JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
16 March 2004 *

In Case T-157/01,

Danske Busvognmænd, established in Frederiksberg (Denmark), represented by P. Dalskov and N. Symes, lawyers,

applicant,

v

Commission of the European Communities, represented by H. Støvlbaek and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Danish.

supported by

Kingdom of Denmark, represented by J. Molde, acting as Agent, assisted by P. Biering and K. Hansen, lawyers, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Decision SG(2001) D/287297 of 28 March 2001 (aid NN 127/2000) declaring aid granted by the Danish authorities to Combus A/S in the form of capital injections as part of the privatisation of that company to be compatible with the common market,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: N.J. Forwood, President, J. Pirrung, P. Mengozzi, A.W.H. Meij and M. Vilaras, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2003,

gives the following

Judgment

Facts and procedure

Background to the dispute

1 The Danish market in public transport by bus is divided into two sectors: the capital region and the rest of the country.

2 As regards the operation of buses in the capital region, the county councils and the municipalities of Copenhagen and Frederiksberg, represented on the Capital Development Council, have the task of planning routes, traffic volumes, the bus network, timetabling, bus stations, types of vehicles and fares and ensuring the provision of public transport through invitations to tender.

3 As regards operation of buses outside the capital region, the equivalent tasks are taken care of by the various county or municipal councils in each county. In some cases those councils have set up county or inter-municipal transport undertakings, whose task is to ensure bus transport in accordance with the plans drawn up. Those transport undertakings function as 'management companies', which then

delegate the task of operating bus transport to private and public undertakings, following invitations to tender. Those undertakings are required to operate transport in accordance with the route network, timetable and fares set by the county.

4 The rules governing invitations to tender require that the contract be awarded to 'the most economically advantageous tender', regardless of whether the tenderer is from the private or public sector. The income from the operation of the transport does not accrue to the transport undertakings, but rather to the counties, who then remunerate the undertakings in the form of a gross amount per hour of transport and per bus in traffic, plus an additional amount. The amount of that remuneration is determined by the invitation to tender.

5 In practice, the fares paid by the passengers do not cover all of the costs. In 2000, the income from bus ticket sales covered 53% of all costs.

6 Public transport by bus was originally provided in Denmark inter alia by De Danske Statsbaner (Danish State Railways, 'DSB'). Under legislation introduced in 1995, those activities were transferred to DSB Busser A/S, an independent undertaking which was still State-owned, however. Under 1996 legislation, the undertaking changed its name to Combus A/S ('Combus'). That undertaking was established with a view to managing transport operations on a commercial basis and operating in the market in conditions of competition comparable to those of private bus companies.

7 When Combus was created, close to 1 600 people were employed in bus transport, including approximately 750 on a contract basis and 845 officials. Those officials maintained their employment relationship with the State and while being made available to Combus through a newly introduced secondment scheme. Since the officials were working for Combus, Combus had to compensate the State for the remuneration and pensions paid by the latter to them. In addition, the officials enjoyed specific protection in the event of loss of employment, in the form of entitlement to paid leave of absence for three years, unless it was possible for the employer to find them another, adequate State post.

8 In 1995, the new company's opening accounts showed a provision of DKK 140 million paid by the Danish State to cover the additional expenditure due to pensions and paid leave of absence for seconded officials.

9 Legislation introduced in 1998 allowed the State to dispose of all of the shares in Combus with a view to privatisation. The State was also authorised to incur expenditure for a one-off payment to the some 550 officials who were employed by Combus on 1 October 1998 and who agreed to give up their status as officials and become employed on a contract basis by that undertaking. It was more costly to employ officials than employees on a contract basis.

10 For that reason, in September 1998 the State concluded an agreement with the rail union Dansk Jernbaneforbund governing the conditions of the change of status from official to employee under contract for the officials working for Combus. That agreement consisted essentially of giving State employees the choice, as of 1 April 1999, between working on a contract basis for Combus or transferring to another suitable post within DSB. In return for their waiving their rights derived

from their status as officials upon transfer to employment on a contract basis for Combus, the officials concerned demanded a single payment. The total expenditure for that single payment was assessed at DKK 100 million. That amount was paid to the officials concerned in 1998.

11 Subsequently, in view of Combus's critical financial situation, the State decided, on 21 May 1999, to increase the company's capital by DKK 300 million.

12 In that context, the applicant, a trade association representing more than 90% of the regional public bus transport undertakings in Denmark, turned to the Commission, writing a letter of 25 June 1999 and lodging a complaint of 11 November 1999, criticising two State aids granted to Combus and a possibly forthcoming third aid. It referred inter alia to the DKK 140 million provision set aside when Combus was created, and to the DKK 100 million paid in 1998, both allegedly intended to facilitate the transition from employment as a State employee to employment under contract, whereas there was no guarantee that those amounts would not actually be used simply to cover Combus's operating expenses. It also criticised the payment of DKK 300 million on 31 May 1999.

13 In November 2000, Combus was privatised through the transfer of its shares to Arriva Danmark A/S ('Arriva'), a company which is part of a British group listed on the London Stock Exchange. By letter of 30 November 2000, the Danish authorities informed the Commission of their intention to grant new aid in the amount of DKK 171.8 million to Combus as part of the transfer to Arriva.

14 The Danish State had chosen Arriva by tender from among several interested undertakings, having found that Arriva's tender was the best from an economic standpoint.

15 By decision of 28 March 2001, the Commission, following a preliminary assessment, decided not to raise objections either to the aid granted by way of compensation for Combus's future losses for the period 2001-2006 or to the aid granted by way of compensation for its earlier losses ('the contested decision').

The contested decision

16 In the contested decision, the Commission describes, first, the public bus transport market in Denmark, the liberalisation of which began in the 1990s and which is characterised by the presence of a few large operators and numerous small local operators. Combus is the only undertaking to operate throughout Denmark and had a market share of 33% in 2000.

17 In regard to Combus's situation, the Commission states that most of its drivers had previously had the status of officials, which meant higher costs for Combus than if it had employed drivers on a contract basis. Combus's drivers were thus asked to opt for employment on a contract basis. Those who accepted the new terms were given a bonus by DSB.

18 Combus's financial situation deteriorated considerably starting in 1995, as the contracts it had won in 1997 turned out to be heavy loss generators. This led the State to inject DKK 300 million of capital in order to enable Combus to continue operating, whilst at the same time accelerating its transfer. A market study was conducted which led to several potential purchasers being identified. In November 2000 the Danish Minister for Transport signed the contract to transfer Combus to Arriva, whose tender had been found to be the most financially attractive.

19 In its legal assessment, the Commission finds that all of the DKK 300 million paid to Combus in 1999 must be regarded as State aid because it does not satisfy the criterion of the private investor operating in the normal conditions of a market economy. The same holds true for the additional injection of DKK 171.8 million granted to Combus when it was transferred to Arriva.

20 According to the Commission, the current net value of that aid, adjusted at an updating rate of 6%, amounts to DKK [Z] [1]: DKK [X] could be considered to be aid for the purposes of Article 73 EC, whilst DKK [Y] could be likened to State aid which falls to be assessed under Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1) (hereinafter 'Regulation No 1191/69').

21 As regards the DKK [Y] intended to cover future losses attributable to transport contracts concluded by Combus, the Commissionstates that, under the normal

1 — Confidential information withheld.

Danish compensation scheme, local authorities conclude contracts with bus transport undertakings, following invitations to tender, with a view to operating certain routes. The local authorities pay the amount agreed to the transport undertakings, set fares and receive the income from ticket sales.

22 The Commission considers that this manner of operating is in accordance with Regulation No 1191/69 provided the tender procedure takes account of the tariff obligation, the obligation to operate and the obligation to carry. The DKK [Y] are intended to be used during the period 2001 to 2006 to cover forecasted losses arising from the contracts taken over by Arriva from Combus. That amount is in reality an adjustment of the normal compensation which the Danish authorities are bound to pay. The Commission concludes that that part of the aid is compatible with the EC Treaty.

23 Regarding the DKK [X], the Commission considers whether Article 87(3)(c) EC and the Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2, 'the Guidelines') may apply, since the activities at issue here consist of operating the transport routes served by Combus until the end of the transport contracts so as to avoid disruptions in local public transport. The Commission finds that all of the conditions for restructuring aid are satisfied, except for one: Combus's viability does not, strictly speaking, meet the Guidelines' requirements because it is partly dependent on other forms of State aid. According to the Commission, this fact may make the analysis hypothetical as regards the restructuring aid.

24 If there can be any doubt, the Commission is of the view that, given the exceptional circumstances of this case, this part of the aid may be appraised directly having regard to Article 73 EC. The Commission states that the aid in question does enable Combus's contractual obligations to the competent authorities to be fulfilled and therefore represents reimbursement for the discharge of certain obligations inherent in the concept of a public service within the meaning of Article 73 EC.

25 Applying Article 86(2) EC by analogy, the Commission confirms that that part of the aid does not affect the development of trade to such an extent as would be contrary to the interests of the Community. It takes the view that, in this case, the development of trade will probably not be affected significantly, since Arriva's contracts are of limited duration and the competent authorities will launch fresh invitation to tender procedures once they expire.

26 The Commission states, by way of conclusion, first, that the payment of DKK [Y] is in keeping with Regulation No 1191/69 and, second, that the payment of DKK [X] may be regarded as restructuring aid which is compatible with Article 87(3)(c) EC, or at least with Article 73 EC, which is of direct application. Accordingly, the Commission declares the aid in the amount of DKK [Z] to be compatible with the EC Treaty.

27 The contested decision was published in the *Official Journal of the European Communities* of 5 May 2001 (OJ 2001 C 133, p. 21) by means of a reference to the Commission's internet site.

28 By letter of 8 May 2001, the Commission informed the applicant that, following its complaint, the Danish authorities had notified the Commission of the capital injections which were the subject of the contested decision. A copy of the contested decision was attached to that letter, which was received by the applicant on 15 May 2001.

Procedure

29 By application lodged on 11 July 2001 at the Registry of the Court of First Instance, the applicant brought the present action.

30 By order of 9 January 2002, the President of the Second Chamber (Extended Composition) of the Court of First Instance granted the Kingdom of Denmark leave to intervene in support of the form of order sought by the Commission.

31 On 27 March 2002, the Kingdom of Denmark submitted its statement in intervention.

32 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) requested the Commission and the Kingdom of Denmark to lodge certain documents. The documents were produced within the prescribed period.

33 By a pleading of 24 February 2003, the applicant lodged observations on the Kingdom of Denmark's statement in intervention and on the documents produced.

34 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure and to put certain questions to the parties. The parties provided their answers within the prescribed period. On that occasion, the Commission and the Kingdom of Denmark expressed their views on the applicant's observations of 24 February 2003.

35 The parties presented oral argument and answered questions put to them by the Court at the hearing on 21 October 2003.

Forms of order sought

36 The applicant claims that the Court should:

— principally, annul the contested decision;

— in the alternative, annul the contested decision in so far as it authorises the part of the State aid paid to Combus on 31 May 1999;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

38 The Kingdom of Denmark supports the form of order sought by the Commission.

Admissibility and scope of the action

39 The Commission questions the applicant's standing to bring proceedings. On this point, it suffices to observe that on 25 June and 11 November 1999 the applicant, as a trade association representing the interests of the majority of Danish bus companies, complained to the Commission about the State aid at issue in the present proceedings, pursuant to Article 2(1) of its statutes, which entrusts it with the defence of its members' national and international interests. By letter of 8 May 2001, the Commission replied: 'As a result of your complaint ... the capital injections made in 1999 were notified as a State aid'. A copy of the contested decision was attached to that letter. In addition, the contested decision was adopted by the Commission following a preliminary assessment, that is, without opening the formal assessment procedure provided for in Article 88(2) EC.

40 Accordingly, the applicant, in its capacity as complainant which, in addition, influenced the course of the administrative procedure before the Commission and at least some of whose members were in competition with the undertaking which benefited from the disputed aids, enjoys the procedural guarantees provided for by Article 88(2) EC. Moreover, compliance with those guarantees can be secured only if the applicant is given the opportunity to challenge the contested decision before the Community Courts under the fourth paragraph of Article 230 EC (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 40, 41 and 47, and the case-law cited therein). Accordingly, the present action must be declared to be admissible.

41 As regards the scope of the present action, the Court does not accept the line of argument put forward by the Danish Government at the hearing, to the effect that

the Court's powers of review should be confined to the issue of whether the Commission should have opened the formal assessment provided for in Article 88 (2) EC. Although it is true that the applicant criticises the Commission for not having opened that procedure, it puts forward additional pleas in law based inter alia on infringement of other principles and provisions of Community law. Since the present action serves the interests of the applicant and those of its members who were competitors of Combus, the applicant is entitled to plead any of the grounds of illegality listed in the second paragraph of Article 230 EC, provided they concern the total or partial annulment of the contested decision (see, to that effect, although under appeal, Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum* v *Commission* [2002] ECR II-5121, paragraph 78), without being limited to relying on infringement of the procedural rights provided for in Article 88(2) EC.

42 It follows that the Court is not, in principle, confined in its appraisal of the pleas in law put forward by the applicant in the present action.

Substance

43 In support of its claim for annulment, the applicant puts forward 10 pleas in law, directed against either the authorisation of some of the financial measures complained of or against the contested decision in its entirety. In the circumstances of the present case, it is appropriate to examine the various financial measures undertaken by the Danish authorities in chronological order, as authorised in the contested decision.

Aid in the amount of DKK 140 million to cover special expenditure associated with the status of official of Combus employees

44 It should be borne in mind that the applicant, in its letter of 25 June 1999 and in its complaint of 11 November 1999, criticised the DKK 140 million provision in Combus's opening accounts as likely to constitute unlawful State aid. Accordingly, the Commission was, in principle, required to conduct a diligent and impartial examination of the complaints raised by the applicant and, if it found that no State aid existed, it had to provide the applicant with an explanation of the reasons for which the facts and points of law put forward failed to demonstrate the existence of State aid, although it was not required to define its position on matters which were manifestly irrelevant or insignificant or plainly of secondary importance (*Commission* v *Sytraval and Brink's France*, cited above, paragraphs 62 and 64). It is, however, common ground that neither the contested decision nor the covering letter of 8 May 2001 defines any position on the legal nature of the DKK 140 million provision.

45 It is appropriate, however, to consider whether the complaint concerning the DKK 140 million provision was validly raised in the application itself. Under the first paragraph of Article 21 of the Statute of the Court of Justice, which is applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of that Statute, as well as under Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications initiating proceedings are to state the subject-matter of the proceedings and to include a summary of the pleas raised. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary without any further information. In order to guarantee legal certainty and the sound administration of justice it is necessary, in order for a plea to be admissible, that the essential matters of law and fact relied on are stated, at least in summary form, coherently and intelligibly in the application itself (see Case T-110/98 *RJB Mining* v *Commission* [2000] ECR II-2971, paragraph 23, and the case-law cited therein; Case T-195/00

Travelex Global and Financial Services and Interpayment Services v *Commission* [2003] ECR II-1677, paragraph 26).

46 An examination of the application reveals that the DKK 140 million provision is mentioned only once, not in the form of a plea but merely by way of narrative. There is only a statement that, when Combus was created, a provision was made in the opening accounts to cover at least part of the special costs being borne by Combus because it had to continue employing officials. The issue of Combus's former officials was discussed only from the point of view of the DKK 100 million compensation package, with the applicant merely criticising the Commission for not having examined that aid and for having limited its analysis to the aids of DKK 300 million and DKK 171.8 million.

47 It thus emerges that the application does not contain any plea specifically directed against the provision of DKK 140 million. In order for a plea in law to be declared admissible, it is not sufficient that documents attached to the application refer to it. According to the case-law referred to above, the plea must be clear from the application itself.

48 The detailed line of argument which was first developed in the reply concerning several tranches of the DKK 140 million might nevertheless be admissible if it could be regarded as amplifying a plea previously put forward, directly or by implication, in the application initiating proceedings, and was closely connected with that plea (*RJB Mining* v *Commission*, cited above, paragraph 24, and the case-law cited therein), that is, in this case, with the plea concerning the DKK 100 million compensation to cover the waiving of the status of official by Combus employees. However, the DKK 100 million, as criticised in the application, was not closely connected with the DKK 140 million provision. In fact, there are fundamental differences between those two financial measures effected by the Danish State.

49 It is clear that the DKK 140 million provision was in Combus's opening accounts of 1 January 1995 and was there to cover the financial expenditure resulting from the secondment of 845 officials to Combus who maintained their working relationship with the State whilst at the same time being available to Combus. Since those officials were working for Combus, Combus was obliged to compensate the State for the remuneration and pensions the latter was paying to them. By contrast, the DKK 100 million compensation was paid out in 1998, directly to the officials concerned and not to Combus, and was paid out to compensate for the financial disadvantages for those employees who wished to give up their status as officials and go over to being employed on a contract basis.

50 It follows that the plea, raised in the reply, against the DKK 140 million provision must be described as a new plea within the meaning of the first subparagraph of Article 48(2) of the Rules of Procedure. Since this plea is not based on matters of fact or law which have come to light in the course of the procedure following measures of organisation of procedure decided on by the Court, it must be declared inadmissible.

51 Accordingly, the contested decision cannot be annulled in the present proceedings on the grounds that the Commission failed to examine the DKK 140 million provision made in favour of Combus. The form of order seeking annulment of the contested decision must, therefore, be dismissed in so far as it concerns that provision.

Aid in the amount of DKK 100 million to finance Combus employees' waiving their status of official in order to transfer to employment on a contract basis

52 In its application, the applicant maintains that the Commission erred by failing to examine, in the contested decision, the payment of DKK 100 million to Combus

in order to finance its employees' giving up their status as officials in order to transfer to employment on a contract basis and by not finding that that change of status involved an element of State aid. According to the applicant, the advantage thereby conferred on Combus should have been assessed as being worth DKK 10 to 15 million per year.

53 In its reply, the applicant adds that Combus's having to assume upon its creation certain obligations towards the officials made available to it by the State was compensated for by the payment of the abovementioned DKK 140 million provision. Following the DKK 100 million payment, Combus was released from the obligations for which it had received consideration. Combus thus made irregular use of DKK 21.3 million of the DKK 140 million, by using it for purposes other than those intended. With the DKK 100 million package granted by the Danish State, Combus benefited from indirect aid worth at least DKK 12.7 million.

54 It should be borne in mind that the applicant, in its letter of 25 June 1999 and in its complaint of 11 November 1999, had requested the Commission to examine the compatibility of the DKK 100 million payment with Article 87 EC. Accordingly, the Commission was, in principle, required to conduct a diligent and impartial examination of that request and, if it found that that payment did not constitute State aid, to provide the applicant with an explanation of the reasons for which the facts and points of law put forward failed to demonstrate the existence of State aid, although it was not required to define its position on matters which were manifestly irrelevant or insignificant or plainly of secondary importance (see paragraph 44 above).

55 As regards the question of whether, in the contested decision, the Commission answered the applicant's question sufficiently, the Court finds that the Commission's legal assessment (see point 3 of the contested decision) concerns only the aids totalling DKK 300 million and DKK 171.8 million respectively,

without addressing the question of the DKK 100 million. The issue of the change in status of Combus's employees is discussed only in point 2.2 of the contested decision (under the headings 'summary of the case', 'Combus A/S'), where the Commission merely states that those Combus employees who accepted the new terms were awarded a bonus.

56 The Court finds that this last statement, read in the context of the contested decision, must be interpreted as meaning that, in the Commission's view, the recipients of the payment in question were only the Combus employees who had opted for the change to employment on a contract basis and that that payment did not constitute State aid for Combus within the meaning of Article 87(1) EC.

57 This finding was, moreover, manifestly correct, since the measure in question had been introduced to replace the privileged and costly status of the officials employed by Combus with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings competing with Combus. The intention was thus to free Combus from a structural disadvantage it had in relation to its private-sector competitors. Article 87(1) EC is aimed merely at prohibiting advantages for certain undertakings and the concept of aid covers only measures which lighten the burdens normally assumed in an undertaking's budget and which are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 26; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 12 and 13; and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 84, and the case-law cited therein). Moreover, instead of paying the DKK 100 million directly to the officials employed by Combus, the Danish Government could have obtained the same result by reassigning those officials within the public administration, without paying any particular bonus, which would have enabled Combus to employ immediately employees on a contract basis falling under private law.

58 Given the obvious nature of that legal classification, the Commission was not obliged to state specific reasons in the contested decision on the issue of the payment of the DKK 100 million. In any event, the applicant has not established in its application that that payment should have been held to be unlawful State aid granted to Combus.

59 Regarding the plea alleging irregular use by Combus of DKK 21.3 million, which allegedly provided it with at least DKK 12.7 million in aid, suffice it to recall that it was raised for the first time in the reply and is aimed at linking the use of the DKK 100 million to the use of the DKK 140 million provision. Accordingly, this plea must be held to have been submitted too late as provided for in the first subparagraph of Article 48(2) of the Rules of Procedure and must be held to be inadmissible (see paragraph 50 above).

60 It follows that the contested decision cannot be annulled in the present proceedings on the grounds that the Commission failed to find that the DKK 100 million payment involved an element of State aid in favour of Combus. The form of order seeking annulment of the contested decision must, therefore, be dismissed in so far as it concerns that payment.

Aid in the amount of DKK [Y] to cover Combus's future losses

61 The applicant puts forward several pleas criticising the aid in the amount of DKK [Y] to cover Combus's future losses, including a plea based on an incorrect application of Regulation No 1191/69.

Arguments of the parties

62 The applicant maintains that Combus was not performing a public service, but rather providing transport services by virtue of contracts governed by civil law. No public service obligation within the meaning of Regulation No 1191/69 is imposed on Combus. The corresponding public service obligations are borne by the public authorities responsible for transport, who can then pass them on to any undertaking. The amounts paid by the authorities to Combus for the services it provides result from the contracts concluded, and should normally ensure Combus sufficient income.

63 The applicant states in this regard that the transport provided by the bus undertakings is not financed by the tickets paid for by the passengers. The amounts paid by them do not accrue to the bus undertakings but to the public authorities entrusted with the task of transport. The bus undertaking has only one opposite contracting party, that is, the public authority responsible for transport. Accordingly, there is no tariff obligation within the meaning of Regulation No 1191/69, since the bus undertaking merely collects the ticket money and gives it to the public authority responsible for transport. In addition, the transport contract is concluded not between the passenger and the bus undertaking, but between the passenger and the public authority. Consequently, the Danish State pays subsidies not to the bus undertakings, but rather to the public authorities responsible for transport and thereby to the passengers.

64 Since the Danish authorities have determined that the price paid by the users of public transport need not represent the actual cost thereof, part of the costs incurred by the bus undertakings is financed by the Danish taxpayers. In that sense, that is no different from cases where a public authority purchases a product or service under market conditions.

65 The applicant adds that there was no question for the Danish Government of ensuring the financial equilibrium of Combus for the period 2001 to 2006, as compensation for expenditure inherent in a public service obligation. Rather, the government granted aid in the amount of DKK 300 million in order to avoid a collapse of public bus transport services which would have been to the detriment of the passengers, of the public authorities responsible for transport and of Combus's employees, and to cover the undertaking's loss-making contracts. The applicant states that Combus pursued a nonsensical growth policy, inter alia by responding to numerous invitations to tender with price proposals which were too low and by acquiring other undertakings.

66 According to the applicant, nor was the DKK 171.8 million in State aid granted in April 2001 intended to cover Combus's future contractual losses for the period 2001 to 2006. The provisions made in Combus's annual accounts for loss-making contracts from 1999 until their expiry were sufficient. Thus, when it drew up its accounts for 2000, the new board appointed by Arriva after acquiring Combus did not find it necessary to make other provisions.

67 The Commission contends that the public financing of Combus in the order of DKK [Y] is covered by Regulation No 1191/69. Combus provides a transport service encompassing public service obligations financed by the agreed-upon compensation. This does not mean that Combus is the only operator to which the regulation applies. The applicant's argument that the regulation applies only to public entities responsible for the organisation of public transport services, and not to the bus undertakings themselves, is based on an incorrect interpretation of the regulation. The regulation is aimed at facilitating the financing of bus undertakings through the grant of compensation corresponding to their public service obligations. The existence of intermediary bodies between the State and Combus does not deprive Combus of its status as a public service provider.

68 The Commission states that a service of general economic interest (public service) may be entrusted to an undertaking either unilaterally or through a contract (Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 65 et seq.), which is confirmed by Regulation No 1191/69, which contains an entire section (Section V) concerning public service contracts. Article 1(4) of that regulation provides, regarding Section V, that Member States may conclude contracts expressly referred to as public service contracts 'in order to ensure adequate transport services'.

69 Regarding the contested decision, the Commission and the Danish Government state that the Commission rightly finds that it is for the Danish authorities to determine, at the county and municipal levels, the routes, timetables and fares applied by the bus undertakings, particularly the routes that those undertakings must operate in order to ensure adequate transport services. The purpose of the invitations to tender is to procure the required services at best possible cost and to find the operator which will require the least amount of financial assistance. In the present case, Combus's financing should thus be added to the price proposed by Combus in response to the invitations to tender.

70 The relevant Danish legislation, dating from 1995, imposes a public service obligation on regional authorities which consists of drawing up, through county and inter-municipal transport undertakings, plans concerning traffic volumes and forecasts and determining fares and ticketing systems. Those transport undertakings may choose between providing the transport themselves — which has never been done — or entrusting bus undertakings such as Combus with the task. Thus the public service obligation incumbent on Combus results from the contracts Combus has concluded with the public authorities and the transport undertakings.

71 In so far as the applicant appears to equate public authorities to transport providers who 'subcontract' their obligations to bus undertakings, the Commission states that the responsibility which the public authorities have for the

organisation of transport comes under the internal organisation of each State, whereas the actual implementation of transport services by undertakings encompassing means of transport and personnel is another thing entirely. Moreover, the responsibility incumbent on the public authorities to ensure transport services is of a different nature from that of the undertakings which actually provide transport services. In any event, even if there were 'subcontracting' of transport services, this does not necessarily mean that the sub-contractors do not have public service obligations which they are bound to fulfil.

72 The Commission concludes that the compensation granted by the public authorities to operators such as Combus, undeniably higher than the income generated by ticket sales, places the situation squarely in the domain of public service obligations and, therefore, obligations that the bus undertakings would not take on to the same extent if they took account of their own commercial interest. The provision of public services can thus be distinguished from activities which are purely commercial in nature.

Findings of the Court

73 It should be borne in mind that the Commission, in the contested decision (point 3.7), finds that the payment of DKK [Y] was compensation for future losses associated with public service obligations for the period 2001 to 2006 and thus satisfies the requirements of Regulation No 1191/69. The Commission finds inter alia that the Danish contractual system complies with that regulation in that invitations to tender launched by local authorities 'take account of cost and income factors relating to the tariff obligation, the obligation to operate and the obligation to carry for the purposes of Articles 10 to 13 of the regulation'. In its view, that system 'also satisfies the requirements of Article 14 of Regulation [No 1191/69] concerning public service contracts'. The payment of the DKK [Y] is, in effect, 'an adjustment of the normal compensation which Denmark must pay'. The aid also satisfies the requirements of Regulation No 1191/69 'in that it takes

account of the scale of the financial constraints arising from the public service obligations' (see point 3.2 of the contested decision). The Commission infers therefrom that the operating aid for Combus's bus routes during the period 2001 to 2006 is compatible with the EC Treaty.

74 The Commission's reasoning on this point does not hold up to scrutiny.

75 First of all, Article 2(1) of Regulation No 1191/69 defines 'public service obligations' as 'obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions', whilst Article 2(2) adds that public service obligations within the meaning of paragraph 1 'consist of the obligation to operate, the obligation to carry and tariff obligations'. In that context, Articles 10 and 11, in Section IV of that regulation, provide for 'common compensation procedures' where there is an obligation to operate or to carry and where there is a tariff obligation.

76 It is clear that the Danish public bus transport system and particularly the role played by Combus in the implementation of that system are not covered by those provisions of Regulation No 1191/69.

77 The wording of Article 1 of Regulation No 1191/69 introduces a clear distinction between the 'obligations inherent in the concept of a public service' which the competent authorities are to terminate (Article 1(3)) and 'transport services' which those authorities are authorised to ensure through 'public service contracts' (Article 1(4)), stating that those authorities may 'however, ... maintain or impose the public service obligations referred to in Article 2' (Article 1(5)). Only in this latter case may the common compensation procedures provided for inter alia in

Section IV of Regulation No 1191/69, that is, Articles 10 to 13, be applied. Although the German version of Article 1(4) of Regulation 1191/69 may authorise the competent authorities to conclude contracts for transport services 'on the basis of public service obligations', that is clearly a drafting error, contrary to the new contractual system, since none of the other language versions so provides.

78 Article 14 of Regulation No 1191/69 defines a 'public service contract' as a contract concluded in order to provide the public with adequate transport services, and which is to provide for, in addition to its duration, all of the transport service details, including 'the price of the services ... , which shall either be added to tariff revenue or shall include the revenue, and details of financial relations between the two parties' (Article 14(1) and (2)(b)). Thus, this purely contractual system does not provide either for compensation for achievement of an imposed objective or for a public service obligation within the meaning of Article 2 of Regulation No 1191/69.

79 Article 14(4) to (6) of Regulation No 1191/69 provides in this respect that if an undertaking intends to discontinue a transport service which is not covered by the contract system 'or' the public service obligation, the competent authorities may insist on the maintenance of the service concerned, in which case expenditure arising from that obligation 'shall be compensated in accordance with the common procedures laid down in Sections II, III and IV'. It necessarily follows that the contractual relationships established following a tender procedure between the transport undertaking and the competent authority include, by virtue of Article 14(1) and (2) of Regulation No 1191/69, a specific financing scheme which leaves no room for compensation according to the methods laid down in Sections II, III and IV of that regulation.

80 In this case, the obligations to operate, to carry and to collect the tariffs fixed were not imposed unilaterally on Combus; nor was Combus obliged to operate its transport services in an unprofitable manner, contrary to its commercial interests.

On the contrary, Combus voluntarily assumed those obligations once it had been successful in the tendering procedures, which did not provide for any State subsidies and in which it was free to participate or not, depending on its economic interests. The transport services provided by Combus were paid for by the price it itself had proposed in its bids in the tendering procedures and which were included in the contracts subsequently concluded. Accordingly, it cannot be inferred that Combus had to bear public service obligations within the meaning of Article 2(1) of Regulation No 1191/69.

81 The reciprocal obligations of Combus and the competent authorities were fully laid down by the contracts concluded for that purpose. Thus Combus was entitled to payment of the contractual price it had stated in its own bid, in return for which it was obliged, for the duration of the contracts, to provide operation, carriage and collection of the tariffs fixed by the competent authority and to pass on to that authority the income from ticket sales. In particular, Combus was not to bear any tariff risk because the contract price was not affected by any fluctuations in the number of passengers or the income from ticket sales. Under the contract system, therefore, there was no reason for Combus to be granted any compensation in addition to the agreed remuneration.

82 Contrary to the Commission's assertions, then, it is not because of the 'compensation' granted by the public authorities, amounting to more than the income from ticket sales, that Combus actually took on public service obligations. In fact, Combus obtained only the financial remuneration provided for in the transport contracts it had voluntarily concluded with the competent authorities after having been successful in the tendering procedure.

83 The contested decision is, therefore, vitiated by an error in that it finds the payment of DKK [Y] to be compensation for public service obligations for the purposes of Articles 2 and 10 to 13 of Regulation No 1191/69.

84 In any event, even if Combus, in the course of providing its transport services, could be viewed as being subject to public service obligations — in that its services, from the point of view of its users, were 'of general economic interest, such interest having special characteristics, in relation to those of other economic activities' (Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 45) — the payment of DKK [Y] authorised by the contested decision did not comply with the relevant provisions of Regulation No 1191/69.

85 It should be borne in mind that Regulation No 1191/69 authorises the competent national authorities to adopt, in the field of road transport, all the measures covered by that regulation, including financing measures necessary to that end, and that Article 17(2) thereof even exempts them from the prior notification procedure provided for by Article 88(3) EC. Regulation No 1191/69 thus introduces a sectoral derogation from the prohibition on State aid, the principle of which is laid down in Article 87(1) EC, and leaves the Commission no margin of discretion regarding the authorisation of aids covered by that derogation. It follows that that regulation establishes a particularly favourable authorisation scheme, one which thus calls for a narrow interpretation (see, by analogy, *Commission* v *France*, cited above, paragraph 53, and Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 132, concerning Articles 86(2) and 87(2) EC).

86 That particularly favourable authorisation scheme must therefore be limited to those aids which are directly and exclusively necessary for the performance of the public transport service per se, and do not include subsidies intended to cover deficits incurred by the bus transport undertaking as a result of circumstances other than its task of providing transport, such as the consequences of unsound financial management which is not an inherent factor in the transport sector. The public financing of those deficits which are not specifically sectoral in nature can be authorised only pursuant to the general provisions found in Article 87(2) and (3) EC.

87 The Court finds that the losses accumulated by Combus were not occasioned directly and exclusively by the provision of transport services per se, but rather are the result of the general management of the undertaking, particularly the submission of tenders with excessively low prices with a view to being the successful tenderer.

88 In addition, the contracts which Combus concluded with the competent authorities following the tendering procedures already provided for remuneration – proposed by Combus itself in its bids – which was, in principle, sufficient for the provision of the transport service, without Combus receiving any compensation from the State. Under the contractual scheme introduced by Regulation No 1893/91, which amended the provisions of Regulation No 1191/69, it was therefore necessary to refer to those contracts, the only valid points of reference, to determine which payments would be likely to be authorised to finance the bus transport service. Article 14(2)(c) of Regulation No 1191/69 provides explicitly for the possibility of amendment and modification of those contracts 'in particular to take account of unforeseeable changes'.

89 The contested decision, however, far from noting such unforeseeable changes in the case of Combus and analysing the losses caused by the individual transport contracts, refers to Combus's overall financial situation (see table 7 in point 3.1 of the contested decision) and lists several amounts covering the years 1998 to 2008 (State aids, debt cancellation, restructuring costs, investments, etc.), concluding (see point 3.1 of the contested decision *in fine*) that 'the balance, i.e. DKK [Y] (2001 value), is equated with State aid which falls to be assessed in accordance with Regulation No 1191/69'. This generalised, overall approach by the Commission is incompatible with the contractual system focusing on individual transport contracts established by Article 14 of Regulation No 1191/69.

90 Before the Court, the Commission relied on Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 178, which allowed compensation to

offset the additional costs incurred in performing the particular task assigned to an undertaking entrusted with the operation of a service of general economic interest when the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium. According to the Commission, the aid granted in this case allowed Combus to take on public service obligations assigned to it on each of its bus routes under precisely such conditions of economic equilibrium.

91 That case-law does not apply to the present situation, however. The undertaking concerned in *FFSA and Others* v *Commission*, cited above, that is, La Poste, had performed public service tasks in a reserved sector which was not as such exposed to competition: La Poste was obliged to provide a general postal service throughout the national territory, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation. To that end, La Poste had had to equip itself with infrastructures the costs of which were not covered by the tariffs, which explained the State compensation paid to it.

92 In this case, by contrast, all of the transport activities performed by Combus and by all of the other bus transport undertakings active in the Danish market in public transport by road were open to competition; it was not a sector reserved to a single undertaking whose specific costs resulting from the provision of a public service had to be compensated in order to eliminate the financial burden on the undertaking as compared to undertakings competing with it in other sectors. All transport undertakings active in that market were in the same situation: they were free to participate in the tendering process and to propose to the transport authorities the contractual price which corresponded to their economic interest, whilst remaining obliged to comply with their contractual commitments following the conclusion of transport contracts.

93 This finding is not disturbed by the fact that Combus had actually to perform the contracts by which it was bound to the competent authorities. That obligation is inherent in any bilateral contract and cannot by itself justify compensation in the form of the aid contemplated in this case. Even if each contract held by Combus involved the performance of a public service and Combus was the only undertaking called on to perform that service on the routes assigned to it, Combus had undeniably already benefited contractually from the application of Regulation No 1191/69 with respect to the remuneration provided for in its public service contracts.

94 Nor has it been established in the contested decision that only financial rescue of Combus was such as to guarantee the functioning of the competitive environment prevailing in the Danish bus public transport market. The Commission and the Danish Government merely stated that, were Combus to go bankrupt, there was a considerable likelihood of disruption of the transport service provided by Combus, since competitors would not be in a position to take over Combus's activities immediately. Contrary to those assumptions and vague statements, the applicant stated in its application, and was not contradicted by the Commission and the Danish Government, that the Danish bus transport market is capable of adapting quickly to demands from the transport authorities and that, in the event of liquidation of an undertaking which has secured a contract, recourse may be had easily to other undertakings until a new round of tenders has been initiated. Consequently, in the eventuality that Combus were to be liquidated, its contracts could be taken over by other operators.

95 Moreover, the Danish system of invitations to tender provides for renewal every five years of each public service contract, bus route by bus route (see point 2.1 of the contested decision). Since the possibility of renewing contract holders is inherent in such a scheme, it cannot be alleged that the taking-over by other undertakings of Combus's activities prior to the five-year term of Combus's contracts would have been such as to perturb the performance of the transport service on the routes concerned.

96 Since the Commission and the Danish Government have relied on a derogation from the principle of prohibition of State aid, they should have demonstrated that all the conditions of application of that derogation were satisfied. They have not set out in detail why, in the event of Combus's going bankrupt, the provision of transport services on the routes served by it would no longer be possible in economically acceptable conditions (see, by analogy, *Commission* v *France*, cited above, paragraph 101).

97 In response to a question from the Court, the Commission again maintained that the payment of DKK [Y] fulfilled the conditions laid down in paragraph 95 of *Altmark Trans and Regierungspräsidium Magdeburg*, cited above, and thus could no longer be considered as State aid within the meaning of Article 87(1) EC.

98 Suffice it to note that, contrary to the Commission's submission, the payment of the DKK [Y] does not satisfy all of the conditions laid down in that judgment. As explained in paragraphs 75 to 83 above, Combus was not actually entrusted with the performance of public service obligations, as required by paragraph 89 of *Altmark Trans and Regierungspräsidium Magdeburg*. In any event, the contested decision, particularly the presentation of table 7 and the calculation of the DKK [Y] (see point 3.1 of the contested decision *in fine*), does not show that the factors on the basis of which the disputed compensation was calculated had been previously established in an objective and transparent manner, as required by paragraphs 90 and 91 of that judgment.

99 It follows from the foregoing that the plea in law based on incorrect application of Regulation No 1191/69 must be upheld. Accordingly, the contested decision must be annulled in so far as it authorised the payment of DKK [Y] pursuant to that regulation, without its being necessary to rule on the other pleas put forward on this point.

Aid in the amount of DKK [X] to cover past losses accumulated by Combus

Plea of incorrect application of Article 73 EC

100 As rightly pointed out by the applicant, the Member States may no longer rely directly on Article 73 EC in situations not covered by secondary Community law. Thus, so long as Regulation No 1191/69 does not apply to the present case and the payment of the DKK [X] falls within the scope of Article 87(1) EC, Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ, English Special Edition 1970 (II), p. 360) lists exhaustively the circumstances in which the authorities of the Member States may grant aids under Article 73 EC (*Altmark Trans and Regierungspräsidium Magdeburg*, cited above, paragraphs 107 and 108).

101 Accordingly, the plea directed against the contested decision in so far as it authorises the payment of the DKK [X] on the basis of Article 73 EC must be upheld.

Pleas of infringement of Article 87(3)(c) and incorrect application of the Guidelines

Arguments of the parties

102 The applicant maintains that the aid granted to Combus in the amount of DKK [X] is not covered by either Article 87(3)(c) EC or the Guidelines because it cannot

in any way be viewed as restructuring aid. It points to the absence of a restructuring plan and states that Denmark itself never considered the first aids paid out as being capable of falling within the scope of Article 87(3)(c) EC, but concluded that they did not fall within the scope of Article 87(1) EC. This is why no restructuring plan was submitted.

103 The applicant states that Combus pursued an aggressive growth policy by entering into contracts at a loss. That policy was the reason for its making losses, particularly in 1998, 1999 and 2000. The aids granted to Combus were aimed solely at covering those losses and ensuring the survival of a State undertaking. They can only be described as rescue or operating aids. Article 87(3)(c) EC, however, does not authorise operating aids. Nor were the provisions on rescue aid found to be relevant in the contested decision. Consequently, there is no legal basis for authorising those aids.

104 According to the Commission, the applicant's line of argument has no bearing on the issue. The contested decision was based primarily on Article 73 EC as regards the aid relating to past losses. It is based on the idea that that aid is compensation for the performance of a public service task in the field of transport.

105 The Commission states that rationalisation measures were taken based on a restructuring plan which provided inter alia for the purchase of new buses, dismissal of some of the employees, the sale of certain assets and some cost-cutting. The submission of those measures led the Commission to consider whether the State financing could be authorised as restructuring aid. It did,

however, take account of the fact that restructuring aid must make the recipient undertaking capable of generating profits so that it no longer is a recipient of public subsidies. Regional bus transport is an activity which is not run under profitable conditions, since it is dependent on the grant of public subsidies.

106 The possibility cannot be excluded, however, that the aid in question does contribute to the development of the sector concerned for the purposes of Article 87(3)(c) EC. The measures taken by the Danish authorities, particularly the award of contracts through a tendering procedure, help to strengthen competition because they offer a number of private operators the opportunity to take part in that process. Combus's current position as a former State undertaking in relation to its private-sector competitors is part of that trend, all the more so because Combus had to achieve savings, reduce its workforce and renew its bus fleet in order to perform its tasks better. In the Commission's view, that rationalising of the former State undertaking helps to improve competition conditions in the market in question, since a rollback of public-sector involvement generally serves to promote free trade.

107 The Commission even submits that the contested decision may be understood as promoting a '*sui generis*' type of restructuring which in turn leads to a '*sui generis*' type of viability for an undertaking entrusted with a public service task. If one accepts that the restructuring of a public service undertaking is aimed solely at internally rationalising of that undertaking — which then becomes viable by itself, if one disregards the public service obligations — the aids granted to cover past losses could be classified as restructuring aids, even though Combus still has to receive subsidies in order to discharge its public service obligations.

108 The Commission reiterates, however, its argument that the applicant's arguments on this point are, in any event, of limited relevance, since the contested decision was ultimately not based on Article 87(3)(c) EC. Following the same line of reasoning, the Commission submits that the applicant's argument that the aid in

question is operating aid is immaterial. Since it is not restructuring aid in the strict sense of the term, it was not necessary to have a prior restructuring plan.

109 Whilst acknowledging that the Guidelines require a link to a restructuring plan, the Commission maintains that the various rationalisation measures taken by the Danish authorities — namely, the reform of the status of the employees which was part of the privatisation plan beginning in 1998 and the privatisation itself which took place in 2000 — pursued the same objective: Combus's transition towards commercial operation. Those measures came about within one and the same framework comprising a number of financial and operational initiatives. The fact that the privatisation plan was completed only in 2000 does not preclude its being viewed overall as a preconceived plan. That plan was finalised in the course of its implementation with the assistance of a private investor, namely Arriva.

110 In its rejoinder, the Commission adds that the Danish authorities submitted to it a business plan for Combus in which they outlined their restructuring actions in relation to the privatisation of Combus. The concept of the rationalisation process already existed when the decision was made to reform the employees' status. In that context, the Commission refers to the *travaux préparatoires* for two laws submitted to the Danish Parliament in 1995 and 1998. According to the Commission, it is not necessary for such a restructuring plan to be finalised in advance; rather, it is sufficient that the aids falling to be assessed are a consequence of the implementation of that plan, which was the case here.

Findings of the Court

111 The Court observes that, in the contested decision, the Commission, after having found that the conditions for the existence of restructuring aid were satisfied,

notes (point 3.4.7 of the contested decision) that 'Combus's viability remains to be assessed, however, since the company will cease to be a distinct legal person [following its transfer to Arriva] and that that viability also depends on the aid granted under Regulation No 1191/69. This situation may render the above analysis completely hypothetical'. The Commission infers therefrom (point 3.7 of the contested decision) that the payment of the DKK [X] 'may potentially be considered as compatible with Article 87(3)(c) EC or at least with Article 73 EC, ... [it] may be likened to restructuring aid aimed at reducing debt arising from earlier losses and at contributing to the achievement of the restructuring plan and is, in any event, compensation for losses for the purposes of Article 73 EC, which is of direct application'.

112 In its written pleadings, the Commission attempted to explain that uncertain and ambiguous reasoning by stating that, in the contested decision, it first discussed 'restructuring aid' and, second, to be on the safe side, supplemented its analysis by referring to the provisions on public service activities. The applicant's pleas directed against the authorisation of 'restructuring aid' were described by the Commission as irrelevant on the grounds that the contested decision was based on Article 73 EC as its principal legal basis. The considerations concerning 'restructuring' were not decisive because Combus was not truly viable.

113 At the same time, the Commission seems to have changed its analysis of Combus's viability, finding that one can talk of a '*sui generis*' type of restructuring leading to a '*sui generis*' type of viability. If one accepts that the restructuring of an undertaking entrusted with a public service task is aimed solely at internal rationalisation of that undertaking, then the aid granted to cover past losses could be classified as restructuring aid, even though Combus still has to receive compensation in order to discharge its public service obligations

114 Faced with this position of the Commission, the Court finds that the contested decision cannot be interpreted as meaning that the college of Commissioners granted clear, unconditional and definitive authorisation for payment of DKK [X] on the basis of Article 87(3)(c) EC and the Guidelines. On the contrary, the Commission's reasoning must be considered as expressing serious doubt as to Combus's viability for the purposes of that article and the Guidelines, a doubt which the Commission did not, however, believe it was bound to clarify since Article 73 EC seemed to it to be a sufficient legal basis for the authorisation of the aid in question. Since that latter provision may not be so relied on (see paragraphs 100 and 101 above), the payment of the DKK [X] is no longer validly authorised in the contested decision.

115 Even if — contrary to what may be inferred from Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 116 and 117 — it were to be found that the contested decision could be validly supplemented by the new concept of viability on which the Commission's agents elaborated before the Court, the question of Combus's viability would not be resolved. The Commission in fact expressly stated, in response to a question from the Court, that the assessment of Combus's profitability had to take account of the fact that part of the aid was 'compensation for public service obligations falling under Regulation No 1191/69', adding that 'without that compensation, the undertaking would not be profitable'. However, as discussed in paragraphs 75 to 99 above, Combus was not entrusted with the performance of public service obligations and, in any event, the payment of the DKK [Y] authorised under Regulation No 1191/69 does not satisfy the conditions laid down by that regulation. Consequently, Combus's viability cannot in any manner be considered as established.

116 Accordingly, the Court must uphold the pleas in law directed against the contested decision in so far as it authorises the payment of the DKK [X] on the basis of Article 87(3)(c) EC and the Guidelines, without its being necessary to consider whether the other conditions of existence of restructuring aid are satisfied, including the one concerning the existence of a restructuring plan which satisfies the Guidelines' requirements.

117 It follows from the foregoing that the authorisation for the payment of the DKK [X] must be annulled in its entirety, without its being necessary to rule on the other pleas in law submitted on this point.

Costs

118 Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared if the parties fail on one or more heads. In the present case, since the Commission has substantially failed, the Court considers it fair, having regard to the circumstances of the case, to order the Commission to pay all of the costs, except for those incurred by the Kingdom of Denmark, which will bear its own costs pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision SG(2001) D/287297 of 28 March 2001 (aid NN 127/2000) in so far as it declares aid granted by the Danish authorities to**

Combus A/S in the form of capital injections in the amounts of DKK [Y] and DKK [X] to be compatible with the common market;

2. **Dismisses the remainder of the application;**

3. **Orders the Commission to bear its own costs and pay those of the applicant;**

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

Forwood Pirrung Mengozzi

Meij Vilaras

Delivered in open court in Luxembourg on 16 March 2004.

H. Jung J. Pirrung

Registrar President

Table of contents

Facts and procedure ..... II - 925

Background to the dispute ..... II - 925

The contested decision ..... II - 929

Procedure ..... II - 932

Forms of order sought ..... II - 934

Admissibility and scope of the action ..... II - 935

Substance ..... II - 936

Aid in the amount of DKK 140 million to cover special expenditure associated with the status of official of Combus employees ..... II - 937

Aid in the amount of DKK 100 million to finance Combus employees' waiving their status of official in order to transfer to employment on a contract basis ..... II - 939

Aid in the amount of DKK [Y] to cover Combus's future losses ..... II - 942

Arguments of the parties ..... II - 943

Findings of the Court ..... II - 946

Aid in the amount of DKK [X] to cover past losses accumulated by Combus .... II - 955

Plea of incorrect application of Article 73 EC ..... II - 955

Pleas of infringement of Article 87(3)(c) and incorrect application of the Guidelines ..... II - 955

Arguments of the parties ..... II - 955

Findings of the Court ..... II - 958

Costs ..... II - 961