COMMISSION DECISION (EU) 2024/2549

of 29 November 2023

on State aid SA.57543 and SA.58342 (2020/NN) (ex 2020/N), implemented by the Kingdom of Denmark and the Kingdom of Sweden for Scandinavian Airlines System AB

(notified under document C(2023) 8356)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(2), first subparagraph, thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1), point (a), thereof,

Having called on interested parties to submit their comments pursuant to the provisions ([1]) cited above and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By electronic notifications of 11 August 2020, following pre-notification contacts ([2]), the Kingdom of Denmark ('Denmark') and the Kingdom of Sweden ('Sweden') notified to the Commission their plans to participate in the recapitalisation (the 'Measure') of Scandinavian Airlines System AB ('SAS').

(2) Denmark and Sweden notified the Measure under Article 107(3), point (b), of the Treaty on the Functioning of the European Union ('TFEU'), as interpreted by section 3.11 of the Temporary Framework for State aid measures to support the economy in the COVID-19 pandemic (the 'Temporary Framework') ([3]).

(3) The Measure comprised two recapitalisation instruments:

— the subscription by Denmark and Sweden to State hybrid notes (the 'hybrid capital instrument'); and,

— the subscription by those two Member States of new common shares (the 'equity instrument').

(4) The total maximum amount of the Measure, as notified by Denmark and Sweden on 11 August 2020, was approximately SEK 11 billion (EUR 1,069 billion) ([4]), of which approximately SEK 6 billion was to be provided by Denmark and SEK 5 billion by Sweden.

([1]) OJ C 250, 14.7.2023, p. 11.

([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. Denmark and Sweden submitted further information on 24, 27, 30 and 31 July 2020 and 1 and 2 August 2020.

([3]) Communication from the Commission – Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 35), and C(2020) 4509 (OJ C 218, 2.7.2020, p. 3). After the adoption of the initial decision, the Temporary Framework was amended by Commission Communications C(2020) 7127 (OJ C 340I, 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).

([4]) 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.

(5) Furthermore, the recapitalisation plan also provided for the participation of private investors for an amount of SEK 3,75 billion. To that end, SAS, inter alia, entered into agreements with the holders of certain existing hybrid notes and the holders of certain bonds to convert, respectively, those hybrid notes into new common shares and the bonds into either new commercial hybrid notes or new common shares.

(6) On 17 August 2020, the Commission adopted a decision by which it decided not to raise objections to the Measure, on the ground that it was deemed compatible with the internal market based on Article 107(3), point (b), TFEU (the 'initial decision') ([5]).

(7) Denmark and Sweden granted the aid to SAS on 26 October 2020. Denmark and Sweden in the end paid an amount of aid of approximately SEK 9,54 billion (EUR 907 million), which was thus lower than the SEK 11 billion envisaged in the notification and approved by the Commission in the initial decision (see recital (4)).

(8) On 4 May 2021, Ryanair DAC ('Ryanair') lodged an action seeking the annulment of the initial decision. In its judgment of 10 May 2023 in Case T-238/21 (the 'SAS II judgment'), the General Court annulled the initial decision for an infringement of points 61 and 62 of the Temporary Framework ([6]). The General Court considered that the Commission had failed to require the inclusion of a step-up or an alternative mechanism regarding the equity instrument, contrary to the requirements set out in those provisions of the Temporary Framework.

(9) 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 respectively on 12, 15 and 16 June 2023.

(10) By letter dated 4 July 2023, the Commission informed Sweden and Denmark that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid (the 'opening decision').

(11) The opening decision was published in the *Official Journal of the European Union* ([7]). The Commission called on interested parties to submit their comments.

(12) Denmark and Sweden jointly submitted their comments on the opening decision on 19 July 2023.

(13) The Commission also received comments from two interested parties, namely SAS and Ryanair, on 10 August 2023 and on 14 August 2023 respectively. On 23 August 2023, the Commission forwarded those comments to Denmark and Sweden. By letters dated 25 September 2023, Denmark and Sweden submitted to the Commission a joint reply to the comments provided by Ryanair.

(14) On 2 October 2023, the Commission sent a request for information to Denmark and Sweden. The two Member States replied to that request in several stages on 6, 11, 12, 13, 16, 19 and 23 October 2023. The Commission also sent requests for information on: 16 October 2023, to which Denmark and Sweden replied on 24, 26 and 31 October 2023; on 9 November 2023, to which Denmark and Sweden replied on 14 November 2023; and on 14 November 2023, to which Denmark and Sweden replied on 20 and 21 November 2023.

(15) By letters dated 24 and 17 October 2023 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 ([8]) and to have this decision adopted and notified in English.

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

([7]) Cf. footnote 1.

([8]) Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385, ELI: http://data.europa.eu/eli/reg/1958/1(1)/oj).

2. DETAILED DESCRIPTION OF THE MEASURE

(16) In the following sections, the Measure and its context are described at the time the Measure was granted, which was on 26 October 2020. The assessment of the Measure, following the annulment of the initial decision by the General Court (see recital (8)), is to be based on the facts and elements prevailing at the time the aid was granted.

2.1. Objective of the Measure

(17) The Measure aimed at restoring the equity and liquidity of SAS in the exceptional situation caused by the COVID-19 pandemic.

(18) The Measure formed part of an overall package of measures adopted by Denmark and Sweden that aimed to ensure that sufficient liquidity would remain available in the market and to counter the liquidity shortage faced by undertakings because of the outbreak of the pandemic. That package of measures also aimed at ensuring that the disruptions caused by the pandemic would not undermine the viability of undertakings and would preserve the continuity of economic activity during and after the pandemic.

2.1.1. *The containment measures adopted by Denmark and Sweden as a response to the COVID-19 pandemic*

(19) On 11 March 2020, the World Health Organisation characterised the COVID-19 disease as a pandemic. The public health risk deriving from the absence of therapeutics or vaccines for the novel COVID-19 virus determined the exceptionality of those circumstances. The rapidity of the spread caused enormous consequences both in terms of fatal outcomes in high-risk groups and in terms of economic and societal disruption.

(20) To limit the spread of COVID-19, Member States including Denmark and Sweden adopted large-scale containment measures, such as 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, Denmark and Sweden, as well as the other Member States, drastically limited movements and travels within their territories and to and from foreign countries, by adopting travel restrictions and general sanitary measures (e.g. flight bans, quarantine or negative COVID-19 test requirements).

(21) As regards Denmark, the Danish Ministry of Foreign Affairs advised on 13 March 2020 its citizens and residents against all non-essential travel to all countries. On the same day, the Danish authorities closed its borders and imposed a temporary ban on entry to Denmark. Those restrictions applied to most of the foreign countries until 26 June 2020 ([9]), date on which Denmark lifted the restrictions on travel to Member States and Schengen countries, with some exceptions ([10]). Despite the lifting of those restrictions, Denmark continued to monitor the weekly evolution of the epidemiological risk in all foreign countries, including other Member States, and to update its recommendations on travel outside Denmark accordingly. Furthermore, the partial lifting of restrictions as of 26 June 2020 was nevertheless accompanied by a 6-day rule requiring foreigners travelling for recreational purposes to only enter Denmark if they had booked a holiday stay for at least six nights. That rule affected foreign tourism in Denmark since in summer 2019, 70 % of the foreign tourists entering the country stayed less than 6 days.

([9]) On 29 May 2020, Denmark had started to lift travel restrictions for travels to Germany, Iceland, and Norway, with effect as of 15 June 2020.

([10]) The exceptions concerned the United Kingdom, Sweden, Portugal, Romania, Malta, and Ireland. See at: https://via.ritzau.dk/pressemeddelelse/ny-model-for-rejsevejledningerne-for-europa-traeder-i-kraft?publisherId=2012662&releaseId=13596062 (last accessed on 28 November 2023).

(22) Denmark later observed a rise of the epidemiological risk all over the Union as of September 2020 onward. Denmark issued restrictions on travels to France and Croatia on 31 August 2020 due to the spike of COVID-19 infections in those countries ([11]). It issued similar restrictions on travels to Czechia on 11 September 2020 ([12]), and to Austria, Hungary, the Netherlands, Portugal, and Switzerland a week later ([13]). Denmark continued to add Member States to its list of high-risk countries based on its weekly monitoring of the epidemiological situation around the world, issuing restrictions to Iceland, Ireland, the United Kingdom and Slovenia on 25 September 2020 ([14]); Slovakia and San Marino on 3 October 2020 ([15]); several regions of Sweden on 9 October 2020 ([16]); Bulgaria, Italy, Lithuania and Poland on 16 October 2020 ([17]); and Cyprus, Latvia and Germany on 23 October 2020 ([18]). As a result, by 26 October 2020, Denmark had put in place travel restrictions for 24 Member States, as well as all third countries, in view of the resurgence of a second wave of the COVID-19 pandemic ([19]).

(23) Sweden, in turn, issued similar travel restrictions. On 14 March 2020, the Swedish authorities advised their citizens and residents against non-essential travel to all countries. That advice applied until 17 June 2020, before its progressive lift as far as travels to and from other Member States were concerned ([20]). Furthermore, Sweden applied a temporary ban on entry of all foreigners to the Union via Sweden between 19 March 2020 and 31 August 2020. After 17 June 2020, like Denmark, Sweden continued to monitor the evolution of the epidemiological situation in all foreign countries on a regular basis, issuing new recommendations against travel to all countries presenting a high contamination risk of COVID-19. After a progressive lift of the travel restrictions for certain Member States between July and September 2020, Sweden also reinstated travel restrictions as of 22 October 2020, in view of the resurgence of a second wave of the COVID-19 pandemic ([21]).

(24) Overall, the coronavirus pandemic represented a severe shock for the global economy and the Union economies, including those of Denmark and Sweden, with severe economic and social consequences. Economic activity in the Union suffered a dramatic fall in the first half of the year and only partially rebounded over the summer 2020 as containment measures were gradually lifted. However, the resurgence of the pandemic in September 2020 resulted in further disruptions as national authorities introduced new public health measures to limit its spread. The Commission estimated in its Autumn 2020 Economic Forecast that the euro area economy would contract by 7,8 % in 2020. For the years 2021 and 2022, the Commission warned that, although it projected an economic growth of 4,2 % and 3 % respectively, those estimations were subject to an extremely high degree of uncertainty and risks in view of the COVID-19 context ([22]).

(25) As a result, Denmark and Sweden considered that the COVID-19 pandemic and the related containment measures that they and many other countries adopted seriously affected the real economy, and especially undertakings such as SAS.

([11]) https://www.schengenvisainfo.com/news/denmark-urges-its-citizens-to-avoid-travel-to-france-and-croatia-due-to-covid-19/ (last accessed on 28 November 2023).
([12]) https://www.schengenvisainfo.com/news/denmark-urges-its-citizens-to-avoid-travel-to-france-and-croatia-due-to-covid-19/ (last accessed on 28 November 2023).
([13]) https://www.schengenvisainfo.com/news/denmark-to-quarantine-arrivals-from-another-five-european-countries/ (last accessed on 28 November 2023).
([14]) https://www.schengenvisainfo.com/news/denmark-to-quarantine-nationals-of-another-four-countries-from-sept-26/ (last accessed on 28 November 2023).
([15]) https://www.schengenvisainfo.com/news/arrivals-from-slovakia-san-marino-to-be-quarantined-in-denmark-from-october-3/ (last accessed on 28 November 2023).
([16]) https://www.schengenvisainfo.com/news/covid-19-denmark-advises-citizens-to-avoid-travel-to-eight-swedish-regions/ (last accessed on 28 November 2023).
([17]) https://www.schengenvisainfo.com/news/denmark-discourages-its-citizens-from-travelling-to-bulgaria-italy-lithuania-poland/ (last accessed on 28 November 2023).
([18]) https://www.schengenvisainfo.com/news/danes-advised-to-avoid-non-essential-trips-to-cyprus-latvia-germany/ (last accessed on 28 November 2023).
([19]) https://www.schengenvisainfo.com/news/danes-advised-to-avoid-non-essential-trips-to-cyprus-latvia-germany/ (last accessed on 28 November 2023).
([20]) As of 17 June 2020, Sweden removed the advice against travel to Belgium, Croatia, France, Greece, Hungary, Iceland, Italy, Luxembourg, Monaco, Portugal, San Marino, Spain, Switzerland and the Vatican City; as of 15 July 2020, for travel to Andorra, Germany and Poland; and as of 29 July 2020, for travel to Denmark, Norway, and Czechia.
([21]) https://www.schengenvisainfo.com/news/sweden-extends-its-temporary-entry-ban-until-december-22/ (last accessed on 28 November 2023).
([22]) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2021 (last accessed on 28 November 2023). Those projections are based on information collected until 22 October 2020.

2.1.2. *The impact of the COVID-19 pandemic and the related containment measures on SAS' activities*

(26) The COVID-19 pandemic and the related containment measures adopted worldwide, including by Denmark and Sweden, resulted in the halting of most of the aviation transport activities for airlines such as SAS.

(27) In 2019, SAS transported, overall, close to 30 million passengers ([23]), with an average passenger load factor of 75,2 % ([24]). This was only slightly less than in 2018 (– 1,1 %). Similarly, SAS also registered a similar small decrease in 2019 compared with 2018 for certain key performance indicators, such as the Available Seat Kilometre or 'ASK' ([25]) (– 0,8 %) and the Revenue per Passenger Kilometre or 'RPK' ([26]) (– 1,4 %).

(28) Between December 2019 and February 2020, namely shortly before the World Health Organisation declared the COVID-19 a pandemic, SAS was improving those key performance indicators ([27]). The company recorded a substantial increase of the number of passengers transported compared with the period from December 2018 to February 2019 ([28]), of its ASK ([29]), and of its RPK ([30]).

(29) However, in March 2020, following the adoption of the first containment measures (recitals (21) and (23)), SAS lost approximately 60 % of its passengers compared with March 2019 and its RPK dropped by 62 % ([31]). Until June 2020, SAS cancelled nearly all its international flights, limiting its activities to a few domestic routes in Sweden and Norway, with a drop in passengers of more than 95 % (April 2020) and 93 % (May 2020) compared with the same periods in 2019. SAS had to ground most of its fleet, composed of more than 150 aircraft, maintaining only 15 in activity ([32]).

([23]) See SAS' Annual and Sustainability Report for the fiscal year 2019 (p. 44), available at https://www.sasgroup.net/files/documents/Corporate_governace/annual-reports/sas-sas-annual-and-sustainability-report-fiscal-year-2019-200130.pdf (last accessed on 28 November 2023). In that report, 2019 corresponds to the fiscal year of SAS, i.e. November 2018- October 2019.

([24]) Passenger Load Factor is an airline industry metric that measures how much of an airline's passenger carrying capacity is used. It is an important indicator to estimate the ability of an airline to fill in the capacity of the aircraft that it uses, although that metric may not consider the pricing and profitability at which that capacity is sold.

([25]) The Available Seat Kilometre (ASK) is an indicator measuring an airplane's carrying capacity available to generate revenues. It refers to how many seat kilometres are available for purchase on an airline. Seat kilometres are calculated by multiplying the number of kilometres that a given airplane will be flying on a route by the number of seats available on that airplane. ASK can be used to assess how efficient an airline is at generating revenues from the availability of seats to customers. Thus, the airline operates below capacity if all the seats on the plane are not sold.

([26]) The Revenue Passenger Kilometre (RPK) is calculated by multiplying the number of paying passengers by the distance travelled. For example, an airplane with 100 passengers that flies 250 kilometres generates 25 000 RPK.

([27]) COVID-19 started to spread significantly worldwide as of February 2020. SAS already noted during that month a certain contraction of the demand on certain of the routes that it operated, notably on the intercontinental routes (outside the Union) and routes to and from Italy. Despite those first clear signs of the pandemic, SAS registered a higher number of passengers transported in February 2020 compared to that month in 2019.

([28]) More specifically, SAS registered in December 2019 a total increase of 2,1 % of passengers transported compared with the same month in 2018 (see https://www.sasgroup.net/newsroom/press-releases/2020/nearly-2-million-passengers-traveled-with-sas-in-december/); of 3,2 % in January 2020 compared with the same month in 2019 (see https://www.sasgroup.net/newsroom/press-releases/2020/1-9-million-passengers-traveled-with-sas-in-january/); and of almost 4 % in February 2020 compared with the same month in 2019 (https://www.sasgroup.net/newsroom/press-releases/2020/sas-traffic-figures---february-2020/) (all last accessed on 28 November 2023).

([29]) SAS increased its offer in terms of ASK by 0,9 % in December 2019, by 1,9 % in January 2020 and by 1,5 % in February 2020 compared respectively with December 2018, January 2019, and February 2019.

([30]) SAS increased its RPK by 2,6 % in December 2019, by 2,8 % in January 2020 and by 0,5 % in February 2020, compared with the same period the previous year.

([31]) https://www.sasgroup.net/newsroom/press-releases/2020/sas-traffic-figures---march-2020/ (last accessed on 28 November 2023).

([32]) https://www.sasgroup.net/newsroom/press-releases/2020/sas-traffic-figures---may-2020/ (last accessed on 28 November 2023).

(30) Despite the relative and gradual lifting of the travel restrictions within the Union during the summer of 2020, the traffic figures of SAS barely improved between June and September 2020. Compared with the previous year, SAS experienced a reduction in capacity of between 73 % (September 2020) and 91 % (June 2020), and a drop in the total number of passengers transported of between 74 % (August 2020) and 86 % (June 2020) ([33]). In October 2020, following the resurgence of a second wave of the COVID-19 pandemic, SAS continued to operate in an environment of severely constrained demand, with approximately 20 % of the number of passengers transported in October 2019 ([34]).

(31) At the time of the granting of the Measure, Eurocontrol estimated in its best-case scenario that, based on the data collected between January and October 2020, the aviation sector would not recover its 2019 levels before 2024 ([35]). Airports Council International Europe provided a similar forecast on 6 October 2020, considering that the recovery of the 2019 levels of the European air traffic was unlikely before 2024 or 2025, with extreme uncertainty as to the development of that traffic in 2021 ([36]).

(32) The substantial loss of demand suffered by SAS due to the consequences of the COVID-19 pandemic, the containment measures, and the significant uncertainty as to the outlook of the aviation sector over the short and medium term, severely affected its financial position.

2.1.3. *SAS' equity and liquidity needs to face the COVID-19 pandemic*

(33) According to Denmark and Sweden, SAS incurred significant losses since the outbreak of the COVID-19 pandemic and the adoption of the containment measures described in section 2.1.1. SAS expected to incur further losses at the time of the granting of the Measure. As a result, the company needed equity and liquidity support in the form of a recapitalisation to address its financial difficulties.

(34) According to Denmark and Sweden, SAS needed that support despite several cost-savings initiatives that it took to mitigate its losses, and the State aid that it previously received in the context of the COVID-19 pandemic.

2.1.3.1. Cost-savings initiatives decided by SAS to mitigate the impact of the COVID-19 pandemic

(35) As of 3 March 2020, shortly after the COVID-19 pandemic broke out in Europe, SAS announced that it would immediately launch several cost-savings initiatives to face the consequences of the pandemic and the reduced level of demand for air travel services ([37]). SAS suspended flights to Hong-Kong from 5 March 2020, and further announced a reduction of its short-haul flights in the coming months to compensate as much as possible the loss of revenues by a reduction in flight-related costs (fuel, personnel, aircraft taxes and fees, etc.).

(36) On 12 March 2020, at the meeting of the Board of Directors of SAS, SAS informed the board members that it was necessary to work on two streams to face the consequences of the COVID-19 pandemic and the deterioration of SAS' financial position.

(37) *First*, SAS indicated that it needed to secure cash by urgently cutting costs. In that regard, SAS' management agreed on a voluntary reduction of 20 % of their salaries with immediate effect for a period of 3 months. In parallel, SAS informed the Board of Directors that it had engaged in a dialogue with the worker unions to agree on a temporary reduction in working time of up to 20 % (and corresponding cut in pay) for a period of 3 months for all SAS employees. In addition, it appears from the minutes of the board meeting of 12 March 2020 that SAS had already engaged in discussions with lessors to waive or postpone aircraft and other asset leases temporarily. Given the low booking levels, SAS would also engage in a reduction of its air services of 15–20 % in March and April 2020, with

([33]) https://www.sasgroup.net/newsroom/press-releases/2020/sas-traffic-figures---june-2020/ (last accessed on 28 November 2023).
([34]) https://www.sasgroup.net/newsroom/press-releases/2020/sas-traffic-figures---october-2020/ (last accessed on 28 November 2023).
([35]) https://www.eurocontrol.int/sites/default/files/2020-11/eurocontrol-five-year-forecast-europe-2020-2024.pdf (last accessed on 28 November 2023).
([36]) www.aci-europe.org/downloads/resources/ACI%20EUROPE_updated%20estimates%20of%20COVID19%20traffic%20revenue%20impacts_06.10.2020.pdf (last accessed on 28 November 2023).
([37]) https://www.sasgroup.net/newsroom/press-releases/2020/update-on-covid-19/ (last accessed on 28 November 2023).

suspension of flights to China and to Italy until 3 April 2020, and reduction of the frequencies on most of SAS' destinations. *Second*, SAS informed the Board of Directors that it was working on a new business plan to factor in the effects of the COVID-19 pandemic and its consequences on its short and long-term commercial strategy.

(38) On 15 March 2020, SAS announced that it was temporarily halting most of its traffic starting as of 16 March 2020, due to the evolution of the COVID-19 pandemic and the containment measures adopted by Denmark and Sweden (see recitals (21) and (23)). Further, SAS announced that it would introduce temporary work reductions concerning up to 10 000 employees, equivalent to 90 % of its total workforce, immediately following the adoption of legislation allowing temporary layoffs by Denmark (on 15 March 2020) and Sweden (on 16 March 2020) ([38]).

(39) At the board meeting of 1 April 2020, SAS indicated that it was then operating only at 10 % of its air services compared with the same period in the previous year. SAS also indicated that it had identified, for the remainder of the year 2020, several cost-cutting initiatives with a potential in savings of SEK 4,1 billion. Furthermore, the Board of Directors approved the conclusion of a sale and lease-back agreement concerning five aircraft spare engines, with the effect of bringing USD 45 million in cash for SAS.

(40) At the board meeting of 15 April 2020, SAS presented its business plan laying down its new commercial strategy to address the COVID-19 pandemic and its consequences in the short and long-term.

(41) SAS' business plan assumed, in essence, that there would be almost no demand for air transport services between April and June 2020 due to travel restrictions ([39]). Passengers would only restart travelling between July and October 2020, and to a limited extent ([40]). The passenger traffic would then recover at a steady rate as of November 2020 to reach 85 % of the 2019 passenger traffic in February 2022. After that, the growth of passenger traffic would slow down, due to the long-term travel behaviour changes induced by the COVID-19 pandemic (homeworking, fewer business conferences, new leisure patterns, etc.). As a result, SAS was not expecting to return to pre-COVID-19 levels before at least mid-2023. That demand forecast was based on the premise that there would be no additional waves of the pandemic and no travel restrictions after October 2020.

(42) In that scenario, SAS projected a loss of SEK 22 billion for the fiscal years 2020 and 2021 ([41]). To mitigate that loss, the company projected in its business plan to work on three main levers: adapt its offer to the demand; initiate an aggressive cost reduction; and manage redundancies.

(43) Concerning the first lever (adapt its offer to the demand), SAS planned to closely monitor the evolution of the demand for air transport service on a weekly basis in the context of the COVID-19 pandemic. SAS would maintain grounded most of its fleet until June 2020, and gradually increase the number of aircraft in service as of July 2020 depending on the results of three main indicators. Those indicators would measure respectively the 'ability to travel' (through an analysis of the government travel restrictions and corporate bans in place around the world), the 'intent to travel' (e.g. through a measurement of the search data or bookings levels on SAS' websites) and the 'actual travel' (e.g. through the number of show rates, passengers transported and booking classes registered by SAS). Over a longer term (namely after October 2020), when demand was expected to recover at a steady rate, SAS would concentrate its services on the most profitable routes (notably short-haul flights within Scandinavia and Europe) and for the most profitable customers (business category), while reducing capacity and frequency to maximise the utilisation of aircraft. It also planned to replace most of its current analytics, systems, and tools with more advanced products to improve the accuracy of the traffic and booking indicators, and to revisit its on-board services to eliminate 'waste' costs (reduction of double-servicing on-board, etc.).

([38]) https://www.sasgroup.net/newsroom/press-releases/2020/sas-temporarily-halt-most-of-the-traffic/ (last accessed on 28 November 2023). See also the minutes of the board meeting of SAS of 16 March 2020 (Annex 40.1 of the notification).
([39]) Less than 8 % of the passengers transported in 2019 by SAS.
([40]) SAS expected to reach in October 2020 only 30 % of the passengers it transported in 2019.
([41]) Cf. footnote 23. SAS' fiscal year runs from 1 November to 31 October.

(44) Concerning the second lever (initiate an aggressive cost reduction), SAS proposed to carry out its aggressive cost reduction by targeting fixed costs, with an objective to achieve SEK 2,4 billion in savings by the end of October 2020, and an additional saving of SEK 1 billion by the end of March 2021 ([42]). SAS also anticipated to reduce costs beyond October 2020 by reducing its fleet; by shifting progressively towards a single type of aircraft to gain efficiency in maintenance costs; and by delaying deliveries of aircraft to preserve cash, for an additional saving of SEK 1,1 billion until 2024.

(45) Concerning the third lever (manage redundancies), SAS envisaged to continue having recourse to large temporary layoffs in Sweden, Norway, and Denmark for a total saving of SEK 2 billion by the end of October 2020, followed by further measures to increase productivity in the recovery period (namely 25 % productivity improvement on landside and 17 % on cabin crew) for an additional reduction of SEK 2 billion. In parallel, SAS would initiate a redundancy programme to reduce on a permanent basis its total staff by 30 % by the end of October 2020, and to further reduce overhead costs by SEK 1,6 billion by March 2021 (with a reduction of one third of the staff in overhead and of 50 % of the cargo branch staff; fixed IT cost reduced by 20 %; increased outsourcing of cargo and ground-handling operations; and marketing, IT and product investments reduced to what is strictly necessary for SAS).

(46) With that cost-cutting programme, SAS aimed to achieve a total reduction of SEK 5,4 billion during the fiscal years 2020 and 2021 (and a further SEK 4,5 billion cost reduction beyond 2021).

(47) However, at the board meeting of 15 April 2020, the Board of Directors asked the management of SAS to identify more sources of cost reductions in the business plan.

(48) At the board meeting of 22 April 2020, SAS therefore presented a more ambitious cost-cutting programme. In essence, SAS proposed to reduce further external spending; to increase the number of redundancies (from 30 % to 40 % of the total staff of SAS); and to delay more deliveries of aircraft. It is also apparent from the minutes of that meeting that SAS studied the option of divesting some key assets, and notably its customer loyalty programme Eurobonus, and cargo and ground handling activities. Concerning the Eurobonus programme, SAS balanced the pros and cons of such divestment and concluded that other options were more suitable than a divestment ([43]). Concerning the divestment of the cargo branch, SAS indicated that no buyer showed interest to buy part or all of the cargo branch ([44]), while for the ground-handling services, […] (*).

(49) With that revised business plan, SAS aimed at reaching a total of up to SEK 7,3 billion cost reduction in 2020 and 2021, reducing the projected accumulated losses from SEK 22 billion to SEK 15 billion by the end of 2021.

(50) SAS adopted that business plan on 24 April 2020 after the approval of the Board of Directors and pursued its cost-cutting initiatives along the three main levers identified.

([42]) Those cost reductions targeted personnel costs (through hiring freeze, reduced trainings) for a total of more than SEK 800 million; aircraft maintenance (through renegotiation of wet lease agreements, delayed aircraft deliveries, reduced maintenance, etc.) for a total of SEK 1,3 billion; and other costs (stopped projects, reduced spend on non-essential activities such as marketing, consultants, reduced cost IT and premises) for a total of SEK 1,3 billion.

([43]) Among other reasons, the Eurobonus programme of SAS was an important source of revenues for the company and a strategic asset for its commercial strategy targeted towards specific and regular customers. SAS considered that there were other ways to generate cash from that programme than a divestment, for example by transferring that programme to a separate legal entity in order to enable SAS to use it as a collateral in the near future for debt financing, or by selling points at discount to loyal customers to generate more cash. Such transfer would however require several months to be completed, leading SAS to consider that such transfer could not constitute a short-term solution to its financial difficulties, but only something that could be explored for the medium-term.

([44]) SAS does not own cargo aircraft but uses the belly of its passenger aircraft to transport goods. Therefore, potential freight forwarders would have difficulties to optimise flows of goods, as they would depend on SAS' passenger flight programme, since the flights are operated by SAS. Therefore, the only interest manifested by acquirers concerned the takeover of marketing and sales activities of the 'belly capacity' of SAS, but subject to an important commission fee. Also, previous attempts by SAS to sell that branch had proved unsuccessful. SAS considered that it was therefore better to keep the branch within the group, but with a substantial reduction of staff (– 50 %).

(*) Confidential information.

(51) First, as regards operations (recital (43)), SAS operated only a few domestic routes in Sweden, as well as between Norway, Denmark and Sweden, and some repatriation flights ([45]) and cargo flights ([46]) between April and June 2020, operating at less than 10 % of its capacity in April and May compared to the same period in 2019 (recital (29)) ([47]). On 8 June 2020, based on the encouraging results of the most recent demand measures (recital (43)) ([48]), SAS prepared to gradually increase the number of aircraft in service from 16, on 2 June 2020, to 45 in mid-July 2020, to follow the ramp-up trend of the traffic that it identified ([49]). The flight programme would focus mostly on domestic traffic in Denmark, Norway and Sweden, and on some connections to key European business destinations (Belgium, Germany, the Netherlands); and on reinforcing the connections within Scandinavia. For example, SAS estimated that for the first week of July 2020, it planned to offer 34 % of its offer (in seats capacity) on the market to, from and within Scandinavia compared with the same week in 2019, which it considered to be in line with the average capacity offered by competitors (28 %) ([50]). The increase in flights in June and July 2020 brought additional revenues to SAS, reducing its losses, and allowed it to envisage a second increase of aircraft put in service in August 2020 for leisure destinations in Europe, also given the good results of the most recent measurements of the evolution of the demand. In that regard, SAS evaluated that such increase (that would result in up to 45 % of its market offer at the same period in 2019) was in line with competitors' offer for August 2020 ([51]). However, with the increase in the number of COVID cases across Europe in September and October 2020, SAS reduced its capacity well below 40 % by the end of October 2020.

(52) Second, concerning the reduction of fixed costs (recital (44)), SAS reduced its planned investments by delaying aircraft deliveries. SAS quickly initiated a dialogue with its aircraft supplier Airbus on the possibility to defer pre-delivery payments and aircraft deliveries. By doing so, SAS managed to achieve a USD [0-300] million (SEK [200-500] million) deferral of pre-delivery payments in the period […], and to reschedule the delivery of four […] from […] to […], four […] from […] to […] and two […] from […] to […]. However, Sweden and Denmark explained that SAS could not obtain any order cancellations from […], without taking the risk of […]. In addition, SAS postponed all the […] deliveries of leased aircraft by […] months and accelerated the process of selling or terminating at an earlier date the lease contracts for […] ([52]) to generate cash earlier. In addition, SAS renegotiated contracts with more than 200 suppliers across all parts of its operations, with the aim of removing any variable cost on the short term; renegotiate fixed costs on short and long-term and improve payment terms. Those renegotiations enabled SAS to save more than SEK 1,5 billion in cost reduction for the remaining part of the year 2020.

(53) Third, concerning the redundancies (recital (45)), SAS announced on 28 April 2020 that it would initiate the process of reducing permanently the size of its future workforce by up to 5 000 full-time positions, most of them with a notice period of 6 months ([53]). Other labour-related measures included the reduction of collected overtime and the granting of unpaid leave to certain employees.

([45]) SAS operated repatriation flights from Brazil, Pakistan, Colombia, Guinea, Peru, and Türkiye.

([46]) Notably several flights between Stockholm and Hong-Kong, using empty passenger aircraft, to transport medical equipment and pharmaceutical products from Asia to Europe.

([47]) On 15 April 2020, SAS was operating 7,4 % of its air services compared to 2019. SAS estimated, based on Eurocontrol data, that this was rather in line with the average offer of peer companies (5,7 %) comprising a sample of 25 airlines (Wideroe, Alitalia, Aer Lingus, KLM, Turkish Airlines, Iberia, Wizz Air, Lufthansa, Air France, LOT, Ryanair, Austrian airlines, EasyJet, etc.) (Source: Board meeting of SAS AB of 15 April, Annex 40.1 to the notification).

([48]) The indicators revealed a partial and upcoming lift of the travel restrictions in Europe and within Scandinavia at the start of the summer 2020; an increase in sales of up to 29 % compared with the previous week and profitability/load factor increasing since the beginning of June.

([49]) SAS registered an actual traffic in July 2020 that was higher than what it had anticipated in its business plan adopted on 24 April 2024.

([50]) SAS analysed the published weekly capacity of, inter alia, Norwegian, Lufthansa, Ryanair, Air France/KLM, Wizz Air, Wideroe, the IAG Group, Finnair, EasyJet, Braathens Regional and Turkish Airlines.

([51]) SAS estimated that Wizz Air was returning to its full offer in August 2020 compared to August 2019; Ryanair and Air France/KLM to approximately 65 %; Lufthansa to less than 40 % and Finnair to less than 30 %.

([52]) 15 […], five […] and one […].

([53]) https://www.sasgroup.net/newsroom/press-releases/2020/sas-initiates-processes-to-reduce-the-size-of-its-future-workforce-due-to-lower-expected-demand-for-air-travel/ (last accessed on 28 November 2023).

(54) Overall, SAS managed to reduce variable costs by almost 40 % compared to the previous year; delayed 10 aircraft deliveries and accelerated the phase-out of 21 aircraft; renegotiated more than 200 contracts with suppliers to improve payment terms and reduce variable costs; and finalised its 5 000 redundancies by 26 October 2020.

(55) On top of these cost-cutting measures, Denmark and Sweden indicated that SAS applied for and received State aid in the context of the COVID-19 pandemic to mitigate its losses.

2.1.3.2. State aid granted to SAS in the context of the COVID-19 pandemic

(56) At the time of the granting of the Measure, SAS had benefited from several State aid measures and other State aid measures were envisaged.

(57) First, on 15 April 2020 ([54]) and 24 April 2020 ([55]), the Commission approved State aid to SAS from Denmark and Sweden 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), point (b), TFEU.

(58) Second, SAS also received compensation from Denmark for its fixed costs under the scheme approved by the Commission on 8 April 2020 ([56]). In that context, SAS received SEK 59 375 580 for its subsidiary Scandinavian Airlines System Denmark-Norway-Sweden ([57]); SEK 21 126 457 for ground operations; and SEK 11 135 382 for cargo operations (i.e. a total of SEK 91 637 419 or EUR 8,9 million).

(59) Third, in August 2020, the Danish authorities communicated a preliminary estimate of the potential aid that SAS could receive under two schemes in support of airlines that had been pre-notified by Denmark to the Commission at that time ([58]). According to that estimate, SAS would 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 ([59]).

(60) Lastly, SAS received compensation for damage caused by the COVID-19 pandemic from Norway under the scheme approved by the EFTA Surveillance Authority on 17 April 2020 in case 85047 ([60]). That compensation amounted to approximately NOK 10 million (EUR 932 723) ([61]). Also, as submitted by Denmark and Sweden, SAS concluded a public service contract with the Norwegian State. SAS had estimated the payments under that contract to be approximately SEK 500 million (EUR 49 million).

([54]) 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).

([55]) 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).

([56]) 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, OJ C 144, 30.4.2020, p. 1. The scheme was approved under Article 107(2), point (b), TFEU.

([57]) Scandinavian Airlines System Denmark-Norway-Sweden is a consortium owned by three subsidiaries of SAS (see also section 2.7).

([58]) Case SA.58157 – COVID-19: aid to Danish airports and to airlines that land in and depart from Denmark and Case SA.58088 – COVID-19: compensation to airlines on Danish domestic routes for COVID-19 damage (based respectively on Article 107(3), point (b), TFEU as interpreted by section 3.1 of the Temporary Framework and Article 107(2), point (b), TFEU). The Commission approved the first measure in its decision of 3 September 2020 in case SA.58157 (OJ C 7, 7.1.2021, p. 4); as to the second measure, Denmark ultimately abandoned its project to grant aid under the scheme in case SA.58088 and withdrew its notification on 14 October 2020.

([59]) Eventually, SAS only received aid under the scheme in case SA.58157 for an amount of EUR 800 000. Following Denmark's abandonment of its project to grant aid under case SA.58088, SAS did not benefit from the estimated EUR 4,7 million. However, both the aid received under the scheme in case SA.58157 and the aid estimated under case SA.58088 are taken into account in the proportionality assessment (section 6.3.3).

([60]) https://www.eftasurv.int/state-aid/state-aid-register/covid-19-grant-scheme-undertakings-suffering-substantial-loss-turnover (last accessed on 28 November 2023).

([61]) InforEuro exchange rate August 2020 applied.

2.1.3.3. SAS' financial needs for equity and liquidity

(61) In their notification of 11 August 2020, the Danish and Swedish authorities explained that the mitigation measures taken and the State aid received by SAS were insufficient to remedy its dire financial position resulting from the COVID-19 pandemic and the related containment measures.

(62) SAS' business plan showed that, despite the mitigation measures adopted and the government support received, SAS expected to accumulate a loss of approximately SEK 15 billion in 2020 and 2021. SAS expected to run out of liquidity by the end of October 2020, and to close its fiscal year 2020 with a negative equity of almost SEK 11 billion.

(63) Denmark and Sweden also explained that, according to SAS' Interim Report Q2 2020, the debt-to-equity ratio ([62]) of SAS was negative at the end of April 2020 (– 459,4). In addition, SAS' financial preparedness decreased from 32 % to 26 %, almost reaching the minimum threshold of 25 % required by Regulation (EC) No 1008/2008 of the European Parliament and of the Council ([63]). The shareholders' equity had gone negative, from SEK 5,4 billion in April 2019 to minus SEK 65 million in April 2020. Between May and July 2020, SAS' revenues continued to drop by more than 80 % compared to the same period in 2019. The reduction in operating costs (– 67 % compared to the same period in 2019), resulting from the lower demand and the mitigation measures taken by SAS, did not offset that drop in revenues ([64]).

(64) Overall, SAS continued to incur losses through July 2020, accumulating almost SEK 6 billion since the start of the COVID-19 pandemic. SAS' equity also continued to decrease, with a booked negative equity position of more than SEK 1 billion on 31 July 2020 ([65]). The decline of the financial situation of SAS continued between August and October 2020, with a 77 % drop in revenues compared with the previous year ([66]).

(65) Denmark and Sweden confirmed in their notification of 11 August 2020 with updated data (July 2020) that by December 2020, SAS expected to reach a negative equity of SEK 9,4 billion and would have consumed its available liquidity (which on 31 January 2020 was of SEK 6,598 billion) by December 2020, if not earlier ([67]). That finding was supported by an analysis of SAS' financial position provided by the credit rating agency Moody's dated 10 June 2020, in which Moody's estimated that SAS had liquidity to operate only until the end of the year ([68]).

(66) According to Denmark and Sweden, a significant disruption in air transport, such as that which would have been caused by a potential bankruptcy or default of SAS, would have significantly aggravated the situation of the Swedish and Danish economies, notably due to the importance of SAS for the economy of those Member States.

([62]) The debt-to-equity ratio is a financial indicator that shows how much of a company is owned by creditors compared with how much shareholder equity is held by the company. It calculates the weight of total debt and financial liabilities against total shareholders' equity. The higher the ratio, the more a company is leveraged. Highly leveraged companies carry more risk of missing debt payments when revenues decline. They are also less able to raise new debt. A negative ratio indicates that the company's liabilities exceed its assets. In most cases, this would be considered a sign of high risk and an incentive to seek bankruptcy protection.

([63]) The financial preparedness requirement of SAS is to have cash funds in preparedness of at least 25 % of annual fixed costs at all times. Denmark and Sweden observe that that liquidity requirement derives from Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3, ELI: http://data.europa.eu/eli/reg/2008/1008/oj), under which an airline is required to maintain a financial preparedness in order to keep its operating license.

([64]) https://www.sasgroup.net/investor-relations/financial-reports/interim-reports/continued-negative-impact-of-covid-19/ (last accessed on 28 November 2023).

([65]) See SAS' interim report for Q3 2020 available at: https://www.sasgroup.net/files/documents/financial-reports/Q3-2020/Q320-Presentation-2020-08-25.pdf (last accessed on 28 November 2023).

([66]) https://www.sasgroup.net/investor-relations/financial-reports/interim-reports/full-year-financials-significantly-impacted-by-the-ongoing-pandemic/ (last accessed on 28 November 2023).

([67]) Annex 33 to the notification of the Danish and Swedish authorities.

([68]) Annex 34.1 to the notification of the Danish and Swedish authorities.

2.1.4. *Role of SAS for the Danish and Swedish economy*

(67) Denmark and Sweden first referred to the essential passenger transport services carried out by SAS to, from and within those two Member States.

(68) As regards Denmark, the Danish authorities explained that SAS accounted for 32 % of Denmark's total domestic and international passenger air traffic in 2019, offering more than 100 routes from, to and within Denmark ([69]). In 2019 alone, SAS opened 12 new routes from Danish airports ([70]).

(69) At domestic level, according to the Danish authorities, SAS contributed to 41 % of the domestic connectivity of Denmark in 2019 ([71]), operating from Aalborg, Aarhus, Billund, Bornholm and Faroe Islands' airports. In 2019, from Copenhagen, SAS connected Billund, Aarhus and Aalborg with an average of 250 domestic flights per month, and to some extent the Faroe Islands (with more than 500 flights per year), all year long and at regular frequencies. SAS maintained domestic connections during the COVID-19 pandemic between Copenhagen and Aalborg, Aarhus, and the Faroe Islands, allowing essential travels to take place in Denmark between April and June 2020. After June 2020, SAS operated between 100 and 200 monthly flights between those destinations ([72]).

(70) As regards international destinations, SAS offered connections to Scandinavian countries ([73]) and to Union ([74]) and international business centres (New York, Chicago, Washington, Hong-Kong, London, Geneva, etc.) at regular frequencies, generally all year long ([75]). SAS transported around 10 million passengers to and from Denmark in 2019, representing close to 30 % of the total number of international passengers to and from Denmark ([76]). Between January and September 2020, SAS remained the biggest airline in terms of passenger transported, with still 30 % of the total number of international passengers transported to and from Denmark ([77]).

(71) As regards Sweden, the Swedish authorities explained that, because Sweden is located on a large and sparsely populated peninsula geographically located in the periphery of the Union, aviation is the most common mode of transport for international travel to and from the country, representing about 70 % of all international travel. According to the Swedish Transport Agency, SAS accounted for 49 % of the domestic air traffic in Sweden in 2019 in terms of passengers transported, and one quarter of the international air traffic, offering more than 150 routes from, to and within Sweden ([78]).

([69]) According to the data collected by the Danish authorities from Trafikstyrelsen (Danish civil aviation and railway authority) in response to the request for information of the Commission of 2 October 2023, the three biggest airlines operating from, to and within Denmark (besides SAS) in 2019 were Norwegian Air Shuttle (with 85 routes), Ryanair (48 routes) and EasyJet (16 routes). Norwegian Air Shuttle operated a single domestic route, while Ryanair and EasyJet did not operate any.

([70]) See SAS' annual and sustainability report of fiscal year 2019, p. 8, available at: https://www.sasgroup.net/files/documents/Corporate_governace/annual-reports/sas-sas-annual-and-sustainability-report-fiscal-year-2019-200130.pdf (last accessed 28 November 2023).

([71]) According to the data of the Danish civil aviation and railway authority, SAS was in 2019 the biggest airline at domestic level with 41 % of the total number of domestic passengers transported, followed by Norwegian Air Shuttle (29 %), Danish Air Transport (22 %), Air Alsie (4,5 %) and Dancopter (0,8 %).

([72]) According to the Danish civil aviation and railway authority, SAS remained the biggest airline at domestic level between January and September 2020 with 39 % of the total number of domestic passengers transported in Denmark, followed by Danish Air Transport (28,5 %), Norwegian Air Shuttle (24 %), and Air Alsie (3,1 %).

([73]) In 2019, SAS offered, for example, between 600 and 700 monthly flights to Oslo, as well as to Stockholm; more than 300 monthly flights to Gothenburg and Stavanger; and flights connecting Denmark with Helsinki, Aalesund, Trondheim, and Bergen.

([74]) In 2019, SAS offered, for example, more than 100 monthly flights to Brussels, Amsterdam, Paris, Gdansk, Hamburg, Frankfurt, Dusseldorf, Munich, Vilnius, Warsaw, and Milan.

([75]) According to the Danish civil aviation and railway authority and SAS' data, SAS operated around two-third of its routes all year long (64 routes out of 102 routes), including New York, Chicago, Washington, Hong-Kong, London and Geneva, while Norwegian Air Shuttle operated 29 routes all year long (out of 85 routes), Ryanair 23 routes (out of 48 routes) and EasyJet 11 routes all year long (out of 16 routes).

([76]) According to the data from the Danish civil aviation and railway authority, SAS was the leading airline in terms of international passengers transported to and from Denmark in 2019, followed by Norwegian Air Shuttle (15 %), Ryanair (9 %), EasyJet (5 %) and KLM (4 %).

([77]) According to the Danish civil aviation and railway authority, SAS transported more than 2 million passengers between January and September 2020, followed by Norwegian Air Shuttle (11 % of the total number of international passengers), Ryanair (10 %), KLM (5 %) and EasyJet (4,5 %).

([78]) According to the data of the Swedish Transport Agency, SAS was the leading airline for domestic passenger air transport services with more than 3 million passengers transported, followed by Braathens Regional (30 %), Norwegian Air Shuttle (18 %), LOT Polish airlines (0,8 %) and Amapola Flyg (0,7 %).

(72) At domestic level, SAS operated from Stockholm and Gothenburg airports, connecting passengers to Umeå, Luleå, Malmö, Visby, Östersund, Helsingborg, Skelleftea, Sundsvall, Kalmar, Örnsköldsvik, Ronneby and Kiruna airports, with more than 150 monthly flights (for each destination) at regular frequencies, all year long. During the COVID-19 pandemic, between March and June 2020, SAS maintained most of those domestic connections, allowing essential travels within Sweden to take place. After June 2020, SAS reopened all its domestic routes with an average of 50 monthly flights per destination ([79]). As regards international destinations ([80]), SAS offered connections to Scandinavian countries ([81]), to other Member States ([82]) and international business centres (Los Angeles, Saint-Petersburg, London, Zürich, etc.) at regular frequencies, all year long.

(73) Both Denmark and Sweden also emphasised the specific contribution that SAS provided during the COVID-19 pandemic with its cargo services and special flights. They highlighted that SAS operated approximately 50 flights with over 800 tons of medical and pharmaceutical products from China, delivering them to Sweden and Denmark, including 600 tons of personal protection equipment and over 40 million protective masks for Swedish and Danish health care staff. Moreover, SAS has established cargo charters for important Swedish and Danish industrial companies, including components for production and spare parts, to enable the continuity of the production chain that was interrupted due to the COVID-19 pandemic. As mentioned in recital (51), SAS also operated several repatriation flights from countries such as Brazil and Pakistan for stranded Swedish and Danish residents, in coordination with the Swedish and Danish authorities.

(74) Denmark and Sweden also explained that SAS has been an important employer for those Member States. They indicated that, although SAS had already carried out approximately 5 000 redundancies to mitigate its losses, it was still employing approximately 6 000 people at the time of the granting of the Measure, whose redundancy would have further aggravated the serious disturbance caused by the COVID-19 pandemic and caused serious social hardship for the economy of those Member States.

(75) Lastly, Denmark and Sweden also indicated that SAS' potential insolvency or default situation would have knock-on effects on a large number of suppliers (aircraft and engine manufacturers, airport and air navigation service providers, fuel suppliers, catering suppliers, IT suppliers, technical maintenance suppliers, regional productors partners, financial services), for which SAS represented an important customer. In that regard, Denmark and Sweden indicated that SAS' purchases from suppliers in Sweden and in Denmark amounted in 2019 to SEK 4,2 billion and SEK 3,9 billion respectively. More generally, in 2019, SAS directly contributed SEK 5,9 billion to the Swedish Gross Domestic Product ('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 ([83]). SAS also contributed DKK 3 billion annually to the Danish GDP in 2019 ([84]). The Danish authorities pointed out in that regard that in 2020, 58 % of passengers carried by SAS from and to Denmark were travelling for business.

([79]) According to the data of the Swedish Transport Agency, between January and September 2020, SAS remained the biggest airline for domestic traffic in terms of passenger transported, accounting for 60 % of the total traffic; Braathens Regional for 20 %; Norwegian Air Shuttle for 14 %, Air Leap for 1,8 % and Amapola Flyg for 1,8 %.

([80]) According to the data of the Swedish Transport Authority, SAS was the leading airline for international air transport services from and to Sweden in 2019 with more than 7 million passengers transported, followed by Norwegian Air Shuttle (18 %), Ryanair (8 %), Wizz Air (5,6 %) and Lufthansa (5 %). Between January and September 2020, SAS' shares of international passengers slightly decreased from 25 % to 23 %; Norwegian Air Shuttle retained the second highest share with 13 % (instead of 18 % in 2019). Ryanair's share remained stable, while those of Wizz Air and Lufthansa increased from 5,6 % to 7,2 % and from 5,1 % to 6,6 %, respectively.

([81]) In 2019, SAS offered for example more than 600 monthly flights to Oslo and Copenhagen, and more than 300 to Helsinki; more than 100 flights to Billund, Tampere, Turku, and Vaasa; and flights connecting Sweden with Aarhus, Stavanger, Tromsø, Trondheim and Oulu.

([82]) In 2019, SAS offered for example more than 100 monthly flights to Brussels, Amsterdam, Paris, Berlin, Frankfurt, Vilnius, and Tallinn.

([83]) See report by Copenhagen Economics from April 2019 available at: https://www.copenhageneconomics.com/dyn/resources/Filelibrary/file/6/216/1562329592/sas-swedenreport.pdf (last accessed on 28 November 2023).

([84]) Idem. The report also indicates that the connectivity created by SAS contributes DKK 18,4 billion to the Danish GDP.

(76) To avoid the harsh consequences of an insolvency or default of SAS on their economies, Denmark and Sweden considered that there were no other alternatives to the Measure as notified by those two Member States.

2.1.5. *Absence of alternatives to the recapitalisation measure*

(77) Denmark and Sweden explained in their notification that SAS did not find alternative financing to cover its capital and liquidity needs concerned by the Measure, neither on the market nor under other aid measures.

(78) Immediately following the COVID-19 outbreak in March 2020, SAS attempted to contract a revolving credit facility with a group of banks ([85]) that proved unsuccessful without State support, as the banks were not ready to take any unsecured risk. In parallel, the Swedish authorities decided to support the airline industry by way of a scheme providing State guarantees to airlines covering 90 % of the loans contracted with credit institutions. The Commission approved that scheme by means of a decision adopted on 11 April 2020 in case SA 56812 ([86]). SAS attempted to secure a loan with credit institutions backed up by the Swedish State guarantee, but the former were reluctant to provide a partly unsecured loan. In view of SAS' difficulties, the Swedish authorities, together with the Danish authorities, therefore decided to grant to SAS a State guarantee potentially covering up to 100 % of the revolving credit facility sought by SAS in the event that credit institutions would still refuse to take a 10 % risk on the loan or deem SAS' collaterals insufficient to cover their own risk. The Commission approved that aid (recital (57)). Denmark and Sweden indicated that, with that joint State guarantee, SAS ultimately managed to contract a revolving credit facility, backed up at 90 % by the State guarantees, but the banks granting that facility required significant securities for the remaining 10 % of unsecured part of the facility in the form of unencumbered assets owned by SAS. According to the terms and conditions of the revolving credit facility agreement concluded with those banks, SAS provided as collateral a package of aircraft assets for a total value that represented twice the amount of the unsecured amount of the revolving credit facility left at the risk of the banks (10 % of the nominal amount of the loan), and a negative pledge on SAS intra-group loans and accounts ([87]).

(79) Furthermore, on 10 June 2020, SAS saw its credit rating downgraded by two credit rating agencies. Standard & Poor's downgraded SAS' credit rating from B+ to CCC ([88]) and maintained it on credit watch with negative implications, reflecting a '*high probability of a debt restructuring within the next few weeks*' because SAS' liquidity position had further deteriorated in the previous weeks and the airline's capital structure appeared unsustainable ([89]). Moody's downgraded SAS' credit profile from B2 to Caa1 ([90]), prompted by the significant cash that SAS was burning to maintain operations, '*making it inevitable that SAS will require a recapitalisation from its shareholders*' ([91]). Moody's considered that '*SAS' gross leverage, measured as debt/EBITDA, was 4,6x in fiscal year 2020, leaving little buffer against the severe market downturn induced by the coronavirus outbreak*' ([92]).

([85]) Namely […], […], […] and […].

([86]) Commission decision of 11 April 2020 in case SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines (OJ C 269, 14.8.2020, p. 2).

([87]) A negative pledge is a contract, or a clause in a loan contract, that prevents the borrower from pledging all or designated assets to another lender. It ensures that the original lender will maintain priority if the borrower defaults and its assets are seized.

([88]) According to Standard & Poor's rating scales, a rating of CCC means that the company's credit profile is currently vulnerable and dependent on favourable business, financial and economic conditions to meet financial commitments. See https://www.spglobal.com/ratings/en/about/intro-to-credit-ratings (last accessed on 28 November 2023).

([89]) See https://www.airfinancejournal.com/articles/3579433/s-and-p-downgrades-sas-on-debt-default-risk; https://www.marketscreener.com/quote/stock/S-P-GLOBAL-INC-27377749/news/S-P-Global-Scandinavian-Airline-SAS-AB-Downgraded-To-CCC-On-Potential-Debt-Restructuring-Rating-30751970/ (last accessed on 28 November 2023).

([90]) According to Moody's rating scales, a rating of Caa means that the obligations are judged to be of poor standing and are subject to very high credit risk. See https://www.moodys.com/sites/products/productattachments/ap075378_1_1408_ki.pdf (last accessed on 28 November 2023).

([91]) Annex 34.1 to the notification of the Swedish and Danish authorities.

([92]) The debt to EBITDA ratio is a leverage ratio that measures a company's ability to pay off its incurred debt. Commonly used by credit agencies, this ratio determines the probability of defaulting on issued debt. This ratio is useful in determining how many years of EBITDA would be required to pay back all the debt. Typically, it can be alarming if the ratio is over 3, but this can vary depending on the industry. See e.g. https://www.investopedia.com/terms/l/leverageratio.asp (last accessed on 28 November 2023).

(80) Furthermore, Denmark and Sweden explained that the State aid measures already received by SAS were either insufficient or inadequate to address its equity needs, as they aimed at addressing only SAS' immediate liquidity shortage rather than the deterioration of its capital structure over the short and long-term.

(81) According to Sweden and Denmark, the revolving credit facility backed up by the State guarantee measure (recital (57)) only had the effect of limiting the operating cash burn rate of SAS ([93]) to SEK 500 to 700 million per month until the end of fiscal year 2020, and was therefore not suitable to enable SAS to rebuild its pre-COVID capital structure (and insufficient to preserve cash). In addition, pursuant to the terms of the revolving credit agreement, SAS had to cancel the revolving credit facility (and repay any outstanding amount) as soon as the recapitalisation plan explored by Denmark and Sweden would be successfully implemented ([94]). All other aid received by SAS only aimed at covering for a short period of time some operating costs in the form of grants or compensation for public service obligations (recitals (58) to (60)) and did not help to address the substantial financial difficulties of SAS and to ensure its viability.

(82) Denmark and Sweden also indicated that there were no other existing horizontal aid schemes adopted by those two Member States in the context of the COVID-19 pandemic that could have addressed SAS' financial difficulties, for the reasons set out in **Table 1** and **Table 2**.

Table 1

List of relevant aid schemes adopted by Sweden in the context of the COVID-19 pandemic between 1 March 2020 and 26 October 2020 ([95])

Aid scheme	Description of the measure	Explanations of Sweden on the inadequacy/ insufficiency of the measure
SA.56860 Loan guarantee scheme to undertakings affected by the COVID-19 pandemic	The measure provided aid in the form of guarantees on loans not exceeding SEK 75 million (approximately EUR 6,8 million) per company. Higher loan amounts might be permitted in exceptional cases but only up to a maximum of SEK 250 million (approximately EUR 22,7 million)).	The maximum aid amount that could be granted under that scheme was insufficient to ensure SAS' viability. SAS also needed capital to strengthen its equity and could therefore not rely exclusively on loans.
SA.56812 Loan guarantee scheme to airlines affected by the COVID-19 pandemic	The measure provided aid in the form of State guarantees for new loans to certain airlines with a Swedish license to ensure they had sufficient liquidity.	SAS could not obtain a loan on the market under that aid scheme (recital (78)).
SA.56972 Rent rebate for tenants affected by the COVID-19 pandemic	The scheme provided aid (maximum EUR 800 000) to cover rent rebates agreed by landlords and undertakings active in durable consumer goods (with the exclusion of internet trade), hotels, restaurants, and certain other activities with a focus on customer relations in the context of the COVID-19 pandemic.	The aid scheme was inappropriate to cover SAS' liquidity and capital need, and the amount provided was manifestly insufficient.

([93]) The rate at which a company depletes its cash reserves or cash balance in a loss-generating scenario due to its operating activities.
([94]) Following the granting of the Measure on 26 October 2020, SAS repaid the revolving credit facility in full on 29 October 2020. The Swedish and Danish State guarantees lapsed at the same time.
([95]) That list only includes the aid schemes for which SAS could meet the eligibility requirements to benefit from the aid.

Aid scheme	Description of the measure	Explanations of Sweden on the inadequacy/ insufficiency of the measure
SA.58822 Compensation scheme for undertakings faced with turnover losses due to the COVID-19 pandemic	The measure provided aid (up to EUR 800 000) for the losses incurred by undertakings due to the COVID-19 pandemic outbreak and the related restrictive measures in June and July 2020.	The aid scheme only covered a loss of turnover for a limited period of time. In addition, the aid amount provided was manifestly insufficient to address SAS' financial needs.

Table 2

List of relevant aid schemes adopted by Denmark in the context of the COVID-19 pandemic between 1 March 2020 and 26 October 2020 ([96])

Aid scheme	Description of the measure	Explanations of Denmark on the inadequacy/ insufficiency of the measure
SA.57027 Credit facility and tax deferrals linked to VAT and payroll tax	The measure provided aid in the form of both tax deferrals and credit facility to alleviate the liquidity constraints for the most vulnerable undertakings, with a particular focus on SMEs for a total budget of EUR 130 million.	The measure was not appropriate to address SAS' financial situation, as the aid only covered tax deferrals and credit facilities. In addition, the aid was granted principally to SMEs, and its amount was limited.
SA.57932 Compensation scheme for undertakings affected by closure of borders and travel restrictions	The measure provided aid to undertakings in the travel and tourism-related sectors fulfilling certain eligibility conditions.	The maximum aid amount that could be granted under the scheme (EUR 8 million per company) was insufficient to ensure SAS' viability.

(83) In addition, Denmark and Sweden explained that financing in the form of increased debt would in any case not address the capital needs of SAS. The company necessarily needed to raise capital to address its equity needs. In that regard, Denmark and Sweden explained that the Measure was designed with the objective to cover as much of SAS' capital needs as possible from the market, by attracting private investors and by requesting existing private shareholders of SAS to share the burden of the recapitalisation with Denmark and Sweden, as further explained in section 2.2.

(84) The minutes of the board meetings of SAS held in May and June 2020 reveal that Denmark and Sweden explicitly required SAS to ask private investors to share the financial burden of the recapitalisation ('burden-sharing'), as a condition to the participation of those two Member States to the recapitalisation of SAS. SAS was thus required to negotiate with private shareholders, bondholders and noteholders of SAS' obligations, and banks participating in the recapitalisation process. SAS announced a first recapitalisation plan on 30 June 2020, comprising a conversion of existing bonds and existing hybrid notes under certain conditions, and calling bondholders and noteholders to approve the proposed plan at a meeting planned on 17 July 2020 ([97]). However, on 10 July 2020, SAS announced that that meeting was cancelled, due to the expected refusal of noteholders and bondholders to accept the conversion conditions included in the first recapitalisation plan ([98]).

([96]) That list only includes the aid schemes for which SAS could meet the eligibility requirements to benefit from the aid.

([97]) See SAS' press release of 30 June 2020, detailing the first recapitalisation plan proposal, at: https://www.sasgroup.net/investor-relations/recapitalization-2020/recapitalization-plan/sas-announces-recapitalization-plan-to-continue-as-a-key-provider-of-important-scandinavian-airline-infrastructure/ (last accessed on 28 November 2023).

([98]) See SAS' press release of 10 July 2020 at: https://www.sasgroup.net/investor-relations/recapitalization-2020/recapitalization-plan/sas-cancels-noteholders-meetings-scheduled-for-17-july-2020-as-required-conversions-under-the-recapitalisation-plan-are-not-expected-to-be-approved--process-continues-with-initiation-of-noteholder-discussions/ (last accessed on 28 November 2023).

(85) The rejection of the recapitalisation plan proposed by SAS with the support of Denmark and Sweden led those two Member States to agree to a revision of the conditions under which the bondholders and noteholders concerned would accept the burden-sharing. The Measure assessed in the present decision was part of that revised recapitalisation plan and is described in the following sections.

2.2. Outline of the different components of the Measure

(86) The recapitalisation plan comprised three main elements: the equity instrument (SEK 6 billion), the hybrid capital instrument (SEK 6 billion), both of them constituting the Measure, and the conversion of private debt into equity or hybrid instruments (SEK 3,75 billion). Thus, the recapitalisation plan provided for a total of SEK 15,75 billion of capital injection to SAS, out of which SEK 11 billion were to be provided under the Measure by Denmark and Sweden.

(87) More specifically, the recapitalisation plan comprised:

— the hybrid capital instrument, itself composed of:

  — directed hybrid notes of an amount of SEK 5 billion, placed with Denmark and Sweden and split equally between the two Member States; and

  — directed hybrid notes of an amount of SEK 1 billion, placed with Denmark only;

— the equity instrument, itself composed of:

  — a rights issue of approximately SEK 4 billion, under which Denmark and Sweden subscribed and underwrote new common shares for an amount up to approximately SEK 3 billion (split equally between the two Member States), and open to all SAS' shareholders and other investors; and

  — a directed issue of common shares for an amount of approximately SEK 2 billion, placed with Denmark and Sweden (split roughly equally between the two Member States).

— the conversion of private debt into equity or hybrid capital, itself composed of:

  — the conversion of subordinated perpetual floating rate capital securities (the 'Existing Hybrid Notes'), of an amount of SEK 1,5 billion, into common shares ([99]), and

  — 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 ([100]).

2.3. Form of the Measure

(88) The Measure took the form of a recapitalisation for a total amount of SEK 11 billion by means of equity (SEK 6 billion) and hybrid capital instruments (SEK 5 billion).

2.4. Legal basis

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

([99]) 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 SAS at a subscription price of SEK 1,16 per share, subject to approval by the extraordinary shareholders' meeting.

([100]) 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 SAS.

2.5. Granting authority and administration of the Measure

(90) The Danish Ministry of Finance and the Swedish Government were the granting authorities. The Measure was administered by the Danish Ministry of Finance and the Swedish Ministry of Enterprise and Innovation. The Measure was financed by the Swedish and Danish governmental budgets.

2.6. Budget and duration of the Measure

(91) The budget of the Measure amounts to SEK 11 billion. As explained in recital (7), Denmark and Sweden in the end paid SEK 9,54 billion in aid.

(92) Denmark and Sweden granted the Measure on 26 October 2020.

2.7. Beneficiary

(93) 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 and offering direct connections to the main Union and international business centres. It is also a member of the global aviation Star Alliance ([101]).

(94) SAS is a Swedish public limited liability company governed by the Swedish Companies Act 2005:551 ('Swedish Companies Act') ([102]). SAS is the parent company of SAS Danmark A/S, SAS Norge AS and SAS Sverige AB ([103]), as well as SAS Cargo Group, SAS Ground Handling Denmark A/S, SAS Ground Handling Norway AS, SAS Ground Handling Sweden AB and SAS Technical Services (all those undertakings forming the 'SAS Group').

(95) According to the Danish and Swedish authorities, in 2019, SAS carried approximately 30 million passengers. SAS operated flights to 233 destinations with a fleet of more than 150 aircraft. SAS' main hub is Copenhagen airport, while Oslo airport and Stockholm Arlanda airport are its second and third largest hubs, respectively.

(96) At the time of the 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'), which owned 6,5 %.

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

(98) Denmark and Sweden confirmed in their notification that SAS was not in difficulty within the meaning of Commission Regulation (EU) No 651/2014 (the General Block Exemption Regulation ('GBER')) ([104]) on 31 December 2019 and provided evidence in support of that conclusion, including the consolidated accounts of SAS demonstrating its financial position on 31 December 2019 ([105]). They indicated that (i) the consolidated accounts of SAS, 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' subscribed share capital was SEK 7,7 billion whereas its equity was SEK 5,7 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' book debt/equity ratio was 4,96, thus far below the 7,5 threshold set out in Article 2(18), point (e), GBER.

([101]) 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.

([102]) Aktiebolagslag (2005:551).

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

([104]) 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, ELI: http://data.europa.eu/eli/reg/2014/651/oj).

([105]) For the sake of clarity, the figures included in the 2019 annual report of SAS pertain to the fiscal year running from 1 November 2018 to 31 October 2019. Therefore, for the purpose of this assessment, the Commission requested the relevant numbers to be adjusted to reflect the financial situation of SAS on 31 December 2019.

2.8. **Implementation of the Measure**

(99) The Measure consisted of (i) the equity instrument (SEK 5 billion) and (ii) the hybrid capital instrument (SEK 6 billion).

(100) 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. *The equity instrument*

(101) The equity instrument of the Measure included a (i) directed issue and (ii) a rights issue.

2.8.1.1. Directed issue

(102) The Measure provided for a directed issue of common shares in the amount of approximately SEK 2 billion, corresponding to about 1,729 billion new shares at a subscription price of SEK 1,16, to Denmark and Sweden.

(103) On 26 October 2020, Denmark and Sweden subscribed to new shares at a subscription price of SEK 1,16 for a total amount of SEK 2 billion (split between approximately SEK 1 016 million for Denmark and approximately SEK 990 million for Sweden).

2.8.1.2. Rights Issue

(104) The Measure provided for a rights issue with the following characteristics:

— The rights issue of new common shares was available to eligible shareholders [106] in an amount of approximately SEK 4 billion and at a subscription price of SEK 1,16. Eligible shareholders received 9 subscription rights for each share held on the record date for the rights issue. It was possible for investors other than the eligible shareholders to participate in the rights issue either by purchasing subscription rights on the market or, to the extent the rights issue would not be fully subscribed through the exercise of subscription rights, by applying for subscription of shares without subscription rights.

— The rights issue was covered by subscription undertakings and underwriting commitments corresponding to 81,5 % of the total amount of the rights issue, where approximately SEK 3 billion was covered by pro rata subscription undertakings and underwriting commitments from Denmark and Sweden (split equally) and approximately SEK 259 million was covered by a pro rata subscription undertaking from KAW, subject to certain conditions.

— The final amount of the rights issue to be covered by Denmark and Sweden depended on the final subscription of shares by other shareholders and could range from a minimum of approximately SEK 1,16 billion by Denmark and Sweden (if all the shares underwritten by Denmark and Sweden were subscribed by private capital) to a maximum of approximately SEK 3 billion (if none of the shares underwritten by Denmark and Sweden were subscribed by private capital).

(105) In October 2020, the private interest in the rights issue of SEK 4 billion proved to be higher than expected. Thus, Denmark and Sweden subscribed common shares in the rights issue for a total of only SEK 1 540 765 422, instead of the maximum amount envisaged of approximately SEK 3 billion.

[106] All shareholders of SAS registered in SAS' shareholders' register on the record date, as defined in the prospectus of the rights issue.

2.8.2. *The hybrid capital instrument*

(106) The hybrid capital instrument took the form of SEK denominated capital securities with perpetual tenor (the 'new State hybrid notes') as issued to Denmark and Sweden, and included:

— One set of hybrid notes ('NSHN1'), which was placed with Denmark and Sweden 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 would then increase 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 790 bps p.a.; and during the 8th year and thereafter 1 040 bps p.a. The NSHN1 was subordinated capital securities and ranked *pari passu* with the NSHN2.

— One set of hybrid notes ('NSHN2'), which was placed only 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 would then increase as follows: 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 was subordinated capital securities and ranked *pari passu* with the NSHN1.

(107) The new State hybrid notes were freely transferable but unlisted, did not include the option to convert into shares, were callable by SAS at any time at par value, and were treated as equity in SAS' accounting under International Financial Reporting Standards ('IFRS').

(108) In order to allow equity treatment under IFRS, the payment of the new State hybrid notes coupons was non-mandatory and at the sole discretion of SAS. However, in case of deferment of coupons, they would accrue compounded interests until the effective coupon payment.

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

(109) 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:

— 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;

— 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 had a floating interest rate of 6M STIBOR plus an initial margin of 340 bps per annum. The planned margin of the New Commercial Hybrid Notes would then increase 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.

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

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

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

(112) SAS and all the companies controlled by SAS would be subject to a ban on advertising and a ban on acquisition. 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;

— 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 had 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 might acquire a stake of more than 10 % in upstream or downstream companies in its field of business if the acquisition was necessary to maintain the viability of the acquirer.

(113) As long as at least 75 % of the Measure had not been redeemed, Denmark and Sweden committed that: (i) the remuneration of the management of SAS should not go beyond the fixed part of its remuneration on 31 December 2019; for persons becoming members of the management on or after the recapitalisation, the applicable limit was 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 or other variable or comparable remuneration elements.

(114) Until the Measure had been fully redeemed, SAS would be subject to the obligation not to make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to Denmark and Sweden or where there was a legal obligation to do so. The dividend ban would not apply to intra-group dividend payments made to SAS by companies that are (directly or indirectly) fully owned by SAS.

(115) However, the ban on non-mandatory coupon payments would not apply to coupon payments on the New Commercial Hybrid Notes resulting from the conversion of existing Bonds. The Danish and Swedish authorities explained that payment of such coupons was crucial for certain bondholders during the negotiations on burden-sharing, and more generally, it was expected to be a key consideration for all the bondholders to agree to conversion. According to Denmark and Sweden, that conversion was essential for the success of the entire recapitalisation plan and aimed at achieving three positive effects.

(116) First, it would 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' balance sheet, which would most likely have been requested to be covered by Denmark and Sweden, due to SAS' limited access to capital markets before the Measure. By contrast, a successful conversion would accordingly reduce the State aid needed and the amount of coupon payments due by SAS. Indeed, as a result of the conversion of the Bonds, SAS would be able to significantly reduce its cash outflows in the first years following the granting of the Measure. According to Denmark and Sweden, the Bonds were 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 them in November 2022, thus avoiding a SEK 2,25 billion outflow that would have been difficult to refinance on capital markets.

(117) Second, it would 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 ([107]); financial solidity ([108]); gearing ratio; etc.) and its liquidity position ([109]) would greatly benefit from the conversion.

([107]) Assuming an EBITDA of SEK 3,4 billion in financial year 2021, the conversion would lead to SEK 2,25 billion in decreased debt and a 66,2 % decrease of the net debt-to-EBITDA ratio.

([108]) The solidity of a company is defined as the ratio between equity raised from its shareholders and external capital raised from debt holders. Assuming using total assets of SEK 54 billion in financial year 2021, an equity improvement of SEK 2,25 billion would increase that solidity by 4,2 %.

([109]) As a result of the conversion, SAS would not have to repay the SEK 2,25 billion of existing Bonds due in November 2022. In addition, 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 5 years compared with the amount of the planned coupon payments due on the existing Bonds and hybrids.

(118) Third, it would facilitate and better secure the remuneration of the Danish and Swedish' equity and hybrid capital instruments, for the reasons noted at recital (116).

(119) Denmark and Sweden also indicated that the conversion of the existing Bonds into the New Commercial Hybrid Notes occurred 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 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).

(120) 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, with the exception of the ban on non-mandatory coupon payments, 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 or above par value including accrued coupon payments and compound interest.

(121) SAS would also be prohibited from cross-subsidising group companies which, on 31 December 2019, were undertakings in difficulty as defined in the GBER.

2.8.5. *Exit strategy of Denmark and Sweden*

(122) As regards the rights issue, according to the Danish and Swedish authorities, there would be two potential exit strategies for Denmark and Sweden: (i) SAS could buy back the shares from Denmark and Sweden or (ii) Denmark and Sweden could sell their shares on the market.

(123) The Swedish authorities explained that under the Swedish Companies Act, 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.

(124) 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) would be the only practically viable option.

(125) Furthermore, Denmark and Sweden indicated that SAS planned to redeem the Measure by 2025. 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 ([110]). Additionally, Denmark and Sweden 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.

(126) In any event, under the Measure, Denmark and Sweden committed to receive and endorse a credible exit strategy within 12 months following the granting of the Measure, unless the States' intervention would be reduced below the level of 25 % of equity by that deadline.

([110]) 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.

2.9. **Cumulation of State aid**

(127) The aid granted under the Measure could be cumulated with aid under Commission Regulations (EU) No 1407/2013 ([111]) and (EU) No 360/2012 ([112]) or under the GBER, provided the respective conditions set out in those Regulations were respected.

(128) The aid granted under the Measure could also be cumulated with aid granted under other measures approved by the Commission pursuant to Article 107(2), point (b), TFEU or the Temporary Framework, provided the respective conditions set out in those legal bases were respected.

2.10. **Monitoring and reporting**

(129) 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 3 months from the moment of granting) ([113]).

(130) The Danish and Swedish authorities also confirmed that they would ensure that:

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

— SAS as beneficiary of the Measure publishes, 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' 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 date of 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' equity within 6 years after the granting of the Measure.

([111]) 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, ELI: http://data.europa.eu/eli/reg/2013/1407/oj).

([112]) 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, ELI: http://data.europa.eu/eli/reg/2012/360/oj).

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

2.11. Grounds for opening the formal investigation procedure

(131) In order to comply with the SAS II judgment, the Commission adopted the opening decision. Therein, the Commission considered that, after a preliminary examination, the Measure constituted State aid within the meaning of Article 107(1) TFEU ([114]). It also found that that Measure, although notified in accordance with Article 108(3) TFEU in the procedure that resulted in the adoption of the initial decision, had become unlawful aid from the moment it was granted, following the annulment of that decision by the General Court, in so far as the Measure was no longer approved by a Commission decision ([115]).

(132) The Commission considered on a preliminary basis that, since the Measure had become unlawful, its compatibility needed to be assessed in accordance with the legal provisions in force at the time when the aid was granted, namely on 26 October 2020. At that time, the Temporary Framework contained the relevant provisions to assess the compatibility of the Measure under Article 107(3), point (b), TFEU ([116]).

(133) In its opening decision, the Commission considered, on a preliminary basis, that the Measure did not comply with points 61 and 62 of the Temporary Framework.

(134) In line with the SAS II judgment, the Commission preliminarily considered that the equity instrument of the Measure did not appear to be accompanied, as required by point 61 of the Temporary Framework, by a step-up mechanism increasing the remuneration of the State to incentivise the beneficiary to buy back the State capital injection. The Commission also expressed doubts as to whether, pursuant to point 62 of the Temporary Framework, the equity instrument of the Measure was accompanied by an appropriate alternative mechanism to the one envisaged in point 61 of the Temporary Framework, overall leading 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.

3. COMMENTS FROM DENMARK AND SWEDEN

(135) In their joint comments on the opening decision, Denmark and Sweden focused on the doubts raised by the Commission concerning the compliance of the Measure with points 61 and 62 of the Temporary Framework. They also briefly addressed a few other aspects of the preliminary assessment of the compatibility of the Measure.

3.1. The Measure already provides an appropriate remuneration and exit incentives for Denmark and Sweden

(136) Although they acknowledge the SAS II judgment and its conclusions on the non-respect of points 61 and 62 of the Temporary Framework, the Danish and Swedish authorities consider that the Measure can nonetheless be declared compatible with the internal market. In their views, the Measure already contained an appropriate alternative to a step-up mechanism, in line with point 62 of the Temporary Framework, for the following reasons.

(137) First, the significant discount provided under the Measure on the maximum share price at which Denmark and Sweden acquired SAS' shares had the effect of increasing the remuneration in their favour.

(138) Second, the obligation for SAS to submit a restructuring plan under the Measure already constituted a strong incentive for the exit of Denmark and Sweden.

(139) Third, the amount of burden-sharing taken up by private investors had the effect of reducing the need for exit incentives of Denmark and Sweden.

([114]) opening decision, recitals (71) to (75).
([115]) opening decision, recitals (77) and (78).
([116]) opening decision, recitals (79) to (85).

(140) Last, the authorities of both Denmark and Sweden had, according to their political mandates, the intention to exit the capital structure of SAS insofar as the COVID shares acquired through the Measure were concerned. In the political agreement of 15 June 2020 about the Danish State's recapitalisation and ownership of SAS ([117]) and in a Ministerial Decree dated 24 June 2020, it is stipulated that the ownership of SAS in principle must be reduced by selling the shares to responsible long-term investors, when market conditions were favourable. In Sweden, the government had explicitly stated its intention, at any appropriate time when the market situation allowed it again, to reduce/divest its ownership in SAS in line with the mandates previously obtained from the parliament ([118]).

(141) Alternatively, Denmark and Sweden consider that the Measure can be declared compatible with the internal market directly under Article 107(3), point b, TFEU. This is the case, in their views, because of the specific characteristics of the recapitalisation of SAS, and notably the desire to ensure burden-sharing and to attract new private capital to the recapitalisation. Denmark and Sweden consider that these (i) were not required by the Temporary Framework, as acknowledged by the Commission in recital (95) of the initial decision and recital (206) of the opening decision; and (ii) would have proven, in the case of SAS, to be a more appropriate tool to ensure the remuneration of Denmark and Sweden and mitigate the distortions of competition.

3.2. **Other comments on the opening decision**

(142) Denmark and Sweden highlight that the General Court, in the SAS II judgment, confirmed that the hybrid capital instrument fulfilled all the relevant conditions on remuneration and exit incentives set out by the Temporary Framework.

(143) They also point out that the Lufthansa judgment ([119]) of the General Court confirmed the methodology used by the Commission to assess the existence of significant market power based on the airport-to-airport approach, also used by the Commission in the opening decision.

4. **COMMENTS FROM INTERESTED PARTIES**

(144) Two interested parties submitted comments in the context of the formal investigation procedure, namely SAS and Ryanair.

4.1. **Comments from SAS**

(145) SAS provided comments on two points of the preliminary assessment of the compatibility of the measure made by the Commission in the opening decision, concerning the application of points 61 and 62 of the Temporary Framework on the one hand, and the application of point 49(c) of the Temporary Framework on the other hand.

4.1.1. *The Measure already provides an appropriate remuneration and exit incentives for Denmark and Sweden*

(146) SAS recalls that under Swedish company law (see recital (123)), it is not possible to implement a step-up mechanism granting a specific holder of shares additional shares, triggered by a future event. There was therefore a legal barrier against applying a step-up mechanism as the one specifically provided for in point 61 of the Temporary Framework.

(147) Furthermore, according to SAS, in view notably of the significant *ex ante* discount on the shares acquired by Denmark and Sweden through the Measure, and the behavioural commitments imposed on SAS, the Measure already included both a sufficient amount of remuneration for Denmark and Sweden and sufficient exit incentives to provide an alternative leading to the same overall outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration.

([117]) https://fm.dk/media/18483/aftale-om-rekapitalisering-og-statens-ejerskab-af-sas-ab_a.pdf.
([118]) The latest such mandate being Regeringens proposition 2019/20:187 of 15 June 2020: https://data.riksdagen.se/fil/93D66908-D6E7-4ED0-8D30-7AF1EDAD2AD0.
([119]) Judgment of 10 May 2023, *Ryanair* v *Commission*, T-34/21 and T-87/21, ECLI:EU:T:2023:248, paragraph 322.

(148) That position notwithstanding, SAS has put forward an alternative mechanism that, should the Commission reach the conclusion that the Measure as notified by Denmark and Sweden does not comply with points 61 and 62 of the Temporary Framework, could be implemented to ensure that those provisions of the Temporary Framework are complied with. That alternative mechanism would take the form of an issuance of additional capital securities to the relevant Member State ([120]), with the following characteristics:

— At the time when that mechanism must be triggered, if one or both of the Member States have not sold the requisite number of shares, SAS would either (i) amend the terms of the respective State hybrid note(s) to increase the amount payable thereunder, for example by increasing the principal amount; or (ii) issue a new instrument to the State(s) concerned under the same terms (e.g. level of subordination, accounting treatment and remuneration) as the existing respective hybrid note(s).

— That mechanism would correspond in monetary terms to 10 % of the amount resulting from multiplying the respective State's shareholding (i.e. the number of shares) exceeding its shareholding in SAS prior to the recapitalisation, not yet sold at that point, by the higher of (i) SEK 1,16 (the 2020 share subscription price) or (ii) the volume-weighted average price paid for SAS' shares on Nasdaq Stockholm during a period of 20 trading days immediately preceding the fifth trading day prior to the triggering date. Given that the remuneration of the State hybrid notes may not be in line with market terms at the moment of the triggering of the mechanism, the additional principal amount resulting from this calculation would be adjusted in order to account for the expected future cash flows associated with this additional nominal amount of capital securities, discounted at an appropriate market rate reflecting their terms and conditions and the riskiness of the issuer at the time of the step-up. This methodology ensures that, given the expected future cash flows and discount rate at the time of the step-up, the increase in remuneration corresponds to exactly 10 % in monetary terms.

— In line with the specific mechanism set out in point 61 of the Temporary Framework, that alternative mechanism would be activated at year 4 following the granting of the Measure, if the relevant Member State has not sold at least 40 % of its COVID-19 recapitalisation participation, and at year 6 following the granting of the Measure, if the relevant Member State has not sold that recapitalisation participation in full.

(149) According to SAS, the mechanism proposed would provide an appropriate incentive for SAS to buy back the shares acquired by Denmark and Sweden through the Measure. That alternative would, in SAS' view, meet the conditions of points 61 and 62 of the Temporary Framework, and be proportionate to the objective sought by those provisions.

4.1.2. *SAS was not able to find financing on the markets at affordable terms*

(150) As a preliminary remark, SAS shares the explanations provided by Denmark and Sweden in their notification of the Measure and the preliminary assessment made by the Commission in the initial decision, according to which SAS was not able to find financing at affordable terms on the markets to cover its capital needs. SAS nonetheless provided additional elements and background information on that aspect.

(151) According to SAS, before the COVID-19 pandemic, it used various sources of market financing, including bank loans, bonds, subordinated loans, hybrid bonds and leasing. In financing its aircraft, SAS typically used a combination of leases and secured bank loans and credit facilities. In addition to that, SAS used other sources of financing that were still outstanding before the launch of the recapitalisation (August 2020), including (i) an unsecured bond amounting to SEK 1,5 billion (issued in November 2017), (ii) a common share private placement of SEK 1,27 billion (issued in November 2017), (iii) an unsecured bond amounting to SEK 0,75 billion (issued in June 2018), and (iv) a hybrid bond amounting to SEK 1,5 billion (issued in 2019) ([121]).

([120]) SAS considers that the Commission has accepted similar mechanisms in previous decisions, e.g. in Commission decision of 31 July 2020 in case SA.57659 – Spain – COVID 19: Recapitalisation fund (OJ C 269, 14.8.2020, p. 8).

([121]) Under the Measure, both unsecured bonds were converted into new hybrid bonds or common shares (at the option of the bondholders) and the hybrid bond was converted into common shares.

(152) In addition, SAS explains that, prior to the COVID-19 pandemic, it had a private placement bond programme with […] under the European Medium-Term Note programme (the 'EMTN programme'). These were bonds covered by credit default swap contracts. SAS did new bond issuances in 2016, 2017 and 2018. The EMTN programme with […] was intended to be rolled forward in 2020. However, because of the COVID-19 pandemic, there was no availability in the credit default swap market, with no investor willing to invest in SAS. As a result, SAS was not able to roll the EMTN programme forward.

(153) SAS further indicates that, due to the COVID-19 pandemic, it also had difficulty to access other sources of market financing at the time of the granting of the Measure. SAS submitted three main explanations in that regard.

(154) To start with, SAS' credit rating indicates that it was unlikely that SAS would have been able to issue unsecured debt or hybrid instruments at affordable terms. On 16 January 2020, prior to the COVID-19 pandemic, the credit rating agency Standard & Poor's issued a B+ rating for SAS, considering that the company could sustain credit measures; whereas on 10 June 2020, the company's credit rating was downgraded to CCC and maintained on CreditWatch with negative implications. SAS provided the note of Standard & Poor's of 10 June 2020 explaining the motivations of that credit rating agency for the downgrade.

(155) According to SAS, the lack of market financing in the form of unsecured bond and hybrid instruments at affordable terms is further evidenced by the trading levels of SAS' financing instruments on the secondary market. That evidence suggests that those instruments had a very high financing cost, thus excluding any issuance of new instruments to private investors as a feasible option:

— Bonds: on 31 December 2019, SAS' senior unsecured bond issued in 2017 with maturity in 2022 was, according to Bloomberg, quoted at 103,4 % of par value. This is equivalent to an effective margin (i.e. the credit spread premium over risk free rates) of 375 bps and an implied financing cost of 3,99 %. Conversely, on 14 June 2020 – 1 day prior to the announcement of support from the governments of Sweden and Denmark – the bond was quoted at 67 % of par, equivalent to an effective margin of 2485 bps and an implied financing cost of 24,9 %. The substantial increase in the implied yields on SAS' existing bonds during the first months of the COVID-19 pandemic showed its lack of alternative financing on the bond market at affordable terms.

— Hybrid instruments: on 31 December 2019, SAS' hybrid bond issued in 2019 was, according to Bloomberg, quoted at 102,38 % of par, equivalent to an effective margin of 802 bps, and an implied financing cost of 8,17 %. Conversely, on 14 June 2020, the bond was quoted at 52 % of par value, equivalent to an effective margin of 1571 bps and an implied financing cost of 15,81 %. The substantial increase in the implied yields on SAS' existing hybrids during the first months of the COVID-19 pandemic showed its lack of alternative financing on the hybrid instruments market at affordable terms.

(156) Then, according to SAS, the fact that, at the date of the granting of the Measure, outstanding unsecured and hybrid bonds were being converted as part of the recapitalisation of SAS indicates that SAS' access to the market for bonds and hybrid instruments at affordable terms was very limited. SAS was indeed already asking its existing investor base to convert their existing instruments into equity or debt instruments with less strict terms. Asking the same investors to invest in new bonds or hybrids could not have been successful in such circumstances. In turn, new investors would necessarily assess the credit risk of investments in SAS bonds or hybrids, based on the company's distressed credit rating, which had been downgraded to CCC.

(157) In addition, according to SAS, other options to obtain market financing at affordable terms in the form of collateralised loans by using unencumbered aircraft or other assets, such the Eurobonus programme, were also likely to be ineffective for three reasons.

(158) *First*, on the date of the granting of the Measure, SAS owned 35 % of its aircraft fleet, out of which 17 aircraft were unencumbered with a total book value of approximately SEK [0-2] billion. Nevertheless, 10 of these 17 aircraft were being phased out, and thus were unattractive as collateral for potential lenders ([122]). In addition, SAS indicated that 3 of the remaining 7 unencumbered aircraft were already used as part of the collateral to secure the revolving credit facility of SEK 324 million backed up by the Danish and Swedish' guarantee at 90 % of the facility, with the remaining 10 % left at the risk of the banks ([123]). According to SAS, an independent third party valued those three aircraft at USD [50-100] million. Yet, according to SAS, those aircraft were not sufficient to secure the unguaranteed part of the revolving credit facility, given that the banks required, in addition to the aircraft, pledges over SAS' intra group loans and accounts. According to SAS, if three aircraft were not sufficient to secure 10 % of a loan of SEK 0,3 billion, it was evident that the 4 other aircraft available would not have been sufficient to cover any meaningful part of its capital needs.

(159) *Second*, SAS did hold certain other assets which, in theory, could have been used as collateral for secured debt. In particular, the use of the Eurobonus programme as collateral would have required significant internal restructuring efforts, including the need to set up new companies to which the assets would be transferred. SAS considered at the time of the granting of the Measure that none of these options were feasible due to the time constraints involved.

(160) *Third*, according to SAS, the appetite for providing loans, even secured by collateral, to companies in the aviation sector was at the time very low. This is evidenced by the fact that prior to the recapitalisation, SAS was only able to secure a revolving credit facility because it was covered for 90 % by State guarantees. Although the remaining 10 % was unguaranteed, the banks providing the loan required full collateralisation for these remaining 10 % (including with aircraft).

(161) Lastly, in any event, issuing new debt instruments would not have helped to address the solvency issues of SAS as it needed fresh equity to restore its capital structure. The fact that SAS suffered significant losses meant that its share capital was decreasing quickly. In that regard, SAS provided an annex containing several research reports from banks (Den Norske Bank, Nordea, Sydbank) and newspapers (Dagens Industri) ([124]), as well as a graphic dated 2 June 2020 showing brokers' recommendations concerning SAS' shares ([125]). In such context, increased debt would not have had the effect of restoring the share capital. If anything, it would have increased SAS' losses due to increased interest payments. Hence, according to SAS, the only way for the company to remain a going concern was to raise capital in the form of equity.

([122]) In particular, those 10 out-of-operation aircraft represented a book value amounting to SEK [350–400] million. Nevertheless, according to SAS, during the pandemic, aircraft financing for older technology or out-of-operation aircraft was close to impossible.

([123]) It was agreed that part of the funds of the recapitalisation would serve to repay the revolving credit facility. After that, the 3 aircraft that were used to secure this debt facility would again become unencumbered.

([124]) On 28 May 2020, Den Norske Bank (DNB) issued the following comment: '*With book equity already in negative territory, a balance sheet with unsustainable debt levels, and an outlook for continued significant earnings losses in a ramp-up scenario set to take years, we forecast that as much as SEK 10 billion in new funding could be needed*'. On the same day, Sydbank issued the following comment: '*If the losses continue as we model in the coming months, up to SEK 10 billion will be needed in capital contributions*'. On 29 May 2020, Nordea issued the following comment: '*Short term, the SEK 4,2 billion in cash and SEK 3,3 billion in State guaranteed credit facilities will keep SAS in the air. However, given the lack of equity and eventually a lack of sufficient cash, SAS will need to convert existing debt to equity and issue more equity*'. The newspapers Dagens Industri reported on 2 June 2020 that '*HSBC reduced its recommendation for SAS' [shares from "hold" to "sell"]. […]. Among other things, the bank points out that SAS has a negative cash flow of SEK 500-700 million per month and considers that it illustrates the capital requirements that the company needs*'.

([125]) That graphic shows the evolution of broker recommendations between June 2018 and June 2020, along with the evolution of the share price of SAS. It shows that brokers recommended at 100 % to buy SAS' shares between June 2018 and December 2018. Between January 2019 and February 2020, broker's recommendations were at 60 % in favour of 'buying', and 40 % in favour of 'holding'. Between March and April 2020, the recommendations were to 'hold'. As of May 2020, brokers started to recommend to 'sell' SAS' shares (50 % in May 2020 and 67 % in June 2020 of the recommendations).

(162) In that context, SAS highlights that the Measure was effectively structured to attract a high level of private participation:

— Equity: to incentivise the participation of private stakeholders to the rights issue, the transaction had to be covered by underwriting commitments by Denmark and Sweden for 81,5 % of the rights issue. Ultimately, for a rights issue amounting to a total of approximately SEK 3,99 billion, private investors subscribed to common shares for a substantial amount of approximately SEK 2,45 billion.

— Unsecured bonds: private investors converted unsecured bonds for a total of approximately SEK 1,615 billion into new commercial hybrid notes at 100 % of par value, and the remaining unsecured bonds for a total of approximately SEK 0,635 billion were converted into common shares at 100 % of par value.

— Hybrid bonds: private investors converted SEK 1,5 billion of hybrid bonds into common shares at 90 % of par value.

4.2. **Comments from Ryanair**

(163) Ryanair provided comments to the opening decision on the lawfulness of the Measure and on seven aspects of the preliminary assessment of the compatibility of the Measure made by the Commission in the opening decision.

4.2.1. *Lawfulness of the Measure*

(164) Ryanair argues that, since the Commission declared the Measure unlawful in the opening decision, it should as a result, and in application of the standstill provision, order Denmark and Sweden to immediately suspend the aid and pay interests for the period during which the unlawful aid has remained at the disposal of SAS ([126]).

4.2.2. *The Measure does not comply with Articles 18, 49 and 56 TFEU and Article 15 of Regulation (EC) No 1008/2008*

(165) Ryanair first submits that, while Article 107(3), point b, TFEU lays down an exception to the prohibition of State aid under Article 107(1) TFEU in case of a serious disturbance in the economy of a Member State, it does not lay down an exception to the other Union rules and general principles. Ryanair argues that, according to established case-law ([127]), the Commission has the obligation, when assessing the compatibility of State aid with the internal market, to ensure compliance of the aid measure, and of any elements indissolubly linked to it, with any other Union rules and general principles, such as equal treatment. Ryanair considers that the Commission did not undertake such assessment for the measure at issue in the opening decision.

(166) Ryanair further argues that the Measure does not comply with the prohibition of discrimination on grounds of nationality (Article 18 TFEU), the freedom of establishment (Article 49 TFEU) and the free provision of services (Article 56 TFEU and Article 15 of Regulation (EC) No 1008/2008.

(167) Ryanair recalls that the general principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. Furthermore, according to Ryanair, the Court of justice held that Article 15 of Regulation (EC) No 1008/2008, which extends the freedom to provide services of Article 56 TFEU to air transport services, '*precludes the application of any [measure] which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State*'. Similarly, Article 49 TFEU provides that '*restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited*'.

([126]) Ryanair refers to the judgment of 12 February 2008, *CELF I*, C-199/06, ECLI:EU:C:2008:79, paragraphs 63 and 64.
([127]) E.g. judgment of 12 March 1977, *Iannelli v Meroni*, C-74/76, ECLI:EU:C:1977:51, paragraph 14.

(168) Ryanair claims that since the COVID-19 pandemic has severely affected all the airlines operating in Sweden and Denmark (including itself), and since the Measure benefits only SAS, the Measure favours SAS over airlines in a comparable situation. In Ryanair's view, the Commission fails to provide any objective justification for that difference in treatment. In particular, it fails to explain why other carriers operating in Sweden and Denmark cannot meet the intended public objective, namely, to remedy the serious disturbance in the economy of Sweden and Denmark.

(169) Ryanair underpins its arguments by noting that SAS only accounted for an estimated 35 % and 34 % of intra-European connectivity in Sweden and Denmark, respectively, whereas other airlines accounted for the remaining majority of 65 % in Sweden and 64 % in Denmark ([128]). In addition, in 2020, due to the COVID-19 pandemic and ensuing containment measures, there was significant overcapacity of air transport services as thousands of planes were grounded throughout the Union ([129]). According to Ryanair, other airlines had ample capacity to attain the intended public objective.

(170) Ryanair further submits that, by reserving the Measure to SAS without objective justification, Denmark and Sweden discriminate between airlines in a comparable situation. That discrimination would have the effect of discouraging the free provision of services and the freedom of establishment within the Union. While Ryanair was developing its position in Sweden and Denmark over the recent years, the Measure threatens this development by artificially allowing SAS to entrench and develop its competitive position in those countries.

4.2.3. *The eligibility criteria were not satisfied for SAS to obtain the Measure (point 49 of the Temporary Framework)*

4.2.3.1. The Commission did not duly justify that, without the Danish and Swedish' intervention, SAS would go out of business or face serious difficulties to maintain its operations

(171) Ryanair criticises the Commission's assessment under point 49(a) of the Temporary Framework for considering that the only realistic alternative to the aid was SAS' '*insolvency scenario*' and '*serious difficulties to maintain its operations*' (recital 88 of the opening decision) and referring to financial projections that allegedly show that SAS would face '*technical illiquidity by December 2020*' (recitals 14 and 88 of the opening decision).

(172) Ryanair considers that, by taking this approach, the Commission did not assess an alternative scenario other than that of SAS' insolvency or illiquidity. According to Ryanair, SAS could have downsized its non-systemic activities or found alternative financing on the markets at affordable terms.

([128]) Ryanair provided those figures in Annex A.2.a (Denmark) and A.2.b (Sweden) to its comments. Those annexes refer to a study of an airline analyst dated 27 April 2021, commissioned by Ryanair to prepare an analysis of the size and operating license origin of the largest airlines in several major European markets in the context of Ryanair's appeal of the initial decision (the 'Airline's Market Study'). That study covers the airline market in ten Member States, including Denmark and Sweden, and identifies (i) the main airlines' market shares in each country, as well as (ii) the 5 year rate of growth of these (2014–2019), (iii) the contribution to this growth by the leading airlines and (iv) the overall growth in routes served by those airlines over this same period. The data used for that study comes from OAG, an independent global air travel intelligence company. The Airline's Market Study gathers data over three tables, both in Annex A.2.a (for Denmark) and Annex A.2.b (for Sweden): Table 1 provides for Denmark and Sweden the four biggest airlines in terms of seat capacity and market shares in 2019; Table 2 provides data on the evolution of the number of seat capacity offered by 16 European airlines in Europe between 2014 and 2019; and Table 3 provides the evolution of the number of routes and seats capacity between 2014 and 2019 (both at domestic and Intra-European level) in Denmark, for SAS, Danish Air Transport, low-costs carriers, and 'others'; and in Sweden, for SAS, Braathens regional, low-cost carriers, and 'others'.

([129]) Ryanair provided in Annex 3 to its comments an extract of several data concerning the number of grounded aircraft in the Eurocontrol area, available at: https://ansperformance.eu/covid/acft_ground/ (last accessed on 28 November 2023).

4.2.3.2. The Commission did not establish that it was in the common interest to intervene

(173) As a preliminary remark, Ryanair criticises the Commission's assessment under point 49(b) of the Temporary Framework for relying exclusively on the assertions made by the Swedish and Danish authorities. Instead, it should have performed an autonomous assessment of the systemic importance of SAS for those two Member States.

(174) In any event, according to Ryanair, even if the Commission fully relied on the elements provided by Sweden and Denmark, it would still not be able to establish that SAS is a systemic undertaking that could not be easily replaced by its competitors.

(175) First, the data provided in the opening decision on the contribution of the aviation sector to the Danish and Swedish economy are irrelevant since they do not reflect SAS' specific contribution.

(176) Second, based on the figures contained in the opening decision, SAS' contribution to GDP is only 30 % of the total contribution of the aviation sector in Sweden and 10 % in Denmark. According to Ryanair, these are not particularly high figures for a supposedly systemic airline, especially where dynamic competitors (such as Ryanair) are perfectly able to replace SAS on several routes. More importantly for Ryanair, these are pre-pandemic figures that say nothing about SAS' possible contribution to the economy and jobs post-pandemic. That contribution is likely to be much lower in light of the financial challenges highlighted by the Commission itself throughout the opening decision.

(177) Third, Ryanair argues that the Commission must demonstrate that SAS' entire activities are irreplaceable or assess precisely what share of its current activities could not be replaced. According to Ryanair, airlines have regularly gone bankrupt in the past decades in Europe and their demise has never jeopardised their home country's economy and connectivity. When an airline enters bankruptcy proceedings, its operations are generally taken over by more efficient airlines such as low-cost airlines. According to Ryanair, a few precedents illustrate that point, such as the bankruptcies of Sabena, as well as those of Malev and Spanair in 2012. In the latter two cases, those bankruptcies had been followed by an immediate growth of traffic at Budapest and Barcelona airports, where those airlines were operating. That scenario would, in Ryanair's view, be even more likely in 2020, in a context marked by incomparably higher available capacity than in 2012 (due to the COVID-19 crisis and durably low demand) and therefore, higher readiness of other airlines to step in. This would also be consistent with a conclusion reached by the Commission in 2014, according to which '*[e]xperience shows that even if an airline goes bankrupt and can't be restructured to become viable again, its disappearance doesn't mean the Member State concerned will lose its connectivity*' and '*the number of direct destinations from the affected airports can increase significantly in the short- to medium-term and may exceed those available before the collapse of the national carrier. That increase appears to be mainly due to low-cost carriers*' ([130]).

(178) Lastly, Ryanair argued that the alleged lack of substitutability of SAS' operations is contradicted by the opening decision, where the Commission claimed that – despite SAS' high market share – it did not have significant market power and that it was possible for SAS' competitors to enter the market and challenge SAS.

(179) Furthermore, according to Ryanair, the Commission did not explain why a scenario related to the downsizing of SAS would not serve equally well the common interest. Even if some of SAS' activities had a truly systemic character, the Commission did not determine, in Ryanair's view, whether such systemic activities could not be preserved by downsizing the group and reducing or suppressing non-systemic activities, such as its ground handling activities ([131]).

([130]) Ryanair refers to Annex A.4 of its observations, containing an article from the Commission's competition policy brief of 9 July 2014, '*State aid for airline restructuring: Does it give you wings?*' (2014 – Issue 10, 9 July 2014., pages 1 and 4) (the 'Competition policy brief').

([131]) Ryanair refers to Annex A.5 to its observations, containing an extract of an article dated of May 2020 from Emmanuel Combe and Didier Bréchemier ('*Before COVID-19, Air Transportation in Europe: an already fragile sector*') (the 'Think Tank Article'). That article was written for the Fondation pour l'innovation politique, a French think tank for European integration and free economy. The extract provides an overview of the financial position of certain European airlines before and during the COVID-19 pandemic.

4.2.3.3. SAS was able to find financing on the markets at affordable terms

(180) As a preliminary remark, Ryanair criticises the Commission's assessment under point 49(c) of the Temporary Framework for relying exclusively on the assertions made by the Swedish and Danish Governments to conclude that SAS was not able to cover its capital and liquidity needs from the capital markets.

(181) Furthermore, the preliminary conclusion of the Commission in the opening decision under point 49(c) of the Temporary Framework is allegedly incorrect for three reasons.

(182) First, Ryanair considers that significant amounts of equity from new investors would have likely been available to SAS on the capital markets. Ryanair provides in Annex 7 to its comments an economic report it commissioned from Oxera Consulting LLP, to support that finding (the 'Oxera report'). The Oxera report indicates that only SAS' existing shareholders were able to participate in the capital increase provided by the Measure, since only the Swedish and Danish authorities were allowed to contribute to the directed issue of new common shares, while the rights issue of common shares was only open to SAS' existing shareholders. Yet, according to the Oxera report, during the onset of the COVID-19 pandemic, many publicly traded firms raised funding from equity markets. In the aviation sector, the Oxera report indicates that nine airlines raised a total of EUR 6,2 billion over the period April to December 2020 ([132]). According to Ryanair, this implies that SAS could have raised equity financing from investors other than its existing shareholders via a public offering, without the involvement of Sweden and Denmark.

(183) Secondly, Ryanair argues that market evidence shows that several airlines with comparable credit ratings to SAS at the start of the COVID-19 pandemic were able to raise significant amounts of debt financing on the markets. That evidence provides a strong indication that SAS would also have been able to do so, including by offering the unencumbered value of the 55 aircraft that SAS owned as collateral to raise debt at more affordable terms. In that regard, the Oxera report provides a table comparing airlines with the same creditworthiness as SAS before the COVID-19 pandemic, which managed to raise debt financing in 2020 ([133]).

(184) Lastly, Ryanair criticises the Commission for not considering whether SAS could have carried out other transactions with private market participants which would have contributed to SAS' liquidity without increasing its debt, such as the issuance of hybrid instruments or the sale of mortgaged aircraft.

4.2.3.4. The Commission relied on erroneous data to assess compliance with point 49(d) of the Temporary Framework

(185) Ryanair casts doubt on the financial data used for the Commission's assessment to check whether SAS could be classified as an undertaking in difficulty on 31 December 2019 within the meaning of the GBER. Ryanair argues that the assessment was based on the unconsolidated accounts of SAS, while the consolidated accounts should have been used.

(186) In addition, Ryanair indicates that the Commission should have clarified whether it relied on the appropriate consolidated set of accounts for SAS in other parts of its assessment.

4.2.4. *The Measure is neither appropriate nor the least distortive alternative to competition (point 53 of the Temporary Framework)*

(187) Ryanair considers that the opening decision merely describes the Measure without providing an explanation of its appropriateness to address SAS' recapitalisation needs. It also asserts that the opening decision contains no finding that the Measure is the least distortive to competition. In particular, the opening decision allegedly does not contain any analysis of the distortions caused by the Measure as compared with other possible aid instruments.

([132]) Those airlines were Ryanair, EasyJet, IAG, Air Canada, United Airlines, American Airlines, Spirit Airlines, Norwegian Airlines and Hawaiian Airlines.

([133]) Those airlines were American Airlines, Allegiant Air, Azul, Hawaiian Airlines, Spirit Airlines and GOL Airlines.

4.2.5. *The Measure is not proportionate and the amount of the recapitalisation exceeds the minimum needed to ensure viability (point 54 of the Temporary Framework)*

4.2.5.1. Alleged misapplication of the Temporary Framework

(188) By reference to the Rescue and Restructuring Guidelines ([134]), Ryanair considers that viability within the meaning of point 54 of the Temporary Framework is achieved '*when an undertaking is able to provide an appropriate projected return on capital after having covered all its costs including depreciation and financial charges*'. According to Ryanair, the opening decision does not assess SAS' capacity to return to a level of profitability that would be acceptable for private investors. Ryanair criticises the Commission for equating viability with '*the company's access to private capital markets*' and for the fact that its assessment of viability considers only debt and equity indicators. Ryanair argues that the Commission should have assessed a range of metrics, in particular profitability indicators such as future profit margins, return on assets or return on equity.

(189) Ryanair also considers that the Commission should have evaluated the impact of downside scenarios on the potential for SAS to return to viability, as in previous decisions concerning the banking sector. The Commission's sensitivity tests on SAS' business plan are insufficient, and it should have undertaken a '*wide range of stress tests*' by considering '*a number of possible downside scenarios taking into account the existing market uncertainty*'.

4.2.5.2. Alleged manifest error of assessment regarding the calculation of the amount of the aid

(190) Ryanair argues that the Commission made several errors of assessment regarding the calculation of the amount of aid needed by SAS.

(191) First, according to Ryanair, the thresholds used by the Commission in the opening decision to determine viability are inappropriate because they are too high and target an excessively favourable financial position. Ryanair notes that prior to the COVID-19 pandemic, SAS' net debt-to-equity ratio, net debt-to-EBITDA ratio, and equity-to-asset ratio (three out of the four viability criteria assessed) were worse than the targets set by the Commission for demonstrating viability, and that SAS was nevertheless able to raise financing on the capital markets at that time. For example, according to Ryanair, SAS' net debt-to-equity ratio was 4,75 in January 2020, its net debt-to-equity ratio consistently exceeded 3,0–3,5, reaching as high as 4 in January 2020, and its equity-to-assets ratio was consistently below 18,1 %, ranging from around 16 % in October 2019 to around 8 % in January 2020.

(192) Second, Ryanair argues that the Commission targeted an inappropriate benchmark when it considered that an investment grade credit rating represents the minimum rating needed to enable a company to access market financing. Indeed, there are airlines that have access to capital markets with lower ratings, including during the COVID-19 pandemic. As the proportionality of the aid has been established in relation to a credit rating threshold that is higher than what is usually required by investors for airlines to obtain financing on the capital markets, the aid is not limited to the minimum necessary to ensure SAS' financial viability.

(193) Third, Ryanair states that the opening decision does not contain a sufficient analysis of SAS' financial projections. In addition, the Commission should have assessed, notably, the extent to which SAS could structurally lower its cost base to improve profitability or the extent to which it was able to reduce costs in the short term. Similarly, the Commission did not assess the impact of alternative traffic projections and assumptions regarding the recovery of traffic from the pandemic.

(194) Accordingly, Ryanair considers that the aid is not limited to the minimum necessary to ensure SAS' financial viability.

([134]) Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

4.2.6. *The Measure does not ensure appropriate remuneration for and the exit of Denmark and Sweden (section 3.11.5 of the Temporary Framework)*

4.2.6.1. The equity instrument provides neither a step-up mechanism nor a comparable alternative (points 61 and 62 of the Temporary Framework)

(195) Ryanair refers to the SAS II judgment, which found that the equity instrument was not accompanied by any step-up mechanism, as also noted in recital (134) of the opening decision. Ryanair shares the preliminary finding of the Commission according to which the equity instrument of the Measure does not appear to be accompanied by an appropriate alternative mechanism that overall leads 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 as the step-up mechanism envisaged in point 61 of the Temporary Framework.

4.2.6.2. The hybrid capital instrument does not sufficiently remunerate Sweden and Denmark (points 65 and 66 of the Temporary Framework)

(196) Ryanair disputes the preliminary conclusion of the Commission according to which the hybrid instruments sufficiently remunerated Sweden and Denmark.

(197) It argues that the margins of the NSHN1 and NSHN2, which are respectively 90 bps and 190 bps higher than the minimum requirements as laid down in point 66 of the Temporary Framework, do not fully compensate Sweden and Denmark for the risk characteristics of those instruments. The Oxera report provided by Ryanair analyses the spread between financial instruments that are characterised by one of the four key risk features identified by the Commission (see recital (430)) and a relevant market benchmark consisting of financial instruments that do not share this risk feature but are otherwise similar, e.g. in terms of date of issuance, maturity and credit rating ([135]). That analysis concludes that an additional margin of 400 bps would be needed to adequately compensate Sweden and Denmark, rather than the actual margins of 90 bps and 190 bps.

(198) In addition, according to Ryanair, because the NSHN1 and NSHN2 are identical in terms of their risk profile, the delta of 100 bps margin difference between the two instruments is not based on any tangible and credible considerations.

4.2.7. *The Measure does not prevent undue distortions of competition (point 72 of the Temporary Framework)*

(199) Ryanair claims that the Measure does not prevent undue distortions of competition and, specifically, is in breach of point 72 of the Temporary Framework.

(200) To support its claim, Ryanair raises two sets of arguments in relation to (i) the definition of the relevant markets and (ii) the assessment of SAS' market power at airports.

(201) First, Ryanair argues that, in the opening decision, the Commission departed from its decision-making practice concerning mergers of airlines, which involves defining markets as pairs of cities between a point of origin and a point of destination (the 'O&D approach') and proposed instead to define the relevant markets solely on an airport-by-airport approach. Ryanair considers that, in so doing, the Commission incorrectly defined the relevant markets and failed to assess whether SAS holds significant market power on at least one of the relevant markets, as required by point 72 of the Temporary Framework. According to Ryanair, the fact that the Measure is directed at SAS as a group and not at specific routes does not preclude that the specific competitive position of SAS in each of the O&D city pairs is affected as a result of the aid granted. There is therefore, according to Ryanair, no objective reason to focus the scope of the competitive assessment to supply-side considerations in State aid. Demand side effects are

([135]) In particular, Ryanair compares: senior non-convertible bonds to junior non-convertible bonds (to assess the required margin for the level of subordination), convertible loans and bonds to non-convertible bonds (to assess the required margin for non-convertibility), non-convertible bonds to non-convertible payment-in-kind bonds (to assess the required margin for the discretion of the issuer to pay coupons), and non-convertible 10–20-year bonds to non-convertible perpetual bonds (to assess the required margin for the perpetual maturity).

equally relevant for the assessment of State aid in the aviation sector because the beneficiary receives an advantage over other undertakings which are its competitors on O&D routes. Furthermore, point 72 of the Temporary Framework mandates the Commission to (i) assess whether the beneficiary holds significant market power in each one of the relevant markets in which it operates and (ii) require remedies in those markets. As a result, the Temporary Framework demands a competitive assessment aligned with the one normally required in antitrust and merger cases. Ryanair referred in its observations to the Oxera report, which analysed SAS' market shares on 567 routes that SAS operated to and from Scandinavian countries during the Summer 2019 IATA Season.

(202) Second, Ryanair argues that, in the Opening Decision, the Commission's assessment of SAS' market power presents a number of flaws: (i) the Commission failed to undertake a forward-looking approach and only relied on historical data for the Summer 2019 and Winter 2019/2020 IATA Seasons; (ii) the Commission failed to consider airports where SAS had no base while it is not necessary for an airline to have a base to successfully operate in an airport; (iii) the Commission failed to take account of other barriers to entry than slot constraints, such as economies of scope, branding, promotions and customer loyalty, network economies or the risk of aggressive retaliation by incumbents; and (iv) the Commission wrongly ignored the degree of fragmentation of competitors at the airports, inappropriately focused on slot holdings instead of market shares, and did not assess airports in sufficient detail.

4.2.8. *The Commission cannot waive the prohibition of non-mandatory coupon payments (point 77 of the Temporary Framework)*

(203) Ryanair states that there was no exceptional circumstance which could justify a deviation from point 77 of the Temporary Framework. The COVID-19 pandemic itself may not constitute such exceptional circumstance, because the Temporary Framework already takes into account the exceptional character of that pandemic and lays down requirements on that basis.

(204) As to the specific features of the Measure, Ryanair criticises several inconsistencies.

(205) First, it considers that the description of the negotiations on burden-sharing with bondholders presents a contradiction. In its view, the Commission claimed that '*the payment of [the] coupons was included in the negotiations with certain bondholders*', while '*it was expected to be a key consideration for all the bondholders to agree to conversion*'.Second, Ryanair notes that the Commission explains that the aim of the ban on non-mandatory coupon payments is to minimise the amount of aid needed. Yet, in its view, the Commission found that waiving the ban was expected to decrease the amount of State aid injected. According to Ryanair, the prohibition laid down in point 77 of the Temporary Framework is to impose a binding commitment on the beneficiaries of the recapitalisation aid, to avoid negotiating with investors on this point and ultimately reduce the amount of aid needed. In Ryanair's view, the bondholders already had sufficient incentives to invest, given the significant backing of the aid by Denmark and Sweden.

(206) Third, Ryanair asserts that the Commission's assessment was based on the wrong counterfactual, namely that SAS would simply have received more aid to cover its financial needs in case the bondholders were not to agree with the prohibition of non-mandatory coupon payments. In that regard, Ryanair considers that the appropriate counterfactual, absent the bondholders' consent, would be that SAS would have obtained less aid, or no aid at all.

(207) Fourth, Ryanair considers that the fact that the waiver of the ban on non-mandatory coupons may have been a key element for bondholders to participate in the recapitalisation could not justify the Commission's deviation from the Temporary Framework. The fact that '*the Temporary Framework does not impose any burden-sharing requirement*' (recital 206 of the opening decision) would be irrelevant according to Ryanair because point 77 of the Temporary Framework allegedly imposes some burden-sharing, as acknowledged by the Commission in recital (198) of the opening decision: '*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)*'.

4.2.9. *The Commission does not require the notification of a restructuring plan in time (point 85 of the Temporary Framework)*

(208) Ryanair states that the six-year period after which Member States may be obliged to submit a restructuring plan of the beneficiary of a recapitalisation measure as set out in point 85 of the Temporary Framework does not incentivise the exit of the State. It is also in stark contrast with the 2008 Banking Communication ([136]), which allegedly required banks to provide a restructuring plan before recapitalisation could even be authorised. According to Ryanair, such a lax approach, paired with the absence of any structural measures aimed at remedying competition distortions, is incompatible with the principle of proportionality. It also contradicts point 45 of the Temporary Framework, which establishes that '*the issuing of [recapitalisation] instruments should be subject to stringent conditions because they are highly distortive for competition between undertakings*'. Accordingly, the Commission should require a restructuring plan to be notified much earlier.

5. COMMENTS FROM DENMARK AND SWEDEN ON INTERESTED PARTIES' COMMENTS

(209) The Danish and Swedish authorities reacted on four points raised by Ryanair in its comments, namely the unlawfulness of the aid, the common interest to intervene, the rules on free movement and the compliance with points 61 and 62 of the Temporary Framework.

5.1. An interim recovery of the aid is not justified

(210) The Danish and Swedish authorities understand from Ryanair's comments that the latter requested the Commission to order both the suspension of the unlawful aid and its provisional recovery. They acknowledge that in the context of a formal investigation, the Commission may issue an injunction to the Member State to provisionally recover the aid until the Commission has taken a position on compatibility with the internal market. However, provisional recovery of aid is at the discretion of the Commission. Furthermore, according to Article 13(2) of Council Regulation (EU) 2015/1589 (the 'Procedural Regulation') ([137]), the following conditions must be fulfilled for an interim recovery to be imposed:

— according to an established practice there are no doubts about the aid character of the measure concerned;

— there is an urgency to act;

— there is a serious risk of substantial and irreparable damage to a competitor.

(211) In this case, the Danish and Swedish authorities stress that there is no urgency to act, and the Measure is not causing risk of substantial and irreparable damages to Ryanair, or to any other competitor.

(212) Moreover, Denmark and Sweden assert that Ryanair did not substantiate why the conditions for the Commission to issue an injunction for provisional recovery of the aid were met in this case.

5.2. It was in the common interest to intervene in favour of SAS

(213) The Danish and Swedish authorities contest the allegation of Ryanair that SAS at the moment of the granting of the Measure was not '*uniquely positioned among all other airlines*' operating in Denmark and Sweden. Denmark and Sweden argue that SAS, with its extensive domestic and international network, played (and still plays) an essential role in maintaining air transport connections in, to and from Sweden and Denmark. For that reason, they considered it necessary to strengthen SAS' equity and its access to liquidity at a time when the viability of SAS was seriously threatened by the effects of the spread of COVID-19.

([136]) Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('Banking Communication') (OJ C 270, 25.10.2008, p. 8).

([137]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9, ELI: http://data.europa.eu/eli/reg/2015/1589/oj).

(214) Furthermore, according to Denmark and Sweden, the fact that the Commission based its assessment, inter alia, on information provided by Member States does not preclude the Commission from making an independent and thorough assessment of that information. The Commission's assessment is based on specific facts and data, which are not in themselves disputed by Ryanair and which show the important contribution made by SAS to employment, connectivity and the economies of Denmark and Sweden. In addition, the Danish and Swedish authorities point out that the Commission requested additional information on several occasions to assess whether point 49(b) of the Temporary Framework was met, thus demonstrating that the Commission carried out an independent assessment.

(215) In response to Ryanair's comment (recital (177)), Denmark and Sweden recall that the crucial point of the analysis was that Denmark and Sweden could not be certain that the level of connectivity provided by SAS would be maintained by other competitors at the time of the granting of the aid.

(216) Besides, Denmark and Sweden consider that Ryanair's assertions that low-fare airlines would replace SAS on all routes, thereby contributing to the economy and connectivity in Denmark and Sweden in the same way as SAS, are incorrect. The Swedish authorities indicate that functioning air transport connections are necessary for the country's economy, especially in view of Sweden's particular geographical position and characteristics ([138]). It was thus necessary, in their view, to maintain SAS' operations to ensure a sufficient level of connectivity, because SAS plays a decisive role in maintaining air connections to, from and within Sweden. SAS flies to thirteen Swedish cities and covers the entire country from Malmö in the south to Kiruna in the north. These domestic destinations are connected to Stockholm and Copenhagen as hubs, from which a connecting flight network is offered for travel both domestically and internationally. This allegedly makes SAS unique. Ryanair does not operate, in contrast to SAS, a business based on a hub-and-spoke network ([139]) and does not enable the same availability of foreign and domestic transfers.

(217) More generally, in the Danish and Swedish authorities' views, Member States have significant discretion when determining the common interest pursued to intervene in favour of a beneficiary, the Commission's control being limited to a manifest error of assessment. In the case of the Measure and the choice of intervening in favour of SAS, there is no such manifest error.

5.3. **The Measure complies with articles 18, 49 and 56 TFEU**

(218) The Danish and Swedish authorities argue that Article 107(3), point b, TFEU allows the granting of individual aid, and that therefore, if Member States comply with the conditions set out in Article 107(3), point (b), TFEU, the implicit exclusion of certain undertakings cannot be considered inextricably linked with the object of the aid measure. On that basis, Denmark and Sweden argue that the Commission is not competent, under State aid procedures, to verify whether exclusion of all undertakings other than SAS is contrary to the Treaty provisions on free movement ([140]).

([138]) The Swedish authorities indicated that a journey between Sweden's northernmost and southernmost point is longer than a journey from Luxembourg to Tunis, Istanbul, or Minsk. The most common means of transport to and from Sweden is by air, which accounts for approximately 70 % of all international passenger travel. The northernmost parts of Sweden also have a harsh winter climate and recurring problems with accessibility on the roads during the winter due to snow and ice. Air travel is thus of great importance for maintaining functioning communications throughout the country and is difficult to replace for most longer journeys and for journeys where there is no road connection.

([139]) A hub-and-spoke network is a business organisation where an airline not only transports passengers between two points but also connects the passengers of distant points via its hub. Routes are used as spokes connecting other cities via its hub. This system contrasts with the point-to-point model, used by Ryanair, in which there are no hubs, and nonstop flights are instead offered between spoke cities.

([140]) Denmark and Sweden refer in this respect among others to the judgment of 22 March 1977, *Iannelli* v *Meroni*, 74/76, ECLI:EU:C:1977:51, paragraph 14.

(219) As a subsidiary point, Denmark and Sweden consider that, were the Commission to make a substantive assessment of Ryanair's allegations in this respect, there is no basis for concluding that the Measure constitutes a restriction of free movement. According to Denmark and Sweden, the General Court held that, to demonstrate that an aid measure restricts free movement, it is necessary to identify the elements of fact or law that cause the aid measure to produce restrictive effects that go beyond those which trigger the prohibition in Article 107(1) TFEU ([141]).

5.4. **Compliance with points 61 and 62 of the Temporary Framework**

(220) In response to Ryanair's observations (recital (195)), the Danish and Swedish authorities refer to their joint comments on the opening decision. They reiterate that the Measure should be declared compatible with the internal market since it already provides for the required incentives in compliance with point 62 of the Temporary Framework. Alternatively, the Measure should be declared compatible with the internal market based directly on Article 107(3), point b, TFEU.

(221) In its request for information dated 9 November 2023 submitted to Denmark and Sweden, the Commission asked Denmark and Sweden to provide their views on the mechanism put forward by SAS in its comments.

(222) Denmark and Sweden confirmed that, like SAS, they consider that the Measure, as granted to SAS on 26 October 2023, complies with point 62 of the Temporary Framework, without there being a need to implement the mechanism envisaged by SAS (section 3.1). The Danish and Swedish authorities nonetheless acknowledged, in response to the Commission's questions, that the mechanism put forward by SAS would meet the conditions of points 61 and 62 of the Temporary Framework. They also acknowledged that there would be no major barrier, be it legal or economic, that would prevent the implementation of such mechanism. Lastly, they acknowledged that they had not identified alternative options to the mechanism envisaged by SAS that would be manifestly less onerous to SAS or Denmark and Sweden while still meeting the conditions of points 61 and 62 of the Temporary Framework.

6. **ASSESSMENT OF THE MEASURE**

6.1. **Existence of State aid**

(223) 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.

(224) The Measure is imputable to the State since it was granted and has been administered by the Danish and Swedish authorities (recital (90)). 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 (recital (91)).

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

(226) The advantage granted by the Measure was selective since Denmark and Sweden awarded it only to one undertaking, namely SAS.

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

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

([141]) Denmark and Sweden refer in this respect among others to the judgment of 14 April 2021, *Ryanair* v *Commission*, T-378/20, ECLI:EU:T:2021:194, paragraph 81.

6.2. **Lawfulness of the State aid**

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

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

(231) As indicated in recital (164), Ryanair requested the Commission to order Denmark and Sweden to immediately suspend the aid and ask SAS to pay interests for the period during which the unlawful aid has remained at the disposal of SAS.

(232) According to Article 13(1) of the Procedural Regulation, '*the Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market*'.

(233) It follows from that provision that the suspension injunction is left at the discretion of the Commission ([142]), and is subject to compliance with certain procedural rules, i.e. the Commission must adopt a specific decision in that regard, after giving the Member State the opportunity to submit its comments. Furthermore, according to the case-law, when exercising its discretion, the Commission is not required to state the reasons for its choice not to adopt a suspension order in any given case ([143]).

(234) Since the object of the present decision is to close the formal investigation procedure in relation to the Measure, by taking a final stance on the compatibility of that aid with the internal market, it is not necessary to assess in the present decision the need for a suspension injunction.

(235) As indicated in section 5.1, Denmark and Sweden observe that Ryanair also appears to request the Commission to order Denmark and Sweden to recover provisionally the unlawful aid from SAS ([144]). According to Denmark and Sweden, however, the Commission may only order the provisional recovery of the aid if all the conditions laid down in Article 13(2) of the Procedural Regulation are fulfilled.

(236) The Commission notes that the injunction for provisional recovery provided under Article 13(2) of the Procedural Regulation, is also left at the discretion of the Commission, and is indeed subject to the conditions recalled by Denmark and Sweden in recital (211). Ryanair did not indicate whether any of the cumulative conditions under Article 13(2) of the Procedural Regulation were met in the present case. In any event, since the object of the present decision is to close the formal investigation procedure in relation to the Measure, by taking a final stance on the compatibility of that aid with the internal market, it is also not necessary to assess in the present decision the need for a recovery injunction.

6.3. **Compatibility of the State aid**

(237) 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 the aid was granted, i.e. on 26 October 2020.

(238) The Commission notes that the Danish and Swedish authorities notified the Measure under Article 107(3), point b, TFEU, as interpreted by the Temporary Framework.

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

([142]) Judgment of 22 April 2016, *Ireland and Aughinish Alumina Ltd* v *Commission*, T-50/06 RENV II and T-69/06 RENV II, EU:T:2016:227, paragraphs 79 and 259.

([143]) Judgment of 25 April 2018, *Hungary v Commission*, T-554/15 and T-555/15, ECLI:EU:T:2018:220, paragraph 112.

([144]) The Commission notes, however, that it is not entirely apparent from Ryanair's observations that the latter requested a provisional recovery pursuant to Article 13(2) of the Procedural Regulation.

(240) 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), point 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*'.

(241) 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 or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 pandemic, 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 the pandemic.

(242) The Measure falls within the scope of section 3.11 of the Temporary Framework as it is a recapitalisation measure, in the form of equity and hybrid instruments aiming at strengthening the equity of SAS and its access to liquidity threatened by the fallout of the COVID-19 pandemic (recital (17)).

(243) Point 48 of the Temporary Framework states that COVID-19 recapitalisation measures may not be granted later than 30 September 2021 ([145]). The Commission notes that Denmark and Sweden granted the Measure on 26 October 2020.

(244) Therefore, in the following sections, the Commission will assess the compatibility of the Measure under section 3.11 of the Temporary Framework, which was the applicable legal basis in force at the time when the aid was granted.

6.3.1. *Eligibility and entry conditions*

(245) According to point 49 of the Temporary Framework, a COVID-19 recapitalisation measure must fulfil four conditions. Those conditions are assessed successively in the following sections.

6.3.1.1. Compliance with point 49(a) of the Temporary Framework

(246) According to point 49(a) of the Temporary Framework, Member States must show that '*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*'.

(247) It is apparent from the facts provided by Denmark and Sweden (section 2.1.3), that without the Measure, SAS would have gone out of business, or at the very least, it would have faced serious difficulties to maintain its operations.

(248) First, SAS registered a negative equity already as of April 2020, thus putting at risk its solvency (recital (63)). SAS' liabilities exceeded its assets, as shown by the deterioration of its debt-to-equity ratio. SAS' accumulated losses continued to increase over the next months, while its equity continued to deplete (recital (64)). In July 2020, Denmark and Sweden estimated that SAS' equity would reach SEK minus 9,4 billion by December 2020, rendering its capital structure unviable (recital (65)).

(249) Second, not only did SAS' equity deteriorate significantly and rapidly, but its liquidity position also appeared unsustainable. Denmark and Sweden estimated that SAS would run out of liquidity by the end of December 2020 (recital (65)). In other words, they were anticipating a default situation in the short term. A market credit rating agency, Moody's, clearly confirmed that estimation (recital (65)).

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

(250) Third, it is noteworthy that SAS found itself in a distressed financial situation despite the fact that it took significant cost-cutting initiatives to mitigate losses (see section 2.1.3.1), by operating at low capacity to reduce variable costs (recital (51)), by taking actions to preserve cash through notably the postponing of aircraft delivery and renegotiation of supplier's contracts (recital (52)); and by restructuring its business to operate in a context of constrained demand through the reduction of staff (recital (53)).

(251) The Commission therefore considers that Sweden and Denmark demonstrated that without State intervention, SAS would have gone out of business, or at the very least, it would have faced serious difficulties to maintain its operations.

(252) That conclusion is further reinforced by the fact that, at the time of the granting of the Measure, there were clear signs of a second wave of COVID-19 pandemic resurging, not anticipated in SAS' business plan, with travel restrictions being reintroduced and reinforced in Denmark and Sweden (recitals (22) to (24), (30) to (31) and (41)). Those travel restrictions were therefore likely to further affect and deteriorate SAS' already fragile financial position.

(253) Contrary to what Ryanair claims in recital (172), the Commission is not required under point 49(a) of the Temporary Framework to assess an alternative scenario in which SAS would have downsized its 'non-systemic' activities or found alternative funding on the market. Point 49(a) of the Temporary Framework requires Member States to demonstrate that the beneficiary would go out of business or face serious difficulties to maintain its operations *without the State intervention*. No other alternative scenario, such as a scenario in which the beneficiary would have downsized or restructured its activities, is therefore envisaged under point 49(a) of the Temporary Framework.

(254) In any event, the Commission points out that Denmark and Sweden provided the required demonstration of the satisfaction of the requirement set out at point 49(a) in a situation where SAS downsized its activities to a significant extent.

(255) As indicated in recitals (35) to (39), SAS swiftly reacted to the evolution of the COVID-19 pandemic and the travel restrictions. For example, as soon as the Swedish and Danish legislation allowed it, SAS immediately and vastly used temporary layoffs (recital (38)). SAS rapidly designed, by 24 April 2020, a new business plan, focusing notably on cost-reduction initiatives (recitals (49) and (50)), and started to implement it without delay (recitals (37), (51) and (53)) ([146]). At the time of the granting of the Measure, SAS had finalised its redundancy programme (recital (53)); it had renegotiated with more than 200 of its suppliers across all sectors, postponed the delivery of 10 aircraft (recitals (52) and (54)) and implemented its new weekly assessment of the demand to adjust its capacity accordingly in order to reduce its variable costs (recital (51)). As a result, SAS showed a rapid and diligent reaction to the COVID-19 pandemic and the travel restrictions.

(256) Furthermore, SAS took a substantial number of cost-savings initiatives. SAS proposed in its initial business plan to reach a cost reduction target of SEK 5,4 billion for 2020 and SEK 4,5 billion beyond 2021, i.e. a cost reduction almost equal to the amount of the Measure (recitals (40) to (46)). It is noteworthy that the board of SAS nevertheless asked for further cuts (recital (47)), which SAS identified and committed to implement, including through a partial divestment of assets such as ground-handling (recital (48)). As a result, the cost reduction target for 2020 was substantially increased (recital (49)). Not only were the cost reduction targets substantial, but they also covered all the different activities of SAS, including cargo, ground-handling services, overhead, passenger services, etc. (recitals (41), (43), (45) and (48)).

(257) As to whether SAS could have found alternative funding on the market, that assessment is the object of point 49(c) of the Temporary Framework, and not of point 49(a) thereof.

(258) In light of all those elements, the Commission concludes that the Measure complies with point 49(a) of the Temporary Framework.

([146]) In particular, SAS had already entered discussions with lessors and suppliers to postpone/waive delivery of aircraft or payments for other assets on 12 March 2020. It also drastically reduced capacity in April and May 2020, operating at less than 10 % of its capacity; and it announced a large redundancy plan on 28 April 2020, 4 days after the adoption of the business plan.

6.3.1.2. It is in the common interest to intervene

(259) According to point 49(b) of the Temporary Framework, Member States must demonstrate that *'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'*.

(260) It appears from the description of the facts contained in section 2.1.4 that Denmark and Sweden notably relied on two of the justifications provided under point 49(b) of the Temporary Framework to explain that it was in the common interest to intervene in favour of SAS.

(261) Before examining those justifications more in detail, it is necessary to address the general comments submitted by, first, Ryanair, and then, Denmark and Sweden.

(262) First, as indicated in recital (173), Ryanair contends that the Commission exclusively relied on elements provided by Denmark and Sweden in the opening decision to assess the compliance of the Measure with point 49(b) of the Temporary Framework, instead of performing its own autonomous assessment. The Commission recalls in that regard that Denmark and Sweden had submitted their joint notification of the Measure on 11 August 2020, and that the notification contained the motives according to which Denmark and Sweden considered the Measure as compliant with point 49(b) of the Temporary Framework. The Commission presented and assessed those elements in the opening decision and found on a preliminary basis that they did not raise any doubts. The crucial point is not whether the Commission relies on information submitted by Member States, but whether that information is accurate, sufficient and supported by evidence, and has been adequately assessed by the Commission. In the present case, none of the information provided by those Member States seemed to raise doubts as to their accuracy, sufficiency or validity. Besides, the purpose of the formal investigation procedure is to give interested parties the possibility to provide their comments in view of enabling the Commission to carry out a full assessment of the facts and information at its disposal. However, as correctly noted by the Danish and Swedish authorities (recital (215)), no interested parties, including Ryanair, have disputed the veracity of the facts presented in the opening decision, but only their relevance and interpretation for the purpose of assessing whether it is in the common interest to intervene in favour of SAS.

(263) Secondly, concerning the relevance of the data related to the contribution of the aviation sector for the Danish and Swedish economy (recital (175)), that data is relevant to examine whether it is in the common interest to intervene in favour of the beneficiary, pursuant to point 49(b) of the Temporary Framework.

(264) Lastly, contrary to what Ryanair claims in recital (179), point 49(b) of the Temporary Framework requires Member States to demonstrate, and the Commission to assess, that it is in the common interest to intervene pursuant to at least one of the justifications provided under that provision. Therefore, once the Commission establishes the existence of that common interest, it is not required, as suggested by Ryanair, to assess whether the beneficiary could further downsize or suppress non-essential activities without endangering the pursuit of the common interest identified.

(265) As regards the comment of the Danish and Swedish authorities in recital (218), according to which the Commission's assessment as to what Member States consider as the common interest to intervene is limited to the control of the manifest error of assessment, that comment must be rejected. According to settled case-law, when applying Article 107(3), point b, TFEU, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Union context ([147]). Therefore, the Commission's control under point 49(b) of the Temporary Framework is not limited to a control of the manifest error of assessment of the justification provided by the Member State.

([147]) See to that effect judgment of 12 December 2014, *Banco Privado Português, SA* v *Commission*, T-487/11, ECLI:EU:T:2014:1077, paragraph 83.

(266) It is in the light of those preliminary considerations that the Commission will assess whether the Measure complies with point 49(b) of the Temporary Framework, taking into account the submissions of interested parties and of Denmark and Sweden in the context of the formal investigation procedure.

Risk of disruption to an important service

(267) *First*, as indicated in recitals (68) and (71), SAS operates an important domestic and international network that ensures connectivity within and outside Denmark and Sweden. In both Member States, SAS operated before the COVID-19 pandemic regular ([148]) all year long and numerous domestic connections to the different regions of those Member States ([149]). SAS accounted for 40 % of the domestic passengers transported in Denmark in 2019, and 50 % in Sweden, as the largest air carrier in Denmark and Sweden. Furthermore, through its hubs of Copenhagen and Stockholm, SAS connected domestic passengers with international flights, offering air services to and from the main Union and international business centres. SAS accounted for 30 % of the total number of international passengers transported to and from Denmark, and 25 % to and from Sweden. Those air services are all the more necessary for Sweden given its relatively remote geographical position in the Union and the width of its territory (and for which alternative modes of transport are not as efficient or appropriate as air transport), and for Denmark given notably its islands (for example Faroe Islands and Bornholm). In total, SAS offered more than 100 routes to, from and within Denmark and more than 150 routes to, from and within Sweden.

(268) *Second*, SAS provided essential cargo and passenger services during the COVID-19 pandemic (before the granting of the Measure), by operating special repatriation flights (recital (51)), transporting medical equipment and pharmaceutical products to Denmark and Sweden and contributing to ensure the continuity of the production chain for Swedish and Danish businesses (recital (73)). Furthermore, SAS maintained domestic and international connections during the pandemic, allowing essential travel to take place (recitals (68) and (71)). No other airlines provided similar services in those countries, which were particularly essential in a context where Sweden and Denmark were seeking to limit the effects of the spread of the pandemic. Therefore, SAS' exit from the market could have caused, at that time, and in view of the context of the COVID-19 pandemic, a disruption to an important service. This was especially the case since a second wave of COVID-19 had already broken out at the time of the granting of the Measure (recitals (22) and (23)), thus potentially requiring the mobilisation again of SAS' air services to bring essential cargo to Sweden and Denmark or to repatriate Danish and Swedish residents.

(269) Based on those elements, the Commission observes that SAS was providing important air passenger and cargo transport services from, to and within Denmark and Sweden, including during the COVID-19 pandemic. A failure of SAS, or its serious difficulties to maintain its business, would clearly have led to a risk of depriving, immediately, Denmark and Sweden of important air services for their economy.

(270) Ryanair asserts that, under point 49(b) of the Temporary Framework, the Commission must show that all of the beneficiary's activities are irreplaceable or, alternatively, it must identify the share of its activities that cannot be replaced (recital (177)). The Commission considers that such requirement does not stem from the wording or the objective of point 49(b) of the Temporary Framework. Point 49(b) provides that the common interest to intervene can be demonstrated by '*a risk of disruption of an important service*'. In that respect, as correctly pointed out by Denmark and Sweden in recital (216), it is sufficient to demonstrate that the important service in question may not be replicated to the same or a similar extent by other undertakings, as, by definition, such finding would characterise the existence of a risk of disruption of important services.

([148]) 250 monthly domestic flights in Denmark between Copenhagen and three other Danish cities; 150 monthly domestic flights in average in Sweden between Stockholm/Gothenburg and twelve other Swedish cities.

([149]) Both for Denmark and Sweden, the cities served by SAS are geographically dispersed throughout the territory of Sweden and Denmark, and not concentrated in specific regions.

(271) In any event, as to whether other airlines could have replaced SAS' important services to offset, within a short period of time, the effects of the disruption of those services in Denmark and in Sweden, the Commission analyses below, for the sake of completeness, the capacity and offer deployed by competitors both at domestic and international levels. The Commission notes, however, that the submissions provided by Ryanair only dispute the importance of the commercial air passenger services provided by SAS, which is only one factor taken into account by the Commission among others. Ryanair does not dispute in its observations the importance of the cargo and repatriation services that SAS carried out during the COVID-19 pandemic for Denmark and Sweden (recital (269)).

Denmark

(272) The Commission observes that, for domestic services, based on the elements provided by Denmark described in recital (68), only Norwegian Air Shuttle ([150]) (with one domestic route) and Danish Air Transport ([151]) provided a meaningful amount of domestic air services in 2019 ([152]). Between January and September 2020, during the COVID-19 pandemic, Norwegian Air Shuttle reduced its domestic air services in Denmark with its market share declining from 29 % to 24 %, while that of Danish Air Transport increased from 22,5 % to 28,5 %. SAS remained the biggest airline at domestic level with close to 40 % of the total number of domestic passengers transported.

(273) As for international services to and from Denmark, Norwegian Air Shuttle and Ryanair ([153]) were, behind SAS, the main airlines in terms of passengers transported to and from Denmark, with respectively 15 % and 9 % of the total number of international passengers transported in 2019. The Commission notes that both Norwegian Air Shuttle and Ryanair had a great share of seasonal routes from and to Denmark (54 routes out of 85 for Norwegian Air Shuttle and 25 routes out of 48 routes for Ryanair) compared to SAS (36 routes out of more than 100 routes). Between January and September 2020, Norwegian Air Shuttle also registered a decrease in the share of passengers transported (from 15 % to 11 %); all other airlines maintained more or less their market shares (Ryanair's slightly increased by 1 % while those of EasyJet ([154]) slightly decreased). It is also apparent from Ryanair's submission that Norwegian Air Shuttle found itself in serious financial difficulties at the onset of the COVID-19 pandemic ([155]). That fact is also supported by SAS' internal documents ([156]) and press releases ([157]).

(274) In light of the foregoing elements, the following conclusions can be drawn. First, it appears that Norwegian Air Shuttle, SAS' main competitor both at domestic and international level in Denmark, was experiencing serious financial difficulties, which makes it unplausible to expect that this company would have been capable of taking over all or a significant part of SAS' services to, from and within Denmark over the short-term. Second, as to Danish Air Transport, the Commission notes the limited size of that company, which operated a small number of routes ([158]) with less than 20 aircraft (comprising small aircraft) ([159]), rendering it also unlikely that it could substitute

([150]) Norwegian Air Shuttle is a low-cost carrier which, before the COVID-19 pandemic, had a relatively comparable size as SAS operating domestic, international and intercontinental flights.

([151]) Danish Air Transport was a regional airline composed of a smaller fleet (10–20 aircraft).

([152]) In Denmark, Norwegian Air Shuttle transported 29 % of the total number of domestic passengers in 2019, and Danish Air Transport 22 %. In Sweden, Braathens Regional transported 30 % of the total number of domestic passengers in 2019, and Norwegian Air Shuttle 18 %.

([153]) Ryanair is also a low-cost airline, and the biggest airline in Europe providing mostly intra-European flights.

([154]) EasyJet is one of the major low-cost carriers in Europe.

([155]) In page 29 of the Think Tank Article, the extract reads: '*According to Roland Berger's estimates, Norwegian had a cash position at the beginning of the year that would enable it to go less than a month without any activity. […] Although the Norwegian parent company experienced some relief on 4 May 2020 thanks to a rescue package, which provided it with a contribution of EUR 880 million, its financial situation remains very precarious*'.

([156]) Annex 40.1 to the notification of Denmark and Sweden. At the meeting of 7 May 2020, the board of SAS discussed the ongoing restructuring process of Norwegian Air Shuttle.

([157]) See for example the press report dated of 1 May 2020 from Reuters, available at: https://www.reuters.com/article/uk-health-coronavirus-norwegianair-histo-idUKKBN22D4QZ (last accessed on 28 November 2023). See also press report of 20 April 2020 from the website CNBC, available at: https://www.cnbc.com/2020/04/20/norwegian-says-4700-jobs-at-risk-after-unit-bankruptcies-contracts-axed.html (last accessed on 28 November 2023).

([158]) See the Airline's Market Study, in which Table 3 indicates that Danish Air Transport operated 9 domestic routes and 4 international routes in 2019.

([159]) See the website of Danish Air Transport: https://dat-corporate.com/about-us/dat-fleet/ (last accessed on 28 November 2020). Part of the fleet of Danish Air Transport was composed of ATRs, which are aircraft designed for regional transport with limited capacity (50 to 70 seats). See also an estimation of the historical fleet of Danish Air Transport (estimated at 14 aircraft) provided by Planespotters.net available at: https://www.planespotters.net/airline/Danish-Air-Transport?refresh=1 (last accessed on 28 November 2020).

even part of SAS' services over the short term, with similar network, capacity, and frequency. Lastly, as for Ryanair, it is also unlikely that that company would have taken over SAS' services over the short term. Ryanair did not operate any domestic traffic in Denmark, and its international traffic was limited to 23 yearlong routes before the COVID-19 pandemic, i.e. almost three times less than SAS, while the total number of routes of Ryanair to and from Denmark was half that of SAS. It is therefore reasonable to consider that that airline would not have replaced SAS' services over the short-term, in view also of the context of the aviation sector following the COVID-19 pandemic and the second wave of that pandemic that had irrupted at the time of the granting of the Measure (recitals (22) to (24) and (31)). The Commission notes in that regard that Ryanair did not provide any plans for expansion concerning its operations in Denmark at the time of the granting of the Measure.

(275) The data provided by Ryanair in the Airline's Market Study (recital (169)) do not allow to conclude otherwise. That study presents, in essence, the evolution of the air traffic to, from and within Denmark between 2014 and 2019, in terms of seats offered and number of routes proposed by airlines. The Airline's Market Study concludes that low-cost carriers expanded much more rapidly between 2014 and 2019 (increase of 66 % of the growth of seats offered and increase of 62 routes) than 'Danish-domiciled airlines' such as SAS, which had allegedly only contributed to 3 % of the growth of seats capacity and added only 14 routes.

(276) However, the Airline's Market Study is incomplete on several aspects.

(277) *First*, it only describes the evolution of the air traffic to, from and within Denmark between 2014 and 2019, but does not provide any indication on the consequences of the COVID-19 pandemic on air traffic to, from and within Denmark, which is a key element for the assessment under point 49(b) of the Temporary Framework in the present case. The fact that low-cost carriers increased their presence over the five-year period contemplated by the analysis does not constitute evidence that such increase would have continued following the COVID-19 pandemic that affected the entire aviation sector. On the contrary, the data provided by Denmark show that between January and September 2020, low-cost carriers such as Norwegian Air Shuttle and EasyJet reduced their shares of passengers transported to and from Denmark, while Ryanair only slightly increased its share.

(278) *Secondly*, although low-cost carriers increased their offer for international air services from and to Denmark between 2014 and 2019, the same was not the case for domestic traffic: low-cost carriers only operated two domestic routes, without any increase between 2014 and 2019, and the capacity in terms of seats offered on those domestic routes decreased over that 5 year period.

(279) *Thirdly*, the study provides no indication as to the regularity and frequency of the offer provided by the different airlines analysed, nor even the network and the destinations they proposed. It only gives indication on the number of seats offered and the number of routes operated by airlines. However, the data provided by the Danish civil aviation and railway authority show that, if low-cost carriers such as Norwegian Air Shuttle and Ryanair operated a substantial number of routes to and from Denmark in 2019, more than half of them were seasonal routes (recital (275)), thus not operated at regular frequencies throughout the year.

(280) *Fourthly*, the study distinguishes between SAS and 'low-cost carriers' when analysing Denmark's growth between 2014 and 2019 in terms of routes and seats offered. However, it does not provide specific information for each of the 'low-cost carriers' analysed. As it is apparent from recital (68), there is great disparity between low-cost carriers, with Norwegian Air Shuttle that operated, in 2019, 85 routes to, from and within Denmark, and EasyJet that operated only 16 routes to and from Denmark. By the same token, as indicated in the Think Tank Article provided by Ryanair, low-cost carriers were not all in the same financial situation at the time of the granting of the Measure: for example, Norwegian Air Shuttle had experienced severe financial difficulties compared to Ryanair.

(281) *Lastly*, although the Airline's Market Study found that '*SAS, as the primary carrier, is not the growth vehicle*' for air traffic between 2014 and 2019, the fact remains that in 2019, as shown by that study, SAS operated 95 routes from, to and within Denmark, with 7,1 million seats offered ([160]). In comparison, the low-cost carriers' group ([161]) operated 171 routes from, to and within Denmark, with 7,1 million seats offered. In other words, SAS deployed a seat capacity in 2019 to, from and within Denmark that was equal to that of all the low-cost carriers combined, and offered a number of routes that corresponded to more than half of the total number of routes operated by all low-cost carriers combined. That finding reinforces the conclusion that it would be difficult for low-cost carriers, contrary to what is claimed by Ryanair, to substitute SAS' operations over the short-term, in a context of the COVID-19 pandemic severely affecting the aviation sector.

Sweden

(282) The Commission observes that, based on the elements provided by Sweden and described in recitals (70) to (71), Braathens Regional and Norwegian Shuttle Air were at domestic level the airlines providing a meaningful amount of services besides SAS, with respectively 30 % and 18 % of the total number of domestic passengers transported. Braathens Regional is a regional airline ([162]) operating mostly domestic traffic in Sweden, with a small fleet (10 to 15 aircraft) ([163]) composed of small aircraft ([164]). Between January and September 2020, the Commission notes that at domestic level, Braathens Regional's share of passengers transported decreased from 30 % to 20 %. In that regard, it is worth mentioning that Braathens Regional entered bankruptcy proceedings as of April 2020, halting all of its traffic until after the summer 2020 ([165]). As indicated in recital (274), Norwegian Air Shuttle's share of passengers transported also decreased from 18 % to 14 %.

(283) As for international services to and from Sweden, besides SAS, Norwegian Air Shuttle accounted for 18 % of all the international passengers (more than 5 million passengers) transported in 2019, followed by Ryanair with 8 % (more than 2 million passengers), and Wizz Air and Lufthansa with around 5 % (more than 1 million). Wizz Air is a low-cost carrier of a size more or less comparable with that of SAS, while Lufthansa is one of the biggest airlines in Europe. Between January and September 2020, during the COVID-19 pandemic, it is worth noting that SAS' main competitor, Norwegian Air Shuttle, significantly reduced its share of international passengers from 18 % to 13 %, while that of Ryanair remained stable.

(284) In light of those elements, the following conclusions can be drawn. First, it appears that Norwegian Air Shuttle, SAS' main competitor both at domestic and international level in Sweden, was experiencing serious financial difficulties, which makes it implausible that this company would have been capable of taking over all or part of SAS' services to, from and within Sweden over the short-term. Second, as to Braathens Regional, the Commission notes the limited size of that company, which operated with a much smaller fleet than SAS, and which, like Norwegian Air Shuttle, faced serious difficulties to maintain its business. In that context, it was implausible that that company could have substituted even part of SAS' services over the short term at domestic level. Lastly, as for Ryanair, it is also unlikely that that company would have taken over SAS' services over the short term. Ryanair did not operate any domestic traffic in Sweden, while its network to and from Sweden consisted of 44 routes between January and September 2020, against 85 for SAS ([166]), i.e. around half. It is therefore reasonable to consider that that airline would not have replaced SAS' services over the short-term, in view also of the context of the aviation sector

([160]) See Table 3 of the Airline's Market Study. The figures used in that table only include flights in Denmark and intra-European flights from and to Denmark. Since SAS also operates several intercontinental destinations, the numbers for SAS are under-estimated.

([161]) The Commission assumes that this group is composed *at least* of Norwegian Air Shuttle, Ryanair, and EasyJet, which were the main low-cost airlines behind SAS in Denmark in 2019.

([162]) See Braathens Regional's website, available at: https://www.flygbra.se/en/about-braathens-regional-airlines/corporate-information (last accessed on 28 November 2023).

([163]) See an estimation of the historical fleet of Braathens Regional provided by Planespotters.net available at: https://www.planespotters.net/airline/BRA-Braathens-Regional-Airlines (last accessed on 28 November 2023). See also an indication provided by the website Aviation24, available at: https://www.aviation24.be/airlines/bra/braathens-regional-airways-files-for-bankruptcy/ (last accessed on 28 November 2023).

([164]) Braathens Regional operated only with ATR 72/600, with a seat capacity of 72 passengers.

([165]) See for example the website Aviation24 available at: https://www.aviation24.be/airlines/bra/braathens-regional-airways-files-for-bankruptcy/ (last accessed on 28 November 2023). See also https://simpleflying.com/covid-airline-bankruptcies/ (last accessed on 28 November 2023).

([166]) Data from the Swedish Transport Agency.

following the COVID-19 pandemic and the second wave of the pandemic that had irrupted at the time of the granting of the Measure. The Commission notes in that regard that Ryanair did not provide any plans for expansion concerning its operations in Sweden at the time of the granting of the Measure.

(285) For the same reasons set out in recitals (278) to (281), the data provided by Ryanair in the Airline's Market Study do not allow to conclude otherwise. Although that study found that '*SAS, as the primary carrier, is not the growth vehicle*' for air traffic between 2014 and 2019 in Sweden, the fact remains that in 2019, as shown by the study itself, SAS operated 107 routes from, to and within Sweden, with 10 million seats offered ([167]). In comparison, the low-cost carriers' group ([168]) operated 227 routes from, to and within Sweden, with 8,2 million seats offered. In other words, SAS' deployed in 2019 a seat capacity that was higher than that of all the low-cost carriers combined, and a number of routes offered that corresponded to almost half of the total number of routes operated by all low-cost carriers combined. That finding reinforces the conclusion that it would be difficult for low-cost carriers to substitute SAS' operations over the short-term, in a context of the COVID-19 pandemic severely affecting the aviation sector.

Conclusion

(286) The Commission therefore concludes that SAS' exit would have caused a disruption to important air services for Denmark and for Sweden, both for the domestic and international connections of those two Member States, as it is unlikely that any airline, including SAS' main competitors, would have been capable of taking over and maintaining SAS' operations over similar network, capacity and frequency, or even a significant part of them, over the short term (if not beyond), in a context in which the entire aviation sector was gravely affected by the COVID-19 pandemic. In that regard, the Commission concludes that Denmark and Sweden (recital (216)) could not be certain, at the time of the granting of the aid, that the level of connectivity provided by SAS would be maintained by other competitors.

(287) Furthermore, as indicated by the Swedish authorities in recital (217), there was a clear risk for Denmark and Sweden to lose a service based on a hub-and-spoke model, whereby SAS allowed domestic passengers to seamlessly connect with international flights, thus ensuring both domestic and international connectivity of Denmark and Sweden with major business centres in the Union and beyond. That service was not provided by any of the main competitors of SAS, before and after the COVID-19 pandemic.

(288) Those conclusions are not called into question by Ryanair's general claim in recital (177), based on the Commission's 2014 Competition policy brief, according to which airlines that have gone bankrupt in the past are generally replaced by more efficient airlines such as low-cost airlines, as illustrated by the alleged precedents of Sabena, Malev and Spanair. The Commission notes first that that article explicitly provides for a disclaimer unambiguously indicating that it did not express an official statement of the Commission. In any event, the Commission notes that that article, written in 2014, did not relate to the situation of a potential bankruptcy of an airline in a context of a pandemic affecting severely the entire sector, such as that of the COVID-19 pandemic. Similarly, concerning the precedents of Malev and Spanair ([169]) cited by Ryanair, the Commission considers that they correspond to situations that all occurred in a different context and at a different time, in Member States with a different geographic and market situation and all in relation to different companies. They do not inform the Commission as to whether, in the present case, there was no risk of disruption of the important air services provided by SAS for Sweden and Denmark in a context of a severe health crisis affecting the entire aviation sector.

([167]) The figures used in the Airline's Market Study only include flights in Sweden and intra-European flights from and to Sweden. Since SAS also operates several intercontinental destinations, the numbers for SAS are under-estimated.

([168]) The Commission assumes that this group is composed *at least* of Norwegian Air Shuttle, Ryanair, and Wizz Air, which were the main low-cost airlines behind SAS in Sweden in 2019.

([169]) Ryanair did not submit any information concerning the consequences of the bankruptcy of Sabena.

(289) Furthermore, Ryanair's claim that the Commission contradicts itself by concluding on the one hand that SAS' operations could not be replaced while on the other hand, that SAS does not hold market power, is also without merit. Ryanair equates the disruption of important services with the holding of significant market power. However, an undertaking may carry out important services from the Member State's perspective, without necessarily enjoying significant market power.

Avoiding social hardship and market failure due to significant loss of employment

(290) The Commission also observes that SAS is an important direct and indirect employer in Denmark and Sweden. First, SAS still employed directly close to 6 000 workers (recital (74)), focused its air transport services on business travel (more than 50 % of its passengers since 2015) and spent approximately SEK 4 billion in 2019 in suppliers' expenses, thus contributing also indirectly to the Swedish and Danish GDPs (recital (75)). In that regard, Denmark and Sweden measured through studies that SAS contributed directly and indirectly to Danish and Swedish GDP with several billions annually (recital (75)).

(291) The Commission therefore considers that SAS' exit from the market could have caused serious social hardship through the direct and indirect effects resulting from the loss of employment that SAS' bankruptcy/default would risk triggering. The Danish and Swedish intervention was therefore justified to avoid social hardship and market failures resulting from that significant loss of employment.

(292) Contrary to Ryanair's argument set out in recital (176), the contribution of SAS to employment in the Danish and Swedish economy is substantial in itself, in view of the number of employees SAS had, but also the indirect jobs it created, without it being necessary to compare that contribution with the rest of the aviation sector. By the same token, the fact that SAS' contribution to Danish and Swedish employment may be lower post-pandemic, due to SAS' financial challenges, is irrelevant. Indeed, the purpose for Denmark and Sweden is also to avoid at the time of the granting of the aid further social hardship and market failure resulting from the significant loss of direct and indirect employment caused by SAS' potential exit from the market. Consequently, the aid also aims at avoiding an aggravation of the serious disturbance caused by the COVID-19 pandemic already affecting the Danish and Swedish economy.

Conclusion

(293) In light of all those elements, the Commission concludes that, in view of the risk of disruption to several important services carried out by SAS (passenger transport services, repatriation services, cargo services for medical equipment, etc.) which in their absence would likely not be replicated by other airlines to a similar extent (if at all), and in order to avoid further social hardship and market failure due to a significant loss of employment, Denmark and Sweden demonstrated the common interest to intervene in favour of SAS.

(294) Point 49(b) of the Temporary Framework is therefore respected.

6.3.1.3. Compliance with point 49(c) of the Temporary Framework

(295) According to point 49(c) of the Temporary Framework, Member States must demonstrate that '*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*'.

(296) As a preliminary remark, the Commission notes that, as explained in section 2.1.3, the mitigation measures taken and the State aid received by SAS were insufficient to remedy its financial needs for equity and liquidity resulting from the COVID-19 pandemic and the related containment measures. SAS still expected to reach a negative equity position of SEK 9,4 billion and to run out of liquidity by December 2020. That negative equity position did not only affect SAS' liquidity, but also threatened its solvency and viability in the short term. To address its solvency issue, SAS needed to restore urgently its balance sheet with fresh equity to avoid exiting from the market (section 6.3.1.1). Such restoration could therefore not be achieved by taking up further debt, as this would have been ineffective in achieving the desired result.

(297) Before the COVID-19 pandemic and as explained in recital (151), the sources of financing for SAS mainly consisted of:

— unsecured debt or hybrid instruments (e.g. revolving credit facilities, unsecured bonds, hybrid bonds) ([170]);

— secured debt and operating leases secured by collateral in the form of own assets (e.g. aircraft); and

— equity capital.

(298) Yet, it is clear from the facts provided by Denmark and Sweden as described in section 2.1.5 and from the submission of SAS summarised in section 4.1.2, that in spite of the mitigation measures that SAS undertook and the State aid it received previously, SAS' impaired financial situation as of March 2020 increased its capital and liquidity needs to such an extent that they could not be covered by financing on the market at affordable terms, nor under horizontal measures existing in Denmark and Sweden.

(299) First, SAS could not access financing in the form of unsecured debt and hybrid instruments at affordable terms.

(300) In particular, evidence suggests that private investors were seeking to reduce their financial exposure to SAS at the time of the granting of the Measure. The Commission notes, in that regard, that a reliable starting point for this assessment is the deterioration of SAS' credit rating, which investors typically rely on to gauge the risk involved in investing. It is noteworthy that the credit rating agency Standard & Poor's had issued a B+ rating for SAS on 16 January 2020, i.e. prior to the COVID-19 pandemic, but downgraded it to CCC on 10 June 2020 (recital (154)) with negative implications for SAS' ability to finance itself at affordable terms on the market for unsecured debt and hybrid instruments. The credit rating agency Moody's carried out a similar downgrade, in view of SAS' poor financial perspective in the absence of a recapitalisation (recital (79)). The deterioration of SAS' credit rating is further evidenced by the fact that SAS' outstanding bonds and hybrid instruments traded at distressed levels on the secondary markets in June 2020 (recital (155)). The evolution of the pricing of those instruments between December 2019 and June 2020 clearly indicates the desire of private investors to reduce their financial exposure to SAS. SAS was also unable to roll forward its ETMN programme that had been in place prior to the pandemic ([171]) (recital (152)). Moreover, the appetite amongst the investor base for outstanding debt and hybrid instruments to invest into new instruments at affordable terms was likely to be negligible since those investors were asked to convert their existing instruments at less preferential terms as part of the recapitalisation (recital (156)).

(301) Second, SAS was not able to access market financing at affordable terms in the form of secured debt by using unencumbered aircraft or other types of assets.

(302) Indeed, following the COVID-19 outbreak in March 2020, SAS attempted to contract a revolving credit facility with a group of banks that proved unsuccessful without State support, as the banks were not ready to take any unsecured risk (recital (78)). This certainly indicates that the willingness at that time to provide loans, even secured by collateral, to companies in the aviation sector was very low. Ultimately, SAS contracted the revolving credit facility backed up for 90 % by the State guarantees, but the banks required securities for the remaining unsecured part of the facility in unencumbered assets owned by SAS. In that regard, the Commission observes that the group of banks required a significant collateralisation compared to their own risk exposure (recital (78)) ([172]). In addition, as demonstrated by SAS (recital (158)), the company could not rely on a sufficient number of unencumbered aircraft to cover any meaningful part of its liquidity or capital needs, as this could reasonably only involve 4 aircraft with newer

([170]) As can be seen from page 110 of its 2019 Annual report, SAS had entered into various short-term credit facilities in order to secure additional funding if needed. The report is publicly available at https://www.sasgroup.net/files/documents/Corporate_governace/annual-reports/sas-sas-annual-and-sustainability-report-fiscal-year-2019-200130.pdf (last accessed on 28 November 2023).

([171]) As requested, the Commission received evidence confirming the unavailability of the ETMN programme at the time of the recapitalisation, in the form of the refusal letter of […].

([172]) To conclude the revolving credit facility agreement, SAS had to provide as collateral to the banks a package of aircraft assets for a total value that represented twice the amount of the unsecured amount of the revolving credit facility left at the risk of the banks (10 % of the nominal amount of the loan), and a negative pledge on SAS intra-group loans and accounts. Clearly, this agreement already limited the remaining collateral at the disposal of SAS at the time of the recapitalisation.

technology. Moreover, the terms and conditions related to the revolving credit facility provide further indication that secured debt at affordable terms was not likely to be available to SAS at the time of the granting of the Measure (recital (158)) ([173]). Finally, the Commission considers that any remaining assets which, in theory, could have been used as collateral (such as the Eurobonus programme) would not have served as an effective solution for SAS' liquidity and solvency issues, given notably the urgency to act at the time of the granting of the Measure and the time constraints attached to the possibility to divest those assets (recitals (48) and (159)).

(303) Third, to address its solvency issue resulting from a significant negative equity position at the time of the granting of the Measure, SAS needed to restore urgently its balance sheet with fresh equity to avoid its exit from the market. A company's balance sheet cannot be restored by taking up further debt, as this would have been ineffective in achieving the desired result (recital (297)) ([174]). In that context, SAS needed an equity injection coming either from existing shareholders and/or new investors to address its solvency issues and gradually restore its access to the financial markets at affordable terms.

(304) In that regard, the Commission notes that the Measure was effectively designed to facilitate the participation of private investors to cover SAS' capital and liquidity needs as much as possible. In particular, SAS did so by offering attractive conditions to private investors to participate in the rights issue and by negotiating a burden-sharing with shareholders other than Denmark and Sweden (recitals (84), (85), (117) and (162)).

(305) Lastly, the Commission notes that no other horizontal instruments available to SAS at the time of the granting of the Measure would have been sufficient to cover SAS' liquidity needs and ensure its viability (recital (82)).

(306) The submission provided by Ryanair on that point (recitals (180) to (184)) does not alter those findings.

(307) First, as regards Ryanair's argument that the Commission's assessment relied exclusively on the assertions made by the Swedish and Danish authorities (recital (180)), the Commission refers to the previous section of the present decision (recital (263)).

(308) Second, Ryanair asserts that SAS could have raised equity financing from investors other than its existing shareholders via a public offering, without the involvement of Sweden and Denmark. Based on the evidence included in the Oxera report, it indicates that nine airlines raised a total of EUR 6,2 billion over the period April to December 2020 (recital (182)) ([175]). However, Ryanair's submission offers no concrete evidence of private financing available to SAS at the time of the granting of the Measure. The fact that a number of airlines might have obtained equity funding from the market does not necessarily mean that those companies were in a comparable situation to SAS or that similar options were (sufficiently) available to SAS or could have (partly) replaced the Measure ([176]).

([173]) According to the terms and conditions of the revolving credit facility agreement concluded with the banks, SAS was required to provide as collateral a package of unencumbered aircraft assets for a total value that represented twice the amount of the unsecured amount of the revolving credit facility left at the risk of the banks (10 % of the nominal amount of the loan) together with a negative pledge on SAS intra-group loans and accounts.

([174]) To illustrate the relative magnitude of SAS' solvency issues against mere liquidity needs, it is worth to compare its expected equity position at the end of 2020 (SEK minus 9,4 billion) against the approved aid amount under the Measure (SEK 11 billion). As described in footnote 123, this view is confirmed by several research reports from banks, including that from Den Norske Bank (DNB), which issued the following comment on 28 May 2020: '*With book equity already in negative territory, a balance sheet with unsustainable debt levels, and an outlook for continued significant earnings losses in a ramp-up scenario set to take years, we forecast that as much as SEK 10 billion in new funding could be needed*'.

([175]) According to Ryanair, those airlines were Ryanair, easyJet, IAG, Air Canada, United Airlines, American Airlines, Spirit Airlines, Norwegian Airlines and Hawaiian Airlines.

([176]) It should also be mentioned that the capital structure of airlines, their business model, their legal status and their access to external capital can vary considerably. Ryanair does not bring any evidence of comparability between all companies listed and SAS.

(309) In any event, it is sufficient to note that the Measure allowed other investors than the eligible and existing shareholders of SAS to participate in the rights issue (recital (104)). In that regard, the Commission observes from the outcome of the rights issue that, although the interest from private investors was higher than expected, there was not sufficient capital from market investors to cover the entire transaction, as the subscription by existing and new shareholders amounted to approximately 90 % of the total amount of offered shares at the rights issue. On that basis, the underwriting commitments by the Danish and Swedish authorities had to be exercised to achieve the required capital increase. That finding confirms that, even with the security offered by Denmark and Sweden with the underwriting commitments, sufficient equity financing from private investors was not available to SAS at the time of the granting of the Measure (recitals (104) and (105)).

(310) In addition, the Commission notes that the airlines mentioned by Ryanair had obtained prior loans under favourable terms to cover their liquidity needs. As such, those loans may have had the effect of rendering the rights issue or equity injection more attractive to private investors. As a result, these loans do not provide a reliable benchmark supporting Ryanair's argument that other airlines were able to raise equity financing from investors during the COVID-19 pandemic, without any public support.

(311) To illustrate that point, the Oxera report indicates that IAG raised more than EUR 2 billion in right issues subscribed on a pro rata basis by existing shareholders. However, it should be mentioned that in May 2020 (prior to the rights issue) Iberia and Vueling, two subsidiaries of IAG, obtained a total of EUR 1 billion loans from commercial banks guaranteed by the Instituto de Crédito Official ([177]). The same is applicable to Ryanair ([178]) and EasyJet ([179]), which both received a GBP 600 million loan from the Government of England and Bank of England under the government's COVID-19 corporate financing facility (which allowed UK businesses to apply for loans at pre-COVID-19 commercial rates). Finally, also Allegiant Air, American Airlines, Hawaiian Airlines and Spirit Airlines received government support in the form of grants and loans from the Treasury Department of the government of the United States in April 2020 ([180]). By contrast, when SAS did receive support prior to the Measure (section 2.1.3.2), that support was mostly granted through a State guarantee of a lower amount than those airlines. That facility had to be immediately cancelled and paid back in full in the event that SAS would carry out a recapitalisation (recital (81)).

(312) Third, Ryanair claims that SAS could have raised debt financing from market investors, based on evidence included in the Oxera report, indicating that several airlines with comparable credit ratings to SAS were able to raise significant amounts of debt financing on the markets at the start of the COVID-19 pandemic ([181]). In particular, Ryanair argues that SAS could have relied on its 55 unencumbered aircraft as collateral to raise secured debt at more affordable terms.

(313) As indicated in recital (309), Ryanair offers no concrete evidence of private financing available to SAS at the time of the granting of the Measure. The fact that several airlines might have obtained unsecured or secured debt funding from the markets does not necessarily mean that those companies were in a comparable situation to SAS or that similar options were (sufficiently) available to SAS or could have replaced the State recapitalisation ([182]).

([177]) See e.g. https://www.iairgroup.com/en/newsroom/press-releases/newsroom-listing/2020/ib-vy-loan-agreements (last accessed on 28 November 2023). See also press reports on the IAG group receiving the same type of loan from the Government of England: https://www.aljazeera.com/economy/2020/5/7/british-airways-parent-iag-taps-uk-government-funds-for-help (last accessed on 28 November 2023).

([178]) See e.g. https://news.sky.com/story/coronavirus-airlines-among-businesses-given-bank-of-england-bailouts-12000568 (last accessed on 28 November 2023).

([179]) See e.g. https://www.theguardian.com/business/2020/apr/06/easyjet-secures-600m-coronavirus-loan-from-uk-treasury-and-bank (last accessed on 28 November 2023).

([180]) See e.g. https://home.treasury.gov/policy-issues/coronavirus/assisting-american-industry/payroll-support-program-payment (last accessed on 28 November 2023).

([181]) According to Ryanair, those airlines were American Airlines, Allegiant Air, Azul, Hawaiian Airlines, Spirit Airlines, GOL Airlines.

([182]) It should also be mentioned that the capital structure of airlines, their business model, their legal status and their access to external capital can vary considerably. Ryanair does not bring any evidence of comparability between all companies listed and SAS.

(314) As also explained in recital (304), the Commission reiterates that SAS needed to restore its balance sheet with fresh equity urgently, with a view to addressing its solvency issue and avoiding its exit from the market. Only by raising new equity from existing and/or new investors, SAS could initiate the restoration of its balance sheet, address its solvency issues with the required urgency and gradually restore its access to market financing at affordable terms.

(315) In addition, the examples of airlines provided by Ryanair with a credit rating ranging from Ba3 to B1 do not offer any basis for a like-for-like comparison, since SAS' credit rating was downgraded from B+ to CCC on 10 June 2020 (see recital (300)). Therefore, the listed transactions carried out by certain airlines do not provide a reliable benchmark for Ryanair's argument showing that comparable airlines were able to raise debt financing from investors during the COVID-19 pandemic.

(316) Furthermore, SAS did not have 55 unencumbered aircraft ([183]) as collateral to raise secured debt at more affordable terms, contrary to what Ryanair claimed. As explained in recital (303), SAS could not rely on a sufficient number of unencumbered aircraft to cover any meaningful part of its liquidity or capital needs, as SAS could reasonably only involve 4 aircraft with newer technology. Moreover, the terms and conditions related to the revolving credit facility, the State guarantee for which was approved in April 2020, provides further indication that secured debt at affordable terms was not likely to be available to SAS at the time of the recapitalisation (recital (303)).

(317) Fourth, Ryanair criticises the Commission for not considering whether SAS could have carried out other transactions with private market participants, which would allegedly have contributed to its liquidity without increasing its debt, such as the issuance of hybrid instruments or the sale of mortgaged aircraft.

(318) Based on the evidence submitted to it, the Commission considers it was highly unlikely that SAS would be able to access financing in the form of hybrid instruments at affordable terms (see recital (300)). It is also relevant to consider that SAS' credit ratings were downgraded in June 2020 with negative implications for the company's ability to finance itself at affordable terms on the market for hybrid instruments. This is further evidenced by the fact that SAS' outstanding hybrid instruments traded at distressed levels on the secondary markets at the time of the recapitalisation, as seen from the evolution of the pricing of those instruments between December 2019 and June 2020.

(319) In addition, under point 49(c) of the Temporary Framework, the Commission is required to assess whether an aid beneficiary could access alternative market financing at affordable terms. Thus, that assessment does not involve checking whether the beneficiary could further downsize its activities, as suggested by Ryanair. Therefore, Ryanair's claim that SAS should be required to consider the sale of mortgaged aircraft as a form of alternative market financing at affordable terms, which would in effect lead to a downsizing of SAS' operations, is not justified.

(320) Therefore, in light of the foregoing, the Commission considers that SAS was 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 were insufficient to ensure its viability. The Measure therefore complies with point 49(c) of the Temporary Framework.

6.3.1.4. Compliance with point 49(d) of the Temporary Framework

(321) According to point 49(d) of the Temporary Framework, Member States must demonstrate that *'the beneficiary is not an undertaking that was already in difficulty on 31 December 2019 (within the meaning of the GBER)'*.

(322) As a preliminary remark, Ryanair rightly pointed out that the Commission relied on the unconsolidated accounts for SAS in its initial decision in its assessment under point 49(d) of the Temporary Framework (see recital (185)). The Commission has now further assessed the conditions under Article 2(18), points (a) and (c), GBER, using the consolidated accounts of SAS, which were prepared in accordance with the applicable financial and accounting rules.

([183]) To estimate this number, Ryanair simply assumes that all owned aircraft at the end of 31 October 2019 were still unencumbered at the time of the recapitalisation.

(323) Hence, based on evidence provided by the Danish and Swedish authorities (recital (98)), the Commission reviewed the consolidated accounts of SAS, as a limited liability company and parent company of the SAS Group. The Commission found that SAS did not lose more than half of its subscribed share capital as a result of accumulated losses (see Article 2(18), point (a), GBER). According to the consolidated financial statements of SAS, its shareholder equity on 31 December 2019 (SEK 5,7 billion) remained above half of its subscribed share capital (SEK 7,7 billion). Second, the Commission found that 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). Lastly, based on the consolidated accounts of SAS, the Commission calculated its book debt/equity ratio on 31 December 2019 (4,96). The Commission notes that this value remained below the 7,5 threshold set out in Article 2(18), point (e), GBER.

(324) It follows that SAS was not an undertaking that was already in difficulty on 31 December 2019 within the meaning of the GBER. As such, the Measure complies with point 49(d) of the Temporary Framework.

6.3.2. *Types of recapitalisation measures*

(325) 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")* ([184])*, 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*'.

(326) As mentioned in recital (99), the Measure is a combination of an equity instrument and hybrid capital instruments.

(327) The equity instrument eventually consisted of a total SEK 3,54 billion equity paid by Denmark and Sweden to SAS against the issuance by SAS of new common shares (recitals (103) to (105)).

(328) The hybrid capital instruments took the form of SEK 6 billion in perpetual new hybrid notes held and fully disbursed by Denmark and Sweden (recital (106)). Those instruments qualify as equity under IFRS.

(329) As regards more specifically point 53 of the Temporary Framework, Ryanair stated in its comments that the Commission did not explain why the Measure was appropriate to address SAS' recapitalisation needs and that it did not assess that the Measure was the least distortive to competition, in particular compared to other possible aid instruments (recital (187)).

(330) In response to that comment, it is necessary to recall that a recapitalisation instrument and the conditions attached thereto may be considered appropriate to meet the beneficiary's recapitalisation needs while being the least distortive of competition as referred to in point 53 of the Temporary Framework, provided that they meet the various requirements laid down for that purpose in that framework and relating to the amount of the recapitalisation (section 3.11.4), remuneration and exit of the State (section 3.11.5), governance and prevention of undue distortions of competition (section 3.11.6) and the exit strategy of the State from the participation resulting from the recapitalisation (section 3.11.7). All those requirements are intended precisely to ensure that the measure at issue and the conditions attached thereto do not go beyond what is appropriate to address the beneficiary's recapitalisation needs, while at the same time being the least distortive of competition. Hence, if those requirements are met, the selected recapitalisation instrument must be considered compliant with point 53 of the Temporary Framework. All those requirements are assessed in the following sections.

([184]) 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.

(331) As to the existence of alternative aid instruments, the Commission already concluded in section 6.3.1.3, that there were, in the present case, no other alternatives to the Measure. Besides, it is settled case-law that the Commission is not required to show, positively, that no other conceivable aid measure, which is by definition hypothetical, would be more appropriate and less liable to give rise to distortions of competition ([185]).

6.3.3. *Amount of the recapitalisation (point 54 of the Temporary Framework)*

(332) 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*'.

(333) 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 thus 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.

(334) As noted in recital (16), the assessment of the Measure, following the annulment of the initial decision by the General Court, must be based on the facts and elements prevailing at the time the aid was granted. For that reason, the Commission's assessment uses forecasts and projections established at the time for certain figures. The Commission has relied on the consolidated accounts of the entire SAS group, including that of SAS and its subsidiaries, to conduct its proportionality assessment under point 54 of the Temporary Framework.

(335) 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 considered financial projections concerning (i) the equity position of the beneficiary; and (ii) the debt-to-equity ratio of the beneficiary. Those projections concerned the situation after the COVID-19 recapitalisation at the end of fiscal year 2021. The Commission compared the value of those indicators to those predating the COVID-19 outbreak ([186]).

(336) Second, in order to assess whether the aid corresponds to the minimum needed to ensure the viability of SAS, the Commission identified 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 analysed the following indicators (as forecast):

— 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 a useful and appropriate benchmark.

— 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 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.

([185]) See to that effect judgment of 6 May 2019, *Scor* v *Commission*, T-135/17, EU:T:2019:287, paragraph 94.

([186]) 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 fiscal year 2020 (ending in January 2020) to assess the situation predating COVID-19, instead of using the data on 31 December 2019.

— The equity-to-assets ratio, a further indicator which is part of the assessment of a company's creditworthiness. The Commission used that ratio to perform the same benchmarking test as for the net debt-to-equity ratio.

— The financial preparedness ratio, which is the ratio of a company's liquid funds, including unused credit lines, to its fixed costs. The Commission benchmarked that ratio against the 25 % threshold. 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 in that situation, that authority would require it to have quarterly financial reports, instead of annual, and a restoration plan showing the measures to bring the index back to a value higher than 25 %.

(337) Ryanair equates the concept of viability to a level of profitability acceptable to private investors and argues that the Commission should have assessed profitability indicators such as the return on equity (recital (188)). However, point 54 of the Temporary Framework makes no mention of profitability. Instead, it is clear from the Temporary Framework that its key objective is to cover liquidity needs to allow the operational continuity of undertakings during and after the COVID-19 outbreak. For that purpose, it is stated in point 9 of the Temporary Framework that public support is needed '*to ensure that sufficient liquidity remains available in the markets*' and '*to preserve the continuity of economic activity during and after the COVID-19 outbreak*'. Further, point 11 clarifies that the Temporary Framework sets out the possibilities Member States have '*to ensure liquidity and access to finance for undertakings*'. Finally, it is stated in point 18 that '*State aid is justified […] 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*'.

(338) Accordingly, the Commission is not required to use profitability indicators such as the return on equity and the return on assets (recital (188)), since it does not have to assess SAS' profitability to assess its viability. As explained above, the indicators considered by the Commission (in particular the net debt-to-equity ratio, the net debt-to-EBITDA ratio, and the equity-to-assets ratio) are key metrics to assess a company's creditworthiness and its access to market financing.

(339) The Commission conducted the analyses mentioned in recitals (336) and (337) based on the financial projections of SAS submitted by Denmark and Sweden in their joint notification. The Commission requested and analysed internal documents to assess whether those projections genuinely correspond to the projections SAS prepared for its own internal planning. In particular, the Commission scrutinised the amount of forecast 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 confirmed that SAS expected an amount of losses corresponding to those reported in the business plan submitted to the Commission by Denmark and Sweden.

(340) Ryanair further asserts that the Commission should have assessed the extent to which SAS could structurally lower its cost base and increase its profitability or the extent to which it could lower costs in the short term, and that the Commission should therefore have challenged SAS' financial projections (recital (193)). The Commission notes that there is no such requirement in point 54 of the Temporary Framework. Ryanair's argument seems to stem from an analogy with the Rescue and Restructuring Guidelines (recital (188)). The Temporary Framework, however, does not require a restructuring, notably because a beneficiary of recapitalisation aid in the context of the COVID-19 pandemic is not responsible for the events undermining its viability.

(341) The Commission conducted 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 conducted its assessment by including, in the recapitalisation amount, both the contributions from Denmark and Sweden and those from private investors. The recapitalisation thus considered in this decision amounts to SEK 14,25 billion, although (i) that recapitalisation need was expected to be filled in part also by private shareholders ([187]); and (ii) the Measure eventually amounted only to SEK 9,54 billion (see recital (7)). Thus, the assumption of the Commission is very conservative.

([187]) 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. The contribution of Denmark and Sweden eventually amounted to approximately SEK 9,54 billion at most (see recital (7)).

(342) Ryanair considers that the Commission should have assessed the impact of alternative traffic projections (recital (193)).

(343) At the time when SAS drew up the business plan that it presented at the board meeting of 15 April 2020 (see recital (40)), industry forecasts ([188]) were more optimistic than the ones used by SAS (recital (41)). However, in the course of July 2020, industry forecasts were revised downwards ([189]), in view of the slower recovery in traffic registered and the worsening outlook of the COVID-19 pandemic. SAS decided not to revise its business projections, and as a result, its traffic projections were in line with those updated industry forecasts, with a full recovery expected between 2023 and 2024. The Commission considers that there is no reason to conclude that SAS should have taken a more optimistic approach or that its traffic projections, in line with industry forecasts, were not appropriate.

(344) Finally, in order to assess the proportionality of the Measure, the Commission took into account (i) the aid already granted to SAS under other State aid measures (see recitals (57) to (60)) at the time of the granting of the Measure and (ii) the aid that was expected to be granted to SAS under the present Measure, pursuant to the notification of 11 August 2020 (see recital (342)). In effect, first, the business plan's projections on which the proportionality assessment was carried out included all aid granted at the time of the granting 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 6.3.3.3) verified that the proportionality assessment had a sufficient buffer to accommodate potential additional aid. Again, the approach of the Commission is conservative, in so far as it takes into account aid that SAS could have potentially received under a Danish aid scheme (SA.58088) that the Danish authorities ultimately did not adopt (see recital (59)).

6.3.3.1. Public support limited to the minimum needed to restore SAS' capital structure

(345) **Table 4** illustrates the effect of the recapitalisation on the capital structure of SAS predating the COVID-19 outbreak, i.e. the situation on 31 January 2020.

Table 4

Proportionality indicators (SEK million) ([190])

Total COVID-19 recapitalisation	14 250
Equity position without recapitalisation (31.10.2021)	– 10 024
A. Equity position (31.1.2020) ([191])	4 433
B. Expected equity position after recap (31.10.2021)	4 226
Proportionality indicator I: B – A ≤ 0	**– 207**
C. Net Debt/Equity Ratio (31.1.2020) ([192])	4,75
D. Net Debt/Equity Ratio after recap (31.10.2021)	6,81
Proportionality indicator II: C – D ≤ 0	**– 2,06**

([188]) On 27 April 2020, Airports Council International Europe projected in its mild scenario that the passenger traffic would return to its pre-COVID-19 levels by 2022 at the earliest, and 90 % of those levels by December 2021. See: https://www.aci-europe.org/downloads/resources/200427%20ACI%20EUROPE%20updated%20estimates%20of%20COVID19%20related%20traffic%20and%20financial%20losses%20FY%20European%20Airports.pdf (last accessed on 28 November 2023).

([189]) Airports Council International Europe then projected that full recovery would not take place before 2024, while IATA projected it would happen in 2023. See: https://www.aci-europe.org/downloads/resources/ACI%20EUROPE_updated%20estimates%20of%20COVID19%20traffic%20revenue%20impacts_06.07.2020.pdf and https://www.iata.org/en/pressroom/pressroom-archive/2020-press-releases/2020-07-28-02/ (last accessed on 28 November 2023).

([190]) 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.

([191]) 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.

([192]) 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.

(346) **Table 4** shows that the expected equity position of SAS after the recapitalisation (on 31 October 2021) was SEK 4,226 billion. This amount of equity includes the following recapitalisation measures ([193]): (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 (see recital (342)).

(347) Following the COVID-19 outbreak, SAS forecast losses of SEK 9,354 billion in fiscal year 2020 and SEK 3,939 billion 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.

(348) The Commission concludes that the recapitalisation of SAS did not go beyond restoring the capital structure of the beneficiary to that before the COVID-19 outbreak, because the net debt-to-equity ratio of SAS was expected to be 6,81 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 2024.

6.3.3.2. Public support limited to the minimum needed to ensure the viability of SAS

(349) According to its financial projections ([194]), absent the State recapitalisation measure, SAS would have consumed its available liquidity on 31 January 2020 (SEK 6,598 billion) by December 2020, and on 31 October 2021 SAS would have had a negative cash position of SEK 4,935 billion. The Measure prevented SAS from running out of liquidity and led to a cash position forecast of SEK 3,666 billion on 31 October 2021.

(350) To assess the viability condition of point 54 of the Temporary Framework that the amount of the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary, the Commission applied the four tests mentioned in recital (337).

(351) The first test consists in comparing the forecast 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 ([195]). This sample consists of 10 European airlines ([196]). Among them, three had a credit rating on 31 December 2019, which ranged from BBB to BBB+ ([197]).

(352) The Commission uses the third quartile of SAS' peers' net debt-to-equity ratio distribution as a benchmark (i.e. those among the worst performing companies) instead of relying on a measure of central tendency, such as the mean or the median. This is a conservative approach, as adopting a higher benchmark for the net debt-to-equity ratio lowers 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).

([193]) 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.

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

([195]) 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.

([196]) 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.

([197]) 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.

(353) The Commission notes that, taking into account the recapitalisation measures, the expected net debt-to-equity ratio of SAS on 31 October 2021 (6,81) was well above the third quartile of the peers' distribution of the same ratio predating the COVID-19 outbreak (1,92). The capital structure of SAS was expected to become better than its peers only in fiscal year 2025, when the forecast net debt-to-equity ratio was 1,64. Further, the Commission notes that the expected net debt-to-equity ratio of SAS on 31 October 2021 was also higher than the highest ratio among the rated peers.

(354) With regard to the second test, the Commission 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 7,3 at the end of fiscal year 2021, well above the 3–3,5 threshold.

(355) The net debt-to-EBITDA ratio of SAS was expected to gradually decrease over time to reach a value of 3,4 at the end of fiscal year 2023 and a value of 2,6 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 was expected to fall below the 3–3,5 thresholds).

(356) The third test consists in comparing the forecast equity-to-asset ratio of SAS, taking the recapitalisation into account, to the same ratio that the peer airlines mentioned in recital (352) had on 31 December 2019 ([198]). The Commission used 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 lowers 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).

(357) The Commission notes that, taking into account the recapitalisation, the expected equity-to-asset ratio of SAS on 31 October 2021 (7,87 %) was well below the first quartile of the peers' distribution of the same ratio predating the COVID-19 outbreak (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 lowest ratio among the rated peer airlines.

(358) The fourth test consists in benchmarking the financial preparedness ratio of SAS to the 25 % threshold (recital (337)). This threshold is the minimum to continue operating an aviation license without incurring further obligations, such as more frequent reporting to the aviation authority and filing a restoration plan. SAS did not forecast that ratio to be higher than 25 % before fiscal year 2023.

(359) According to Ryanair, the thresholds used by the Commission (recital (337)) are an inappropriate benchmark, because they target an investment grade credit rating whereas airlines are typically able to access capital markets with ratings below investment grade (recital (190)).

([198]) 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 %).

(360) In fact, the Commission considers the notion of an investment grade credit rating only for one of the four indicators assessed (the net debt-to-EBITDA ratio). Notably, the net debt-to-equity ratio and the equity-to-assets ratio are benchmarked to ten peer European airlines. While three of these airlines did indeed have an investment grade credit rating (recital (352)), the Commission conservatively benchmarks the indicators to a poorly performing quartile of the peer group (consisting of companies that did not have an investment grade credit rating), and even then it finds that SAS is expected to perform significantly worse after the recapitalisation (at 31 October 2021) than the benchmark ratio (recitals (354) and (358)).

(361) Ryanair also argues that the thresholds set by the Commission target an excessively favorable financial position, since SAS' financial position prior to the COVID-19 pandemic was worse than the targets set, based on three out of the four indicators (recital (191)), but it was still able to access financing on the markets at that time.

(362) As explained, the proportionality test laid down in point 54 of the Temporary Framework has two cumulative conditions: on the one hand, the COVID-19 recapitalisation cannot go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak. On the other hand, the COVID-19 recapitalisation cannot go beyond the minimum amount of recapitalisation aid needed to restore the company's access to private capital markets (recital (334)). The first part of the test is conducted in section 6.3.3.1, and it concludes that SAS' capital structure does not go beyond the one predating the COVID-19 outbreak.

(363) The Commission considers that for the second part of the test, related to restoring a company's access to private capital markets, it is justified to make use of indicators that are clearly related to creditworthiness, and to then benchmark those indicators – conservatively – to a group of peer airlines (as for the net debt-to-equity and equity-to-assets ratios) or to a commonly used threshold (as for the net debt-to-EBITDA ratio), as explained in recital (337). Secondly, the Commission notes that the Measure was not actually projected to restore SAS' financial position after the recapitalisation (on 31 October 2021) to the thresholds set, or to the financial position it held prior to the COVID-19 outbreak. As regards the net debt-to-equity ratio, the projected level of SAS after the recapitalisation (on 31 October 2021) of 6,81 (recital (354)) is worse than it was prior to the COVID-19 outbreak (4,75, as indicated in recital (191)). The same is true for the net debt-to-EBITDA ratio (7,3 versus a maximum of 4,0, as indicated in recitals (355) and (191)) and the equity-to-assets ratio (7,87 % versus a range of 8–16 %, as indicated in recitals (358) and (191)). Finally, it can also be noted that taking as a benchmark the pre-COVID period is conservative, in fact, given the uncertainty on the financial markets caused by the consequences of the COVID-19 pandemic for the aviation sector (recitals (24) and (31)).

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

6.3.3.3. Sensitivity analysis

(365) The Commission 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 and necessarily on the financial projections of SAS that Denmark and Sweden provided and, in particular, on the forecast losses. Thus, the Commission identified 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 (337). That 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 ([199]).

([199]) 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.

(366) 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 forecast. In turn, without considering the financial preparedness indicator (recital (359)), a reduction in forecast losses higher than SEK 1,5 billion would have to take place for the recapitalisation measures not to be proportionate ([200]).

(367) Given that the cumulated forecast losses of SAS amounted to SEK 13,2 billion, 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 (342)), the Commission considers the buffer amounting to SEK 1–1,5 billion sufficient to make the proportionality assessment robust to alternative assumptions on financial projections.

(368) It is also important to note that the buffer amounting to SEK 1–1,5 billion also acted 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 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 envisaged amounts of approximately DKK 6 million under the first scheme and DKK 35 million under the second scheme, or EUR 5,5 million in total (recital (59)).

(369) Ryanair's asserts that the Commission should have considered a wide range of stress tests with a number of possible downside scenarios (recital (189)).

(370) Point 54 of the Temporary Framework requires the Commission to assess that the amount of the aid '*must not exceed the minimum needed to ensure the viability of the beneficiary*'. Forecasts considering more pessimistic downside scenarios could only result in the conclusion that more aid was needed. On that basis, there is no purpose in extending the sensitivity analysis to further downside scenarios. Further, SAS' business projections were in line with the industry standards (recital (343)) and forecast cumulative losses for SAS of SEK 13,2 billion. Finally, the Commission recalls that it estimated a sufficient buffer amounting to SEK 1–1,5 billion to make the proportionality assessment robust to alternative assumptions on financial projections – including upside scenarios (recital (367)).

6.3.3.4. Conclusion

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

6.3.4. *Remuneration and exit of the State*

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

(373) 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*'.

(374) 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*'.

([200]) When the financial preparedness ratio is excluded 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 ratio at the end of financial year 2021.

(375) In recitals (377) to (437), the Commission assesses 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 to 64 as regards the equity instruments and points 65 to 70 as regards the hybrid capital instruments).

6.3.4.1. Remuneration of the equity instruments and exit of the States

6.3.4.1.1. Entry price

(376) 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' formal written request for the capital injection is dated 8 May 2020 (recital (97)), the maximum share price is thus calculated as being SEK 8,71 per share.

(377) 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 (103) and (104)), 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 are met.

6.3.4.1.2. Step-up mechanism

(378) 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 requires 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 provides 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.

Absence of step-up mechanism or of an adequate alternative to it

(379) The Commission observes that the equity instrument of the Measure is not accompanied by a step-up mechanism within the meaning and in line with the requirements of point 61 of the Temporary Framework.

(380) Therefore, the Commission must assess, pursuant to point 62 of the Temporary Framework, whether the equity instrument is accompanied by an alternative mechanism to the one required in point 61 thereof.

(381) 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 (namely, 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 included sufficiently strong incentive effects on the exit of the State from SAS' 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.

(382) However, as mentioned in recital (8), in its SAS II judgment, the General Court concluded 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.

(383) First, the General Court considered that the price of the shares acquired by Denmark and Sweden on their entry into the equity of SAS 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 considered that the requirement on the initial purchase price of the shares only has an *ex ante* impact on the situation of SAS, that is to say, at the time Denmark and Sweden enter the capital of SAS, and it is not intended to increase over time the incentive, for SAS, to buy back that shareholding, since the price of the shares may rise as well as fall.

(384) Second, the General Court considered that the fact that the remuneration for the Danish and Swedish new State hybrid notes would be provided by an increasing coupon was a separate requirement, laid down by point 66 of the Temporary Framework for hybrid capital instruments until their conversion into equity-like instruments.

(385) Third, the General Court found that the fact that SAS would 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 also 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.

(386) In view of those findings of the General Court, the factors identified in the initial decision, as described in recital (382), cannot be deemed to constitute, in the present case, a step-up mechanism or an alternative to it within the meaning of points 61 and 62 of the Temporary Framework. Therefore, Denmark and Sweden's arguments in recital (137), as well as the ones of SAS in recital (147), must be rejected.

(387) The General Court also found that the obligation to notify a restructuring plan under point 85 of the Temporary Framework does not, in and of itself, have any bearing on the amount of and the methods for the remuneration of the State. Moreover, that obligation is applicable only if the State's intervention has not been reduced to below 15 % of the total equity of the beneficiary, and when 6 years have elapsed since the recapitalisation. That obligation cannot therefore, according to the General Court, lead to a similar effect on the remuneration, or have the same incentive effects on the exit of the State, as the step-up mechanism laid down in point 61 of the Temporary Framework. It follows that Denmark and Sweden's arguments in recital (138) must also be rejected.

(388) Lastly, the General Court found that, while it is common ground that under the Swedish Companies Act a company may not buy back ordinary shares from only one specific shareholder, SAS provided no evidence for its assertion that the Swedish Companies Act precludes the granting of additional shares to a shareholder at no cost. In its comments to the opening decision, SAS still did not substantiate that the Swedish Companies Act precludes the granting of additional shares to a shareholder at no cost. On that basis, the arguments raised by SAS in recital (146) must also be rejected. In any event, even if the Swedish national law would have precluded the implementation of a step-up mechanism as provided under point 61 of the Temporary Framework, the Commission notes that the difficulty encountered by SAS in relation to the Swedish Companies Act is not unique and that in comparable circumstances regarding other recapitalisation measures approved by the Commission, alternatives to a step-up mechanism were put in place ([201]).

(389) In their comments to the opening decision, Denmark and Sweden provided new arguments that were not addressed in the initial decision or in the SAS II judgment, related to the amount of burden-sharing (recital (139)) and to the Danish and Swedish States' political mandates to reduce the need for exit incentives (recital (140)).

(390) Concerning the comments presented in recital (139), the Commission notes that points 61 and 62 of the Temporary Framework are applicable regardless of the level of the original ownership of Denmark and Sweden in SAS or of the existence of burden-sharing. The objective of the step-up mechanism provided for in points 61 and 62 of the Temporary Framework is to restore the *status quo ante*. Since the Measure had the effect of increasing Denmark and Sweden's shareholding in SAS, as noted in recital (96) of the opening decision, it should have been accompanied by incentives to encourage the exit of Denmark and Sweden and the return to their pre-COVID-19 level of shareholding in SAS, such as the step-up mechanism provided under point 61 of the Temporary Framework or an adequate alternative to it as provided under point 62 of that framework.

(391) Concerning the argument presented in recital (140), Denmark and Sweden's political mandates do not set specific targets for their respective exit and do not foresee additional remuneration. They are overall vague and not binding on Denmark and Sweden, and even less on SAS. Those political mandates therefore do not comply with the requirements set out in point 61 of the Temporary Framework, and they do not 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 as provided under point 62 of the Temporary Framework.

(392) As a result, contrary to what Denmark and Sweden claim, the Measure cannot be deemed to comply with point 62 of the Temporary Framework.

(393) Denmark and Sweden invoked, in the alternative, exceptional circumstances justifying the direct application of Article 107(3), point b, TFEU, in derogation to points 61 and 62 of the Temporary Framework. The Commission will now assess whether such exceptional circumstances could be deemed to exist for that specific point.

([201]) E.g. in case SA.57659, the Commission accepted a mechanism where the remuneration took the form of debt or an equivalent instrument (see recitals 30 and 73 of that decision).

Existence of exceptional circumstances justifying a direct application of Article 107(3) TFEU

(394) As indicated in recital (141), Denmark and Sweden argued that a direct application of Article 107(3), point (b), TFEU, is justified, in essence, due to the burden-sharing that the recapitalisation plan involved, and the desire to attract private capital to the recapitalisation.

(395) According to settled case-law ([202]), in assessing the compatibility of aid measures with the internal market under Article 107(3) TFEU, the Commission enjoys a discretionary power. In the exercise of that discretion, the Commission may adopt guidelines 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 guidelines 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 guidelines, without being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations ([203]).

(396) Accordingly, in the specific area of State aid, the Commission is bound by the guidelines and notices that it issues, to the extent that they do not depart from the rules in the Treaty ([204]). Nevertheless, the adoption of guidelines by which the Commission limits its discretion does not 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), point b, TFEU ([205]).

(397) Therefore, since Denmark and Sweden did not implement a step-up mechanism (or an adequate alternative to it) in accordance with points 61 and 62 of the Temporary Framework, it must be assessed whether there are, in the present case, exceptional circumstances which could justify the direct application of Article 107(3), point b, TFEU and, therefore, the absence of a step-up mechanism or an adequate alternative to it as required by points 61 and 62 of the Temporary Framework.

(398) The Commission is of the view that the specific characteristics of the recapitalisation of SAS, notably the objective of guaranteeing the attractiveness of the recapitalisation to private investors and the significant burden-sharing accepted by those investors, while they constitute a significant feature of the recapitalisation of SAS and contributed significantly to the reduction of the amount of aid necessary, they do not justify such direct application of Article 107(3), point b, TFEU allowing for a derogation from the requirements set out in points 61 and 62 of the Temporary Framework.

(399) The Commission considers, first, that Denmark and Sweden have not demonstrated that the absence of a step-up mechanism was an important consideration for private investors, and, in particular, that including such a mechanism would have compromised their participation to the recapitalisation. Therefore, it cannot be held that the inclusion of such mechanism would have significantly deterred private investors from participating in the recapitalisation of SAS.

([202]) See for example judgment of 19 July 2016, *Kotnik and Others*, C 526/14, ECLI:EU:C:2016:570, paragraph 38 and the case-law cited.
([203]) 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, ECLI:EU:C:2016:570, paragraphs 39 and 40.
([204]) See judgment of 2 December 2010, *Holland Malt* v *Commission*, C-464/09 P, ECLI:EU:C:2010:733, paragraph 47 and the case-law cited.
([205]) 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, ECLI:EU:C:2016:570, paragraph 41.

(400) Second, as a result of the Measure, the Danish and Swedish level of shareholding in SAS increased considerably, regardless of the participation of private investors to the recapitalisation of SAS. Therefore, the Measure, and more specifically, the equity instrument of the Measure, should have been accompanied by incentives to encourage the sale of the COVID-19 shares acquired by Denmark and Sweden, as required by points 61 and 62 of the Temporary Framework.

(401) Third, while the triggering of a step-up, notably in the form of the grant of additional shares, would have the effect of further diluting private shareholders' shares, including those newly acquired by private investors in the context of the recapitalisation of SAS, the fact remains that the objective of the step-up mechanism is to restore the *status quo ante*, i.e. the level of shareholding of Denmark and Sweden before the COVID-19 pandemic. It aims at incentivising the beneficiary or other investors to buy back the Member State's shares acquired through the COVID-19 recapitalisation, by notably making the State's ownership of those shares more costly for SAS. With that incentive, the latter or other investors are encouraged to buy back those COVID-19 shares from the Member State, so that the shareholding of that Member State is reduced to its pre-COVID-19 level. Point 61 of the Temporary Framework leaves a margin of 4 and 6 years (in two successive stages) following the grant of the COVID-19 recapitalisation for the beneficiary or other investors to buy back those COVID-19 shares. During that period, it is possible for them to buy back the COVID-19 shares from the Member State, so that the step-up is not triggered and a dilution of private shareholders is ultimately avoided. Therefore, the existence of a step-up mechanism, or of an adequate alternative to it, is not incompatible with the participation of private investors to a COVID-19 recapitalisation.

(402) In those circumstances, the Commission considers that Denmark and Sweden have not demonstrated that the implementation of a step-up mechanism, or an adequate alternative to it, would have materially affected SAS' ability to attract private investors to share in the burden of the recapitalisation.

(403) The Commission therefore considers that a derogation from the requirement in points 61 and 62 of the Temporary Framework is not justified in the present case.

(404) It follows that the Measure, as granted to SAS on 26 October 2020, does not comply with points 61 and 62 of the Temporary Framework, as it is not accompanied by a step-up mechanism or an adequate alternative to it.

(405) As a result, the Commission will examine the alternative mechanism put forward by SAS in case the Commission were to conclude that the Measure does not comply with points 61 and 62 of the Temporary Framework.

Alternative to a step-up mechanism provided by SAS

(406) As indicated in recitals (148) and (149), in its comments to the opening decision SAS put forward a mechanism which, in its view, would meet the requirements of points 61 and 62 of the Temporary Framework.

(407) That mechanism would in essence: (i) be activated 4 years after the grant of the Measure, if the relevant State has not sold at least 40 % of its equity participation, and 6 years after the COVID-19 equity injection, if the relevant State has not sold its equity participation in full; and (ii) when activated, increase the remuneration to Denmark and/or Sweden in the amount of 10 % of their respective additional participation resulting from the COVID-19 recapitalisation that has not yet been repaid. That increase in remuneration would not take the form of additional shares, as explicitly envisaged in point 61 of the Temporary Framework. Instead, SAS would either (i) amend the terms of the Danish and/or Swedish hybrid capital instruments to increase the amount payable thereunder; or (ii) issue a new instrument to Denmark and/or Sweden under the same terms as the hybrid capital instruments.

(408) The Commission observes, first, that the mechanism provided by SAS would be triggered under the same timeframe and conditions as those set out at point 61 of the Temporary Framework, i.e. 4 years after the grant of the Measure, if the relevant Member State has not sold at least 40 % of its equity participation, and 6 years after the COVID-19 equity injection, if the relevant Member State has not sold its equity participation in full.

(409) Second, that mechanism would provide, both after year four and year six following the grant of the Measure, for an increase of the remuneration payable to Denmark and/or Sweden by 10 % of their respective additional participation resulting from the COVID-19 recapitalisation that has not yet been repaid. That increase in remuneration corresponds to the minimum increase required under point 61 of the Temporary Framework.

(410) Third, the Commission notes that the mechanism put forward by SAS does not provide an increased remuneration in the form of additional shares. The Commission also observes, however, that while granting additional shares is the mechanism specifically envisaged under point 61 of the Temporary Framework, that provision refers as well to 'other mechanisms'. Further, point 62 of the Temporary Framework confirms the flexibility that the Commission enjoys to accepting alternative mechanisms as to the form of that remuneration. In the mechanism put forward by SAS, that remuneration will take the form of either an increased amount payable under the State hybrid notes held by Denmark and Sweden, or through the issuance by SAS of a new instrument to Denmark and Sweden under the same terms and conditions as those State hybrid notes on the date of triggering the mechanism ([206]).

(411) It follows from the above that the mechanism put forward by SAS would (i) have the same impact on the remuneration of Denmark and Sweden as that of the step-up mechanism provided under point 61 of the Temporary Framework, and (ii) would incentivise the buy back of the shares acquired by Denmark and Sweden through the Measure, by rendering those shares (that are not sold before the triggering of the mechanism to their pre-COVID-19 level) gradually more costly to SAS.

(412) In light of the above, the Commission considers that the mechanism put forward by SAS would lead overall to a similar outcome regarding the incentive effects on the exit of the State and have a similar impact on the State's remuneration as that of the step-up mechanism provided under point 61 of the Temporary Framework. The Commission therefore considers that the mechanism, as described in recital (148), would comply with point 62 of the Temporary Framework. In those circumstances, the Commission will examine whether it would be appropriate and proportionate in the present case to require Denmark and Sweden to attach such mechanism to the Measure, as a condition for declaring the Measure compliant with points 61 and 62 of the Temporary Framework.

Appropriateness and proportionality of requiring Denmark and Sweden to implement the mechanism described, as a condition for declaring the Measure compliant with points 61 and 62 of the Temporary Framework

(413) As indicated in recitals (405) and (413), the Measure does not comply with points 61 and 62 of the Temporary Framework. Yet, the mechanism put forward by SAS in its comments to the opening decision would comply with those provisions of the Temporary Framework if it were implemented by Denmark and Sweden.

(414) In that regard, the Commission submitted a request for information to Denmark and Sweden to inquire whether the implementation of that mechanism would be appropriate and proportionate in the views of those Member States (recital (222)).

(415) Denmark and Sweden acknowledged that the mechanism provided by SAS would, in their views, meet the requirements of points 61 and 62 of the Temporary Framework.

(416) Furthermore, Denmark and Sweden confirmed that there would be no major obstacles to the implementation of the mechanism provided by SAS, and that there would be no other less restrictive alternatives to that mechanism that would meet the requirements of points 61 and 62 of the Temporary Framework.

(417) As indicated in recitals (408) to (412)), the Commission considers that the alternative to a step-up mechanism put forward by SAS complies with points 61 and 62 of the Temporary Framework.

([206]) As explained in recital (148), market conditions at the time of the step-up, such as the rate at which future payments by SAS should be discounted, will be taken into account so that the increase in the amount payable under the State hybrid notes (or the amount payable under a new instrument) corresponds, in net present value terms, to a monetary value of exactly 10 % of the additional participation resulting from the COVID-19 recapitalisation that has not yet been repaid.

(418) Furthermore, the Commission considers that requiring from Denmark and Sweden, as a condition for the compatibility of the Measure, the implementation of that mechanism does not go beyond what is necessary to ensure the respect of points 61 and 62 of the Temporary Framework. As indicated in recitals (409) and (410), the activation of the mechanism put forward by SAS will take place on the same dates as those foreseen under point 61 of the Temporary Framework, and the increase of remuneration will correspond to the minimum increase required under that same provision.

(419) The Commission observes, in particular, that, should the mechanism be implemented, its first activation, were it to be triggered, would take place 4 years after the grant of the Measure, i.e. by 26 October 2024, if Denmark and Sweden have not yet sold at least 40 % of their respective equity participation by that time. Therefore, even if that mechanism was not provided under the Measure granted on 26 October 2020, its implementation within the 2 months following the notification of the present decision to Denmark and Sweden would still precisely meet the timeframe provided under point 61 of the Temporary Framework.

(420) Lastly, the Commission notes that the mechanism at stake has been put forward by the beneficiary of the Measure, to the benefit of those two Member States.

(421) In those circumstances, the Commission considers that the inclusion of the mechanism put forward by SAS would ensure the respect of points 61 and 62 of the Temporary Framework and that it is appropriate and proportionate, in the present case, to require Denmark and Sweden, as a condition for the compatibility of the Measure, to implement that mechanism, within 2 months following the notification of the present decision.

Conclusion on points 61 and 62 of the Temporary Framework

(422) The Commission therefore concludes that the Measure complies with points 61 and 62 of the Temporary Framework, subject to Denmark and Sweden implementing the mechanism described in recital (148) within 2 months following the notification of the present decision.

6.3.4.1.3. Exit of the State

(423) Finally, 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 (recitals (122) to (124)). It notes, however, that Denmark and Sweden could sell at any time their COVID-19 equity stake at market prices to purchasers other than SAS. Therefore, the Commission considers that the conditions set out in points 63 and 64 of the Temporary Framework are met.

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

(424) 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 (106) and (107)), its built-in incentives for exit and an appropriate interest rate.

(425) 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) ([207]) plus the premium as set out in **Table 5**.

Table 5

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

(426) As explained in recital (106), the remuneration of the hybrid instruments uses the STIBOR 6M (Stockholm Interbank Offered Rate 6 Months) as the base rate. The Commission notes that, in SEK markets, there exists no public STIBOR 1-year to be used as base rate ([208]). 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 ([209]). Therefore, the Commission 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, and therefore interest would be payable semi-annually.

(427) In line with recital (106), the remuneration of the new hybrids issued by SAS for Denmark and Sweden is set out as described in **Table 6.**

Table 6

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	1 040 bps
NSHN2 (SEK 1 billion)	440 bps	540 bps	540 bps	690 bps	690 bps	890 bps	890 bps	1 140 bps

(428) Comparing the remuneration of the new State hybrid notes (**Table 6**) to the minimum remuneration set out in the Temporary Framework (**Table 5**), the Commission notes that the remuneration of the NSHN1 is 90 bps higher than the minimum remuneration required under the Temporary Framework. As for the NSHN2 placed with Denmark, this difference increases to 190 bps over the minimum remuneration required. The Commission also notes that the difference in remuneration (100 bps) between the NSHN1 and the NSHN2 is due to an agreement between Denmark and Sweden rather than to differences in the risk profile of the hybrid instruments ([210]).

([207]) Base rates are 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.

([208]) 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/.

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

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

(429) The Commission further observes that those hybrid instruments are treated as equity under IFRS (recital (107)), as they have many equity-like characteristics, which make those instruments riskier for investors. Therefore, their higher remunerations above the minimum remuneration required under point 66 of the Temporary Framework (90 bps and 190 bps) take into account the additional risk borne by Denmark and Sweden as investors: (i) those hybrid capital instruments are close to equity in terms of seniority ([211]); (ii) they are not convertible into shares (recital (107)); (iii) they bear coupons only payable at SAS' discretion (recital (108)) ([212]); (iv) they are perpetual in duration (recital (106)).

(430) 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).

(431) As regards the exit incentives for the Danish and Swedish 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 State Hybrid Notes as soon as possible.

(432) Taking into account the particular risk profile, characteristics and built-in exit incentives of the new State hybrid notes, the Commission considers that a top-up of 90 bps over the minimum remuneration ([213]) set out in **Table 6** adequately remunerates Denmark and Sweden for their new hybrid notes. As explained in recitals (428) to (429), this requirement is met for the new State hybrid notes.

(433) According to Ryanair, a margin of 400 bps in excess of the minimum remuneration requirement laid down in the Temporary Framework would be necessary to adequately compensate Sweden and Denmark (see recital (196)). As explained in the Oxera report, the methodology used to arrive at the figure of 400 bps is based on market benchmarks. Ryanair further considers that the 100 bps margin difference between the two hybrid notes, which it says are identical in terms of their risk profile, is itself evidence that the remuneration was not chosen based on tangible or credible considerations.

(434) The Commission notes that measures granted under the Temporary Framework constitute State aid because they grant an advantage that the beneficiary could not have obtained under normal market conditions. Hence, there is no requirement in the Temporary Framework that an adequate remuneration of hybrid capital instruments should be based on market benchmarks. Instead, point 65 of the Temporary Framework requires that the overall remuneration for the hybrid capital instrument must adequately factor in the characteristics of the instrument, its built-in incentives for exit and an appropriate benchmark rate. The Commission considers those elements in recitals (425) to (433) and, in light of them, concludes that a remuneration of 90 bps in excess of the minimum remuneration requirement laid down in the Temporary Framework is appropriate in the present case. As regards the 100 bps margin difference between the two hybrid notes, the Commission acknowledges that this is not based on a difference in risk profile of these instruments, but rather the result of an agreement between Denmark and Sweden (see recital (429)). Of course, since the Commission considers that a margin of 90 bps in excess of the minimum remuneration requirements laid down in the Temporary Framework constitutes an adequate remuneration in the present case, the same is necessarily true for an even higher excess margin of 190 bps.

([211]) In case of insolvency, the new State hybrid notes are senior to subscribed capital and to capital reserves.
([212]) A risk-mitigating factor is the fact that unpaid coupons will accrue compound interests as explained in recital (108).
([213]) Point 66 of the Temporary Framework.

(435) While the Commission is not required to establish the adequate remuneration by reference to a market benchmark, it should be further noted that Ryanair's assessment, in any case, does not establish a reliable benchmark for the market remuneration related to the hybrid instruments at stake. For instance, several of the financial instruments used by Ryanair in its analysis to estimate the alleged required additional margin, such as senior non-convertible bonds (see recital (197)), are not hybrid instruments but debt instruments. In contrast, the minimum remuneration set in point 66 of the Temporary Framework (to which, in the present case, margins of 90 bps and 190 bps are added) is a remuneration that applies to hybrid capital instruments specifically, and that remuneration, reflecting a deeper subordination and other risk factors related to equity or equity-like instruments, is considerably higher than the one for debt instruments as laid down in point 27(a) of the Temporary Framework.

6.3.4.3. Conclusion

(436) In light of the foregoing, the Commission considers that for the equity instrument, the Danish and Swedish remuneration and the exit incentives comply with points 60 to 64 of the Temporary Framework, provided that Denmark and Sweden comply with the condition set out in recital (423). As regards the hybrid capital instrument, for both the NSHN1 and the NSHN2, the Commission considers that the remuneration for Denmark and Sweden and the exit incentives comply with the principles set out in points 65 to 70 of the Temporary Framework.

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

6.3.5.1. Compliance with point 72 of the Temporary Framework

(437) 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.

(438) The Measure concerns an SEK 11 billion (EUR 1 069 million) recapitalisation in favour of SAS. Given that recapitalisation amount, the Commission must assess in the present decision whether SAS had significant market power for the purposes of point 72 of the Temporary Framework.

6.3.5.1.1. Identification of the relevant markets

(439) In its prior decisional practice under Council Regulation (EC) No 139/2004 ([214]) (the 'Merger Regulation') 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 O&D approach, where the target was an active air carrier ([215]); and (ii) the 'airport-by-airport' approach, in certain circumstances, when the target included an important slot portfolio ([216]).

(440) Under the O&D approach, every combination of an airport or city of origin and an airport or city of destination is defined as a distinct market. That market definition reflects the demand-side perspective, i.e. the fact that passengers wishing to travel from a city of origin to a city of destination do not consider as substitutable different city pairs.

([214]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1, ELI http://data.europa.eu/eli/reg/2004/139/oj).

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

([216]) 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; and 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). Ryanair argues that the circumstances that prevailed in the two Air Berlin merger cases are not applicable to the present case, since SAS continues to operate. It is however undisputed that the airlines that were to acquire Air Berlin's assets and slots (easyJet and Lufthansa) would continue to operate the acquired assets and slots post-merger.

(441) While the Commission has generally given pre-eminence to demand-side substitution, supply-side perspective has also played a role in its practice concerning both market definition and competitive assessment in this sector. For instance, the Commission has noted that 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 ([217]). Some low-cost carriers have also claimed that, with the growth of point-to-point airlines, supply-side substitution is an increasingly important aspect of the market definition ([218]).

(442) 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 overall 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. The beneficiary's power on such relevant markets will be assessed, inter alia, based on the level of congestion of the airport and the beneficiary's shares of airport infrastructure capacity that it has the permission to use for its operations (i.e. shares of slots) ([219]).

(443) 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 ([220]). 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*' ([221]). 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 the acquisition of an air carrier that had entered into insolvency proceedings ([222]).

(444) 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, for the purposes of point 72 of the Temporary Framework, 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 ([223]), which may be highly valuable and may be used on any route to and from that airport. That conclusion is also supported by the Commission Notice on the definition of relevant market ([224]), 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.

([217]) See e.g. Cases M.7541 – *IAG/Aer Lingus*, paragraphs 17–18; M.6607 – *US Airways/American Airlines*, paragraph 10; and M.6447 – *IAG/bmi*, paragraph 31.

([218]) See e.g. Case M.6663 – *Ryanair/Aer Lingus III*, paragraph 57.

([219]) See examples by analogy: Case M.8633 – *Lufthansa/Certain Air Berlin assets*; Case M.8672 –*easyJet/Certain Air Berlin assets*.

([220]) See e.g. Case M.8869 – *Ryanair/LaudaMotion*.

([221]) 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 1 December 2011).

([222]) See Case M.6447 – *IAG/bmi*, paragraphs 136-157.

([223]) 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, ELI: http://data.europa.eu/eli/reg/1993/95/oj) ('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'.

([224]) Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

(445) 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 it holds slots, regardless of the specific competitive position of SAS on any of those specific routes. Considering that the Measure does not lead to a strengthening of SAS' position on certain O&Ds as opposed to others and produces effects on the overall situation of SAS, 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 SAS supplies passenger air transport services.

(446) In its comments, Ryanair contends that the effects of the Measure on the overall ability of SAS to operate do not preclude that the specific competitive position of SAS in each of the O&Ds is affected as a result of the Measure. It concludes that there is no valid reason not to assess any of the O&Ds concerned by the Measure.

(447) Ryanair's conclusion by which, under the airport-by-airport approach, no O&D is defined as a relevant market, reflects a misreading of the market definition adopted by the Commission and of its consequences. Under the airport-by-airport approach, all O&Ds to and from a given airport are relevant and included in the overall assessment of the effects of the aid, albeit not on an individual basis. Defining each specific O&D on which SAS operated before the COVID-19 outbreak as relevant, as argued by Ryanair, would not provide the right assessment framework for a recapitalisation measure which, by nature, does not lead to the strengthening of the position of the beneficiary on certain O&D markets as opposed to others. For the same reason, Ryanair's claim that the Commission should have assessed SAS' market power on O&Ds alongside an airport-by-airport assessment cannot be sustained ([225]).

6.3.5.1.2. Overview of the relevant airports

(448) The Commission considers that only the coordinated airports in the European Economic Area ('EEA') at which SAS had a base ([226]) before the COVID-19 pandemic are relevant for the purpose of applying point 72 of the Temporary Framework, for the following reasons.

(449) First, in the context of that assessment, SAS cannot be deemed 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 ([227]). In addition, the establishment of a base at a particular airport generally implies that staff of the carrier are assigned to that base and that 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 establish a stable and long-term commercial presence – with the possibility of acquiring and maintaining some degree of market power – than a carrier operating at that airport with no base there.

(450) Ryanair claims that it is not justified to restrict the definition of relevant markets to airports where SAS has a base. It further notes that, in paragraph 331 of the Lufthansa judgment the General Court did not close the door on the Commission's duty to assess the existence of the beneficiary's significant market power at airports where it does not have a base if sufficient evidence is submitted to that effect. In support of its observation, Ryanair refers to (i) Ryanair's own model, which allegedly demonstrates that it is not necessary for an airline to have a base in an airport to successfully operate in that airport; and (ii) examples of airports where SAS' share in terms of deployed seats exceeded 40 to 50 % even if SAS did not operate a base at those airports (Ålesund, Umeå, Haugesund, Åre-Östersund, and Ängelholm-Helsingborg).

([225]) This means in particular that the Commission will not further consider the '*large number of O&D markets*' on which, according to Ryanair, SAS may have significant market power in view of SAS' market shares in terms of deployed seats, since those individual O&D markets do not correspond to the relevant markets for the purposes of point 72 of the Temporary Framework.

([226]) A 'base' means that the airline's aircraft stay overnight at the airport, and are used to operate several routes from that airport.

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

(451) The Commission considers that those arguments do not call into question its conclusion. According to the Think Tank Article submitted by Ryanair in an annex to its comments, Ryanair operated 87 bases in Europe before the COVID-19 pandemic ([228]). Ryanair neither explains why it considers its own model as not centred around bases established in the EEA, including at regional airports, nor why '*successful operations*' should equate to significant market power. As to the examples of airports served by SAS using non-based aircraft, Ryanair fails to mention that, due to the very small size of those airports, SAS reached such shares of seats by operating a single route to and from each of the airports ([229]). Such limited operations at an airport do not support a finding of significant market power at the airport ([230]). In addition, Ryanair's arguments regarding the possibility for an airline to have significant market power at an airport where it has no base are at odds with its reasoning in relation to barriers to entry ([231]). More specifically, Ryanair claims that the Commission should have recognised that economies of scope ([232]) and network economies ([233]) are factors that may prevent a potential competitor from establishing or expanding its presence at an airport. With that claim, Ryanair acknowledges, in fact, that the operation of a base – even of a large base (hub) – is decisive for the ability of an airline to have significant market power at an airport.

(452) Second, SAS cannot be deemed, for the purpose of the application of point 72 of the Temporary Framework, to have significant market power at airports that do not qualify as coordinated under the Slot Regulation. At coordinated 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 a sufficient scale as to effectively challenge SAS on any O&Ds to and from the airport.

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

(454) Fourth, point 72 requires an assessment of the market power of the beneficiary based on its operations before the grant of aid, on the relevant markets 'in *which it operates*'. The relevant timeframe for the assessment of SAS' market power is therefore the latest operation periods before the COVID-19 pandemic, i.e. the Summer 2019 IATA Season and Winter 2019/2020 IATA Season. Ryanair claims that the Commission should undertake a forward-looking analysis of SAS' market power. However, that claim clearly departs from the wording and purpose of point 72 of the Temporary Framework.

(455) In their notification, 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 ([234]). Of those 23 airports, 16 were coordinated airports ([235]). The Commission will assess SAS' market power at those 16 relevant airports in the following sections.

([228]) The Think Tank Article, page 26.

([229]) Notification of the Danish and Swedish authorities.

([230]) At those airports, even if SAS had exited and returned all its slots, the capacity made available to competitors would not have significantly impacted their competitive position. Therefore, SAS' continued presence does not materially affect the ability and incentive of its competitors to enter or expand at those airports.

([231]) See also recital (464).

([232]) As per Ryanair's definition, economies of scope occur when an airline operates hubs at a number of airports and has the potential to share costs across a broad range of routes, which makes it more difficult for competitors.

([233]) As per Ryanair's definition, network economies occur when an airline operates hubs and can achieve higher load factors, and therefore greater cost efficiencies as a result of transporting connecting passengers. Ryanair adds that SAS' three main operational hubs are at Copenhagen, Oslo and Stockholm airports, which it describes as forming '*the backbone of its flight network*'.

([234]) 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; and Amsterdam airport.

([235]) 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; and Amsterdam airport.

6.3.5.1.3. Criteria for the assessment of SAS' market power at the relevant airports

(456) A finding of significant market power requires, in particular, an examination of all the factors which may sufficiently constrain the behaviour of the undertaking concerned. An assessment of the competitive constraints on an undertaking cannot be based solely on the existing market situation. The potential impact of expansion by actual competitors or entry by potential competitors, including the threat of such expansion or entry, is also relevant.

(457) In this context, for the purpose of the assessment of SAS' market power in this case, the Commission has taken into account the competitive structure at each relevant airport, and in particular (i) constraints imposed by the existing suppliers of passenger air transport services (airlines operating at the airport), and, notably, the position on the market of the beneficiary and its actual competitors (section 6.3.5.1.3.1), and (ii) constraints imposed by the credible threat of future expansion by those actual competitors or entry by potential competitors (sections 6.3.5.1.3.2 and 6.3.5.1.3.3).

6.3.5.1.3.1. Market shares in terms of flights and seats as indicators of existing competitive structures

(458) 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.

(459) A share of flights (or frequencies) ([236]) 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 roughly 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 ([237]).

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

(461) In line with the case-law regarding market dominance ([238]), the Commission has considered that (i) SAS was unlikely to have significant market power at the relevant airports where its share of flights and its share of seats were below 40 %; (ii) additional factors, in particular those reflecting the constraints derived from potential competition ([239]), should be taken into account, for the assessment of the existence of market power for the purposes of point 72 of the Temporary Framework, where SAS had a share of flights or a share of seats of 40 % or more at the relevant airports.

([236]) In this decision, a frequency is defined as a roundtrip flight or two flights (one departure flight from the relevant airport to a destination and one arrival flight from the destination to the relevant airport).

([237]) Under the Slot Regulation, a carrier has to use at least 80 % of an allocated series of slots. If not, the allocated series of slots is returned to the slot pool (the 'use-it-or-lose-it rule'). The data shows that, at the most congested airports, slot utilisation is, in any event, generally over 95 % (see e.g. IATA Submission – Steer EU Fact-Finding Study: Airport Slots, December 2019, p. 37, available at: iata-airport-slots-submission-eu-study-steer-dec-2019.pdf). Therefore, at those airports, the difference between the number of slots used and the number of slots allocated is limited.

([238]) See e.g. judgment of 14 February 1978, *United Brands and United Brands Continental* v *Commission*, 27/76, ECLI:EU:C:1978:22; judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, ECLI:EU:C:1979:36.

([239]) Potential competition can be created by considerable unused production capacity (here unused slots) (see judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, ECLI:EU:C:1979:36, paragraph 48).

6.3.5.1.3.2. Barriers to expansion or entry

(462) For the purpose of assessing the constraints derived from actual and potential competition, the Commission considers that the barriers to expansion or entry faced by other air carriers than the beneficiary should be taken into account. 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 Union air transport sector is the lack of available slots at large airports ([240]). In that context, a high level of airport congestion reflects the airport capacity limitations faced by an air carrier, which affects its ability to effectively constrain the conduct of the beneficiary.

(463) In its comments, Ryanair criticises the Commission for focusing on slot constraints as the only barrier to entry. On the one hand, Ryanair submits that there are other factors that may prevent a potential competitor from establishing or expanding its presence, such as: economies of scope; branding, promotions and customer loyalty; network economies; or the risk of aggressive retaliation by incumbents. Ryanair simply lists those four elements.

(464) The Commission however notes that (i) two of those elements (economies of scope and network economies) are in fact related to slot constraints, since the ability to achieve those economies (cost efficiencies) depends on the ability of an airline to operate a sufficiently high number of routes to and from the airport and, therefore, on the ability to get access to a sufficiently high number of slots at the airport; (ii) branding, promotions and customer loyalty concern the ability to serve a specific category of passengers (premium or time-sensitive passengers) rather than the overall ability to operate to or from an airport and are generally, in any event, part of the benefits resulting for hub operations ([241]), which are accounted for in the identification of the relevant airports (limited to the beneficiary's bases); and (iii) the remaining element (risk of aggressive retaliation by incumbents) is specifically dealt with by the other measure to prevent undue distortions of competition set out in point 71 of the Temporary Framework, which applies to, but is not limited to, markets where SAS has significant market power.

(465) On the other hand, Ryanair submits that the relative stability of SAS' market shares in terms of deployed seats at the relevant airports over time (with the exception of Copenhagen airport) highlights that there are likely to be other barriers than airport congestion, preventing competitors from either entering or significantly expanding their presence at these airports.

(466) Yet, Ryanair does not provide any evidence of the existence of such barriers to entry or expansion at the relevant airports or any indication of airlines deterred from entering or expanding due to those alleged barriers. On the contrary, Ryanair's submission regarding barriers to entry and expansion appears to be contradicted by its argumentation regarding the principle of non-discrimination and free movement rules (recital (169)). In particular, Ryanair provided data ([242]) showing that the low-cost carriers provided 66 % of the growth in seat capacity between 2014 and 2019 in Denmark, whereas SAS and Danish Air Transport only provided 3 % of the growth seen over this five-year period. In Sweden, the low-cost carriers provided 40 % of the growth in intra-European seat capacity between 2014 and 2019, whereas SAS and Braathens only provided 22 % of the growth seen over this five-year period. Those data at national level are supported by the data collected by Denmark and Sweden at airport level, showing that the number of passengers carried by low-cost carriers grew by 43 % at Copenhagen airport and 25 % at Stockholm Arlanda airport over the 2014–2019 period ([243]). The growth of low-cost carriers indicate that the arguments raised by Ryanair in relation to other barriers to entry and expansion than slot constraints are unsubstantiated and tend to confirm the Commission's preliminary findings in the opening decision, according to which SAS' competitors do not face any major barrier to entry or expansion at any relevant airport.

([240]) See judgment of 4 July 2006, *easyJet* v *Commission*, T-177/04, ECLI:EU:T:2006:187, paragraph 166.
([241]) See e.g. Case AT.39964 – *Air France/KLM/Alitalia/Delta*, paragraph 59; Case AT.39595 – *Continental/United/Lufthansa/Air Canada*, paragraph 49.
([242]) The Airline's Market Study.
([243]) Response to the request for information of the Commission of 16 October 2023.

(467) In light of the foregoing, the Commission considers that, in its examination of the existence of barriers to entry and expansion for the purposes of the assessment of SAS' market power at the relevant airports, it is appropriate to focus on slot constraints.

6.3.5.1.3.3. Slot holdings and congestion rates as indicators of potential competitive structures

(468) In the opening decision, for each of the relevant airports for which SAS' market shares in terms of flights and seats were insufficient to exclude SAS' significant market power, the Commission used two additional indicators, i.e. SAS' slot holding at the airport together with the congestion rate at the airport.

(469) A slot holding is defined as the ratio between the number of slots allocated to an air carrier at an airport and the total available slots at that airport (i.e. the airport capacity, corresponding to the 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).

(470) The Commission has used the qualification as a coordinated airport under the Slot Regulation as a first proxy of a high congestion level of an airport.

(471) 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 ([244]).

(472) In its comments, Ryanair claims that the Commission inappropriately focuses its assessment of SAS' market power on slot holdings instead of market shares. That claim results from a misconception of the specific purpose of the analysis of the beneficiary's market power under point 72 of the Temporary Framework. That purpose is to identify the markets where competition is most likely to be negatively affected by the aid, i.e. the markets where the beneficiary enjoys a position of economic strength enabling it to prevent effective competition being maintained. Since the aid aims at preserving the beneficiary's ability to operate (rather than its actual operations), the significant market power of the beneficiary directly relates to its ability to continue operating flights to and from the relevant airports to the detriment of the entry or expansion of competitors. The market shares of SAS expressed in terms of frequencies or seats are indicators of the actual competition that SAS faces in the provision of passenger air transport services at an airport. By contrast, the slot holding of SAS at the airport, complemented by the assessment of the congestion therein, captures both the actual and potential competitive constraints faced by SAS. Indeed, those indicators not only reflect the current operations of passenger air transport services of the different airlines already present, but also their possibilities of expansion (e.g. by opening new routes or increasing frequencies) as well as the scope of new entry by airlines not yet active at the airport ([245]).

([244]) See e.g. Cases M.8672 – *easyJet/Certain Air Berlin Assets*, paragraph 114; M.8633 – *Lufthansa/Certain Air Berlin Assets*, paragraph 196. See also judgment of 20 October 2021, *Polskie Linie Lotnicze 'LOT'* v *Commission*, T-296/18, ECLI:EU:T:2021:724, paragraph 111. 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).

([245]) The Oxera report does not state otherwise in point 5.62: *'market shares indicate SAS' position compared to existing competitors, while available capacity (when there is low congestion) indicates the potential for new competitors to enter, or for existing competitors to expand (assuming that there are no other barriers to entry). Slot holdings conflate both of these measures*'. It should nevertheless be noted that, in the following point (point 5.63), the Oxera report misrepresents the analytical framework applied by the Commission, since the Commission does not use SAS' slot holding without reference to the level of congestion at the airport. Therefore, contrary to Ryanair's submission and using the numerical example proposed in the Oxera report, the Commission would distinguish between situations where (i) SAS' holding is 40 % and the airport congestion is 60 % (SAS' share of flights is 66,7 %); and (ii) SAS' holding is 40 % and the airport congestion is 100 % (SAS' share of flights is 40 % but could '*not be challenged*').

(473) In light of the above, the Commission considers that Ryanair's comments do not call into question the appropriateness of SAS' slot holding, together with the airport congestion rate, as factors particularly relevant for the assessment of the constraints imposed by current and potential competition on SAS and, consequently, for the assessment of SAS' market power ([246]).

6.3.5.1.3.4. Conclusion

(474) The Commission concludes that the following indicators are the most accurate metrics for the assessment of SAS' market power under point 72 of the Temporary Framework: firstly, SAS' share of flights and frequencies at the relevant airports and, secondly, if at least one of the latter reaches 40 %, SAS' slot holding together with the airport congestion rate, complemented, as appropriate, by the slot holding or the relative size of the fleet of based aircraft of its competitors.

6.3.5.1.4. Application of the criteria for the assessment of SAS' market power at the relevant airports

(475) Denmark and Sweden have provided data on SAS' share of frequencies, share of seats and slot holding at the relevant airports and on the congestion rates at those airports. For SAS' 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 ([247]).

(476) Based on those data, out of the 16 relevant airports, SAS' 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 ([248]). In the opening decision, in line with the case law on market dominance (see paragraph 441 above), the Commission considered that SAS was unlikely to have significant market power at those airports.

(477) Ryanair considers that the Commission should assess at least all 16 relevant airports in more detail, including evaluating congestion at different times of the day and barriers to entry other than slot constraints. However, Ryanair does not provide any element that would call into question the conclusion of lack of significant market power enjoyed by SAS at the relevant airports where its shares of frequencies and deployed seats are below 40 %. In particular, there is no indication in Ryanair's comments that SAS' actual or potential competitors are not in a position to effectively constrain SAS' operations at those airports. On the contrary, Ryanair's submission rather shows the ability of SAS' competitors to grow unhindered in those airports.

(478) The five coordinated airports in the EEA where SAS' 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, SAS' market shares in terms of frequencies and seats offered at the airport provide a fist indication of the possible existence of significant market power. Those metrics, however, are not sufficient, in themselves, to come to a final conclusion as to whether SAS has significant market power pursuant to point 72 of the Temporary Framework.

(479) The Commission will thus further assess SAS' market power at those five airports, by taking account of the following additional indicators together: (i) SAS' slot holding at the airport, in particular, for Copenhagen and Stockholm Arlanda airports, at peak times ([249]); and (ii) the level of congestion at the airport. For the sake of comprehensiveness, the Commission will also compare the number of aircraft based by SAS and its competitors at the airport, as a complementary approximation of their respective relative strengths.

([246]) This conclusion is in line with the analytical framework applied by the Commission under the airport-by-airport approach in prior merger decisions (see notably Case M.8633 – *Lufthansa/Certain Air Berlin assets* (2017), paragraphs 165–184).

([247]) The Online Coordination System is a multi-coordinator online web portal, used at 118 airports in 31 countries worldwide. It provides registered users with a comprehensive range of tools to query, sort, view and download slot and schedule information.

([248]) 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 %).

([249]) 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.

(480) As detailed in sections 6.3.5.1.4.1 to 6.3.5.1.4.5, SAS' share of frequencies or seats does not exceed 50 % at any of those five airports, and, importantly, SAS' slot holding at each airport is low or moderate and those airports are not highly congested. In the opening decision, the Commission considered that those indicators were sufficient to find that SAS does not have significant market power at any of Copenhagen, Stockholm Arlanda, Trondheim, Stavanger or Tromsø airports. In its comments, Ryanair argues that the assessment of SAS' market power requires considering other features of the market structure, such as the degree of fragmentation of competitors at the relevant airports or the competitive constraint imposed by them on SAS. However, Ryanair does not explain how those other features would call into question the existence of competitive constraints imposed on SAS, particularly in the form of potential entry or expansion of competitors, which would, thanks to the moderate congestion rate at the airports, be likely, timely and sufficient. However, as indicated in recital (480), for the sake of comprehensiveness, the Commission will also consider the relative market position of SAS' competitors in the below assessment of SAS' market power at Copenhagen, Stockholm Arlanda, Trondheim, Stavanger and Tromsø airports ([250]).

6.3.5.1.4.1. Assessment of SAS' market power at Copenhagen airport

(481) At Copenhagen airport, SAS' 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 %).

(482) Furthermore, as shown in **Table 7**, 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' average slot holding, which reached at most 16 % in 2019.

Table 7

SAS' slot holding and level of congestion at Copenhagen airport

IATA Season	SAS' average slot holding	SAS' 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)

([250]) Overall, the Commission notes that Ryanair's claims about the weak market position of SAS' competitors at the relevant airports are unfounded. In particular, Ryanair does not provide any element effectively calling into question the strong presence of Norwegian Air Shuttle at Norwegian airports (in particular at Trondheim, Stavanger and Tromsø airports), as well as at Copenhagen and Stockholm Arlanda airports. Nor does Ryanair explain why Wideroe's position at Tromsø airport, which it uses as a hub for the northern part of Norway, should be discarded. In view of the specific profile of those relevant airports, the financial difficulties of Norwegian Air Shuttle at the time of the granting of the aid or the regional focus of Wideroe cannot, in themselves, justify Ryanair's statement that they did not impose significant competitive constraints on SAS, in particular at Norwegian airports, and that the relevant airports were characterised by a significant fragmentation of viable competitors.

(483) In addition, the Commission notes that SAS based 12 aircraft at the airport in both Summer 2019 and Winter 2019/2020 IATA Seasons. According to the estimates provided by Denmark and Sweden, a number of other airlines operated a base at Copenhagen airport, including Norwegian Air Shuttle (10 aircraft based in Summer 2019 IATA Season and seven in Winter 2019/2020 IATA Season), Lufthansa Group (Lufthansa, Brussels Airlines, Austrian, Swiss: five aircraft based in Summer 2019 IATA Season and four in Winter 2019/2020 IATA Season) and Air France–KLM (two aircraft based in in both Summer 2019 and Winter 2019/2020 IATA Seasons).

(484) Given (i) SAS' moderate shares of weekly frequencies and deployed seats at Copenhagen airport in both IATA Seasons (at most 40 %); (ii) SAS' limited slot holding position at Copenhagen airport in both IATA Seasons (below 20 % on average); (iii) the available slot capacity at Copenhagen airport in both IATA Seasons; and (iv) the presence of relatively strong competitors, the Commission concludes 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.

6.3.5.1.4.2. Assessment of SAS' market power at Stockholm Arlanda airport

(485) At Stockholm Arlanda airport, SAS' 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).

(486) However, as shown in **Table 8**, 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' limited average slot holding, which reached at most 16 % in 2019.

Table 8

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

IATA Season	SAS' average slot holding	SAS' 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)
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)

(487) In addition, the Commission notes that SAS based 17 aircraft at the airport in Summer 2019 IATA Season and 16 aircraft in Winter 2019/2020 IATA Season. According to the estimates provided by Denmark and Sweden, a number of other airlines operated a base at Stockholm Arlanda airport, including Norwegian Air Shuttle (11 aircraft based in Summer 2019 IATA Season and five in Winter 2019/2020 IATA Season), Lufthansa Group (Lufthansa and Austrian: three aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons) and Air France–KLM (two aircraft based in in both Summer 2019 and Winter 2019/2020 IATA Seasons).

(488) Therefore, while SAS' shares of weekly frequencies and deployed seats at Stockholm Arlanda airport in both IATA Seasons are relatively high (without however exceeding 48 %), the Commission concludes, on the basis of (i) SAS' limited slot holding position at Stockholm Arlanda airport in both IATA Seasons (below 20 % on average), (ii) the significant available slot capacity at Stockholm Arlanda airport in both IATA Seasons, including at peak hours, and (iii) the presence of relatively strong competitors 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 Stockholm Arlanda airport.

6.3.5.1.4.3. Assessment of SAS' market power at Trondheim airport

(489) At Trondheim airport, SAS' market shares exceeded 40 % based on weekly frequencies and deployed seats, reaching 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).

(490) However, the level of congestion at the airport before the COVID-19 pandemic was moderate, so that air carriers willing to expand or enter at Trondheim airport did not face any significant barrier ([251]). Further, SAS' estimated average slot holding would be limited, and in any event below 20 % in 2019 (Summer 2019 IATA Season: 19 %; Winter 2019/2020 IATA Season: 17 %). 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 ([252]).

(491) In addition, the Commission notes that, according to the estimates provided by Denmark and Sweden, Trondheim airport was used as a base not only by SAS (10 aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons) but also by Norwegian Air Shuttle (two aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons) and KLM (one aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons).

(492) In light of the above, the Commission concludes 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.

([251]) 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 %).

([252]) 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' 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.

6.3.5.1.4.4. Assessment of SAS' market power at Stavanger airport

(493) At Stavanger airport, SAS' market shares exceeded 40 % based on weekly frequencies and deployed seats, reaching 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).

(494) However, 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' very limited average slot holding, which reached 10 % on average in Summer 2019 IATA Season and 8 % on average in Winter 2019/2020 IATA Season.

(495) In addition, the Commission notes that, according to the estimates provided by Denmark and Sweden, Stavanger airport was used as a base not only by SAS (eight aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons) but also by Norwegian Air Shuttle (two aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons), Wideroe (one aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons) and KLM (one aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons).

(496) In light of the above, the Commission concludes 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.

6.3.5.1.4.5. Assessment of SAS' market power at Tromsø airport

(497) At Tromsø airport, SAS' 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 %).

(498) In any event, the average level of congestion at the airport before the COVID-19 pandemic 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' very limited average slot holding, which reached 5 % on average in Summer 2019 IATA Season and 4 % on average in Winter 2019/2020 IATA Season.

(499) In addition, the Commission notes that, according to the estimates provided by Denmark and Sweden, SAS was not the airline with the largest fleet based at Tromsø airport. Wideroe based four aircraft at the airport in both Summer 2019 and Winter 2019/2020 IATA Seasons, while SAS based two aircraft at the airport in both Summer 2019 and Winter 2019/2020 IATA Seasons. Norwegian Air Shuttle also operated a base at the airport (one aircraft based in both Summer 2019 and Winter 2019/2020 IATA Seasons).

(500) In light of the above, the Commission concludes 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.

6.3.5.1.4.6. Conclusion on market power

(501) As SAS does not have significant market power at any of the airports at which it operates, the Commission 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.

6.3.5.2. Compliance with other conditions under section 3.11.6 of the Temporary Framework

6.3.5.2.1. Point 71 of the Temporary Framework

(502) 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.

(503) In that regard, the Commission notes that Denmark and Sweden made the Measure conditional upon observance of all the conditions laid down in section 3.11.6 of the Temporary Framework. That includes compliance with point 71. SAS will therefore be prohibited to engage in any aggressive commercial expansion and excessive risk taking (recital (111)).

(504) In addition, the Commission assessed the business plan drawn up by SAS on 24 April 2020. As indicated in recital (41), that business plan projected a prudent and progressive return to pre-COVID-19 traffic levels not before at least mid-2023, with a long recovery period lasting from November 2020 to February 2022. Those forecasts were based on the assumption that governments would not apply travel restrictions beyond October 2020. The Commission notes that, at the time SAS drew up its business plan, industry forecasts were more optimistic than the ones used by SAS. For example, on 27 April 2020, Airports Council International Europe projected in its mild scenario that the passenger traffic would return to its pre-COVID-19 levels by 2022 at the earliest, and to 90 % of those levels by December 2021.

(505) In the course of July 2020, some industry forecasts were revised, in view of the slower recovery registered in May and June 2020, the persistence of travel restrictions and the absence of certainty as to the outlook of the COVID-19 pandemic. Airports Council International Europe then projected that full recovery would not take place before 2024, and so did IATA in its report of 28 July 2020, although those projection concerned global traffic ([253]).

(506) In that regard, Denmark and Sweden explained in their notification that, by the end of July 2020, SAS decided not to revise its business projections given that the traffic actually registered between April and June 2020, and its operating revenues, were better than what it had anticipated. Its traffic indicators also show that booking levels were steadily increasing for July and August 2020 (recital (51)). Furthermore, SAS explained that its core business was focused on domestic and international short-haul flights (notably within Scandinavia), which were recovering at a faster rate than long-haul flights. In any event, SAS' traffic projections remained more or less in line with the updated industry forecasts, expecting a full recovery between 2023 and 2024.

(507) The Commission also notes that, as it is apparent from section 2.1.3.1, the business plan of SAS was manifestly focused on rightsizing (permanent reduction of staff, reduction of activities such as ground-handling, etc.) and its business over the years 2020 and 2021, rather than expanding or taking excessive risks.

(508) Lastly, the Commission notes that SAS is bound to comply with all the conditions of section 3.11.6 of the Temporary Framework, and in particular the acquisition ban set out in point 74 of thereof.

(509) It follows that the Measure complies with point 71 of the Temporary Framework.

6.3.5.2.2. Point 73 of the Temporary Framework

(510) Point 73 of the Temporary Framework requires that '*[b]eneficiaries receiving a COVID-19 recapitalisation measures are prohibited from advertising it for commercial purposes*'.

([253]) The recovery for domestic traffic and international short-haul flights was projected for 2023. Those projections were further revised in late October 2020, following the resurgence of a second wave of the COVID-19 pandemic.

(511) The Measure provides that SAS, and the companies controlled by SAS, will be forbidden to use the Measure for commercial advertising purposes (recital (112)).

(512) The Measure therefore complies with point 73 of the Temporary Framework.

6.3.5.2.3. Points 74 and 75 of the Temporary Framework

(513) 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.

(514) The Measure provides that SAS, and all the companies controlled by SAS, will be obliged to respect that condition, taking into account the possible exception mentioned in point 75 of the Temporary Framework (recital (112)).

(515) The Measure therefore complies with points 74 and 75 of the Temporary Framework.

6.3.5.2.4. Point 76 of the Temporary Framework

(516) The Commission notes that the Measure will require SAS to respect point 76 of the Temporary Framework regarding the use of State aid in undertakings in difficulty already on 31 December 2019 (recital (121)).

(517) The Measure therefore complies with point 76 of the Temporary Framework.

6.3.5.2.5. Point 77 of the Temporary Framework

(518) 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.

(519) Denmark and Sweden made the Measure conditional upon compliance with point 77 of the Temporary Framework, while providing for an exception to the prohibition for the beneficiary to make non-mandatory coupon payments under the New Commercial Hybrid Notes resulting from the conversion of existing Bonds (recital (115). Denmark and Sweden explained, in essence, that the waiving of that specific ban was necessary to obtain the participation of private creditors to the transaction (recital (115).

(520) In other words, Denmark and Sweden invoked a (partial) derogation to point 77 of the Temporary Framework concerning the payment of non-mandatory coupons under the New Commercial Hybrid Notes. However, such a (partial) derogation is not foreseen by point 77 of the Temporary Framework.

(521) In that regard, as a preliminary remark, the Commission refers to the case-law described in recitals (396) and (397).

(522) While the wording of point 77 of the Temporary Framework requires the application of a ban on non-mandatory coupon payments as part of a recapitalisation measure, it must nonetheless be ascertained whether there were, in the present case, exceptional circumstances which justify the direct application of Article 107(3), point b, TFEU to the facts of the present case and, therefore, a derogation to point 77 of the Temporary Framework in relation to non-mandatory coupon payments made under the New Commercial Hybrid Notes.

(523) In the present case, the Commission considers that the Measure (i) was part of a regulatory framework that was impacted by the exceptional circumstances caused by the COVID-19 pandemic and, that (ii) it had specific features that were unique to it, which justified the waiving of the non-mandatory coupon payments for the New Commercial Hybrid Notes.

The regulatory framework was impacted by exceptional circumstances caused by the COVID-19 pandemic

(524) First, the economic repercussions of those exceptional circumstances required immediate action at both Member State and Union 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 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), point 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.

(525) Ryanair's observation about point 77 of the Temporary Framework (recital (203) does not alter that finding. The fact that the Temporary Framework already takes into account the COVID-19 pandemic does not mean that it could foresee, at the time it was adopted, all the measures that the Member States might adopt for economic operators affected by the crisis caused by the COVID-19 pandemic. As indicated in recital (525), the Commission adopted the Temporary Framework within a very short period of time following the first lockdown measures as a result of the COVID-19 pandemic. That instrument was a limited and ever-evolving instrument, as shown by the several amendments that the Commission made to it between the date of its adoption and the date of the granting of the Measure. It is that exceptional context that the Commission is taking into account when assessing, in the present case, the possibility to deviate from the Temporary Framework.

The Measure had specific features that were unique to it

(526) Concerning the specific features attached to the Measure, it is necessary to recall that point 77 of the Temporary Framework sets out a compatibility requirement aimed at preventing existing private investors and creditors from 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 contributes to minimising the amount of aid needed, by reducing the cash outflows of the beneficiary and thus, limiting the quantum of aid to what is strictly necessary to restore the capital structure of the beneficiary and ensure its viability.

(527) The Commission considers, in this case, that the Measure had characteristics that were unique to it for the following six reasons.

(528) Firstly, the Commission recalls that the recapitalisation of SAS involved a significant participation of private investors, allowing SAS to collect up to SEK 3,75 billion of private capital. The conversion of the Bonds amounted on its own to SEK 2,25 billion, i.e. more than 15 % of the total amount of the recapitalisation of SAS. Therefore, that conversion represented a significant part of the financing of the recapitalisation of SAS.

(529) Secondly, the Commission observes that the possibility for SAS to make non-mandatory coupon payments on the New Commercial Hybrid Notes resulting from the conversion of the Bonds was a crucial point in the negotiations with certain bondholders, and, more generally, a key consideration for all the bondholders to agree to the conversion of the Bonds (recital (115)). Contrary to what Ryanair suggested (recital (205)), that statement is not contradictory in itself: SAS negotiated directly with certain bondholders representing the interests of all the bondholders involved, and not with each bondholder individually. Once the agreement was reached, all the bondholders had the opportunity to vote at a general meeting to agree or not to the recapitalisation proposed, as it is apparent from the press release published by SAS on 7 August 2020 ([254]). Therefore, if the waiving of the ban on non-mandatory coupons was crucial to those bondholders negotiating with SAS, Denmark and Sweden could reasonably expect that it would also be a key consideration for all bondholders.

([254]) See SAS' press release of 7 August 2020 (last accessed on November 2023).

(530) Thirdly, it is worth noting that the bondholders had already refused a first proposition of the recapitalisation plan, as they did not initially agree on the terms and conditions of the conversion of the Bonds (recital (83)). It was essential for SAS, and for Denmark and Sweden, to ensure that the negotiations would not fail again on matters that were decisive for those bondholders. In that regard, Ryanair's argument (recital (206)) according to which the bondholders already had sufficient incentives to invest because of the significant back-up from Denmark and Sweden is manifestly unfounded, as those bondholders already refused to participate to the transaction in the first place.

(531) Fourthly, the Commission observes that the conversion of the Bonds into the New Commercial Hybrid Notes did not have the effect of enriching the bondholders that participated to the recapitalisation of SAS. On the contrary, as indicated in recital (119), the initial investment of those bondholders in the Bonds lost value as a result of the conversion into the New Commercial Hybrid Notes. In other words, the bondholders were entitled to a higher return on investment if they had kept the Bonds as compared with accepting their conversion into New Commercial Hybrid Notes. Therefore, the conversion took place at the expense of those bondholders, which thus shared with Denmark and Sweden the burden of the recapitalisation of SAS.

(532) Fifthly, the Commission notes that Denmark and Sweden expected the conversion of the existing Bonds into new privately held hybrids to bring three positive effects for SAS, Denmark and Sweden, namely that (i) it would improve the capital structure, the liquidity position and the key financial ratios of SAS (recital (116)); (ii) it would reduce the amount of State aid needed (recital (117)); and (iii) it would facilitate and better secure the remuneration of Denmark and Sweden (recital (118)).

(533) Ryanair affirms in that regard that the ban on non-mandatory coupon payments under point 77 of the Temporary Framework aims at preventing the beneficiary of a recapitalisation aid to negotiate with its private creditors, and thus at reducing the amount of aid needed (recital (206)). However, this is not correct. While it is true, as indicated in recital (527), that the aim of the ban on non-mandatory coupon payments is to avoid cash outflows from the beneficiary, and thus to reduce the amount of aid, point 77 of the Temporary Framework does not prevent the beneficiary of a recapitalisation aid from negotiating with private creditors (such as bondholders) the conditions under which those creditors will take the risk of injecting fresh private capital, along that of a Member State, to restore the capital structure of the beneficiary and ensure its viability. In any event, Ryanair's affirmation does not alter the finding that, without the waiving of the ban on non-mandatory coupon payments on the New Commercial Hybrid Notes, there was a high risk that the private investors would not have agreed to participate to the recapitalisation of SAS.

(534) In the same vein, Ryanair's observation according to which the Commission wrongly assumed that in the absence of burden-sharing, SAS would have received more aid (recital (207)) is not relevant. As demonstrated in section 6.3.3, the Measure complies with point 54 of the Temporary Framework. The Commission reached that conclusion under the premise that Denmark and Sweden could contribute up to SEK 14,25 billion to the recapitalisation of SAS, (i) in the absence of private capital and (ii) despite that the aid ultimately granted was of SEK 9,54 billion (recital (342)). Therefore, Denmark and Sweden could have indeed filled the gap left by the bondholders with SEK 2,25 billion if the latter had decided not to participate to the transaction. The Commission cannot exclude that Denmark and Sweden would have granted more aid in the absence of burden-sharing. That would have led to a result that is contrary to the objective of the Temporary Framework and of Article 107(3), point b, TFEU, which require that aid must be limited to what is necessary to attain the objectives pursued thereunder.

(535) Sixthly and lastly, the Commission observes that the Temporary Framework does not impose any burden-sharing requirement for the compatibility of the State aid in the form of recapitalisation. The burden-sharing provided by the Measure is, in this case, 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, upon request of Denmark and Sweden (recital (84)).

(536) The Commission rejects Ryanair's argument according to which point 77 of the Temporary Framework already implies a burden-sharing (recital (208)). Point 77 of the Temporary Framework does not require private creditors, nor any other private stakeholders, to participate to the recapitalisation of the beneficiary, let alone to do it at their expense.

(537) It follows from the above that waving the ban on non-mandatory coupon payments under the New Commercial Hybrid Notes represented, in this case, a decisive element for the participation of private bondholders to the recapitalisation of SAS, who contributed to that recapitalisation to a significant extent. The negotiations between SAS and those bondholders were uncertain, as the latter had already rejected a first recapitalisation plan of SAS. Those bondholders had voluntarily accepted (i.e. without being required by the Temporary Framework or any other rules) to suffer losses on their investment as a result of the conversion of the Bonds into New Commercial Hybrid Notes, while that conversion had positive effects on SAS' financial situation and allowed Denmark and Sweden to limit the amount of State aid needed to address the company's liquidity and equity needs.

(538) Consequently, the Commission is of the view that requiring a ban on non-mandatory coupon payments (payable under the New Commercial Hybrid Notes) would have had the likely effect of deterring the bondholders from participating in the recapitalisation plans of SAS, which would have in turn led to an increase of State aid to be injected into the company's capital structure. In those circumstances, maintaining the said ban would run counter the objectives of the Treaty the objective of the Temporary Framework and of Article 107(3), point b, TFEU, which, as noted, require that aid must be limited to what is necessary to attain the objectives pursued thereunder.

(539) Hence, since the measure at issue was designed in such a way as to reduce the amount of aid as much as possible, it was necessary, in order to ensure a substantial contribution by private investors, that they be assured of receiving payments on the New Commercial Hybrid Notes. That was all the more the case since the exceptional circumstances linked to the COVID-19 pandemic had the inevitable effect of causing a deterioration in the investment climate in the aviation sector. Denmark and Sweden, therefore, could not reasonably expect a significant participation by private investors without putting incentives in place.

(540) The Commission therefore considers that waving the 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.

6.3.5.2.6. Point 78 of the Temporary Framework

(541) 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*'.

(542) The Commission observes that the Measure contains the prohibition set out under point 78 of the Temporary Framework (recital (113)).

(543) The Measure therefore complies with point 78 of the Temporary Framework.

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

(544) In light of the foregoing, the Commission concludes that the Measure complies with all the conditions laid down in Section 3.11.6. of the Temporary Framework on the governance conditions and prevention of undue distortion of competition. Although the Measure derogates from point 77 of the Temporary Framework, the Commission considers that such derogation is justified, in this specific case, for the reasons developed in section 6.3.5.2.5.

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

(545) 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*' ([255]). 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.

(546) SAS is a large undertaking that would receive a recapitalisation of more than 25 % at the time of intervention. Accordingly, Denmark and Sweden submitted a business plan developed by SAS to redeem by financial year 2025 the instruments provided by Denmark and Sweden (recital (125)). 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 ([256]). Additionally, Denmark and Sweden 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 was granted, unless the State's intervention would be reduced below the level of 25 % of equity by that deadline (recital (126)).

(547) The Commission therefore concludes that the conditions set out in points 79 and 80 of the Temporary Framework are satisfied.

(548) 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 (recital (130)). 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 (130)).

(549) Finally, in line with point 85 of the Temporary Framework, Denmark and Sweden committed to notify a restructuring plan should their equity intervention not be reduced below 15 % of the beneficiary's equity ([257]) within 6 years after the granting of the Measure (see recital (130)). Therefore, the Measure complies with point 85 of the Temporary Framework.

(550) The Commission notes that Ryanair takes issue with the duration of 6 years laid down in point 85 of the Temporary Framework (recital (209)). It claims that such 'lax' requirement does not incentivise the exit of the State and is contrary to the principle of proportionality and point 45 of the Temporary Framework. It does not however indicate what should be the appropriate duration.

(551) The Commission notes that the requirement for a restructuring plan is not meant to act as an incentive for the exit of a Member State from the share of capital acquired through a COVID-19 recapitalisation. The Temporary Framework already provides such incentives in its section 3.11.5 of the Temporary Framework, and it is only after that 6 year period that it will become clear that the various incentive mechanisms have not produced the expected result and that a restructuring plan will accordingly have to be notified. Such a duration is also entirely consistent with the various mechanisms put in place by the Temporary Framework to encourage and accelerate the exit of the State from the equity of the beneficiary concerned, some of which are spread over a similar period.

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

([256]) 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.

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

(552) It is therefore in no way contrary to the principle of proportionality to provide in point 85 of the Temporary Framework that such a restructuring plan is to be notified only if, after 6 years, the Danish and Swedish intervention has not been reduced to below 15 % of the equity of SAS.

(553) Furthermore, the analogy with the Banking Communication is inappropriate because, as observed therein, that crisis was caused, at least in part, by the excessive risks taken by certain financial institutions, unlike the COVID-19 pandemic, which is a health crisis. Accordingly, it cannot be required that the measures put in place by the Commission in order to remedy the consequences of the COVID-19 crisis be of the same nature as those responding to that financial crisis.

(554) Furthermore, Ryanair's observation based on point 45 of the Temporary Framework must be rejected. While that point requires the recapitalisation measures to be subject to stringent conditions in order to limit distortions of competition, it is explained that those conditions relate to the State's entry into, remuneration and exit from the equity of the undertakings concerned, governance provisions and appropriate measures to limit distortions of competition. This is clearly a reference to the conditions set out in Sections 3.11.2 to 3.11.7 of the Temporary Framework.

(555) Therefore, the Commission concludes that the Measure complies with all the requirements set out in section 3.11.7 of the Temporary Framework.

6.3.7. **Section 4 of the Temporary Framework**

(556) Denmark and Sweden confirmed that they would comply with the reporting and monitoring obligations contained in section 4 of the Temporary Framework (recitals (129) and (130)).

6.3.8. **Compatibility of the Measure with other provisions of Union law**

(557) Ryanair argued in its comments that the Measure infringes several provisions of the TFEU, and in particular Articles 18, 49 and 56 thereof, as well as Article 15 of Regulation (EC) No 1008/2008 (recital (166)). It also refers to an infringement of the general principle of Union law of non-discrimination (recital (167)).

(558) In that regard, Ryanair rightly recalls that State aid which, as such or by reason of some modalities thereof, contravenes provisions or general principles of Union law cannot be declared compatible with the internal market ([258]).

(559) As regards, however, its claim that the Measure infringes Article 18 TFEU, the Commission notes that that provision states in its first paragraph that '*within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*'. Article 18 TFEU is intended to apply independently only to situations governed by Union law in respect of which the TFEU lays down no specific prohibition of discrimination. Article 107(2) and (3) TFEU provides for derogations from the principle, referred to in Article 107(1) TFEU, that State aid is incompatible with the internal market, and thus allows differences in treatment between the undertakings, subject to fulfilment of the requirements laid down by those derogations. According to the Court of justice, those derogations must be regarded as 'special provisions' provided for in the Treaties, within the meaning of the first paragraph of Article 18 TFEU ([259]).

([258]) Judgments of 31 January 2023, *Commission* v *Braesch and Others*, C-284/21 P, ECLI:EU:C:2023:58, paragraph 96, and of 28 September 2023, *Ryanair* v *Commission*, C-320/21 P, ECLI:EU:C:2023:712, paragraph 109.

([259]) Judgment of 28 September 2023, *Ryanair* v *Commission*, C-320/21 P, ECLI:EU:C:2023:712, paragraph 111.

(560) It follows that, in the present case, it is necessary only to examine whether the difference in treatment brought about by the Measure is permitted under Article 107(3), point b, TFEU. Thus, the Commission assessed whether the Measure complied with Article 107(3), point b, TFEU, as interpreted by the Temporary Framework. The Commission has concluded that the Measure is in accordance with those requirements, that is to say, is granted for the purposes of an objective recognised therein and within the limits of what is necessary and proportionate to the achievement of that objective ([260]). There is therefore no further need to assess a possible infringement of Article 18 TFEU. In any event, Ryanair does not elaborate on the reasons why Article 18 TFEU would be, in the present case, infringed.

(561) As to Articles 49 and 56 TFEU and Article 15 of Regulation (EC) No 1008/2008, those provisions protect respectively the free provision of services within the internal market and the free provision of air transport services within the internal market. The Commission notes that according to Article 58 TFEU, Article 56 TFEU is not applicable to the transport sector; therefore, the Measure may not infringe that provision. As to Article 15 of Regulation (EC) No 1008/2008, Ryanair claims that, by reserving the Measure only to SAS, to the detriment of all airlines that were equally affected by the COVID-19 pandemic, Denmark and Sweden discouraged the free provision of services, as well as the freedom of establishment of those airlines, including Ryanair's (recital (170)). It argues, in essence, that the choice of the beneficiary restricts its freedom to provide services and its freedom of establishment.

(562) The Commission notes in that regard that, according to the case-law, the restrictive effects which an aid measure has on the freedom to provide services or the freedom of establishment do not constitute a restriction prohibited by the Treaty, since it may be inherent in the very nature of State aid, such as its selective nature ([261]).

(563) According to that same case-law, where the modalities of an aid measure are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately, their effect on the compatibility or incompatibility of the aid viewed as a whole with the internal market must therefore of necessity be determined by means of the procedure prescribed in Article 108 TFEU ([262]).

(564) In that regard, the Court of justice ruled that, in those circumstances, the effect of the choice of an undertaking as a beneficiary of a measure on the internal market cannot be examined separately from the effect of the compatibility of that aid measure as a whole with the internal market by means of the procedure prescribed in Article 108 TFEU. It is apparent from Ryanair's comments that the latter shares that view, since it claims that the Commission should prohibit the Measure in the context of the procedure laid down under Article 108(3) TFEU, but on the grounds that it allegedly infringes Article 15 of Regulation (EC) No 1008/2008 and Article 49 TFEU.

(565) However, as indicated by the case-law in recital (563), the restrictive effects that a State aid may have on the free provision of services or on the freedom of establishment, do not constitute a restriction prohibited by the Treaty, since it may be inherent in the very nature of State aid, such as its selective nature. In this case, the Commission does not identify any element showing that the Measure, and more specifically, the choice of SAS as the only beneficiary of the Measure, produced restrictive effects that went beyond those inherent in State aid granted in accordance with the requirements laid down in Article 107(3), point b, TFEU. Interested parties have not provided such evidence either.

([260]) As regards a possible infringement of the general principle of non-discrimination, the Commission considers that, even assuming that SAS and other airlines are in a comparable situation in view of the objective of the Measure, such difference of treatment would in any event be justified, given that the Measure is necessary for attaining its objective indicated in recital (17), as demonstrated under section 6.3.1 (and notably, the existence of a common interest to intervene in favour of SAS specifically, for the reasons set out in section 6.3.1.2), and proportionate to that objective, as demonstrated in section 6.3.3 (proportionality of the aid) 6.3.4 (remuneration and exit of the State), 6.3.5 (governance conditions and prevention of competition distortions) and 6.3.6 (exit strategy of the State), in that it does not exceed what is necessary to achieve the objective of the Measure.

([261]) Judgment of 28 September 2023, *Ryanair* v *Commission*, C-320/21 P, ECLI:EU:C:2023:712, paragraph 132.

([262]) Judgment of 28 September 2023, *Ryanair* v *Commission*, C-320/21 P, ECLI:EU:C:2023:712, paragraph 133. See also, to that effect, judgments of 22 March 1977, *Iannelli & Volpi*, 74/76, ECLI:EU:C:1977:51, paragraph 14, and of 31 January 2023, *Commission* v *Braesch and Others*, ECLI:C-284/21 P, ECLI:EU:C:2023:58, paragraph 97.

(566) Therefore, the Measure does not infringe Article 49 TFEU and Article 15 of Regulation (EC) No 1008/2008.

(567) It follows that, in light of the foregoing, the Measure does not contravene to any of the provisions of Union law raised by Ryanair in its observations.

7. **CONCLUSION**

(568) The Commission finds that Sweden and Denmark have unlawfully implemented the Measure in breach of Article 108(3) TFEU. However, the Commission considers that the Measure is compatible with Article 107(3), point b, TFEU, under the condition that Denmark and Sweden implements the mechanism described in recital (148) in line with points 61 and 62 of the Temporary Framework, within 2 months from the notification of the present decision to those Member States.

HAS ADOPTED THIS DECISION:

Article 1

The aid that the Kingdom of Denmark and the Kingdom of Sweden granted to and implemented for Scandinavian Airlines System AB, amounting to SEK 9,54 billion, is compatible with the internal market, subject to the conditions set out in Article 2.

Article 2

The compatibility of the aid referred to in Article 1 is subject to the Kingdom of Denmark and the Kingdom of Sweden requiring from Scandinavian Airlines System AB, for the purpose of meeting the conditions of points 61 and 62 of the Temporary Framework, the issuance of additional capital securities to the Kingdom of Denmark and the Kingdom of Sweden increasing the remuneration of those Member States on the COVID-19 shares that they respectively acquired with the aid referred to in Article 1 via the subscription of new common shares of Scandinavian Airlines System AB.

The issuance of the instruments mentioned in the first paragraph will take place after 4 years (if the Kingdom of Denmark and/or the Kingdom of Sweden have not sold at least 40 % of the COVID-19 shares they acquired) and 6 years (if the Kingdom of Denmark and/or the Kingdom of Sweden have not sold their COVID-19 shares in full) following the date of the grant of the aid referred to in Article 1.

To issue the instruments referred to in the first paragraph, Scandinavian Airlines System AB will either (i) amend the terms of the State hybrid notes issued by that undertaking to the Kingdom of Denmark and the Kingdom of Sweden to increase the amount payable thereunder; or (ii) issue a new instrument to the Kingdom of Denmark and the Kingdom of Sweden under the same terms and conditions as the State hybrid notes issued by that undertaking to the Kingdom of Denmark and the Kingdom of Sweden.

The increase in remuneration provided under the instruments referred to in the first paragraph will correspond to an increase of 10 % of the amount resulting from multiplying the number of shares of Scandinavian Airlines System AB held respectively by the Kingdom of Denmark and the Kingdom of Sweden, which are not yet sold before the dates indicated in paragraph 2 and which exceed the number of shares that those Member States respectively held in that undertaking prior to the grant of the aid referred to in the first paragraph, by the higher of (i) SEK 1,16 or (ii) the volume-weighted average price paid for the shares of Scandinavian Airlines System AB on Nasdaq Stockholm during a period of 20 trading days immediately preceding the fifth trading day prior to the activation of the step-up at the time indicated in paragraph 2. The additional principal amount resulting from this calculation will be adjusted in order to account for the expected future cash flows associated with that additional nominal amount of capital securities, discounted at an appropriate market rate reflecting their terms and conditions and the riskiness of the issuer at the time indicated in paragraph 2.

Article 3

The Kingdom of Denmark and the Kingdom of Sweden shall inform the Commission, within 2 months of notification of this Decision, of the measures taken to comply with the conditions set out in Article 2.

Article 4

This Decision is addressed to the Kingdom of Denmark and the Kingdom of Sweden.

Done at Brussels, 29 November 2023.

For the Commission
Didier REYNDERS
Member of the Commission