementation of the repayment schedule and the compliance with the conditions of section 3.11.6 of the Temporary Framework;

— SAS as beneficiary of the Measure publish, within 12 months from the date of the recapitalisation and thereafter periodically every 12 months, information on the use of the aid received pursuant to point 83 of the Temporary Framework. This must include information on how SAS's use of the aid received supports its activities in line with Union objectives and national obligations linked to the digital transformation and how SAS contributes to the Union's economy-wide objective of climate neutrality by 2050, including through this aid and in its public advocacy activities;

— Denmark and Sweden provide annual reports to the Commission on the implementation of the repayment schedule and compliance with the conditions in section 3.11.6 and point 54 of the Temporary Framework;

— Denmark and Sweden keep detailed records regarding the granting of aid for 10 years from the granting of the Measure and commit to provide them to the Commission upon request. Such records must contain all information necessary to establish that the conditions set out in the Temporary Framework are fulfilled; and

— Denmark and Sweden notify a restructuring plan if Denmark and Sweden's intervention has not been reduced below 15 % of SAS's equity within 6 years after the recapitalisation.

3. **Assessment**

3.1. *Existence of State aid*

(71) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipient. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.

(72) The Measure is imputable to the State since it was granted and has been administered by national authorities. The Measure was financed through State resources, since it was financed by the public funds provided by Sweden and Denmark through equity and hybrid capital instruments.

(73) The Measure conferred an advantage on its beneficiary SAS in the form of a recapitalisation in terms more favourable than existing market conditions. The Measure thus conferred an advantage to SAS as compared to normal market conditions.

(74) The advantage granted by the Measure is selective since it was awarded only to one undertaking.

(75) The Measure is liable to distort competition since it strengthened the competitive position of SAS. It also affects trade between Member States since SAS was (and still is) active in sectors in which there is intra-Union trade.

([47]) Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1), Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

([48]) Referring to information required in Annex III to Commission Regulation (EU) No 651/2014.

(76) In view of the above, the Commission concludes that the Measure constitutes aid within the meaning of Article 107(1) TFEU. The Danish and Swedish authorities do not contest that conclusion.

3.2. ***Lawfulness of the measure***

(77) By notifying the Measure before putting it into effect, the Danish and Swedish authorities had initially respected their obligations under Article 108(3) TFEU.

(78) Nevertheless, following the annulment of the Initial decision by the General Court, the Measure has become unlawful aid since the moment it was granted, in so far as it is no longer approved by a Commission decision.

3.3. ***Compatibility***

(79) Since the Measure involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether that measure is compatible with the internal market. As the Measure constitutes unlawful aid, its compatibility needs to be assessed in accordance with the legal provisions in force at the time when the aid was granted, i.e. on 26 October 2020.

(80) Pursuant to Article 107(3)(b) TFEU the Commission may declare compatible with the internal market aid 'to remedy a serious disturbance in the economy of a Member State'.

(81) By adopting the Temporary Framework on 19 March 2020, the Commission acknowledged (in section 2) that '*the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings*'. The Commission concluded that '*State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability*'.

(82) Section 3.11 of the Temporary Framework deals with recapitalisation measures. It sets out the criteria under which Member States may provide public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak, aiming at ensuring that the disruption of the economy does not result in the unnecessary exit from the market of undertakings that were viable before that outbreak.

(83) The Measure aimed at strengthening the equity of SAS and its access to liquidity at a time when the viability of the company was seriously threatened by the fallout of the COVID-19 pandemic and SAS could not get access to capital markets or alternative financing options to solve its financial difficulties (see recital (17)).

(84) Point 48 of the Temporary Framework states that COVID-19 recapitalisation measures may not be granted later than 30 September 2021 ([49]). The Commission notes that Denmark and Sweden granted the Measure on 26 October 2020.

(85) Therefore, in the following sections, the Commission will assess the compatibility of the Measure under section 3.11 of the Temporary Framework in force at the moment the aid was granted, taking into account, when considering the proportionality of the Measure, the aid already granted to SAS at the time the Measure was granted and the other aid for which SAS was expected to be eligible at the time the Measure was granted (as detailed in recital (16)).

3.3.1. *Eligibility and entry conditions*

(86) According to point 49 of the Temporary Framework, a COVID-19 recapitalisation measure must fulfil the following conditions:

(i) without the State intervention the beneficiary would go out of business or would face serious difficulties to maintain its operations. Such difficulties may be shown by the deterioration of, in particular, the beneficiary's debt to equity ratio or similar indicators;

(ii) it is in the common interest to intervene. This may relate to avoiding social hardship and market failure due to significant loss of employment, the exit of an innovative company, the exit of a systemically important company, the risk of disruption to an important service, or similar situations duly substantiated by the Member State concerned;

(iii) the beneficiary is not able to find financing on the markets at affordable terms and the horizontal measures existing in the Member State concerned to cover liquidity needs are insufficient to ensure its viability; and

([49]) As set out in the version of the Temporary Framework in force at the time the Measure was granted.

(iv) the beneficiary is not an undertaking that was already in difficulty on 31 December 2019 (within the meaning of the GBER).

(87) As observed at recitals (12) to (14), SAS's impaired equity position severely affected the liquidity and equity of the company and threatened its solvency in the short-term, despite the mitigation measures that the company took. The Commission requested and analysed internal documents to assess this matter. Those internal documents show that SAS was likely to face illiquidity and insolvency without the recapitalisation plan ([50]).

(88) It follows that the Measure aimed at maintaining a capital structure and liquidity profile that prevented an insolvency scenario. At this stage, the Commission therefore preliminarily considers that, in absence of the capital increase, SAS would have faced serious difficulties to maintain its operations.

(89) As explained in sub-section 2.7.1, Denmark and Sweden submitted evidence of the systemic importance of SAS for the Danish and Swedish economy from several standpoints, highlighting the severe risks that a default of SAS or a significant downsizing of its activities would entail for Danish and Swedish employment and connectivity. At this stage, the Commission therefore preliminarily considers that it was in the common interest to intervene.

(90) In the light of the elements described in recitals (17) to (19), the Commission is of the preliminary view that SAS was not able cover its capital and liquidity needs from the market at affordable terms and in the timeframe needed to avoid triggering insolvency proceedings. The States nevertheless designed the Measure with the objective to allow SAS to find a part as large as possible part of its financing needs on the market, by offering attractive conditions to private investors to participate in the rights issue and by negotiating a burden sharing with shareholders other than the Major Shareholders. In addition, while SAS had benefitted from State aid either in the form of individual aid or under existing aid schemes, those aid measures were either not sufficient or inadequate to address entirely its liquidity and capital needs (see recital (16)).

(91) Finally, based on the elements described in recital (33), the Commission preliminarily considers that SAS was not an undertaking in difficulty on 31 December 2019 within the meaning of the GBER.

(92) Pursuant to point 50 of the Temporary Framework, when Member States notify COVID-19 individual recapitalisation measures, they must provide evidence of a written request for such aid by the prospective beneficiary undertaking as part of the notification to the Commission. The Danish and Swedish notification included such a written request, sent by SAS on 8 May 2020 to the Danish and Swedish States. It follows that point 50 of the Temporary Framework appears to be fulfilled.

(93) Based on the above, the Commission preliminarily concludes that, at the present stage, the Measure appears to fulfil the eligibility and entry conditions as set out in section 3.11.2 of the Temporary Framework.

3.3.2. *Types of recapitalisation measures*

(94) According to point 52 of the Temporary Framework, '*Member States can provide COVID-19 recapitalisation measures using two distinct sets of recapitalisation instruments: (a) equity instruments, in particular, the issuance of new common or preferred shares; and/or (b) instruments with an equity component (referred to as "hybrid capital instruments")* ([51]), *in particular profit participation rights, silent participations and convertible secured or unsecured bonds*'. Point 53 of the Temporary Framework states that '*[t]he State intervention can take the form of any variation of the above instruments, or a combination of equity and hybrid capital instruments*'. In any event, '*[t]he Member State must ensure that the selected recapitalisation instruments and the conditions attached thereto are appropriate to address the beneficiary's recapitalisation needs, while at the same time being the least distortive to competition*'.

(95) As mentioned at recital (21), the Measure is a combination of an equity instrument and hybrid capital instruments.

(96) The equity instrument eventually consisted of a total SEK 3,54 billion equity paid by the Major Shareholders to SAS against the issuance by SAS of new common shares leading overall to a 43,6 % shareholding of those shareholders in the total registered share capital of SAS due to the COVID-19 recapitalisation (see sub-section 2.8.1).

([50]) See, for example, the following internal documents submitted to the Commission on 23 July 2020: '04_Monthly Board Report APR2020.PDF'; '2020.4.15 — SASABBoard-15Apr2020-Meeting-v1.PDF'; '2020.4.22 — SASABBoard-22Apr2020-Meeting-v1.PDF'.

([51]) Hybrid capital instruments are instruments that have characteristics of debt as well as of equity. For instance, convertible bonds are remunerated like bonds until they are converted into equity. The assessment of the overall remuneration of hybrid capital instruments thus depends on the one hand on their remuneration while they are debt-like instruments and on the other hand on the conditions for conversion into equity-like instruments.

(97) The hybrid capital instruments took the form of SEK 6 billion in perpetual new hybrid notes held and fully disbursed by the Major Shareholders (see sub-section 2.8.2). Those instruments qualify as equity under IFRS accounting standards.

3.3.3. *Amount of the recapitalisation*

(98) According to point 54 of the Temporary Framework, '*[i]n order to ensure proportionality of the aid, the amount of the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak, i.e. the situation on 31 December 2019. In assessing the proportionality of the aid, State aid received or planned in the context of the COVID-19 outbreak shall be taken into account*'.

(99) The proportionality test set out in point 54 has two cumulative conditions. On the one hand, the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary, that is, it cannot go beyond the minimum amount of recapitalisation aid needed to restore the company's access to private capital markets (and be able to get debt and/or equity financing at affordable rates from the markets). On the other hand, the COVID-19 recapitalisation cannot go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak.

(100) First, to assess whether the aid corresponds to the minimum needed to restore the capital structure of the beneficiary to the one before the COVID-19 outbreak, the Commission will consider the financial projections concerning (i) the equity position of the beneficiary and (ii) the debt-to-equity ratio of the beneficiary after the COVID-19 recapitalisation at the end of Fiscal Year 2021. The Commission will compare the value of those indicators to those predating the COVID-19 outbreak ([52]).

(101) Second, in order to assess whether the aid corresponds to the minimum needed to ensure the viability of SAS, the Commission will consider what was the minimum amount of recapitalisation State aid needed to restore the company's access to capital markets (debt and/or equity). To that end, the Commission will analyse the following (forecasted) indicators:

a. The net debt-to-equity ratio, typically considered by rating agencies when assessing the creditworthiness of companies. In particular, the Commission will compare the net debt-to-equity ratio of the beneficiary after the Measure with a benchmark of net debt-to-equity ratios of other European airlines predating the COVID-19 outbreak, i.e. the situation on 31 December 2019. The Commission considers the net debt-to-equity ratio of the third quartile of comparable companies as a useful and appropriate benchmark;

b. The net debt-to-EBITDA ratio, another indicator that rating agencies use to determine a company's creditworthiness. In particular, the Commission will assess whether the net debt-to-EBITDA ratio after the COVID-19 recapitalisation is not below the 3,0-3,5 threshold. That is a conservative test, because it is common practice to consider a net debt-to-EBITDA ratio higher than 3,5 as a signal of poor creditworthiness. Even though actual credit ratings depend on a number of factors, companies with those values of net debt-to-EBITDA ratio do not normally have an investment grade rating, which means they find it more difficult and expensive to access private capital markets;

c. The equity-to-asset ratio, a further indicator which is part of the assessment of a company's creditworthiness. The Commission will use that ratio to perform the same benchmarking test as in paragraph (a);

d. The financial preparedness ratio, which is the ratio between a company's liquid funds, including unused credit lines, and fixed costs. The Commission will benchmark that ratio against the 25 % threshold. According to SAS, a financial preparedness index lower than 25 % would trigger a stricter monitoring by the aviation authority. In order to allow SAS to continue holding an aviation license, that authority would require an airline quarterly financial reports, instead of annual, and a restoration plan showing the measures to bring the index back to a value higher than 25 %.

(102) The Commission will conduct the analyses mentioned in recitals (100) and (101) based on the financial projections of SAS that Denmark and Sweden submitted. The Commission requested and analysed internal documents to assess whether those projections correspond to the genuine and authentic projections that SAS prepared for its own internal planning. In particular, the Commission scrutinized the amount of forecasted losses, as those have a direct impact on the recapitalisation needs by reducing the company's equity. Overall, the analysis of SAS internal documents has revealed that SAS expected an amount of losses corresponding to those reported in the business plan submitted to the Commission by Denmark and Sweden.

([52]) Since the fiscal year of SAS goes from 1 November to 31 October, the balance sheet of the first quarter 2020, which ends on 31 January, is the latest before the COVID-19 outbreak. Therefore, the Commission considers appropriate to use the data from the first quarter of FY2020 (ending in January 2020) to assess the situation predating COVID-19, instead of using the data on 31 December 2019.

(103) The Commission will conduct the proportionality assessment based on the financial data provided in the notification, i.e. actual financial data until June 2020, and business plan projections from July 2020 until the end of fiscal year 2025. In addition, the Commission will conduct its assessment under the premise that Sweden and Denmark could contribute up to SEK 14,25 billion to the recapitalisation of SAS, although (i) that recapitalisation need was expected to be filled in part also by private shareholders [53]; and (ii) the contribution of Denmark and Sweden eventually amounted to approximately SEK 9,54 billion at most [54]. Thus, the assumption of the Commission is very conservative.

(104) Finally, in order to assess the proportionality of the Measure, the Commission will take into account (i) the aid already granted to SAS at the time of the Measure and (ii) the aid that was expected to be granted to SAS under the notification of 11 August 2020 (see recitals (3) and (103)). In effect, first, the business plan's projections on which the proportionality assessment will be carried out include all aid granted at the time of the notification of the Measure. Second, for the aid that, at the time of the notification of the Measure, was expected to be granted to SAS in the future, the sensitivity analysis (see section 3.3.3.3) will verify that the proportionality assessment has a sufficient buffer to accommodate potential additional aid. Again, the approach of the Commission is conservative, in so far as SAS did eventually not receive any aid under the two Danish schemes envisaged at the time of the notification of the Measure (see recital (16) and footnote 22).

3.3.3.1. Whether the public support is limited to the minimum needed to restore the capital structure of SAS.

(105) Table 1 illustrates the effect of the Measure, provided by Denmark and Sweden, on the capital structure of SAS predating the COVID-19 outbreak, i.e. the situation on 31 January 2020.

Table 1

Proportionality indicators (SEK million) [55]

Total COVID-19 recapitalisation	14 250
Equity position without recapitalisation (31.10.2021)	[…]
A. Equity position (31.1.2020) [56]	4 433
B. Expected equity position after recap (31.10.2021)	[…]
Proportionality indicator I: B — A ≤ 0	[…]≤ 0
C. Net Debt/Equity Ratio (31.1.2020) [57]	4,75
D. Net Debt/Equity Ratio after recap (31.10.2021)	[…]
Proportionality indicator II: C — D ≤ 0	[…]≤ 0

(53) On a conservative basis, the Commission will review the proportionality of the Measure by including in its assessment the conversion of the SEK 2,25 billion of outstanding shares held by private investors into common shares, as this was also expected to fill part of the recapitalisation need of SAS.

(54) As explained at recital (51), while the notification of Denmark and Sweden of 11 August 2020 foresaw a participation of the Major Shareholders in the Rights Issue of up to SEK 3 billion, eventually the Major Shareholders only subscribed common shares in the Rights Issue for a total of SEK 1 540 765 422, due to a high private interest in the Rights Issue. Nevertheless, the Commission will base its proportionality assessment based on a participation of the Major Shareholders in the Rights Issue of up to SEK 3 billion. That approach is more conservative.

(55) Source: '1. RFI 3 Data Book 03Aug.xls', submitted on 3 August 2020. The equity position in 2021 without support is calculated as the difference between the equity position with support and the amount of the recapitalisation package.

(56) On 31 October 2019, i.e. at the beginning of the fourth quarter of SAS fiscal year, the equity position of SAS was SEK 5 372 million. Therefore, it is conservative to compare the expected post recapitalisation equity position of SAS to that on 31 January 2020, which is lower.

(57) On 31 October 2019, i.e. at the beginning of the fourth quarter of SAS fiscal year, the net debt-to-equity ratio of SAS was 4,70. Therefore, it is conservative to compare the post recapitalisation net debt-to-equity ratio of SAS to that on 31 January 2020, which is higher.

(106) Table 1 shows that the expected equity position of SAS after the recapitalisation (on 31 October 2021) was of SEK […]. This amount of equity includes the following recapitalisation measures ([58]): (i) SEK 2 billion of Directed Issue of common shares split approximately equally between the Denmark and Sweden; (ii) SEK 4 billion in a Rights Issue of new common shares; (iii) SEK 5 billion of Directed Hybrid Notes split equally between Denmark and Sweden; (iv) SEK 1 billion of Directed Hybrid Notes placed with Denmark; (v) SEK 2,25 billion of outstanding bonds converted into common shares (recital (50) and (103)).

(107) Following the COVID-19 outbreak, SAS forecasted losses of SEK […] in fiscal year 2020 and SEK […]in fiscal year 2021. As such, as a result of the recapitalisation measures, the equity position of SAS in fiscal year 2021 would not be higher than that before the COVID-19 outbreak, i.e. on 31 January 2020.

(108) The Commission observes that the recapitalisation of SAS did not appear to go beyond restoring the capital structure of the beneficiary to that before the COVID-19 outbreak, for the following reason. The net debt-to-equity ratio of SAS was expected to be […] on 31 October 2021, while it was 4,75 on 31 January 2020. Based on the forecasts submitted by Denmark and Sweden, the 2019 net debt-to-equity ratio of SAS was not expected to be restored until fiscal year […].

3.3.3.2. Whether the public support was limited to the minimum needed to ensure the viability of SAS

(109) According to its financial projections ([59]), absent the State recapitalisation measure, SAS would have consumed its available liquidity on 31 January 2020 (i.e. SEK [6; 000-7; 000] billion) by […], and on 31 October 2021 SAS would have had a negative cash position of SEK […]. The Measure prevented SAS from running out of liquidity and lead to a cash position forecast of SEK […] on 31 October 2021.

(110) To assess the viability condition of point 54 of the Temporary Framework, the Commission will apply the four tests mentioned in recital (101).

(111) The first test consists in comparing the forecasted net debt-to-equity ratio of SAS, taking the recapitalisation into account, to the same ratio of a sample of peer airlines on 31 December 2019 ([60]). This sample consists of 10 European airlines ([61]). Among them, three had a credit rating on 31 December 2019, which ranged between BBB and BBB+ ([62]).

(112) The Commission considers that comparing the forecasted net debt-to-equity ratio of SAS to that of those of its peers follows a conservative approach. The reason is that the rated peers had a rating either below or very close to the investment grade threshold (i.e. BBB), which is normally considered as the minimum rating allowing a company to obtain access to market financing without incurring any severe difficulties. In addition, the Commission uses the third quartile of SAS's peers' net debt-to-equity ratio distribution as a benchmark (namely those amongst the worst performing companies) instead of relying on a measure of central tendency, such as the mean or the median. This is also a conservative approach, as adopting a higher benchmark for the net debt-to-equity ratio will lower the minimum amount of aid needed to ensure the viability of SAS and restore the company's access to the capital markets (as it will be possible to meet the benchmark on the net debt-to-equity ratio with a lower amount of aid).

(113) The Commission notes that, taking into account the recapitalisation measures, the expected net debt-to-equity ratio of SAS on 31 October 2021 (i.e. […]) was well above the third quartile of the peers' distribution of the same ratio predating the COVID-19 outbreak (i.e. 1,92). The capital structure of SAS was expected to become better than its peers only in fiscal year […], when the forecasted net debt-to-equity ratio was […]. Further, the Commission notes that the expected net debt-to-equity ratio of SAS on 31 October 2021 was also higher than the maximum ratio among the rated peers.

(114) With regard to the second test, the Commission has assessed whether, and in which fiscal year, SAS expected the net debt-to-EBITDA ratio to fall below the 3-3,5 thresholds. It is common market practice to consider companies with a net debt-to-EBITDA ratio above those thresholds as highly risky. Hence, companies with those net debt-to-EBITDA ratios find it difficult to access private capital markets. The financial projections of SAS showed a net debt-to-EBITDA ratio of […] at the end of fiscal year 2021, which was well above the 3,0-3,5 threshold. Hence, at the end of fiscal year 2021, the State recapitalisation does not appear to be higher than the amount needed to ensure the viability of SAS.

([58]) For reference, the conversion of the Existing Hybrid Notes into common shares by private shareholders (SEK 1,5 billion) does not have any impact on the equity position of SAS.

([59]) Source: '1. RFI 3 Data Book 03Aug.xls', submitted on 3 August 2020.

([60]) For 2 out of 10 companies, whose fiscal year ends on 31 March, the Commission used data from the 3rd quarter balance sheet to ensure comparability.

([61]) The sample is comprised of Ryanair, Deutsche Lufthansa, International Consolidate Airline Group, Air France-KLM, Wizz Air, Norwegian Air Shuttle, Aegean Airlines, Finnair, Croatia Airlines and Icelandair Group. Among these airlines, the median net debt-to-equity ratio was 0,65 and the third-quartile was 1,92 on 31 December 2019.

([62]) The rated peers are Ryanair, International Consolidate Airline Group and Deutsche Lufthansa (Source: Capital IQ). Their net debt-to-equity ratio on 31 December 2019 is between 0,12 and 1,11.

(115) The net debt-to-EBITDA ratio of SAS was expected to gradually decrease over time to reach a value of […] at the end of fiscal year 2023 and a value of […] at the end of fiscal year 2024. Those dynamics indicate that the recapitalisation measures would allow SAS to face the negative effects of the COVID-19 crisis and enable it to restore its access to private capital markets from the year 2023 onwards (when its net debt-to-EBITDA ratio is expected to fall below the 3-3,5 thresholds).

(116) The third test consists in comparing the forecasted equity-to-asset ratio of SAS, taking the recapitalisation into account, to the same ratio that the peer airlines mentioned in recital (111) had on 31 December 2019 ([63]). As explained in recital (112), it is a conservative approach to compare SAS to those peers, as they had a rating very close to the non-investment grade threshold on 31 December 2019. In addition, the Commission uses the first quartile of the peer distribution (which concern here the worst performing companies) as the benchmark for SAS instead of relying on a measure of central tendency, such as the mean or the median. This is also a conservative approach, as assuming a lower benchmark for the equity-to-asset ratio will lower the minimum amount of aid needed to ensure the viability of SAS and restore the company's access to the capital markets (as it will be possible to meet the benchmark on the equity-to-asset ratio with a lower amount of aid).

(117) The Commission notes that, taking into account the recapitalisation measures, the expected equity-to-asset ratio of SAS on 31 October 2021 (i.e. […]%) was well below the first quartile of the peers' distribution of the same ratio predating the COVID-19 outbreak (i.e. 18,12 %). The Commission also observes that SAS did not expect to reach an equity-to-asset ratio above the first quartile of its peers during the course of the planning period, i.e. before fiscal year 2025. Finally, the Commission notes that the expected equity-to-assets ratio of SAS on 31 October 2021 was lower than the minimum ratio among the rated peer airlines. Considering that a company's creditworthiness increases with the equity-to-asset ratio *ceteris paribus*, the overall evidence on the projected equity-to-asset ratio for SAS preliminarily indicates that the recapitalisation measures did not exceed the minimum to ensure its viability and restore the company's access to the capital markets.

(118) The fourth test consists in benchmarking the financial preparedness ratio of SAS (which is the ratio between a company's liquid funds, including unused credit lines, and fixed costs), to the 25 % threshold. This threshold is the minimum to continue operating an aviation license without incurring in further obligations, such as more frequent reporting to the aviation authority and filing a restoration plan. The evolution of the financial preparedness ratio also appears to demonstrate that the recapitalisation measures did not exceed the minimum to ensure the viability of SAS and restore the company's access to the capital markets, as SAS did not forecast that ratio to be higher than 25 % before fiscal year 2023.

(119) Overall, based on the evidence from the net debt-to-equity, net debt-to-EBITDA, equity-to-asset and financial preparedness ratios, the Commission preliminarily considers that the recapitalisation measures did not exceed the minimum to ensure the viability of SAS and would ensure its access to private capital markets at the end of fiscal year 2023.

3.3.3.3. Sensitivity analysis

(120) The Commission has also assessed the proportionality of the recapitalisation measures in favour of SAS under a sensitivity analysis. The rationale of that analysis is that the proportionality assessment relies significantly on the financial projections of SAS that Denmark and Sweden provided and, in particular, on the forecasted losses. The Commission has preliminarily determined the amount of losses for which, all else being equal, the recapitalisation measures would no longer be proportionate on the basis of the capital structure of SAS on 31 January 2020 and the indicators in recital (101). The calculation of the Commission assumes that, had SAS incurred lower losses, SAS would have enjoyed a one-to-one increase in its available cash, which is a conservative assumption ([64]).

(121) The results of that sensitivity analysis show that the recapitalisation measures would still be proportionate had SAS eventually incurred roughly SEK 1 billion lower losses than initially forecasted. Without considering the financial preparedness indicator (recital (118)), a reduction in forecasted losses higher than SEK 1,5 billion would have to take place for the recapitalisation measures not to be proportionate ([65]).

(122) Given that the cumulated forecasted losses of SAS amounted to SEK […], and since the financial projections of SAS appear genuine and authentic as they are in line with those reported in internal documents of SAS (recital (103)), the Commission preliminarily considers the buffer amounting to SEK 1-1,5 billion as sufficient to make the proportionality assessment robust to alternative assumptions on financial projections.

([63]) The sample excludes one of the peers used in the net debt-to-equity test, because that peer, whose fiscal year ends on 31 March, did not report the value of total assets on 31 December 2019. As an additional check, in order to assess the implications of including that company in its analysis, the Commission also estimated the equity-to-asset ratio for that company by relying on its fiscal year-end balance sheet value on 31 March 2020. The benchmark value of that ratio, including that company in the peer sample, is not significantly different (i.e. 18,39 % instead of 18,12 %).

([64]) This is a conservative assumption as for example not all losses have an impact on the cash position in the same period (instead of paying cash, one can recognise a payable to be settled at a later stage). In addition, losses might originate from cost items that are not included in EBITDA, such as financial costs. If losses do not equally affect cash (and therefore, net debt) and EBITDA, the net debt-to-equity and net debt-to-EBITDA ratios would be higher than under the assumptions of the Commission.

([65]) When we exclude the financial preparedness ratio from the analysis, the strictest benchmark for the proportionality assessment becomes the comparison of the net debt-to-equity ratio before the COVID crisis and that at the end of financial year 2021.

(123) It is also important to note that the buffer amounting to SEK 1-1,5 billion could act as an additional safeguard for the proportionality of the Measure in light of the maximum amount of potential compensation to which SAS would be entitled to under the two Danish schemes in support of airlines that had been pre-notified to the Commission at the time the Measure was granted, with amounts of approximately DKK 6 million under the first scheme and DKK 35 million under the second scheme (see recital (16)).

3.3.3.4. Conclusion

(124) In light of the above, the Commission preliminarily considers that the Measure, having also factored in the aid already granted to SAS (at the time the Measure was granted) as well as the aid to SAS that could have been expected in addition to the Measure (at the time the Measure was granted) did not exceed the minimum to ensure the viability of SAS and did not go beyond restoring its capital structure on 31 December 2019. Therefore, at this stage, the Commission preliminarily considers that the above analysis appears to provide sufficient evidence that the Measure is proportionate.

3.3.4. *Remuneration and exit of the State*

(125) According to the general principles of the remuneration and exit of the State set out in points 55-59 of the Temporary Framework, Member States must receive appropriate remuneration for their investment and must put mechanisms in place that gradually incentivise redemption.

(126) According to point 57 of the Temporary Framework, *'[t]he remuneration of the COVID-19 recapitalisation measure should be increased in order to converge with market prices to provide an incentive to the beneficiary and to the other shareholders to redeem the State recapitalisation measure and to minimise the risk of distortions of competition'*. Point 58 of the Temporary Framework clarifies that the purpose of point 57 is that the recapitalisation measures *'contain appropriate incentives for undertakings to redeem the recapitalisation and look for alternative capital when market conditions permit, by requiring a sufficiently high remuneration for the recapitalisation'*.

(127) With particular regard to the remuneration, point 59 of the Temporary Framework allowed Member States to *'notify schemes or individual measures where the remuneration methodology is adapted in accordance with the features and seniority of the capital instrument provided they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration'*.

(128) In recitals (129) to (149), the Commission will assess compliance of the Measure with those general principles, as well as with the specific rules set out by the Temporary Framework depending on the type of recapitalisation instrument (notably, points 60-64 as regards the equity instruments and points 65-70 as regards the hybrid capital instruments).

3.3.4.1. Remuneration of the equity instruments and exit of the State

3.3.4.1.1. Entry price

(129) With regard to the equity instruments, the Commission notes that, according to point 60 of the Temporary Framework, a capital injection by the State must be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection ('the Maximum Share Price'). As SAS's formal written request for the capital injection is dated 8 May 2020 (recital (32)), the Maximum Share Price is thus calculated as being SEK 8,71 per share.

(130) The Commission observes that the price for the new shares in the capital increase, both in the Rights Issue and in the Direct Issue, is SEK 1,16 per share (recitals (49) and (50)), which constitutes a 86,7 % discount compared to the Maximum Share Price. It follows that the conditions set out in point 60 of the Temporary Framework appear to be met.

3.3.4.1.2. Step-up mechanism

(131) In order to increase the remuneration for the State and to incentivise the beneficiary to buy back the State capital injection, point 61 of the Temporary Framework required a step-up mechanism in two rounds respectively at years four and six after the COVID-19 equity injection. Point 62 of the Temporary Framework provided that the Commission may accept alternative mechanisms, provided they lead overall to a similar outcome regarding the incentive effects on the exit of the State and have a similar impact overall on the State's remuneration.

(132) The Commission observes that the equity instrument of the Measure is not accompanied by any step-up mechanism, within the meaning of point 61 of the Temporary Framework. Therefore, the Commission must assess whether the equity instrument is accompanied by an alternative mechanism to the one required in point 61 of the Temporary Framework, in line with point 62 thereof.

(133) In the Initial Decision, the Commission found that the overall structure of the Measure, as notified by Denmark and Sweden on 11 August 2020, constituted such an alternative mechanism. In particular, the Commission considered that the interconnected nature of the two components of the Measure (i.e. the equity instrument and the hybrid capital instrument) justified taking into account their combined effects to incentivise the exit of the State. The Commission relied on several factors to conclude that the overall structure of the Measure, as notified by Denmark and Sweden on 11 August 2020, included sufficiently strong incentive effects on the exit of the State from SAS's capital, in particular: (i) the large discount from which Denmark and Sweden benefited when they acquired the shares in SAS, (ii) the fact that remuneration for the New State Hybrid Notes would be provided by an increasing coupon, which significantly raised the cost of maintaining the State aid within SAS and, (iii) the behavioural commitments to which SAS was subject to, in particular the prohibition on paying dividends, which would remain in force until the aid was repaid in full.

(134) As mentioned at recital (6), in its *SAS II judgment*, the General Court concluded however that, in the Initial Decision, the Commission had infringed points 61 and 62 of the Temporary Framework in that it had failed to require the inclusion of a step-up or an alternative mechanism regarding the equity instrument ([66]). In particular, the General Court found that none of the factors relied on by the Commission demonstrated that the equity instrument was accompanied by an alternative mechanism to that of the step-up.

(135) First, the General Court considered that the price of the shares acquired by the State on its entry into the equity of the beneficiary does not have a sufficiently close connection with the subject matter and purpose of the step-up mechanism or of an alternative mechanism. The General Court observed that the purchase price refers to a different requirement of the Temporary Framework (i.e. point 60) to that of the requirement flowing from points 61 and 62 of the Temporary Framework. In that regard, the General Court considered that the objective pursued by the step-up mechanism is different from the one underpinning the rule on the initial purchase price of the shares. The objective of the step-up mechanism is to cause the State's shareholding to become more onerous over time by increasing the latter's share of the company's equity, without there being a further injection of capital by the State. By contrast, the objective of the rule on the initial purchase price of the shares is to ensure that the price at which the State acquires its shares does not exceed their market price. Consequently, the rule on the initial purchase price of the shares only has an ex ante impact on the situation of the beneficiary concerned, that is to say, at the time the State enters the capital of that beneficiary, and it is not intended to increase over time the incentive, for the beneficiary concerned, to buy back that shareholding, since the price of the shares may rise as well as fall.

(136) Second, the General Court considered that the fact that the remuneration for the State's New State Hybrid Notes would be provided by an increasing coupon was a separate requirement, laid down by point 66 the Temporary Framework for hybrid capital instruments until their conversion into equity-like instruments. Thus, the General Court found that this requirement had an entirely different field of application to that of the requirement flowing from points 61 and 62 of the Temporary Framework.

(137) Third, the General Court found that the fact that SAS will be subject to the behavioural commitments set out in section 3.11.6 of the Temporary Framework, such as a prohibition on the payment of dividends, is a matter of separate requirements which are additional to, but are not a substitute for, the requirement set out in points 61 and 62 of the Temporary Framework. Thus, the General Court found that those behavioural commitments cannot replace the obligation to establish a step-up or an alternative mechanism.

(138) In light of the above, the Commission has doubts that the equity instrument of the Measure can be considered accompanied by an appropriate alternative mechanism to the one envisaged in point 61 of the Temporary Framework regarding the beneficiary's incentives to buy back the States' capital injection. Thus, it appears doubtful that the equity instrument complies with points 61 and 62 of the Temporary Framework. That issue will be assessed in the framework of the formal investigation procedure. The Commission invites Denmark and Sweden as well as the interested parties to submit their comments on this respect.

3.3.4.1.3. Exit of the State

(139) Finally, in view of the information submitted by the Danish and Swedish authorities (see recitals (64) to (66)), the Commission observes that, under the Swedish Companies Act, SAS could not buy back ordinary shares just from some specific shareholders, but only from all shareholders on the same terms. It notes, however, the States could sell at any time their COVID-19 equity stake at market prices to purchasers other than SAS. Therefore, the Commission preliminarily considers that the conditions set out in points 63 and 64 of the Temporary Framework appear to be met.

([66]) Judgment of General Court of 10 May 2023, *Ryanair* v *Commission (SAS II; COVID-19)*, T-238/21, EU:T:2023:247.

3.3.4.2. Remuneration of the hybrid capital instruments and exit of the State

(140) In accordance with point 65 of the Temporary Framework, the Commission assesses the overall remuneration of the Directed Hybrid Notes by factoring in the characteristics of the instrument (recitals (52) and (53)), its built-in incentives for exit and an appropriate interest rate.

(141) According to point 66 of the Temporary Framework, hybrid capital instruments, until they are converted into equity-like instruments, must bear a minimum remuneration at least equal to the base rate (1-year IBOR or equivalent as published by the Commission) ([67]) plus the premium as set out in Table 2.

Table 2

Remuneration of hybrid capital instruments: 1-year IBOR or equivalent +

Type of recipient	1st year	2nd year	3rd year	4th year	5th year	6th year	7th year	8th year and after
Large enterprises	250 bps	350 bps	350 bps	500 bps	500 bps	700 bps	700 bps	950 bps

(142) According to recital (52), the remuneration of the hybrid instruments will use the STIBOR 6M (Stockholm Interbank Offered Rate 6 Months) as base rate. The Commission notes that, in SEK markets, there exists no public STIBOR 1-year to be used as based rate ([68]). The Commission also acknowledges that, at the time the Measure was granted, the longest STIBOR published was the 6 months rate (the STIBOR 9M was not available either). The Commission has adopted the STIBOR 6M as base rate for SEK currency markets, calculated in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates ([69]). Therefore, the Commission preliminarily considers that the STIBOR 6M is the appropriate base rate to apply to set the remuneration of the New State Hybrid Notes issued by SAS in SEK currency and therefore interest would be payable semi-annually.

(143) According to recital (52), the remuneration of the new hybrids issued by SAS for the States is set out as described in Table 3:

Table 3

Remuneration of the New State Hybrid Notes: STIBOR 6M +

Hybrids Notes	1st year	2nd year	3rd year	4th year	5th year	6th year	7th year	8th year and after
NSHN1 (SEK 5 billion)	340 bps	440 bps	440 bps	590 bps	590 bps	790 bps	790 bps	1040 bps
NSHN2 (SEK 1 billion)	440 bps	540 bps	540 bps	690 bps	690 bps	890 bps	890 bps	1140 bps

(144) Comparing the remuneration of the New State Hybrid Notes (Table 3) to the minimum remuneration set out in the Temporary Framework (Table 2), the Commission notes that the remuneration of the NSHN1 is 90bps higher than the minimum required under the Temporary Framework. As for the NSHN2 placed with Denmark, this difference increases to 190bps over the minimum required. The Commission also acknowledges that the difference in remuneration (100bps) between the NSHN1 and the NSHN2 is due to an agreement between the States rather than to differences in the risk profile of the hybrid instruments ([70]).

([67]) Base rates calculated in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6.), published on the website of DG Competition at https://ec.europa.eu/competition/state_aid/legislation/reference_rates.html.

([68]) The Swedish Financial Benchmark Facility (SFBF) is the independent benchmark administrator in charge of the administration and calculation of the STIBOR since 20 April 2020. See https://swfbf.se/

([69]) OJ C 14, 19.1.2008, p. 6.

([70]) Apart from the 100bps difference in remuneration and the amounts issued, all other terms of the NSHN1 and the NSHN2 are exactly the same.

(145) The Commission also notes that those hybrid instruments are treated as equity under IFRS rules (recital (53)), as they have many equity-like characteristics, which make the instruments riskier for investors ([71]). Therefore, their higher remunerations above the minimum required under point 66 of the Temporary Framework (90bps and 190bps) take into account the additional risk borne by the States as investors due to the fact that: (i) those hybrid instruments are close to equity in terms of seniority ([72]); (ii) they are not convertible into shares (recital (53)); (iii) they bear coupons only payable at SAS's discretion (recital (54)) ([73]); (iv) they are perpetual in duration (recital (52)).

(146) To ensure that the coupons are ultimately paid, especially given that SAS has the option not to do so, several incentivising mechanisms are set out: (i) interest on unpaid (deferred) coupons is compounded; (ii) coupons always accrue to the initial nominal amount of the hybrid notes; and (iii) the behavioural requirements will apply until the nominal amount of the hybrid notes and their claims have been fully repaid by the company irrespective of a potential sale of claims, unless all New State Hybrid Notes are sold at par value or above including accrued coupon payments (including compound interest).

(147) As regards the exit incentives for the States' participation, the New State Hybrid Notes include a yearly increasing interest rate (together with compound interests in case of unpaid coupons) that makes them an increasingly costly source of funding for the company. Moreover, in accordance with the Temporary Framework, those hybrid instruments need to be redeemed in order for the behavioural commitments imposed on SAS and its subsidiaries to end. All those elements create strong incentives for SAS to repay or to refinance the States Hybrid Notes as soon as possible.

(148) Taking into account the particular risk profile, characteristics and built-in exit incentives of the New States Hybrid Notes, the Commission preliminarily considers that a top-up of 90bps over the minimum remuneration ([74]) set out in Table 2 is needed to properly remunerate the States for their new hybrid notes. As explained in recitals (143) to (144), this requirement is met for the New State Hybrid Notes.

(149) For the above reasons, at this stage, the Commission preliminarily considers that for the New State Hybrid Notes, both the NSHN1 and the NSHN2, the remuneration for the States and the exit incentives appear to comply with the principles set out in points 65 to 70 of the Temporary Framework.

3.3.5. *Governance and prevention of undue distortions of competition*

(150) According to point 71 of the Temporary Framework, the beneficiary of a COVID- 19 recapitalisation shall not engage in aggressive commercial expansion and excessive risk taking. The business plan of SAS showed that the Company was preparing a prudent and progressive return to its standard volume of activity. In addition, Denmark and Sweden made the aid conditional upon observance of the elements regarding governance and competition set out in section 3.11.6 of the Temporary Framework ('Governance and prevention of undue distortions of competition').

(151) According to point 72 of the Temporary Framework, if the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with significant market power on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. The Measure concerns a SEK 11 billion (EUR 1 069 million) recapitalisation in favour of SAS. In light of that recapitalisation amount, in the present decision the Commission will assess whether SAS had significant market power for the purposes of point 72 of the Temporary Framework.

3.3.5.1. Identification of the relevant markets

(152) In its prior decisional practice related to mergers in the air transport sector, the Commission has defined the relevant markets for scheduled passenger air transport services on the basis of two approaches: (i) the 'point of origin/point of destination' ('O&D') city-pair approach, where the target was an active air carrier ([75]); and (ii) the 'airport-by-airport' approach, when the target included an important slot portfolio ([76]).

([71]) For example, the New State Hybrid Notes are perpetual; the payment of their coupons could be deferred unilaterally by SAS; they could be loss/profit participating instruments (senior to other equity instruments), etc.

([72]) In case of insolvency, the New State Hybrid Notes are senior to subscribed capital and to capital reserves.

([73]) A risk-mitigating factor is the fact that unpaid coupons will accrue compound interests as explained in recital (54), although there is a time value effect as deferring coupons is likely to reduce the net present value of the States' remuneration.

([74]) Point 66 of the Temporary Framework.

([75]) See e.g. Cases M.8869 — *Ryanair/LaudaMotion*, paragraphs 96-97; M.7541 — IAG/Aer Lingus, paragraph 14; M.7333 — *Alitalia/Etihad*, paragraph 63; M.6447 — *IAG/bmi*, paragraph 31.

([76]) See e.g. Cases M.8869 — *Ryanair/LaudaMotion*, paragraph 116; M.8672 — *easyJet/Certain Air Berlin Assets*, paragraph 41; M.8633 — *Lufthansa/Certain Air Berlin Assets*, paragraph 58; M.6447 — IAG/bmi, paragraph 483. In Cases M.8672 — *easyJet/Certain Air Berlin Assets* and M.8633 — *Lufthansa/Certain Air Berlin Assets*, the Commission only carried out an airport-by-airport assessment, since the target assets were not used on any route at the time of the transaction (Air Berlin had definitively ceased its flight operations on all routes due to its insolvency).

(153) Under the O&D approach, every combination of an airport or city of origin to an airport or city of destination is defined as a distinct market. That market definition reflects the demand-side perspective whereby passengers consider all possible alternatives of travelling from a city of origin to a city of destination, which they do not consider substitutable for a different city pair.

(154) While the Commission has generally given pre-eminence to demand-side substitution, it has also acknowledged that, from the supply-side perspective, competition between air carriers also takes place on a network level, as network carriers build their networks and decide to fly essentially on routes connecting to their hubs ([77]). Some low-cost carriers also claimed that, with the growth of point-to-point airlines, supply-side substitution is an increasingly important aspect of market definition ([78]).

(155) Under the airport-by-airport approach, every airport (or substitutable airports) is defined as a distinct market. That market definition enables the Commission to assess the effects of a transaction on the operation of passenger air transport services at a given airport on the basis notably of the slot portfolio held by a carrier at the airport, without distinguishing between the specific routes served to or from that airport.

(156) The airport-by-airport approach has been adopted in particular to assess the effects of the strengthening of an airline's position at certain airports and the risks to effective competition entailed by the concentration of slots at certain airports in the hands of an undertaking ([79]). The Commission has noted, in the framework of its airport policy, that '*slots are a rare resource*' and '*access to such resources is of crucial importance for the provision of air transport services and for the maintenance of effective competition*' ([80]). The Commission has aggregated all routes originating or terminating in an airport for the purpose of defining the relevant situation absent the transaction, in particular, in the case of an air carrier that would have entered into insolvency proceedings ([81]).

(157) For those reasons, the Commission considers that the markets in which the beneficiary operates that are relevant for the purposes of assessing the distortive effects of the Measure on competition are the markets for the provision of passenger air transport services to and from the airports served by the beneficiary. That conclusion is confirmed by the fact that the Measure aims at preserving the overall ability of the beneficiary to operate air transport services, notably ensuring the preservation of its assets and its rights to operate in the medium/long term. Those assets and rights are not assigned, in principle, to any particular route. This is particularly true for slots at a coordinated airport ([82]), which may be highly valuable and may be used on any route to and from the airport. That conclusion is also supported by the Commission Notice on the definition of relevant market ([83]), which states, in its footnote 1, that the focus of assessment in State aid cases is the recipient of the aid at issue and the industry or sector concerned rather than the identification of the competitive constraints faced by that recipient.

(158) The Measure supports the operations of SAS overall and may therefore potentially affect competition on all routes originating and arriving at an airport at which the beneficiary holds slots, regardless of the specific competitive position of the beneficiary on any of those specific routes. Considering that the Measure does not lead to a strengthening of the position of the beneficiary concerned on certain O&Ds as opposed to others and produces effects on the overall situation of the beneficiary, it is not appropriate to analyse the impact of the Measure on each of those routes separately. Instead, for the purposes of the applying point 72 of the Temporary Framework, it is appropriate to follow the 'airport-by-airport' approach and define as relevant markets the airports at which the beneficiary supplies passenger air transport services. The beneficiary's power on such relevant markets will be assessed *inter alia* based on the level of congestion of the airports and the beneficiary's shares of airport infrastructure capacity that it has the permission to use for its operations (i.e. shares of slots) ([84]).

3.3.5.2. Overview of the relevant airports

(159) For the reasons explained below, the Commission considers that only the coordinated airports in the EEA at which SAS had a base ([85]) before the COVID-19 outbreak are relevant for the purpose of applying point 72 of the Temporary Framework.

([77]) See e.g. Cases M.7541 — *IAG/Aer Lingus*, paragraphs 17-18; M.6607 — *US Airways/American Airlines*, paragraph 10; M.6447 — *IAG/bmi*, paragraph 31.
([78]) See e.g. Case M.6663 — *Ryanair/Aer Lingus III*, paragraph 57.
([79]) See e.g. Case M.8869 — *Ryanair/LaudaMotion*.
([80]) Recital (4) of the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (COM/2011/827 final of 01 December 2011).
([81]) See Case M.6447 — *IAG/bmi*, paragraphs 136-157.
([82]) According to Article 2 of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1) (the 'Slot Regulation'), a 'coordinated airport' means 'an airport where a coordinator has been appointed to facilitate the operations of air carriers operating or intending to operate at that airport'.
([83]) Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).
([84]) See examples by analogy: Case M.8633 — *Lufthansa/Certain Air Berlin assets*; Case M.8672 –*easyJet/Certain Air Berlin assets*.
([85]) A 'base' means that aircraft overnight at the airport, and are used to operate several routes from that airport.

(160) First, SAS is unlikely to have significant market power at airports at which it has no base. In particular, the fact that an air carrier has a base at a given airport tends to show that it is established at that airport on a long-term basis, which enables it to exert a more sustained level of competitive pressure on its competitors operating at the same airport. Furthermore, according to the case-law, the possession of a base confers certain advantages, such as the flexibility to switch between routes, the redeployment of aircraft, the minimising of disruption costs, the exchange of crews, customer care and brand awareness ([86]). In addition, the establishment of a base at a particular airport generally implies that some of the carrier's staff are assigned to that base and the aircraft stationed at that base may be deployed on any of the O&D routes departing from it. It follows that a carrier that possesses a base at a particular airport is in a better position to invest in establishing a stable and long-term commercial presence than a carrier operating at that airport with no base there.

(161) Second, SAS is unlikely to have significant market power at airports that do not qualify as coordinated under the Slot Regulation. Such a qualification means that, at those airports, the demand for airport infrastructure, in particular slots, significantly exceeds the airport capacity, while the expansion of airport infrastructure to meet demand is not possible in the short term. Conversely, at non-coordinated airports, the airport capacity generally exceeds demand from airlines and there are sufficient available slots to enable the entry or expansion of a competitor on such a scale as to deter any attempt by SAS to increase prices on O&Ds to and from the airport.

(162) Third, the rules on State aid apply only within the EEA territory. The Commission has no jurisdiction to examine whether SAS holds significant market power at an airport located in a non-EEA country.

(163) In that context, on 16 June 2020, the Commission requested information from Denmark and Sweden regarding data about SAS's position during the Summer 2019 IATA Season and Winter 2019/2020 IATA Season at the coordinated airports in the EEA at which it had a base.

(164) In its reply of 22 June 2020, Denmark and Sweden explained that SAS operated a base at 23 airports in the EEA during the Summer 2019 IATA Season or Winter 2019/2020 IATA Season ([87]). Of those 23 airports, 16 were coordinated airports ([88]). The Commission will assess SAS's market power at those 16 relevant airports.

3.3.5.3. Assessment of SAS's market power at the relevant airports

3.3.5.3.1. Conditions for SAS's significant market power at the relevant airports

(165) For the purpose of the assessment of significant market power in this case, the Commission will take into account the competitive structure of the market, and in particular (i) constraints imposed by the existing supplies from, and the position on the market of the beneficiary and its actual competitors, and (ii) constraints imposed by the credible threat of future expansion by those actual competitors or entry by potential competitors.

(166) Market shares expressed by reference to the number of offered flights (frequencies) or deployed seats at a relevant airport provide a useful first indication of the market position of an airline and of the actual competitive constraints to which it is subject. However, they do not reflect the constraints derived from potential competition.

(167) For that purpose, the Commission considers that the barriers to expansion or entry faced by other air carriers than the beneficiary should be taken into account in the assessment. To be able to provide passenger air transport services, an air carrier needs access to the airport infrastructure. At coordinated airports, an air carrier must hold slots to operate routes from or to those airports. In fact, in accordance with the case-law, the main barrier to entry in the EU air transport sector is the lack of available slots at large airports ([89]). In that context, a high level of airport congestion reflects the airport capacity limitations faced by an air carrier, which affects its ability to constrain effectively the conduct of the beneficiary.

(168) In that context, an air carrier's slot holding at an airport, together with the congestion rate at that airport, provide the most accurate measure of the air carrier's ability to compete on the passenger air transport market to or from that airport. They therefore provide the most accurate indication of the market structure and of the relative importance of the beneficiary and its competitors at an airport.

([86]) See judgment of 6 July 2010, *Ryanair v Commission*, T 342/07, EU:T:2010:280, paragraph 269.

([87]) These airports are: Copenhagen airport; Stockholm Arlanda airport; Oslo airport; Trondheim airport; Bergen airport; Stavanger airport; Göteborg Landvetter airport; Billund airport; Helsinki airport; London Heathrow airport; Aarhus airport; Luleå airport; Tallinn airport; Aalborg airport; Malaga airport; Vilnius airport; Tromsø airport; Düsseldorf airport; Stuttgart airport; Gdańsk Lech Wałęsa airport; Bodø airport; Hamburg airport; Amsterdam airport.

([88]) These airports are: Copenhagen airport; Stockholm Arlanda airport; Oslo airport; Trondheim airport; Bergen airport; Stavanger airport; Göteborg Landvetter airport; Billund airport; Helsinki airport; London Heathrow airport; Malaga airport; Tromsø airport; Düsseldorf airport; Stuttgart airport; Hamburg airport; Amsterdam airport.

([89]) See judgment of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraph 166.

3.3.5.3.2. Methodology

(169) A share of flights (or frequencies) is defined as the ratio between the number of flights (or frequencies) operated by an air carrier at an airport and the total number of flights (or frequencies) operated by all air carriers at the airport. It corresponds to the ratio between the number of slots used by an air carrier at an airport and the total number of slots used by all air carriers at the airport. It also corresponds to the ratio between the number of slots allocated to an air carrier at an airport and the total number of slots allocated to all air carriers at the airport.

(170) A share of seats is defined as the ratio between the number of seats deployed by an air carrier at an airport and the total number of seats deployed by all air carriers at the airport. It is therefore an indicator of the percentage of capacity offered by an air carrier out of the overall capacity offered at the airport.

(171) The Commission considers that an air carrier having a share of flights and a share of seats below 40 % at an airport is unlikely to have significant market power at that airport.

(172) In turn, a slot holding is defined as the ratio between the number of slots held by an air carrier at an airport and the total available slots at that airport (i.e. the airport capacity, corresponding to sum of the number of slots allocated to all air carriers and the number of slots not allocated, which could be used for the expansion or entry of air carriers at the airport).

(173) The Commission will use the qualification as a coordinated airport under the Slot Regulation as a first proxy of a high congestion level of an airport.

(174) For coordinated airports, the actual congestion rate is calculated by dividing the number of slots allocated to all air carriers at the airport in the relevant IATA season by the total capacity of the airport (in terms of slots) in that IATA season. An average congestion rate during the operating hours of less than 60 % would not be *prima facie* problematic ([90]).

(175) Denmark and Sweden have provided data on SAS's share of frequencies, share of seats and slot holding at the relevant airports and on the congestion rates at those airports. For SAS's competitors, Denmark and Sweden have provided the number of slots allocated to them, as well as an estimation of the number of aircraft they base at the relevant airports. The Commission has checked the overall accuracy of the data submitted by Denmark and Sweden based, *inter alia*, on statistical data collected by the Online Coordination System.

(176) Based on those data, out of the 16 relevant airports, SAS's share of operated weekly frequencies and share of deployed seats were below 40 % during Summer 2019 IATA Season and Winter 2019/2020 IATA Season at 11 of those coordinated airports ([91]). Therefore, SAS was unlikely to have significant market power at those airports.

(177) The five coordinated airports in the EEA where SAS's share of operated weekly frequencies or of deployed seats exceeded 40 % during Summer 2019 IATA Season or Winter 2019/2020 IATA Season are: Copenhagen airport; Stockholm Arlanda airport; Trondheim airport; Stavanger airport; and Tromsø airport. For those airports, it is not possible to exclude, on the basis of SAS's market shares in terms of frequencies and seats offered at the airport, that SAS may have significant market power pursuant to point 72 of the Temporary Framework.

(178) In light of the above and of the analytical framework applied by the Commission in prior merger decisions ([92]), the Commission will thus further assess SAS's market power at those five airports, by taking account of the following additional indicators together: (i) SAS's slot holding at the airport, in particular, for Copenhagen and Stockholm Arlanda airports, at peak times ([93]); and (ii) the level of congestion at the airport.

3.3.5.4. Assessment of SAS's market power at Copenhagen, Stockholm Arlanda, Trondheim, Stavanger and Tromsø airports

3.3.5.4.1. Copenhagen airport

(179) At Copenhagen airport, SAS's market shares reached 40 % only based on weekly frequencies (Summer 2019 and Winter 2019/2020 IATA Seasons: 40 %). They were below 40 % based on deployed seats (Summer 2019 IATA Season: 36 %; Winter 2019/2020 IATA Season: 38 %).

([90]) The conditions of operation at the relevant airports may differ due to, notably, different opening hours, night-flight bans and movement restrictions. For the sake of comparability, the Commission has considered slot holdings and airport congestion rates between 6:00 and 21:59 local time (i.e. between 4:00 and 19:59 UTC during IATA Summer Season and between 5:00 and 20:59 UTC during IATA Winter Season).

([91]) These airports are: Oslo airport (below 40 %); Bergen airport (below 40 %); Göteborg Landvetter airport (below 20 %); Billund airport (below 20 %); Helsinki airport (below 5 %); London Heathrow airport (below 5 %); Malaga airport (below 5 %); Düsseldorf airport (below 5 %); Stuttgart airport (below 5 %); Hamburg airport (below 5 %); Amsterdam airport (below 5 %).

([92]) See notably Case M.8633 — *Lufthansa/Certain Air Berlin assets* (2017), paragraphs 165-184.

([93]) The Commission qualifies as 'peak times' the hour bands for which the congestion rate at a given airport is very high, and therefore very limited, or no capacity for entry or expansion is left.

(180) Furthermore, as shown in Table 4 below, the level of congestion at Copenhagen airport before the COVID-19 outbreak was moderate. Air carriers willing to expand or enter at Copenhagen airport did not face any significant barrier. Therefore, SAS was constrained not only by competitors already active at Copenhagen airport (representing an aggregated market share of at least 60 % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors. The strong constraints to which SAS was subject are illustrated by SAS's average slot holding, which reached at most 16 % in 2019.

Table 4

SAS's slot holding and level of congestion at Copenhagen airport

IATA Season	SAS's average slot holding	SAS's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	16 %	32 % (hour band: 5:00-5:59 UTC) 32 % (hour band: 6:00-6:59 UTC) 30 % (hour band: 14:00-14:59 UTC)	43 %	73 % (hour band: 6:00-6:59 UTC) 72 % (hour band: 5:00-5:59 UTC) 70 % (hour band: 17:00-17:59 UTC)
Winter 2019/2020	14 %	34 % (hour band: 6:00-6:59 UTC) 32 % (hour band: 7:00-7:59 UTC) 28 % (hour band: 16:00-16:59 UTC)	37 %	67 % (hour band: 7:00-7:59 UTC) 64 % (hour band: 18:00-18:59 UTC)% 63 % (hour band: 19:00-19:59 UTC)

(181) Given (i) SAS's moderate shares of weekly frequencies and deployed seats at Copenhagen airport in both IATA Seasons (at most 40 %); (ii) SAS's limited slot holding position at Copenhagen airport in both IATA Seasons (below 20 % on average), and (iii) the available slot capacity at Copenhagen airport in both IATA Seasons, the Commission preliminarily finds that, for the purposes of this Decision, SAS does not have significant market power on the market for the provision of passenger air transport services to and from Copenhagen airport.

3.3.5.4.2. Stockholm Arlanda airport

(182) At Stockholm Arlanda airport, SAS's market shares exceeded 40 % based on weekly frequencies and deployed seats, without nevertheless reaching 50 % (Summer 2019 IATA Season: 48 % based on weekly frequencies and 42 % based on deployed seats; Winter 2019/2020 IATA Season: 47 % based on weekly frequencies and 45 % based on deployed seats).

(183) Furthermore, as shown in Table 5 below, the level of congestion at Stockholm Arlanda airport before the COVID-19 outbreak was moderate. Air carriers willing to expand or enter at Stockholm Arlanda airport did not face any significant barrier. Therefore, SAS was constrained not only by competitors already active at Stockholm Arlanda airport (representing an aggregated market share of at least 52 % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors. The strong constraints to which SAS was subject are illustrated by SAS's average slot holding, which reached at most 16 % in 2019.

Table 5

SAS's slot holding and level of congestion at Stockholm Arlanda airport

IATA Season	SAS's average slot holding	SAS's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	16 %	30 % (hour band: 6:00-6:59 UTC) 29 % (hour band: 5:00-5:59 UTC) 29 % (hour band: 12:00-12:59 UTC)	36 %	59 % (hour band: 13:00-13:59 UTC) 58 % (hour band: 6:00-6:59 UTC) 58 % (hour band: 15:00-15:59 UTC)

IATA Season	SAS's average slot holding	SAS's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Winter 2019/2020	14 %	32 % (hour band: 16:00-16:59 UTC) 28 % (hour band: 6:00-6:59 UTC) 27 % (hour band: 7:00-7:59 UTC)	31 %	62 % (hour band: 7:00-7:59 UTC) 56 % (hour band: 16:00-16:59 UTC)% 52 % (hour band: 19:00-19:59 UTC)

(184) Given (i) SAS's moderate shares of weekly frequencies and deployed seats at Stockholm Arlanda airport in both IATA Seasons (at most 48 %); (ii) SAS's limited slot holding position at Stockholm Arlanda airport in both IATA Seasons (below 20 % on average), and (iii) the available slot capacity at Stockholm Arlanda airport in both IATA Seasons, including at peak hours, the Commission preliminarily considers that, for the purposes of this Decision, SAS does not appear to have significant market power on the market for the provision of passenger air transport services to and from Stockholm Arlanda airport.

3.3.5.4.3. Trondheim airport

(185) At Trondheim airport, SAS's market shares exceeded 40 % based on weekly frequencies and deployed seats, but reached 50 % only during one season and only based on deployed seats (Summer 2019 IATA Season: 43 % based on weekly frequencies and 50 % based on deployed seats; Winter 2019/2020 IATA Season: 41 % based on weekly frequencies and 48 % based on deployed seats).

(186) Furthermore, the level of congestion at the airport before the COVID-19 outbreak was moderate, so that air carriers willing to expand or enter at Trondheim airport did not face any significant barrier ([94]). Therefore, SAS was constrained not only by competitors already active at Trondheim airport (representing an aggregated market share of at least 49 % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors ([95]).

(187) In light of the above, the Commission preliminarily finds that, for the purposes of this Decision, SAS does not have significant market power on the market for the provision of passenger air transport services to and from Trondheim airport.

3.3.5.4.4. Stavanger airport

(188) At Stavanger airport, SAS's market shares exceeded 40 % based on weekly frequencies and deployed seats, but reached 50 % only during one season and only based on deployed seats (Summer 2019 IATA Season: 48 % based on weekly frequencies and 50 % based on deployed seats; Winter 2019/2020 IATA Season: 47 % based on weekly frequencies and 48 % based on deployed seats).

(189) Furthermore, the average level of congestion at the airport before the COVID-19 outbreak was low (Summer 2019 IATA Season: 21 %; Winter 2019/2020 IATA Season: 22 %), so that air carriers willing to expand or enter at Stavanger airport did not face any significant barrier. Therefore, SAS was constrained not only by competitors already active at Stavanger airport (representing an aggregated market share of at least 50 % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors. The strong constraints to which SAS was subject are illustrated by SAS's average slot holding, which reached 10 % on average in Summer 2019 IATA Season and 8 % on average in Winter 2019/2020 IATA Season.

(190) In light of the above, the Commission preliminarily finds that, for the purposes of this Decision, SAS does not have significant market power on the market for the provision of passenger air transport services to and from Stavanger airport.

([94]) The coordination at Trondheim airport is due to terminal limitations, rather than runway limitations, so that the capacity of Trondheim airport is notably expressed in maximum number of departing or arriving passengers or maximum number of international departures, rather than number of movements. It is therefore difficult to translate the airport capacity in number of slots. Nevertheless, taking account of the capacity cap expressed in number of international departures per hour (seven) and considering, on a conservative basis, that all the departure slots allocated to airlines (estimated to represent half of the total slots allocated, the other half being made of arrival slots) are dedicated to international flights, Trondheim's congestion rate would be below 50 % in 2019 (Summer 2019 IATA Season: 45 %; Winter 2019/2020 IATA Season: 43 %).

([95]) Taking account of the capacity cap at Trondheim airport expressed in number of international departures per hour (seven) and considering, on a conservative basis, that all the departure slots allocated to SAS (estimated to represent half of the slots allocated to it, the other half being made of arrival slots) are dedicated to international flights, SAS's average slot holding would be below 20 % in 2019 (Summer 2019 IATA Season: 19 %; Winter 2019/2020 IATA Season: 17 %). This illustrates the strong constraints to which SAS was subject before the COVID-19 outbreak at the airport.

3.3.5.4.5. Tromsø airport

(191) At Tromsø airport, SAS's market shares reached 40 % only based on deployed seats (Summer 2019 IATA Season: 49 %; Winter 2019/2020 IATA Season: 46 %). They were below 40 % based on weekly frequencies (Summer 2019 IATA Season: 30 %; Winter 2019/2020 IATA Season: 28 %).

(192) Furthermore, the average level of congestion at the airport before the COVID-19 outbreak was low (Summer 2019 IATA Season: 18 %; Winter 2019/2020 IATA Season: 20 %), so that air carriers willing to expand or enter at Tromsø airport did not face any significant barrier. Therefore, SAS was constrained not only by competitors already active at Tromsø airport (representing an aggregated market share of at least 51 % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors. The strong constraints to which SAS was subject are illustrated by SAS's average slot holding, which reached 5 % on average in Summer 2019 IATA Season and 4 % on average in Winter 2019/2020 IATA Season.

(193) In light of the above, the Commission preliminarily finds that, for the purposes of this Decision, SAS does not have significant market power on the market for the provision of passenger air transport services to and from Tromsø airport.

3.3.5.5. Conclusion on market power

(194) At this stage, as SAS does not appear to have significant market power at any of the airports at which it operates, the Commission preliminarily considers that the conditions under which Denmark and Sweden would be required to propose additional measures pursuant to point 72 of the Temporary Framework are not fulfilled.

3.3.5.6. Other conditions under section 3.11.6 of the Temporary Framework

(195) Point 73 of the Temporary Framework requires that *'Beneficiaries receiving a COVID-19 recapitalisation measures are prohibited from advertising it for commercial purposes'*. This requirement appears to be met, since Denmark and Sweden undertook to implement the commitment that SAS and the companies controlled by SAS would not use the Measure for commercial advertising purposes (recital (58)).

(196) Point 74 of the Temporary Framework states that as long as at least 75 % of the COVID-19 recapitalisation measures have not been redeemed, beneficiaries other than SMEs may not acquire a more than 10 % stake in competitors or other operators in the same line of business, including upstream and downstream operations. The Commission observes that Denmark and Sweden committed that SAS and all the companies controlled by SAS would respect this condition (recital (58)), taking into account the possible exception mentioned in point 75 of the Temporary Framework.

(197) The Commission also notes that Denmark and Sweden committed that SAS would abide by the terms and conditions set out in point 76 of the Temporary Framework regarding the use of State aid in undertakings in difficulties already on 31 December 2019 (recital (63)).

(198) Point 77 of the Temporary Framework states that as long as the COVID-19 recapitalisation measures have not been fully redeemed, beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State (dividend ban). Therefore, point 77 of the Temporary Framework sets out a compatibility requirement that prevents existing private providers of capital benefitting from the State aid through discretionary acts taken by the beneficiary (such as declaration of dividends, buy-back of shares or payment of non-mandatory coupon). In that sense, point 77 of the Temporary Framework aims at minimising the amount of aid needed, namely by ensuring that those existing private investors and creditors remain exposed to the beneficiary without receiving remuneration that would ultimately increase the quantum of aid required.

(199) In the case of SAS, the Commission observes that, as explained by the national authorities, the possibility to receive non-mandatory coupon payments on the New Commercial Hybrid Notes resulting from the conversion of existing Bonds was a crucial point in the negotiations with certain bondholders, and was expected to be a key consideration for all the bondholders to agree on the conversion (recital (61)). The latter would serve to keep the aid to the minimum necessary, by facilitating the injection of private sources of capital that in turn reduce the amount of the State aid (recital (55)). Notably, the Commission notes that the conversion of the existing Bonds into new privately-held hybrids was expected to:

i. improve the capital structure of SAS and its key financial ratios: the successful conversion of the existing Bonds (accounted for as debt) into the New Commercial Hybrid Notes and common shares (accounted for as equity) would improve SAS's balance sheet by SEK 2,25 billion. That was expected to positively affect:

a. the solidity of the company: assuming using total assets of SEK […] in financial year 2021, an equity improvement of SEK 2,25 billion would increase the solidity by […]% ([96]);

b. the net debt-to-EBITDA ratio: assuming an EBITDA of SEK […] in financial year 2021, the conversion would lead to SEK 2,25 billion in decreased debt and a […]x decrease of the net debt-to-EBITDA ratio;

c. the liquidity of the company: due to the conversion, SAS would not have to repay the SEK 2,25 billion of existing Bonds in November 2022. In addition, compared to planned coupon payments on existing Bonds and hybrids, with the conversion SAS could save up to about SEK 0,8 billion in coupon payments on the New Commercial Hybrid Notes over the first five years;

ii. reduce the amount of State aid needed by SAS: in absence of conversion, there would be an outstanding funding gap for SAS that would have to be filled in by the States, due to SAS's limited access to capital markets before the Measure. On the contrary, a successful conversion would reduce the State aid needed by SEK 2,25 billion and the amount of coupon payments due by SAS;

iii. facilitate the remuneration of States' instruments: thanks to the conversion of the Bonds, SAS would be able to significantly reduce its cash outflows in the first years after recapitalisation. That is due to the fact that: the Bonds were then receiving a mandatory coupon of 5,375 % per year, whereas the New Commercial Hybrid Notes would receive lower non-mandatory coupons until the 5th year; by converting the Bonds, SAS would not have to reimburse the Bonds in November 2022, avoiding a SEK 2,25 billion outflow that could be difficult to be refinanced on capital markets by then. The resulting improvement for SAS' equity and liquidity position would secure a safer remuneration for the States.

(200) In addition, the Commission notes that the conversion of the existing Bonds into the New Commercial Hybrid Notes represented a financial advantage for SAS, at the expense of bondholders. The Net Present Value ('NPV') of the New Commercial Hybrids was calculated at 80 % of face value given a stabilised normal situation of SAS (expected to be achievable upon implementation of the recapitalisation plan), while the existing Bonds would be valued at 100 % of its nominal value in the same situation (with the nominal of the Bonds being redeemed in November 2022).

(201) Taking into account the specific circumstances of the above-illustrated scenario, the Commission notes that requiring a ban on such non-mandatory coupon payments (payable to those specific hybrid instruments) could have had the probable effect of deterring the bondholders from participating to the recapitalisation plans of SAS, which would have in turn led to an increase of State aid injected into the company's capital structure.

(202) According to settled case-law ([97]), the Commission, in assessing the compatibility of aid measures with the internal market under Article 107(3) TFEU, enjoys a discretionary power. In the exercise of that discretion, the Commission may adopt rules of conduct in order to establish the criteria on the basis of which it proposes to assess the compatibility, with the internal market, of aid measures envisaged by the Member States. In adopting such rules and announcing, through their publication, that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and, in principle, cannot depart from those rules, without being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations ([98]).

(203) While the Commission, in the area of State aid, is bound by the guidelines that it issues, the adoption of such guidelines does not, however, relieve it of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting the direct application of Article 107(3)(b) TFEU ([99]).

(204) In the present case, it must be noted that the Measure was part of a regulatory framework that was impacted by the exceptional circumstances caused by the COVID-19 pandemic and, in addition, that it had very particular specific features that were unique to it.

(205) The economic repercussions of those exceptional circumstances required immediate action at both Member State and EU level. To that end, the Commission adopted the temporary framework on 19 March 2020, that is to say, a few days after the Member States had adopted the first lockdown measures, in order to enable those States to act with the urgency that the situation demanded. From that point of view, the Commission set out in the temporary

([96]) The solidity of a company is defined as the ratio between equity raised from its shareholders and external capital raised from debt holders.

([97]) See for example judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 38 and the case-law cited.

([98]) See judgments of 8 March 2016, *Greece* v *Commission*, C-431/14 P, EU:C:2016:145, paragraph 69 and the case-law cited, and of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraphs 39 and 40.

([99]) See judgments of 8 March 2016, *Greece* v *Commission*, C-431/14 P, EU:C:2016:145, paragraphs 70 to 72, and of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 41.

framework the conditions that temporary State aid measures had to fulfil in order to be regarded as compatible with the internal market on the basis of Article 107(3)(b) TFEU and authorised very rapidly after their notification by the Member State concerned. That framework, in the light of the extremely urgent circumstances that existed when it was adopted, could not foresee all the measures that the Member States might adopt for economic operators affected by the crisis caused by the COVID-19 pandemic.

(206) As regards the specific features of the Measure, the Commission notes, as described in recitals (199) and (200), that the Measure provided for a significant participation of private investors in the form of burden sharing, by obtaining the conversion of existing and due bonds into new privately-held hybrids. First, the Commission observes that the Temporary Framework does not impose any burden sharing requirement as a condition for the compatibility of the State aid in the form of recapitalisation. The burden sharing provided by the Measure is the result of the efforts of SAS to find alternative financing on the market at affordable terms to minimise the amount of State aid granted. Second, it is noteworthy that the waiving of the ban on non-mandatory coupons relating to the New Commercial Hybrid Notes was a key element for the bondholders to accept the conversion of their existing bonds. The Commission therefore considers, on a preliminary basis, that the payment of non-mandatory coupons constituted a decisive incentive for private shareholders and investors to convert their bonds, and thus to provide SAS with new private capital. Since the measure at issue was designed in such a way as to reduce the amount of aid as much as possible, it was logical, in order to ensure a substantial contribution by private investors, that they be assured of receiving payments on the New Commercial Hybrid Notes.

(207) As a result, the Commission preliminary considers that not requiring a ban on non-mandatory payment of coupons relating to the New Commercial Hybrid Notes — and thus derogating from the requirement set out in point 77 of the Temporary Framework — is justified in the present case in light of the exceptional circumstances of the case and the specific features of the Measure.

(208) In addition, for the sake of clarity, the conditions set out in point 77 of the Temporary Framework do not apply to transactions within SAS that do not imply cash outflows from SAS to other external third parties (i.e. intra-group dividend payments made to SAS by companies that are directly or indirectly- fully owned by SAS).

(209) Point 78 of the Temporary Framework states that '*[a]s long as at least 75 % of the COVID-19 recapitalisation measures has not been redeemed, the remuneration of each member of the beneficiaries' management must not go beyond the fixed part of his/her remuneration on 31 December 2019. For persons becoming members of the management on or after the recapitalisation, the applicable limit is the fixed remuneration of the members of the management with the same level of responsibility on 31 December 2019. Under no circumstances, shall bonuses or other variable or comparable remuneration elements be paid*". The Commission observes that Denmark and Sweden committed that the management of SAS and its subsidiaries would be subject to this condition (recital (59)). The Commission also notes that SAS had to report regularly to Denmark and Sweden in suitable form on compliance with the requirements regarding the remuneration of the management of SAS Group (remuneration report).

3.3.5.7. Conclusion on compliance with the conditions concerning governance and prevention of undue distortions of competition

(210) In light of the above, the Commission preliminarily concludes that the Measure under assessment complied with the conditions concerning governance and prevention of undue distortions of competition laid down in Section 3.11.6. of the Temporary Framework. In particular, although the Measure derogates from point 77 the Temporary Framework, the Commission preliminarily considers that this is justified for the reasons developed above at recitals (198) to (207).

3.3.6. *Exit strategy of the State from the participation resulting from the recapitalisation and reporting obligations*

(211) Pursuant to point 79 of the Temporary Framework, '*beneficiaries other than SMEs that have received a COVID-19 recapitalisation of more than 25 % of equity at the moment of intervention must demonstrate a credible exit strategy for the participation of the Member State, unless the State's intervention is reduced below the level of 25 % of equity within 12 months from the date of the granting of the aid*' ([100]). Pursuant to point 80 of the Temporary Framework, the exit strategy must lay out the plan of the beneficiary on the continuation of its activity and the use of the funds invested by the State, including a repayment schedule and the measures that the beneficiary and the State will take to abide by the repayment schedule.

([100]) In line with footnote 66 of the Temporary Framework, hybrid instruments granted by the State should be counted as equity.

(212) SAS is a large undertaking that would receive a recapitalisation of more than 25 %. Accordingly, Denmark and Sweden submitted a business plan developed by SAS to redeem by financial year 2025 the instruments provided by Denmark and Sweden. Denmark and Sweden explained that SAS intended to use both positive free cash flows of the business as well as proceeds from capital market issuances (including debt and equity) to redeem the State aid instruments ([101]). Additionally, the Major Shareholders also explained that they would consider, as soon as possible and after the financial stabilisation of SAS, a sale to private third parties as a likely exit strategy, particularly for the COVID-19 shares subscribed in the recapitalisation. In any case, Denmark and Sweden committed to receive and endorse a credible exit strategy within 12 months after the aid is granted, unless the State's intervention would be reduced below the level of 25 % of equity by that deadline. The Commission preliminarily concludes that the conditions set out in points 79 and 80 of the Temporary Framework appear to be satisfied.

(213) In addition, Denmark and Sweden confirmed that SAS would report to Denmark and Sweden on the progress in implementing the repayment schedule in compliance with point 82 of the Temporary Framework. SAS, Denmark and Sweden confirmed that they would comply respectively with the publication and reporting obligations set out in points 83 to 84 of the Temporary Framework (see recital (70)).

(214) Finally, in line with point 85 of the Temporary Framework, Denmark and Sweden committed to notify a restructuring plan should the States' equity intervention not be reduced below 15 % of the beneficiary's equity ([102]) within 6 years after the Measure (see recital (70)).

3.3.7. *Section 4 of the Temporary Framework*

(215) Denmark and Sweden confirmed that they would comply with the reporting and monitoring obligations contained in section 4 of the Temporary Framework (see section 2.10).

3.4. ***Conclusion on the compatibility of the Measure***

(216) In the light of the findings above, at this stage the Commission has doubts that the Measure meets all the conditions of compatibility with the internal market pursuant to the Temporary Framework, in particular those set out in points 61 and 62 thereof, and consequently whether it could be declared compatible with Article 107(3)(b) TFEU.

4. **Conclusion**

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests the Kingdom of Denmark and the Kingdom of Sweden to submit their comments and to provide all such information as may help to assess the compatibility of the Measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the recipient of the aid immediately.

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

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter.

([101]) Debt financing may include both secured as well as unsecured instruments: (i) Unsecured bonds including hybrid bonds, promissory notes, commercial paper as well as syndicated loans, (ii) Secured instruments such as Japanese Operating Leases, aircraft financings and potentially sale & lease back instruments. The decision on the financing instrument is taken by SAS on the basis of the following factors, amongst others: attractiveness of terms/cost of financing of the respective instrument; market size and available volumes for SAS; actual credit rating of SAS and expected rating outlook/migration.

([102]) In line with footnote 66 of the Temporary Framework, hybrid instruments granted by the State should be counted as equity.

Your request should be sent electronically to the following address:

European Commission
Directorate-General Competition
State Aid Greffe
1049 Bruxelles/Brussel
BELGIQUE/BELGIË
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission

Margrethe VESTAGER

Executive Vice-President