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<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: SA.29785 (2013/NN) (ex CP 361/2009) – Denmark/Sweden
"Core SAS" – Rights issue for SAS

SA.35668 (2013/C) (ex 2013/NN) (ex 2012/CP) – Denmark/Sweden
SAS new Revolving Credit Facility

SA.36327 (2013/NN) (ex 2013/CP) – Denmark/Sweden
Alleged aid to SAS

Sirs,

The Commission wishes to inform Denmark and Sweden that, having examined the information supplied by your authorities on the aid referred to in SA.35668, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union. In relation to the measures referred to in SA.29785 and SA.36327, the Commission has decided that they do not constitute aid.

1. PROCEDURE

1.1. Procedure SA.29785 – The rights issues in 2009 and 2010

- (1) On 6 February 2009, on the basis of information publicly available in the press, the Commission sent a letter to the Danish and Swedish authorities concerning the new strategic direction of the Scandinavian Airlines group ("SAS" or "the airline"), which apparently was to include a rights issue in the amount of SEK 6 billion.

- (2) Subsequently, on 13 November 2009 the Commission received a complaint filed by the European Low Fares Airline Association ("ELFAA") concerning Denmark, Sweden and Norway's (jointly "the States") involvement in two capital increases in 2009 and 2010 in the form of two rights issues, for a total of approximately EUR 650 million. On 23 November 2009, the Commission submitted the complaint to Denmark and Sweden, who provided comments on 18 December 2009. The Commission requested additional information by letter of 23 July 2010, replied to by Denmark and Sweden by letters of 3 and 9 September 2010.
- (3) On 26 October 2011, the Commission sent a preliminary assessment letter to ELFAA indicating that the capital increases seemed market-conform since the 2009 and 2010 rights issues were subscribed on equal terms by public and private shareholders. However, ELFAA submitted additional information by letter dated 22 December 2011, which was forwarded to Denmark and Sweden by letter dated 21 February 2012. Denmark and Sweden replied on 3 and 4 April 2012.

1.2. Procedure SA.35668 – The new Revolving Credit Facility in 2012

- (4) In late October 2012, the Commission and the EFTA Surveillance Authority ("ESA") were informally contacted by the States in relation to their intention to participate to a new Revolving Credit Facility ("RCF") in favour of SAS. On 12 November 2012, the States decided to participate to the new RCF without however formally notifying the measure to the Commission.
- (5) On 14 November 2012, the Commission opened an *ex officio* case on the new RCF. The Commission sent requests for information to Denmark and Sweden on 29 November 2012, 18 December 201, 28 January 2013, and 18 February 2013, replied to on 6 December 2012, 8 January 2013, 5 and 13 February 2013, and 22 March 2013 respectively. Denmark and Sweden provided additional information by letter of 3 June 2013.
- (6) In addition, on 20 November 2012 the Commission received a complaint from Ryanair, followed by one from ELFAA on 4 February 2013, on which Denmark and Sweden provided comments by letter dated 22 March 2013.

1.3. Procedure SA.36327 – The sale-and-lease-back transaction of April 2012

- (7) On 11 March 2013, the Commission received a complaint from a competitor concerning the same measures above, plus a new allegation on a sale-and-lease-back transaction on a number of real estate properties of SAS in Sweden. This transaction took place in April 2012 between SAS and Swedavia, a Swedish State-owned company which owns and operates airports in Sweden.
- (8) Sweden provided comments on the complaint by letter dated 22 March 2013 and provided additional information on 2 April 2013.
- (9) For all three procedures, the Commission is solely competent to assess whether the provisions of the TFEU have been respected by Denmark and Sweden. On the other hand, the EFTA Surveillance Authority, pursuant to Article 109(1) of the Agreement on the European Economic Area ("EEA Agreement") in conjunction with Article 24 of the Agreement between the EFTA States on the

Establishment of a Surveillance Authority and a Court of Justice, is competent to assess whether the provisions of the EEA Agreement have been complied with by Norway.

2. THE SCANDINAVIAN AIR TRANSPORT MARKET

- (10) Between 2001 and 2011, the Scandinavian air transport market (encompassing Denmark, Sweden, Finland and Norway) grew by 126% in ASK¹ terms. Almost all the growth in the short-haul Scandinavian market came from low cost carriers, in particular Norwegian Air Shuttle and Ryanair. Indeed, it is estimated that low cost carriers generated 90% of the growth in that period.²
- (11) Despite the increase on importance of low cost carriers, the dominant player in the Scandinavian market is still SAS, with an estimated market share in 2011 of 35.6%, far from the highs above 50% enjoyed a decade ago. The market shares of Norwegian Air Shuttle and Ryanair reached that year 18.7% and 6.8% respectively.

3. THE BENEFICIARY

- (12) SAS is the flag carrier of the States, the largest airline in Scandinavia and the eight largest airline in Europe. It is also a founding member of the Star Alliance. The airline group, which includes Scandinavian Airlines, Widerøe and Blue1, is headquartered in Stockholm with its main European and intercontinental hub at Copenhagen Airport. In 2011, SAS carried 22.9 million passengers, achieving revenues of SEK 38 billion.
- (13) SAS is currently 50% owned by the States: 21.4% by Sweden, 14.3% by Denmark, and 14.3% by Norway. The main private shareholder is the Knut and Alice Wallenberg's foundation ("KAW") (7.6%), while the remaining shareholders own stakes of 1.5% or less.

Table 1: Principal shareholders in SAS AB on 31 March 2012³

Shareholder	Total
The Swedish Government	21.4%
The Danish Government	14.3%
The Norwegian Government	14.3%
Knut and Alice Wallenberg's foundation	7.6%
Försäkringsaktiebolaget, Avanza Pension	1.5%
A.H Värdepapper AB	1.4%
Unionen	1.4%

¹ Available Seat Kilometre (ASK) is a measure of an airline flight's passenger carrying capacity. It is equal to the number of seats available multiplied by the number of kilometres flown.

² Source: <http://www.airlineleader.com/regional-focus/nordic-region-heats-up-as-all-major-players-overhaul-their-strategies>.

³ Source: <http://www.sasgroup.net/SASGroup/default.asp>.

Denmark's National Bank	1.4%
Robur Försäkring	0.9%
Ponderus Försäkring	0.8%
Andra AP-fonden	0.5%
Tredje AP-fonden	0.5%
SSB+TC Ledning Omnibus FD No OM79	0.5%
Nordnet Pensionsförsäkring AB	0.4%
Swedbank Robur Sverigefond	0.4%
Swedbank Robur Sverigefond Mega	0.3%
JPM Chase NA	0.3%
AMF Aktiefond Småbolag	0.3%
JP Morgan Bank	0.3%
KPA Pensionsförsäkring AB	0.2%
Nomura International	0.2%

- (14) SAS' financial position has been weak for several years, with recurring losses since 2008 and a current S&P credit rating of CCC+, downgraded from B- in November 2012. These difficulties have been heightened by the market environment of high fuel costs and uncertain demand.

4. DESCRIPTION OF THE MEASURES

4.1. Procedure SA.29785 – The rights issues in 2009 and 2010 (measure 1)

- (15) To address the problems linked to the difficult situation on the air transport market, the appearance of low-cost carriers and the current crisis, SAS followed a substantial cost reduction program ("Core SAS") in 2009/2010. In order to help to implement this program, SAS needed to strengthen its capital base through the addition of new capital. For this reason, two rights issues took place in March to April 2009 and in April 2010.
- (16) The 2009 rights issue was decided at an extraordinary general assembly of SAS on 13 March 2009. The share price was set at SEK 2.63, involving a discount on the then market price of SEK 22.00.
- (17) The 2010 rights issue was deemed necessary because the revenue in 2009 had been lower than anticipated due to the general economic situation and also because the restructuring costs had been higher than anticipated. It was decided at an extraordinary general assembly of SAS on 7 April 2010, with a share price of SEK 0.67, involving a discount on the market price at the time, which was SEK 2.75. On that same date, the general assembly of SAS resolved on a share split of 1:30. After the rights issue, every share in SAS, each with a value of SEK 0.67, would be consolidated into one share with a value of SEK 20.10.

- (18) On both occasions the States and KAW agreed to subscribe to a pro rata percentage of the new shares so that they jointly would still own 57.6% of the share capital. Five banks (JP Morgan, SEB, Nordea, DnB Nor Markets and a division of Danske Bank) guaranteed the remaining portion of the rights issues. The remaining 42.4% of the shares were fully subscribed both in 2009 and 2010 and thus the banks' guarantee was not triggered.
- (19) The 2009 rights issue was 99.6% subscribed for with subscription rights, while the 2010 one reached 99.7%. In addition, both rights issues were oversubscribed⁴ through the participation of private investors – shareholders and others – by 24.2% in 2009 and by 50% in 2010.
- (20) The new shares were issued at a price below the share price on the stock exchange. The discount was calculated in relation to the shares' theoretical ex-rights price (TERP).⁵
- (21) As a result of the rights issues, SAS's equity was increased by approximately SEK 6 billion in 2009, passing from SEK 9 billion to approximately SEK 15 billion, and by approximately SEK 5 billion in 2010.

Table 2: comparison of the main elements of the 2009 and 2010 rights issues

	2009 rights issue	2010 rights issue
Subscription rate by the States	50%	50%
Subscription rate by KAW	7.6%	7.6%
Rate of subscription on a rights issue basis	99.6%	99.7%
Issue terms	14:1 (fourteen new shares for every existing share)	3:1 (three new shares for every existing share)
Subscription price	SEK 2.63	SEK 0.67
Share market value on the last day before the	SEK 22.00	SEK 2.75

⁴ Following the prospectus of the 2010 rights issue, "[a]ny New Shares that are not subscribed for pursuant to the exercise of Subscription Rights will be offered by the Company to those who have exercised Subscription Rights and have subscribed for additional New Shares, regardless of whether such subscribers were shareholders on the Record Date or not. In case of oversubscription, such New Shares will be allotted among such subscribers in proportion to the number of Subscription Rights exercised by each such subscriber, and, to the extent necessary, by the drawing of lots".

⁵ The TERP is calculated on the basis of the market value of the existing shares, the subscription price for the new shares, and the number of new shares issued per every existing share. For example, in SAS' 2010 rights issue, the issue terms were 3:1 (three new shares per every existing share). The market value of the existing shares on the last day before announcement of the offer was SEK 2.75. The subscription price for the new shares was SEK 0.67, and thus for every three new shares the payment would be SEK 0.67 * 3 = SEK 2.01. To establish the TERP, the value of the four shares, including the market value, is allocated evenly: SEK (2.75 + 2.01)/4 = SEK 1.19 per share. Finally, to calculate the discount in the share issue, the issue price of the new shares is compared with the TERP. In the example, the subscription price is SEK 1.19 – SEK 0.67 = SEK 0.52 below the TERP. On a percentage basis, the discount is SEK 0.52 / SEK 1.19 = 44% in relation to the TERP.

announcement of the offer		
Shares' theoretical ex-rights price (TERP)	SEK 3.92	SEK 1.19
Discount	33%	44%

- (22) After the 2009 and 2010 right issues, which were aimed at supporting the implementation of the Core SAS business plan, SAS realised that additional measures were needed. For this reason, in September 2011 it launched the 4 Excellence ("4X") plan with the aim of improving its earnings by SEK 5 billion.

4.2. Procedure SA.35668 – The new RCF in 2012 (measure 2)

- (23) As other airlines globally, SAS has been reliant on external credit facilities to maintain a minimum level of liquidity. Since 20 December 2006, SAS has relied on a RCF that was due to expire on June 2013 ("the old RCF"). The old RCF amounted to EUR 366 million and was exclusively provided by a number of banks [...]. It also included a number of financial covenants or conditions, like for instance [...].
- (24) In December 2011, SAS' management projected that the airline would [...] as a result of the deterioration in its business performance. As a result, in early January 2012, SAS drew the old RCF in full [...]. It afterwards entered into negotiations with the banks and reached an agreement for a covenant reset on 15 March 2012, which increased the cost of drawing the old RCF and required SAS to full and immediate repayment of the drawn amount. In addition, SAS had to provide the lenders with a Recapitalisation Plan that had to be endorsed by the board and the main shareholders, i.e. the States and KAW.
- (25) The Recapitalisation Plan was underpinned by the so-called 4 Excellence Next Generation ("4XNG") business plan, based on a business review by [...] in early 2012. The 4XNG business plan will, according to SAS, enable it to position itself as a financially self-sufficient airline. It foresees a number of financial targets that SAS has to meet in the financial year 2014/2015, namely an EBIT margin above 8%, a financial preparedness ratio above 20% and an equity ratio (equity/assets) in excess of 35%. The plan is supposed to allow SAS to improve its EBT by approximately SEK 3 billion on an annual basis, while its implementation will require restructuring costs and one-off costs of approximately SEK 1.5 billion.
- (26) As a result of the revised international accounting standard concerning employee benefits (IAS 19) that will be applied by SAS as of November 2013, SAS' equity will be reduced when all unrecognized deviations from estimates and plan amendments will have to be recognized in full. In addition, the plan includes [...] an asset disposal and financing plan, which totals approximately SEK 3 billion in potential net cash proceeds. The asset disposal includes (i) the sale of Widerøe, a subsidiary regional airline in Norway,⁶ (ii) the sale of [...], (iii) the sale of [...], (iv) the sale of airport-related real estate interests, (v) the

⁶ On 20 May 2013, SAS reported that it had signed an agreement to sell 80% of its shares in Widerøe to an investor group. SAS will retain a 20% share in Widerøe but will have an option to transfer full ownership in 2016. See <http://mb.cision.com/Main/290/9410155/119539.pdf>.

outsourcing of groundhandling, (vi) the sale of aircraft engines, (vii) the sale-and-lease-back or other financing transaction in respect of [...], (viii) the outsourcing of call centres, and (ix) the sale or secured financing of three Q400 aircraft.

- (27) The States insist that the 4XNG plan is self-financing, which means that SAS would generate enough cash from operations and non-core disposals to fund the upfront cost of 4XNG. However, SAS was concerned about investor perception of a weak liquidity position of the airline brought on by the significant upfront costs of implementing 4XNG. SAS thus requested an extension of the old RCF together with a new RCF supported by the States and KAW. However, SAS argued that neither the extension of the old RCF nor the new RCF would be drawn.
- (28) The discussion on the new RCF started on 4 June 2012.⁷ Initially, in line with the Recapitalisation Plan (see paragraph (24) above), the banks that were lenders of the old RCF required that the States provide another round of equity, e.g. a rights issue, since they were unwilling to support a new RCF on their own. However, the States rejected this idea.
- (29) After some negotiations, the banks accepted a new RCF that would be set up jointly with the States and KAW to be structured strictly on equal terms without subordination or disproportionate rights to security. It must be noted that the new RCF was initially targeted to be of SEK [4-6] billion, while only SEK [1-4] billion of available security existed. On 22 October 2012, the size of the new RCF was finally reduced to SEK 3.5 billion (approximately EUR 400 million).
- (30) The new RCF is provided by the same banks that provided the old RCF (except one⁸) together with the States and KAW: 50% of the new RCF is provided by the States in proportion to their shareholding in SAS, and the remaining 50% is provided by the banks and KAW. The States and KAW participate in the new RCF on the same terms (fees, interest rates, covenants) as the banks.
- (31) The main characteristics of the new RCF are the following:
- It is divided into two sub-facilities of SEK 2 billion (Facility A) and SEK 1.5 billion (Facility B), to which the States participate at 50%. The pricing conditions for both facilities include an up-front fee, a commitment fee, a margin and an exit fee.
 - SAS needs to satisfy certain conditions to be able to draw on the RCF, and these conditions are somewhat tighter for Facility B than for Facility A.
 - The new RCF is secured first ranking on a number of assets of SAS, including 100% of the shares of its subsidiaries Widerøe and SAS Spare Engine, [...] aircraft and a number of properties. These securities are valued at SEK 2.7 billion and are shared pro rata between Facility A and Facility B.
 - Facility B can only be drawn once Facility A has been totally drawn. [...].

⁷ [...]

⁸ [...], one of the lenders under the old RCF, indicated that it would not be prepared to participate in the new RCF. As a result, [...] and [...] increased their participation in the new RCF proportionally.

- The new RCF continues the security package of the old RCF and in addition the lenders have been granted security over all shares in Widerøe and all other unencumbered fixed assets of the SAS Group as of December 2012. Overall, SAS is to provide security with a book value of approximately SEK 2.7 billion, i.e. approximately 75% of the new RCF.
 - The maturity of the new RCF is 31 March 2015.
- (32) The terms of the new RCF were agreed upon on 25 October 2012. It was however subject to *inter alia* parliamentary approvals for each of the States and the signing of union agreements with flight deck and cabin crew.
- (33) The States submitted a report prepared by CITI dated 7 November 2012 ("the CITI report") which sought to assess and evaluate whether a private investor in a situation as close as possible to that of the States may have entered into the new RCF on similar terms and conditions. Assuming a successful implementation of the 4XNG business plan in its base case, the CITI report concluded that the participation of the States to the new RCF would generate an internal rate of return (IRR) of [100-130]%, a cash-on-cash multiple of circa [4-9]x, and an increase in equity value of close to [800-1,200]% (from November 2012 until March 2015). The CITI report concludes that the return required by the States is thus at least equal to that required by private investors in a similar position. However, the CITI report does not assess the probability of SAS successfully executing the "base case" of the 4XNG business plan nor does it assess the impact of deviations from the "base case" such as, for example, a failure to monetise non-core assets.
- (34) SAS announced on 19 December 2012 that all the necessary conditions for the new RCF to enter into force – see paragraph (32) above –, including parliamentary approval in the State, were in place. As of this date, the new RCF replaced the old RCF.⁹
- (35) By letter of 3 June 2013, Denmark and Sweden explained that as the result of the sale of 80% of the shares of Widerøe (paragraph (26) above), the States and the lending banks had agreed with SAS to a modification of the terms and conditions of the new RCF. However, as of 3 June 2013 the agreement had not been formally signed and therefore it seems that the modifications to the new RCF had not entered into force. These modifications include the following:
- [...]
 - [...]
 - [...]
 - [...]

4.3. Procedure SA.36327 – The sale-and-lease-back transaction of April 2012 (measure 3)

- (36) The complainant in procedure SA.36327 referred to measures 1 and 2, and in addition made reference to a sale-and-lease-back transaction dated April 2012 between SAS and Swedavia, a Swedish State-owned company which owns and operates airports in Sweden. This transaction related to real estate belonging to

⁹ See <http://www.reuters.com/finance/stocks/SAS.ST/key-developments/article/2662973>.

SAS located at Stockholm, Göteborg and Malmö airports and amounted to SEK 1.8 billion, with an estimated profit for SAS of SEK 350 million.

- (37) According to the information provided by the States, it results that the sale-and-lease-back transaction was carried out on the basis of a memorandum of investment prepared by a corporate finance advisor. The sales process was done through an auction process in two steps. Based on indicative offers, a limited number of investors was chosen to carry out a due diligence. Following completion, final offers were submitted.
- (38) Swedavia asked an independent expert (DTZ) to carry out a valuation of several properties of SAS in Sweden and on this basis made a binding offer.

5. COMMENTS OF THE PARTIES

5.1. Procedure SA.29785 – The rights issues in 2009 and 2010 (measure 1)

- (39) The complainants argue that measure 1 entail unlawful State aid to SAS, given that it would not fulfil the conditions of the market economy investor ("MEI") test (paragraph (68) below). In particular, ELFAA argues that measure 1 was not carried out on market terms.
- (40) ELFAA's main argument in relation to measure 1 concerns the discount rates. Following its calculations, the discount in the 2010 rights issue was of 75% when compared to market price of the shares. The complainant argues that the only option for existing shareholders was to subscribe to the new shares: ignoring the rights issue would have diluted the shareholder's share in SAS by 75%, while the transfer of their rights to other investors would not be as interesting as subscribing the new shares due to capital gains tax. ELFAA considers that through these measures SAS continued to sustain artificially its significant presence on the market, competing against other, non-subsidised, airlines through artificially competitive prices, preventing its competitors' increase of the frequency and number of their connections to other airports, and occupying premium slots as well as other facilities and resources that would otherwise be available to competition.
- (41) ELFAA consider that thanks to measure 1, SAS continued to be a significant market player, especially in the Nordic region. Therefore, in ELFAA's view, measure 1 was able to distort competition in the airline market.
- (42) From their side, Denmark and Sweden argue that the 2009 and 2010 rights issues were conform to normal market conditions and thus exclude the presence of State aid in measure 1. In this respect, they note that they had asked for engagements to be made by SAS to balance the risks, like for instance (i) that SAS refinance the majority of the debenture loans that would fall due in 2010, and (ii) that it enter into an agreement with the pilot and cabin crew unions to reduce costs by at least SEK 500 million per year.
- (43) In addition, Denmark and Sweden explain that both rights issues were preceded by an analysis to assess if they were economically founded in view of the financial forecasts of the company and general evolution of the sector. Indeed, the Royal Bank of Scotland, adviser to the Danish Government, had concluded on 20 March 2009 and on 23 April 2010 that "*it would not be unreasonable for*

the [Danish Ministry of Finance] to subscribe for the new shares". Sweden also states that it followed the advice of its financial advisors.

- (44) Finally, Denmark and Sweden consider that a discount of 33% and 44% in the 2009 and 2010 rights issue, respectively, is in line with similar operations during these years on the Swedish market and provided a number of examples in this sense.

5.2. Procedure SA.35668 – The new RCF in 2012 (measure 2)

- (45) The complainants are of the view that measure 2 fails to meet the MEI test.
- (46) ELFAA and Ryanair argue that no private investor would be willing to continue financing SAS in view of SAS' financial situation as well as of the rights issues in 2009 and 2010 which failed to make the airline viable. They moreover consider that the 4XNG business plan will fail to restore SAS' viability. In this respect, ELFAA points to statements of the Norwegian Minister for Industry and Trade who admitted that, despite the capital injection in 2009 and 2010, "*SAS' revenue evolved considerably less than planned*" and that "*the return on the Government's investment in SAS, during the period 2006 to date, has been negative. SAS has failed to meet the State's requirement*".¹⁰ Norway's figures on return on investment ("ROI") were significantly negative (-90.8% for the period 2009-2012). ELFAA notes that the same applies to the ROI figures of Denmark and Sweden.
- (47) ELFAA also argues that the new RCF does not meet the *pari passu* argument since the participating banks were under heavy political pressure to participate in the new RCF. These banks would thus not act in a comparable situation to that of the States. Moreover, ELFAA considers that KAW hardly qualifies as a typical private investor due to the charity-like purpose of the foundation.
- (48) As regards the CITI report, ELFAA notes that CITI did not conduct any independent evaluation of the 4XNG business plan and that it merely assumed that this business plan will be carried out in accordance with its conditions. Therefore, ELFAA argues that the over-optimistic working assumption that SAS' business plan is solid and will be carried out as expected is enough to render CITI's statement void of any evidentiary value.
- (49) As regards compatibility, ELFAA argues that the new RCF and the 4XNG business plan are in direct conflict with the essential conditions for the approval of State aid under the Community guidelines on state aid for rescuing and restructuring firms in difficulty¹¹ ("the R&R Guidelines"), in particular as

¹⁰ Source: White Paper to the Norwegian Storting, SAS – participation in the credit facility, Recommendation from the Ministry of Industry and Trade on 16 November 2012 (provided by the complainant).

¹¹ OJ C 244, 1.10.2004, p. 2. The validity of the R&R Guidelines was initially set until 9 October 2009. However, the Commission decided to extend their validity first until 9 October 2012 (Commission Communication concerning the prolongation of the Community Guidelines on State aid for Rescuing and Restructuring Firms in Difficulty, OJ C 156, 9.7.2009, p. 3) and then, in the context of the state aid modernisation (SAM) initiative, until such time as the R&R Guidelines are replaced by new rules on state aid for rescuing and restructuring firms in difficulty (Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004, OJ C 296, 2.10.2012, p. 3).

regards the "one time, last time" principle and the requirement of compensatory measures.

- (50) Finally, ELFAA also asserts that the grant of unlawful State aid may have also extended to the banks participating in the new RCF.
- (51) On the other hand, Denmark and Sweden claim that their participation in the new RCF is on market terms since they participate to it *pari passu*¹² with the banks and KAW, thereby excluding the presence of State aid in measure 2.
- (52) They first argue that the position of each of the participating banks cannot be determined globally, given that there exist marked differences as to the extent to which the banks have other exposures vis-à-vis SAS, which would render any direct comparison meaningless. In any event, they claim that the banks were less exposed than the States and consider that the banks had no actual exposure from the old RCF in the period in which the negotiations on the new RCF took place, given that SAS had not drawn on the old RCF since it had been fully repaid in March 2012.
- (53) Denmark and Sweden admit that no shareholder other than KAW was asked to participate in the new RCF due to the fragmented ownership structure of SAS. However, in their view, this means that these shareholders will not receive any benefit from SAS having access to the new RCF, apart from any potential gain in stock value. Denmark and Sweden consider that KAW fully qualifies as a private investor.
- (54) Denmark and Sweden consider the 4XNG business plan to be sufficiently robust and believe that there is strong evidence that the SAS will be able, after completing the implementation of the plan, to generate return to shareholders at par with market levels and that it will not require further support from its core shareholders. They also argue that the sensitivity analyses of the 4XNG business plan confirm that SAS will achieve long-term viability even if the plan is not implemented in full.
- (55) Finally, Denmark and Sweden also consider that the risks and potential rewards of their participation in the new RCF have been carefully balanced and that sufficient safeguards have been put in place. They moreover explain that the CITI report (paragraph (33) above) confirms that their participation in the new RCF would be on market terms and will generate an IRR of [100-130]%.

5.3. Procedure SA.36327 – The sale-and-lease-back transaction of April 2012 (measure 3)

- (56) The complainant alleges that measure 3 does not meet the MEI test and therefore involves an undue advantage in favour of SAS and consequently constitutes State aid. Moreover, the complainant argues that measure 3 was provided to a firm in difficulty but highlights that the conditions of the R&R Guidelines are not met.
- (57) On the other hand, Sweden argues that measure 3 concerns a traditional sale-and-lease-back of properties, carried out strictly on normal commercial terms by

¹² See paragraph (69) below.

the parties at arm's length, thereby excluding the presence of State aid in measure 3.

- (58) The Swedish authorities explain that in the course of the sales process, all potential bidders were asked to submit bids on the assumption that the properties were to be leased by SAS under new lease agreements on market terms and also by other tenants under existing lease agreements. As all the properties of SAS were located on land owned by Swedavia, a purchase of the SAS properties entailed a potential upside which only Swedavia could utilize. Further, Swedavia considered that the SAS properties, located at Sweden's two largest airports, offered a long term strategic opportunity and a significant development potential.
- (59) Bearing the above in mind, Swedavia appointed the international company DTZ as a valuer. DTZ established a fair market value for the SAS properties in Sweden based on a traditional cash flow analysis. Based on this valuation, Swedavia submitted a final bid on 22 March 2012 for the purchase of five of the SAS properties located at airports in Sweden. After negotiations the parties executed a binding share purchase agreement on 30 April 2012.

6. ASSESSMENT

6.1. Difficulties of SAS

- (60) Point 10 of the R&R Guidelines clarify that a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of the R&R Guidelines in the following circumstances: (a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; (b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; (c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.
- (61) The Commission first observes that SAS' financial position has been weak for several years and that its financial performance has deteriorated significantly in the period 2008-2012. In particular, from the annual reports of the airline result that, from 2008 onwards, SAS has incurred substantial losses every year and has registered significant amounts of financial net debt.

Table 3: SAS' key financial data 2007-2012 (SEK million)¹³

	2007	2008	2009	2010	2011	2012 (Jan-Oct)
Revenue	50,958	52,870	44,918	41,070	41,412	35,986
Financial net debt	1,231	8,912	6,504	2,862	7,017	6,549

¹³ Source: annual reports of SAS for the period 2008-2012, available at <http://www.sasgroup.net/SASGroup/default.asp>.

EBT	1,044	-969	-3,423	-3,069	-1,629	-1,245
Net income	636	-6,360	-2,947	-2,218	-1,687	-985
Cash flow for the year	-1,839	-3,084	-1,741	868	-1,243	-1,018
Return on capital employed (ROCE) – %	6.7	-19.6	-11.7	-7.6	-2.2	-8.1
Return on book equity after tax – %	3.8	-47.6	-26.8	-17.0	-12.0	-24.8
Interest coverage ratio – %	1.8	-5.3	-4.4	-1.9	-0.6	-1.6

- (62) The financial difficulties of the airline reached a peak and apparently became unsustainable in 2012, when SAS presented the 4XNG business plan, perceived by the management of the airline as the "final call" for SAS.¹⁴ In addition, in November 2012 the press reports the possibility of SAS going into bankruptcy.¹⁵ Also, the CITI report indicates that in the absence of a new RCF, the likely outcome would be the default of SAS. These elements suggest that, at least at that time, SAS fulfilled the criteria for being the subject of collective insolvency proceedings under its domestic law in the sense of point 10(c) of the R&R Guidelines. On the basis of the information available at this stage, the Commission cannot exclude that SAS would fulfil this criterion at least since November 2012 and could be deemed a firm in difficulty.
- (63) In any event, the Commission notes that in accordance with point 11 of the R&R Guidelines, a firm may be considered to be in difficulty "*where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value*".
- (64) From table 3 above results not only that SAS had incurred continuous losses and significant amounts of financial debt since 2008, but also that its revenue was in decline from 2008 onwards. The negative EBT for the whole period 2008-2012 and cash flow figures (except for 2010) are also clear indicators of the difficulties SAS has been facing during this time. Also, two of the main indicators of profitability (return on equity and ROCE) show substantial negative values as well as the interest coverage ratio, which shows the incapacity of the airline to generate enough cash from its operations to meet its interest obligations.
- (65) In view of these indicators, and bearing in mind point 11 of the R&R Guidelines, the Commission is at this stage of the view that SAS was a firm in difficulty at the time measures 1, 2 and 3 were provided to the airline. In this

¹⁴ See in this sense the words of the CEO of SAS, quoted by Reuters on 12 November 2012: "*This truly is our 'final call' if there is to be a SAS in the future,*" said Chief Executive after launching a new rescue plan for the airline [...] which has not made a full-year profit since 2007", available at <http://www.reuters.com/article/2012/11/12/uk-sas-idUSLNE8AB01O20121112>. See as well the article entitled "SAS tops European airline critical list" in the Financial Times of 13 November 2012, available at <http://www.ft.com/intl/cms/s/0/fa1cbd88-2d87-11e2-9988-00144feabdc0.html#axzz2TSY5JHUH>.

¹⁵ See for instance Reuters on 18 November 2012 (<http://www.reuters.com/article/2012/11/19/sas-idUSL5E8MI6IY20121119>) and the Financial Times of 19 November 2012 (<http://www.ft.com/intl/cms/s/0/43e37eba-322f-11e2-b891-00144feabdc0.html#axzz2TSY5JHUH>).

respect the Commission recalls that the fact that not every indicator in point 11 of the R&R Guidelines applies to SAS is irrelevant, since the R&R Guidelines contain a non-exhaustive list of typical symptoms of a situation of economic difficulty and not a cumulative list of criteria.¹⁶

6.2. Presence of State aid

- (66) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. The concept of State aid thus applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it.
- (67) To be State aid, a measure must stem from State resources and be imputable to the State. In principle, State resources are the resources of a Member State and of its public authorities as well as the resources of public undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence.
- (68) In order to determine whether an economic advantage in favour of SAS within the meaning of Article 107(1) TFEU was granted by the different measures under assessment and therefore whether these measures involve State aid, the Commission will assess whether the airline received an economic advantage which it would not have obtained under normal market conditions. To examine this question the Commission applies the MEI test. In such a case, SAS would be able to continue operating without having to face the consequences normally deriving from its poor financial results.
- (69) According to the MEI test, no State aid would be involved where, in similar circumstances, a private investor of a comparable size to that of the bodies concerned in the public sector, operating in normal market conditions in a market economy, could have been prompted to provide to the beneficiary the measures in question. The Commission therefore has to assess whether a private investor would have entered into the transactions under assessment on the same terms. The attitude of the hypothetical private investor is that of a prudent investor whose goal of profit maximisation is tempered with caution about the level of risk acceptable for a given rate of return. In principle, a contribution from public funds does not involve State aid if it takes place at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances and on comparable terms (*pari passu*).
- (70) Finally, the measures in question must distort or threaten to distort competition and be liable to affect trade between Member States. According to an established case law, when the financial support granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, then there is at least a potential effect on trade

¹⁶ See Case T-349/03 *Corsica Ferries* [2005], ECR II-2197, paragraph 191, and Commission Decision of 13 May 2003 in case C 62/2000, *Kahla*, OJ 2003 L 227/12, point 117.

between Member States and on competition¹⁷ In keeping with the Court case law, the Commission is of the view that any potential economic advantage granted to SAS through State resources would fulfil this condition, given that SAS is in competition with other airlines of the European Union, in particular since the entry into force of the third stage of liberalisation of air transport ("third package") on 1 January 1993.¹⁸

6.2.1. Procedure SA.29785 – The rights issues in 2009 and 2010 (measure 1)

- (71) The Commission has assessed the presence of State aid in respect of the 2009 and 2010 rights issues (measure 1). Given that the subscription of Denmark and Sweden was decided by the governments and financed with resources coming from the State budget after having obtained approval of their respective parliaments, it is undisputed that the participation of Denmark and Sweden to measure 1 entails State resources and that the measure is imputable to the State.
- (72) Thus, the only element of the notion of State aid that deserves further analysis is whether measure 1 conferred an undue economic advantage to SAS. As explained in paragraph (68) above, it is considered that a contribution from public funds does not involve State aid if it is carried out in *pari passu* terms.
- (73) The Commission first notes, on the basis of the information provided by Denmark and Sweden, that the rights issues of 2009 and 2010 took place on equivalent conditions for public and private investors alike, under circumstances that indicate that a careful assessment was carried out prior to the investment and that the market believed that it was a profitable operation (see section 4.1 above). In particular:
- The rights issues were preceded by an analysis carried out by at least one independent expert (Royal Bank of Scotland) to assess if they were economically founded in view of the financial forecasts of the company and the general evolution of the sector (paragraph (43) above).
 - KAW participated to it together with the States in proportion to their shareholdings, i.e. 50% for the States and 7.6% for KAW.
 - Very importantly, the remaining 42.4% of the rights issues was almost fully subscribed for on a rights issue basis, reaching 99.6% in 2009 and 99.7% in 2010 respectively. In addition, both rights issues were oversubscribed through the participation of private investors, shareholders and others.
 - Finally, both rights issues were decided at the annual assembly at SAS by a significant majority of the shareholders (99.83% in 2009 and 99.99% in 2010). The States could not have decided by themselves to go ahead with the rights issues, since a majority of 2/3 of the votes cast as well as of the shares represented in the meeting was needed.

¹⁷ See Case 730/79 *Philip Morris Holland BV v Commission* [1980] ECR 2671, paragraph 11; Case T-288/97 *Regione Friuli Venezia Giulia v Commission* [2001] ECR 2001 II-1169, paragraph 41; and Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)* [2003] ECR I-7747, paragraph 75.

¹⁸ The "third package" included three legislative measures: (i) Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1); (ii) Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8); and (iii) Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 15).

- (74) The complainant's main argument against the rights issues concerns the discount rates. Following the calculations of the complaint, the discount in the 2010 rights issue was of 75% when compared to market price of the shares. The complainant argues that the only option for existing shareholders was to subscribe to the new shares: ignoring the rights issue would have diluted the shareholder's share in SAS by 75%, while the transfer of their rights to other investors would not be as interesting as subscribing the new shares due to capital gains tax.
- (75) On this basis, the participation of the private existing shareholders to the 2010 rights issues was, in the complainant's opinion, not motivated by prospects of profitability but by the desire to avoid a "confiscation" of a significant part of their investment in SAS and a 75% dilution of their voting rights. This would explain in his view the 99.7% level of subscription of the new shares.
- (76) It however appears that the calculations of the complainant are not correct. The Commission notes that it is market practice to issue the new shares at a price below the share price on the stock exchange. The discount in a rights issue is calculated in relation to the TERP (paragraph (20) above) and not in relation to the current share price on the stock exchange. Bearing this in mind, the discount actually amounted to 44%. This percentage seems to be in line with the standard discount in the Swedish market for comparable operations, in particular during the financial crisis.

Table 4: overview of rights issues on the Swedish market in the period 2009-2011¹⁹

Company	Year	Issue terms X:Y	Discount in relation to the TERP
SEB AB	2009	11:5	40%
Husqvarna AB	2009	1:2	41%
Nordea Bank AB	2009	11:20	46%
Trelleborg AB	2009	2:1	57%
Eniro AB	2009	3:1	48%
Billerud AB	2009	1:1	41%
Swedbank AB	2009	1:2	41%
Rottneros AB	2009	5:1	62%
Haldex AB	2009	1:1	49%
Gunnebo AB	2009	2:3	40%
Tradedoubler AB	2010	1:2	44%
Cision AB	2010	1:1	35%
Eniro AB	2010	30:1	17%

¹⁹ Source: Dealogic Analytics, Deal Report (information provided by the Swedish authorities).

Hemtex AB	2011	4:3	28%
Opcon AB	2011	4:1	45%
Kappahl AB	2011	2:1	41%

(77) Against this background and having regard to the *pari passu* participation of multiple private investors (existing shareholders or not), the Commission considers that the rights issues in 2009 and 2010 could be deemed market-conform and therefore that they did not involve an undue economic advantage to SAS. The Commission thus reaches the conclusion that measure 1 does not constitute State aid.

6.2.2. Procedure SA.35668 – The new RCF in 2012 (measure 2)

Presence of State aid

(78) The Commission has assessed the presence of State aid in respect of the new RCF in 2012 (measure 2). As it is the case for measure 1, it cannot be disputed that measure 2 entails State resources since it financed by resources coming from the States' budgets and that the measure would be imputable to the State, in particular since the parliaments of Denmark and Sweden approved the participation of both Governments in the new RCF (paragraph (34) above).

(79) The only criterion of the notion of State aid that is thus into question is whether measure 2 conferred an undue economic advantage to SAS.

(i) *Pari passu participation of the States, KAW and the banks in the new RCF*

(80) The States claim that their participation in the new RCF is on market terms since they participate to it *pari passu* with the banks and KAW. However, the Commission doubts at this stage that the *pari passu* argument holds as the States and the banks do not seem to be in comparable positions. The General Court has stated in this sense that "[...] *la concomitance ne saurait à elle seule, même en présence d'investissements privés significatifs, être suffisante pour conclure à une absence d'aide au sens de l'article [107], paragraphe 1, [TFUE] sans prendre en considération les autres éléments pertinents de fait ou de droit*".²⁰

(81) The banks have roughly halved their contribution to the new RCF (from EUR 366 million to approximately EUR 200 million) and have therefore reduced their overall present exposure to SAS by approximately 50% in terms of RCF. However, the States – which had no return as regards the 2009 and 2010 rights issues in view of the persistently negative results of SAS (paragraph (14) above) – have increased their exposure to SAS.

(82) The Commission considers it likely that the banks may have carried out their own risk assessment before taking the decision to participate in the new RCF. However, contrary to the arguments of Denmark and Sweden, the Commission is of the view that the position of these banks must be seen in the context of the old RCF. This is, at the time of taking a decision to lend money to SAS through the new RCF, the banks had to compare whether it would be less risky to

²⁰ Case T-565/08 *Corsica Ferries France SAS v Commission* [not yet published], paragraph 122.

participate to the new RCF than to continue with the old RCF which was due to expire on June 2013 (paragraph (23) above).

- (83) The situation of the banks already participating in the old RCF can thus not be compared to that of other banks without participation in the old RCF but with an interest in taking part in the new RCF. As the CITI report underlines, a new lender without participation in the old RCF would require more stringent terms and conditions for the new RCF than those provided by the lending banks. In other words, the independent financial advisor of the States also considers that a new lender would not have participated afresh in the new RCF under the current terms. It therefore appears that a bank without previous exposure to SAS would not have offered the airline a similar deal.
- (84) In addition, the Commission notes that the banks participating to the old RCF should have taken into consideration the fact that SAS could have drawn from the old RCF until June 2013 if the new RCF had not been put into place. This would have meant for the banks an exposure of EUR 366 million (paragraph (23) above) and the risk that SAS may completely draw it, as it had actually done in January 2012 (paragraph (24) above).
- (85) In this respect, the Commission highlights the context in which the new RCF was negotiated and cannot exclude at this stage that the fact that SAS had drawn completely the old RCF in January 2012 (paragraph (24) above) could have influenced the conduct of the lending banks to participate in the new RCF so as to ensure that the money they had lent to SAS was not completely lost in view of the significant difficulties of the airline (section 6.1 above).
- (86) It is also unclear to the Commission whether the behaviour of the banks could have been influenced by the States' conduct. The Commission notes that the banks were willing to participate in the new RCF only on condition that the States participate to it as explained in paragraphs (27) and (28) above. In view of the continuous financial support of the States to the airline throughout the last years (see for example the 2009 and 2010 rights issues), the Commission cannot exclude at this stage that the decision of the banks to participate in the new RCF was influenced by the conviction that the States would support SAS. Moreover, as the involvement of the States was a strict requirement for the private operators to participate in the new RCF, the Commission considers that the *pari passu* condition may not be applicable given that the participation of the public authorities could not be replicated – and in fact was not – by any private investor.
- (87) The Commission moreover questions whether the behaviour of KAW can be considered as a reference point to establish the conduct of a private investor. The General Court has stated in its judgment in *Alitalia* that "[a] capital contribution from public funds must therefore be regarded as satisfying the private investor test and not constituting State aid if, inter alia, it was made at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances".²¹ In other words, in order for the *pari passu* argument to be applicable, the private investor participating in a given operation must be guided by prospects of profitability of the investment and it must not have other interests. However, the Commission observes that

²¹ See Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, paragraph 81.

KAW is already exposed to SAS not only through its shareholding but also via the bank SEB (in which it has a majority shareholding and apparently control). [...]. According to information received from SAS, SEB's net exposure to the airline as of late November 2012 was of *circa* SEK [...] million.²² Therefore, KAW's participation in the new RCF could be motivated not so much by prospects of profitability of the investment but by the perspective to avoid higher losses through its subsidiary SEB.

(ii) *Assessment of the participation of the States to the new RCF under the MEI test*

- (88) The Commission has also examined whether the participation of the States to the new RCF could be considered rational from a shareholder perspective and would fulfil the MEI test outside the *pari passu* line of reasoning.
- (89) In the first place, although the Commission cannot exclude at this stage with absolute certainty that the 4XNG business plan – which constitutes the basis for the lenders' participation in the new RCF – can be successfully implemented in its entirety, it however has doubts whether the said business plan relies on sufficiently robust assumptions and it is uncertain whether the sensitivity analyses carried out in the plan are not overly optimistic. This concerns *inter alia* the following drivers:
- The 4XNG business plan appears to assume a market growth in ASK²³ of [5-9]% and [4-8]% respectively in 2013/2014 and of [2-5]% p.a. for 2015-2017. This seems optimistic in view of expected growth rates for the European air transport market issued by international experts.²⁴
 - The plan assumes a growth in GDP of [1-4]% p.a. for 2013-2017, which seems optimistic in view of the figures publicly available in the Commission's economic forecasts at the moment the 4XNG business plan was prepared, in particular considering the weak growth in the EU and the Euro area, SAS' main markets.²⁵

²² Other banks also had additional exposure to SAS apart from that of the old RCF. For instance, as of 2 November 2012, [...] had a bilateral exposure to SAS of SEK [...] in addition to secured loans for an amount of SEK [...].

²³ See footnote 1 above.

²⁴ According to the most recent financial forecast (March 2013) of the International Air Transport Association (IATA), Europe continues to lag behind other areas, largely as a result of the on-going recession in home markets. IATA predicts growth rates (both in terms of capacity and traffic) below 3% (<http://www.iata.org/whatwedo/Documents/economics/industry-outlook-financial-forecast-march-2013.pdf>).

²⁵ The Commission's European Economic Forecast - spring 2012 (published in May 2012) forecasted a GDP growth in Denmark of 1.1% in 2012 and of 1.4% in 2013, while the forecast for Sweden for 2012 was of 0.3% and of 2.1% for 2013. Also, for Norway the Commission forecasted a GDP growth in 2012 of 1.7%, reaching 2.0% in 2013. These forecasts were revised in the autumn 2012 forecast (published in November 2012): for Denmark, GDP projections were of 0.6% in 2012 and of 1.6% in 2013 (falling to 1.3% in 2014), while for Sweden GDP growth in 2012 was increased to 1.1% and reduced to 1.9% in 2013 (reaching 2.5% in 2014). Regarding Norway, the Commission increased its GDP growth projections – although highlighting a downward trend – to 3.1% in 2012 and to 2.5% in 2013 (and to 2.3% in 2014). However, given that Europe is the main market of SAS, it appears that SAS will continue to suffer from the weak growth in the EU: the spring 2012 forecast projected a 0% GDP growth in 2012 and of 1.3% for 2013 (-0.3% and 1% in 2012 and 2013 respectively in the Euro area). The autumn 2012 forecast revised downwards the GDP projections for the EU to -0.3% in 2012 and to 0.4% in 2013, while it would pick to 1.6% in 2014

- Although the assumed inflation of approximately [1-4] % p.a. in 2013/2014 seems in line with the Commission's forecasts available at the time, it does not appear realistic to assume an inflation of [0-3] % for the period 2015-2017.²⁶
- (90) Also, as indicated in paragraph (26) above, the 4XNG business plan includes a number of assets disposals, with an estimated impact of SEK 3 billion, as well as several cost-reducing measures. In this respect, the Commission observes that while some of these material cost reductions have already been achieved,²⁷ it is not clear whether a complete successful implementation of the 4XNG business plan could have been conclusively predicted at the time of signing the new RCF. For instance, it appears that the divestment of SAS' stake in Air Greenland – which Denmark has explained has been on sale since at least the introduction of Core SAS – has not taken place.²⁸
- (91) In addition, the Commission has assessed the validity of the CITI report, which appears as a crucial element in the argumentation of the States that their participation in the new RCF complies with the MEI test. In addition to assessing generally whether the terms and conditions for the new RCF would be acceptable to a private investor in as close as possible a situation to that of the States, the CITI report also assesses the overall anticipated return on the States' participation in the new RCF over the period 8 November 2012 to 31 March 2015, taking into account their combined 50% shareholding and the anticipated future growth in the equity value of SAS.
- (92) As regards the new RCF terms and conditions, the CITI report assesses the fees, the relatively stringent drawdown conditions and the number and type of financial covenants (albeit making some further recommendations regarding the latter),²⁹ and comes to the view that a private investor in a similar situation may have participated in the new RCF on similar terms.
- (93) Nevertheless, the Commission highlights – as acknowledged by the States – that CITI did not assess the 4XNG business plan nor perform a sensitivity analysis of the financial model, but merely relied on the information provided to them. Furthermore, the CITI report does not value the security of the new RCF.³⁰ As noted in paragraph (35) above, the size of the new RCF will likely be materially reduced by the proceeds of the sale of 80% of the Widerøe shares since these divested shares would no longer serve as security, and SAS will pledge [...] as a

(in the Euro area, the fall in GDP in 2012 was increased to -0.4%, while it would be of 0.1% in 2013 and of 1.4% in 2014). The forecasts are available at http://ec.europa.eu/economy_finance/publications/european_economy/2012/pdf/ee-2012-1_en.pdf and http://ec.europa.eu/economy_finance/publications/european_economy/2012/pdf/ee-2012-7_en.pdf, respectively.

²⁶ In April 2012, at the time the 4XNG business plan was prepared, the International Monetary Fund ("IMF") estimated an inflation of approximately 1.9% p.a. in the EU for the period 2015-2017. For the States, the IMF estimated an inflation of between 1.8-2.5% p.a. in the EU for the period 2015-2017 (figures available at <http://www.imf.org/external/ns/cs.aspx?id=28>).

²⁷ For example, the signing of new collective agreements with flight crew unions and the transfer from defined-benefit to defined-contribution pension schemes in November 2012.

²⁸ [...]

²⁹ For example, the CITI report expressed some reservations regarding the adequacy of the SEK [...] liquidity requirements and recommended an [...] covenant, common in aviation transactions.

³⁰ SAS is to provide security for the new RCF with a "book value" of approximately SEK 2.7 billion, i.e. approximately 75% of the new RCF (see paragraph (31) above).

security to the Facility A. However, it is unclear to the Commission precisely what the market value of the security for the remaining part of the new RCF would be and how the remaining Widerøe shares can be used as security in that regard.

- (94) Since the Commission does not have information showing any independent assessment of the adequacy of the underlying collateral of the new RCF from a private market investor perspective, it is not possible to conclude at this stage that the security package (when viewed together with the relevant drawdown conditions and financial covenants) would meet the conditions of the MEI test.
- (95) The CITI report performs a return analysis on the new RCF including the implied capital gain from the States' shareholding in SAS. The CITI report presents an annualised IRR for the States over a three year investment horizon assuming full and successful implementation of the underlying "base case", ignoring any deviations from this scenario. Historical data for airlines over the last two decades shows that what is called the "base case" scenario appears to be an optimistic scenario.³¹ Moreover, the CITI report focuses entirely on this one particular scenario without considering the impact of possible alternative scenarios with less favourable assumptions on the return analysis.
- (96) Generally, an IRR analysis should take into account a range of future scenarios, including default, and assign probabilities of occurring to each of the scenarios. The CITI report assigns a zero probability to the likelihood that SAS will default in the next three years. However, given that SAS is currently rated CCC+ by Standard & Poor's, this seems an underestimation of the risk. Rating agencies' data shows that CCC+ firms have an average one-year default probability of around 8.5%. Over a multi-year horizon the default probability is higher.
- (97) The Commission also assessed the model accompanying the 4XNG business plan, which offers 7 different scenarios for each of the base, downside and pessimistic case (as indicated above, CITI did not assess this model and limited itself to the base case scenario). The IRR varies depending on the case and the scenario, with the IRR going down to around [80-110]% in what is called the "downside case" or even showing strongly negative IRR in the "pessimistic case". The "downside" case appears to be a variation on "base case" and also seems a rather optimistic case given that the only difference vis-à-vis the "base

³¹ In this respect, the CITI report assumes that the market capitalisation of SAS will grow by [800-1,100]% over three years. Since market capitalisation corresponds to the stock price multiplied by the number of outstanding shares, the Commission assumes that [800-1,100]% is also the projected growth rate of the stock price. The Commission first notes that the historical equity data for SAS from January 2000 onwards shows that the highest historical 3-year return of SAS has been 273% (March 2006) and that since January 2008, SAS has had a negative 3-year return on its stock price. Using Bloomberg data, the Commission then calculated the maximum 3-year returns for a number of companies: (i) Bloomberg EMEA Airlines: 153% in October 2007 (data since January 1999); (ii) S&P500 Airlines: 177% in December 1997 (data since January 1990); (iii) Air France: 186% in May 2007 (data since January 1992); (iv) Deutsch Lufthansa: 155% in August 1995 (data since January 1990); (v) easyJet: 375% in October 2007 (data since December 2000); (vi) Ryanair Holdings: 465% in December 2001 (data since June 1997); and (vii) IAG: 300% in January 1994 (data since January 1990). Based on the above analysis, the Commission considers that a 3-year growth rate of market capitalisation of [800-1,100]% (base case) has a small probability of occurring. The downside scenario assumes a 3-year growth rate of market capitalisation of [700-900]%, which is still very optimistic considering historical stock data for airlines.

case" is that it assumes a [60-100]% implementation of the 4XNG cost initiatives. It should be added that SAS' interim report for November 2012 – January 2013³² shows that the projections of financial ratios for end 2012 were overly optimistic, resulting in too high IRR. Given that deviations from projections further in the future are even more likely, it is important that the IRR reflects this uncertainty.

- (98) On basis of the above, the Commission has doubts whether the 4XNG business plan is sufficiently sound to induce a private investor to participate to measure 2. The Commission reminds that the attitude of the hypothetical private investor is that of a prudent investor whose goal of profit maximisation is tempered with caution about the level of risk acceptable for a given rate of return.
- (99) Against this background, the Commission cannot conclude at this stage that the participation of the States in the new RCF is provided on market terms and therefore cannot exclude an undue advantage in favour of SAS.
- (100) The Commission thus is of the preliminary view at this stage that measure 2 entailed State aid for SAS.
- (101) As regards ELFAA's allegations that measure 2 may have also entailed State aid to the banks participating in the new RCF (paragraph (50) above), the Commission does not have sufficient grounds to consider that these banks may have derived an undue advantage from their participation to the new RCF. The mere fact that the States decided to participate in the new RCF does not necessarily mean that there is an advantage to the other lenders, which in any event continue to be very much exposed to SAS. Taken to the extreme, ELFAA's line of reasoning would mean that, any time that State aid is provided to a given undertaking, the creditors of the beneficiary would also receive State aid due to the improvement in the financial position of the beneficiary.
- (102) The Commission therefore concludes at this stage that measure 2 did not entail State aid to the banks participating in the new RCF.
- (103) In relation to the modifications to the terms and conditions of the new RCF agreed between SAS, the States and the lending banks (paragraph (35) above), the Commission notes that, on the basis of the information provided by Denmark and Sweden, as of 3 June 2013 – date when the information was provided to the Commission – the agreement had not been formally signed and therefore the modifications had not entered into force. In view of this, the Commission notes that in the investigation procedure it will examine how the amended terms and conditions of the new RCF impact on the assessment of measure 2 and whether or not they have to be considered as new aid.

6.2.3. Procedure SA.36327 – The sale-and-lease-back transaction of April 2012 (measure 3)

- (104) The Commission has also assessed the presence of State aid in respect of the sale-and-lease-back transaction with Swedavia in 2012 (measure 3).
- (105) Contrary to measures 1 and 2, it is unclear whether measure 3 could be considered imputable to the State as the complainant seems to indicate. Indeed,

³² Available at http://www.sasgroup.net/SASGROUP_IR/CMSForeignContent/1q2012-13eng.pdf.

although all shares in Swedavia are owned by the Swedish State,³³ the mere fact that a company is State-owned does not suffice to conclude that its actions are imputable to the State in the sense of the *Stardust Marine* case-law.³⁴ In this respect, Sweden argues that Swedavia's decision to participate in measure 3 was taken without intervention from the State and that the company operated at arm's length.

- (106) The Commission at this stage does not have sufficient grounds to consider that the actions of Swedavia are imputable to the State and notes that the complainant has not provided any arguments in this respect. In any event, even assuming that Swedavia's action could be imputable to Sweden, the Commission must assess whether measure 3 entailed an undue advantage to SAS before taken a preliminary view on the presence of State aid in measure 3.
- (107) In this respect, the Commission notes that the sale of assets to State-owned companies might entail an undue advantage to the beneficiary unless it can be demonstrated that the price actually paid constitutes the market price for the assets in question. Usually, an advantage can be excluded by an open, transparent and unconditional tender. In the absence of such a tender, a direct sale can be accepted if the price is based on the values established by independent valuers.
- (108) The Commission observes that the sale-and-lease-back transaction of April 2012 was carried out on the basis of a memorandum of investment dated September 2011 prepared by the corporate finance advisor Newsec and that the sales process was done through an auction process in two steps (paragraph (37) above). Based on indicative offers, a limited number of investors was chosen to carry out a due diligence. Following completion, final offers were submitted.
- (109) The prerequisites for submitting offers on the basis of the memorandum of investment appear very general and would not make the auction process conditional. Moreover, the memorandum of investment did not limit the categories of potential bidders and explained in detail how the auction process would take place. On this basis, the Commission is of the view that the auction process can be deemed as open, transparent and unconditional.
- (110) Furthermore, the Commission observes that Swedavia asked an independent expert (DTZ) to carry out a valuation. The Commission has assessed the valuation carried out by DTZ and finds it sufficiently sound. The Commission observes that the value of the different real estate properties have been established using a future cash-flow analysis, which is a methodology commonly used for this type of valuations. Also, the assumptions used in terms on inflation ([1-3]% per year) appear correct,³⁵ as well as the assumptions regarding vacancy rate and rents, which are stated in the memorandum of investment. Moreover, the different properties have been valued separately taking into account the specificities of each one of them. Therefore, the Commission considers that the result of the valuation report is an appropriate approximation for the realistic market price of the land.

³³ See <http://www.swedavia.com/about-swedavia/this-is-swedavia/corporate-governance/>.

³⁴ Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397.

³⁵ See footnote 26 in this respect.

(111) Given that Swedavia based its binding offer on the result of the valuation of DTZ, and that the auction process can be deemed as open, transparent and unconditional the Commission considers that the price actually paid to SAS constitutes the actual market price.

(112) Therefore, the Commission concludes that no undue advantage was provided to SAS and thus considers that measure 3 does not entail State aid.

Unlawful aid

(113) If indeed measure 2 entailed State aid, then it would have been provided to SAS in breach of the notification and stand-still obligations established in Article 108(3) TFEU. Thus, the Commission considers at this stage that measure 2 would qualify as unlawful State aid.

6.3. Compatibility with the internal market

(114) Insofar as measure 2 constitutes State aid within the meaning of Article 107(1) TFEU, its compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.

(115) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met.³⁶ The Danish and Swedish authorities consider that measure 2 does not constitute state aid and therefore have not provided any possible grounds for compatibility.

(116) The Commission has nonetheless assessed whether any of the possible compatibility grounds laid down in the TFEU would *prima facie* be applicable to measure 2. The Commission considers at this stage that the exceptions laid down in Article 107(2) TFEU are clearly not applicable and have not been invoked by the Danish and Swedish authorities. The same conclusion would apply to the exceptions foreseen in Article 107(3), points (d) and (e), TFEU.

(117) In view of the fact that SAS would seem to be a firm in difficulty within the meaning of the R&R Guidelines in late 2012 – i.e. at the time measure 2 was implemented (see section 6.1 above) –, it does not appear at this stage that the exception relating to the development of certain areas laid down in Article 107(3)(a) TFEU could be applicable.

(118) In view of the nature of measure 2 and of the difficulties of SAS, the only relevant criteria appear to be those concerning aid for rescuing and restructuring firms in difficulty under Article 107(3)(c) TFEU on the basis of the R&R Guidelines.

(119) The Danish and Swedish authorities have provided no arguments as to possible compatibility of measure 2 as rescue and/or restructuring aid. In any event, the Commission notes that the conditions for rescue aid laid down in section 3.1 of the R&R Guidelines do not seem to be met. In relation to restructuring aid as defined in section 3.2, the Commission observes that the 4XNG business plan does not include the necessary elements for it to be considered a restructuring plan in the sense of the R&R Guidelines, in particular regarding own contribution and compensatory measures. What is more, while normally

³⁶ Case C-364/90 *Italy v Commission* [1993] ECR I-2097, paragraph 20.

compensatory measures should lead to a reduction in capacity or market presence of the aid beneficiary, it appears that SAS is expanding its activities and increasing the number of routes: in 2012, 38 new routes were launched and 45 more will be operated as from 2013.³⁷

(120) On the basis of the arguments above, the Commission has doubts whether measure 2 can be regarded compatible with the internal market.

7. CONCLUSION

(121) The Commission has decided, on the basis of the foregoing assessment that the measures referred to in SA.29785 and in SA.36327 (the rights issues in 2009 and 2010 and the sale-and-lease-back transaction of April 2012) do not constitute aid.

Furthermore, in the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Denmark and Sweden to submit their comments and to provide all such information as may help to assess the aid as referred to in SA.35668, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind that on the basis of Article 109(2) of the Agreement on the European Economic Area (EEA), in order to ensure a uniform surveillance throughout the EEA, the EFTA Surveillance Authority and the European Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases.

In the light of that provision and given the parallel competence in the present case of the Commission and the EFTA Surveillance Authority, the Commission will transmit the observations it receives from interested parties and the States to the EFTA Surveillance Authority, unless the party providing such observations has raised a duly motivated objection to that transmission.

The Commission wishes to remind Denmark and Sweden that according to Article 14 of Council Regulation (EC) No 659/1999, all unlawful aid may be recovered from the recipient.

The Commission warns Denmark and Sweden that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union* as well as the full text of the letter in the authentic languages on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

³⁷ See SAS Group' Q4 2012 Media/analyst presentation dated 12 December 2012, available at http://www.sasgroup.net/SASGROUP_IR/CMSForeignContent/Analystmaterial_4q2012.pdf.

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

European Commission
Directorate-General for Competition
State Aid Greffe
1049 Brussels
Belgium

Fax No: +32-2-296-1242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-president