COMMISSION DECISION

of 13 July 2009

on the restructuring aid for Combus A/S

(notified under document C(2009) 4538)

(Only the Danish text is authentic)

(Text with EEA relevance)

(2009/973/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

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

Whereas:

1. PROCEDURE

(1) By letter dated 30 November 2000, the Danish authorities notified their intention to provide financial support to the state owned bus company Combus A/S (hereinafter referred to as 'Combus') in association with its sale to Arriva Denmark A/S (hereinafter referred to as 'Arriva').

(2) Prior to the notification, the Commission had received a letter, dated 25 June 1999, and a complaint, dated 11 November 1999, from the trade association '*Danske Busvognmaend*' ([2]) in which the association criticised financial support granted to Combus in the past and a possibly forthcoming new financial support.

(3) The Commission requested further information from the Danish authorities by letter dated 15 December 2000, to which the Danish authorities answered by letter dated 18 December 2000. The Danish Competition Authority also provided information by letter dated 20 December 2000. The Danish authorities provided further information by letter dated 8 January 2001. The Commission requested further information on 9 January 2001 to which the Danish authorities replied on the same day. The Danish authorities provided further information by letter dated 23 January 2001 and by letter dated 26 February 2001.

(4) Meetings between the Danish authorities and the Commission's services have taken place in Brussels on 23 November 2000 and 19 December 2000 and in Copenhagen on 4 January 2001 and on 15 January 2001.

(5) By decision SG(2001) D/287297 of 28 March 2001 (hereinafter referred to as 'the initial decision'), the Commission, following a preliminary assessment, decided not to raise objections to the notified measures, considering that they

— did not constitute State aid (as regards the compensation payment of DKK 100 million for pension charges), or

— were compatible, for an amount of DKK 162 million ([3]), with the common market based either on Article 73 EC or on Article 87(3)(c) EC in combination with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([4]) (hereinafter referred to as 'the 1999 Restructuring Guidelines'), or

— were compatible, for an amount of DKK 328 million ([5]), with the common market based on Council Regulation (EEC) No 1191/69 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 ([6]).

(6) The decision was published in the Official Journal on 5 May 2001 ([7]). By letter of 8 May 2001, the Commission informed 'Danske Busvognmaend' of the initial decision.

(7) By letters dated 6 November 2002, received by the Commission on 12 November 2002, and dated 19 January 2004, received by the Commission on 20 January 2004, the Danish authorities reported to the Commission about the implementation of the restructuring plan for Combus.

(8) On 11 July 2001, 'Danske Busvognmaend' filed an action with the Court of First Instance (hereinafter referred to as 'the CFI') for annulment of the initial decision.

([1]) OJ C 233, 22.9.2005, p. 28.

([2]) This association represents more than 90 % (in terms of number of companies) of the regional public bus transport undertakings in Denmark.

([3]) See Table 7 of the initial decision; this sum is expressed in 2001 net present value.

([4]) OJ C 288, 9.10.1999, p. 2.

([5]) See footnote 3.

([6]) OJ L 156, 28.6.1969, p. 1.

([7]) OJ C 133, 5.5.2001, p. 21.

(9) By judgment of 16 March 2004 (hereinafter referred to as 'the Combus judgment'), the CFI annulled the initial decision '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 162 million and DKK 328 million to be compatible with the common market' ([8]).

(10) As far as the capital injection in the amount of DKK 328 million is concerned, the CFI found, firstly, that the initial decision is 'vitiated by an error in that it finds the payment of DKK 328 million to be compensation for public service obligations for the purposes of Articles 2 and 10 to 13 of Regulation (EC) No 1191/69. […] Accordingly, the contested decision must be annulled in so far as it authorised the payment of DKK 328 million pursuant to that regulation, without its being necessary to rule on the other pleas put forward on this point' ([9]).

(11) Still regarding the capital injection in the amount of DKK 328 million, the CFI found, secondly, that, as far as Article 73 EC is concerned, '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 (EC) No 1191/69 does not apply to the present case and the payment of the DKK 328 million 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 ([*]). Accordingly, the plea directed against the contested decision in so far as it authorises the payment of the DKK 328 million on the basis of Article 73 EC must be upheld.

([*]) Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg [2003] ECR p. I-7747, paragraphs 107 and 108 (hereinafter referred to as the "Altmark Judgment")' ([10]).

(12) As far as the capital injection in the amount of DK 162 million authorised in application of Article 87(3)(c) EC in combination with the 1999 Restructuring Guidelines is concerned, the CFI found that 'the contested decision cannot be interpreted as meaning that the college of Commissioners granted clear, unconditional and definitive authorisation for payment of DKK 162 million 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 328 million is no longer validly authorised in the contested decision. It follows from the foregoing that the authorisation for the payment of the DKK 162 million must be annulled in its entirety, without its being necessary to rule on the other pleas in law submitted on this point' ([11]).

(13) Following the judgment of the CFI, the Commission prepared a new decision. On 11 January 2005, the Commission services met with the Danish authorities in order to get further information on the development of Arriva/Combus in the time lapsed since the initial decision. On 1 March 2005, the Danish authorities sent the Commission a memo on the development of the Danish bus market, which had been prepared by the Danish Office for transport (*Trafikstyrelse*).

(14) By letter of 3 March 2005 (SG (2005) D/200926), the Commission informed Denmark of its decision to initiate the procedure provided for in Article 88(2) EC with regard to these measures (hereinafter referred to as 'the decision to initiate the procedure'), and invited Denmark to submit its comments. The Danish government requested twice a prolongation of the period to submit its observations, which the Commission granted by letters of 5 April 2005 (TREN D (2005) 106964) and 24 June 2005 (TREN D (2005) 113062). On 21 June 2005, a meeting between the Commission and the Danish government took place. On 30 June 2005, the Danish authorities sent their observations with regard to the decision to initiate the formal proceedings.

(15) The decision to initiate the procedure was published in the *Official Journal of the European Union* ([12]) on 22 September 2005. The Commission called on interested parties to submit their comments on the measures covered by this decision within one month of the date of publication, that is to say by 23 October 2005.

(16) The Commission informed *Danske Busvognmaend* of its decision to initiate the procedure by letter of 12 May 2005 (TREN (2005) D 109473). The Commission, following requests of the *Danske Busvognmaend*, twice prolonged the delay for receiving its observations (letter of 15 July 2005, TREN (2005) D 115786 and letter of 16 August 2005, TREN (2005) D 117806).

([8]) See Case T-157/01, *Danske Busvognmaend* v *Commission* [2004] ECR p. II-917 (hereinafter referred to as the 'Combus Judgment').

([9]) Combus Judgment, paragraphs 83 and 99.

([10]) Combus Judgment, paragraphs 100 and 101.

([11]) Combus Judgment, paragraph 114 ff.

([12]) See footnote 1.

(17) In a letter dated 17 June 2005 (TREN (2005) A 15223), *Danske Busvognmaend* asked the Commission to send it a copy of the decision to initiate the procedure including the information which had been removed following a request from Denmark. By letter of 15 July 2005, the Commission answered that according to Article 24 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules on the application of Article 93 of the EC Treaty ([13]), the Commission shall not disclose information which it has acquired through the application of the Regulation and which is covered by the obligation of professional secrecy. The Commission further on explained that as the pieces of information which had been deleted from the copy of the decision sent to *Danske Busvognmaend* were covered by the obligation of professional secrecy, the Commission could not disclose them to it.

(18) In the same letter of 17 June 2005, *Danske Busvognmaend* also asked the Commission for a copy of the observations of the Danish government on the decision to initiate formal proceedings. The Commission answered that Article 20 of Regulation (EC) No 659/1999, which stipulates the rights of interested parties, does not provide for the transmission of the reply of the Member State to the plaintiff and that accordingly, the Commission could not transmit a copy of the observations of the Danish government to *Danske Busvognmaend*.

(19) With letter of 23 September 2005, *Danske Busvognmaend* submitted its observations. The Commission transmitted these observations with letter of 25 October 2005 (TREN D (2005) 122503) to the Danish authorities, giving Denmark the opportunity to respond to the comments within a period of one month. The Commission received Denmark's response to these observations with letter of 23 December 2005 (SG (2006) A 80), after having prolonged the time period for the reply by one month following a request of the Danish government.

(20) The Commission received comments from one interested party, Arriva Denmark A/S, by letter of 21 October 2005 (TREN (2005) A 27196). It transmitted these comments to Denmark by letter of 24 November 2005, giving Denmark the opportunity to respond to the comments within a period of one month. The Commission received Denmark's response to the comments from Arriva also with letter of 23 December 2005, cited above.

(21) The Danish authorities submitted additional factual information with letters of 22 February 2007 and 2 April 2007 (TREN (2007) A 28850).

2. **FACTS**

2.1. *THE DANISH BUS MARKET*

2.1.1. GENERAL DESCRIPTION OF THE MARKET

(22) The decision to initiate the procedure gives (recitals 13 to 22) a detailed description of the Danish bus market. Accordingly, the description of the bus market is limited here to the most important features of the market for the present case and to additional factual information submitted by the Danish government and the interested parties.

(23) Starting in 1990, Denmark has gradually opened its bus market to competition, in the form of public tendering of the public service contracts, which public authorities conclude with bus operators in Denmark. Since 1994, the applicable Community rules on public procurement (Council Directive 92/50/EC of 18 June 1992 on the coordination of public procurement procedures for service contracts ([14])) oblige Denmark to tender public service contracts for the provision of bus transport, except if these services are provided 'in house' ([15]).

(24) In 1999, the year in which Combus for the first time received financial support from the Danish State, 9 out of the 12 Danish counties were tendering out 100 % of their lines. The 3 remaining counties tendered respectively out 96 % (Copenhagen), 35 % (Ribe) and 21 % (Vyborg) of their lines ([16]). Public service contracts in Denmark run for 5 years, some of them foreseeing the option of an extension for another 3 years.

(25) The Danish bus market has been characterised by a process of continued concentration. In 1988, more than 400 undertakings were offering bus services, whereas in 2004, only approximately 100 operators remained in business. Historically, the Danish Railways, through their bus subsidiary, were the single biggest operator. In June 1995, the Danish Railways spun off their bus subsidiary and incorporated it as a joint stock company under the name DSB Busser A/S. In 1997, the name of the company was changed into Combus A/S. The Danish State kept 100 % of the shares in Combus. Combus and its predecessor had throughout the 1990s a market share of 20 % in Denmark.

(26) In 1997, Arriva Denmark A/S (hereinafter referred to as 'Arriva'), a subsidiary of the British company Arriva plc, and Connex Denmark A/S (hereinafter referred to as 'Connex'), a subsidiary of the French company Veolia, entered the Danish bus market through acquisitions ([17]). In 1999 and 2004, the last year for which figures are available, the market shares of the three companies were the following:

([13]) OJ L 83, 27.3.1999, p. 1.

([14]) OJ L 209, 24.7.1992, p. 1.

([15]) See *Trafikredegorelse 2004*, published by the Danish Ministry of Transport, p. 121, and the Court's case law on in house procurement.

([16]) See the decision to initiate procedure, paragraph 16 and Table 1.

([17]) Arriva acquired Unibus Rutetrafik A/S and Bus Danmark A/S, Connex acquired Liniebus A/S.

Table 1

Market shares for Combus, Arriva and Connex in 1999 and 2004

(in %)

	Combus 1999	Combus 2004	Arriva 1999	Arriva 2004	Connex 1999	Connex 2004
Nordjylland	64,85	0	0	18,64	7,17	24,72
Viborg	17,27	0	0	17,40	0	0,33
Århus	54,24	0	0	10,15	9,11	41,07
Ringkjøbing	38,18	0	0	27,38	0	0
Vejle	56,96	0	21,68	13,29	0	17,22
Ribe	0	0	0	0	0	39,23
Sønderjylland	32,41	0	0	0	0	0
Fyn	97,80	0	0	100,00	0	0
Vestsjælland	25,20	0	24,00	33,86	32,60	35,26
Storstrøm	19,78	0	1,80	28,51	64,49	33,00
Bornholm	28,00	0	0	0	50,67	81,02
Metropolitan Denmark	22,26	0	50,47	46,73	8,60	27,95
Entire country	33,98	0	26,59	34,46	10,99	25,14
Entire country excluding Metropolitan Denmark	56,06	0	5,82	23,94	13,06	22,73

(27) For the interpretation of these figures, the following information is necessary: In 2001, Arriva acquired Combus. Later the same year, Connex acquired 50 % of the lines initially exploited by Combus from Arriva. In 2004, Arriva further strengthened its position by acquiring the undertaking Wulff Bus A/S, which had a 10 % market share in the province of Jutland.

(28) The Danish bus market represents a total volume of appr. DKK 5,5 billions per year.

2.1.2. FINANCIAL DIFFICULTIES OF COMBUS

(29) As explained in the decision to initiate the procedure (recitals 34 and following), Combus had, following its spin-off from the Danish Railways, embarked on an ambitious expansion policy. Combus won many new contracts, especially in the Copenhagen area, and increased its turnover by more than 40 % between 1995 and 1999. However, the vast majority of these new contracts turned out to be loss-making.

(30) As a consequence, Combus got into serious financial difficulties, starting in 1998. The following two tables illustrate these difficulties in both absolute numbers and percentages.

Table 2

Key figures for Combus A/S 1995-2000

(absolute numbers)

DKK 1 000	1995	1996	1997	1998	1999	2000
Net turnover	625 392	686 123	763 432	1 049 489	1 097 535	1 091 253
Gross result	84 172	100 003	81 776	11 910	– 17 230	68 206
Result before interest	30 870	37 423	12 227	– 105 029	– 134 812	– 50 035
Year's result	31 184	28 546	7 684	– 139 128	– 168 267	– 82 249

Table 3

Key figures for Combus A/S 1995-2000

(in %)

DKK 1 000	1995	1996	1997	1998	1999	2000
Operating profit margin	4,9	5,5	1,6	neg.	neg.	neg.
Profit/capital ratio	4,0	5,5	1,3	neg.	neg.	neg.
Gross margin	13,5	14,6	10,7	6,3	– 1,6	1,1
Return on equity	23,5	18,2	2,5	neg.	neg.	neg.

The privatisation of Combus

(31) Three periods can be distinguished in the process of privatisation of Combus. In the period 1995 to 1998, the Danish State pursued the objective of selling only a minority stake of 25 % but this never materialised. Starting at the end of 1998, it launched a first attempt at selling 100 % of the shares. This attempt failed in July 1999. The Danish government then decided to first restructure and then sell the company. This plan resulted in the sale of Combus to Arriva in early 2001.

Exploration of the sale of a minority stake (1995 to 1998)

(32) The Act No 232 on DSB Busser A/S of 1995, by which Combus A/S was set up as an independent company, foresaw that the Danish State would sell up to 25 % of the shares in the company until the end of 1998. To this end, a steering committee was set up, which was composed of representatives from the Ministry of Finance, the Ministry of Transport, Combus and external legal and financial advisers. The steering committee held a total of 7 meetings, before the work was put on hold in mid 1997.

First attempt for a full privatisation (1998 to 1999)

(33) At the beginning of November 1998, the steering committee resumed its work, now with the instruction to prepare the sale of at least a majority holding in Combus. The committee started out with a financial evaluation of the company.

(34) As a basis for this evaluation, Combus submitted in mid November 1998 a forecast of its accounting results for 1998 and a forecast for budget figures for the period 1999 to 2001. Based on these submissions, the financial adviser of the government, the Copenhagen office of Alfred Berg Corporate Finance (hereinafter referred to as 'Alfred Berg'), concluded as follows:

'… it can be concluded that Combus' total share capital has a negative market value of hundreds of millions of Danish kroner. In addition to the profitability of the primary business having fallen significantly over the last couple of years, the estimated value is further reduced by the significant interest-bearing net debt built up by the company over the same period. Most potential buyers understand, however, that financially and economically very weak companies such as Combus are not traded at large negative values as it would then be more appropriate for the vendor to close down the company.

Against this background we recommend that, in the sales process and the information material being prepared in that connection, the scene must be set, as far as possible, for the price of Combus to be set on the basis of the company's actual equity capital, minus a discount. On this basis and combined with

— the potential for operational improvements

— the potential for synergies

— the company's strategic value by virtue of its large market share in the Danish bus sector

it is presumably still conceivable that, despite the continuing deterioration in the company's financial and economic situation, a buyer can be found for Combus so that the Danish State ("the State") can dispose of the company with full cover for its creditors.

It should also be expected that the majority of potential buyers will consider that, in the light of Combus' very weak capital structure and low profitability, the need for an injection of capital into the company is so great that it would be unprofitable for them to acquire Combus' total share capital for a positive amount.

The considerable uncertainty therefore surrounding the terms under which the State can dispose of Combus can, however, only be overcome by continuing the ongoing sales process.'

(35) Alfred Berg listed the following options as alternatives to the quick sale of Combus A/S:

'— carrying out a controlled closure of the company which would, amongst other things, mean the State/DSB taking over all the civil servants who are today seconded to Combus by DSB, and the concomitant financial obligations. It is doubtful whether Combus, despite the positive book value of capital and reserves, could be wound up while fully covering the company's creditors, and consequently there is a risk of negative coverage of the State's handling of the case by lenders, the press etc.

— continuing ownership in order to carry out a thorough rationalisation and streamlining of Combus and thereby ensure that the company will be profitable within 2-3 years and consequently more saleable. Due to the company's very weak capital structure and large debt burden at this time, this will probably mean the State injecting a nine-figure amount in new equity capital in the short term. There is considerable risk in investing in a "turnaround" of Combus, and no guarantee of a positive return on the State's investment.'

(36) The financial adviser, based on this assessment, gave the following recommendation:

'Neither of the two aforementioned alternatives appears immediately attractive, and also depend on the State's attitude to injecting further equity capital into Combus and also assuming the responsibility for carrying out a thorough streamlining of the company.

Alfred Berg therefore recommends that the State continue the ongoing process of selling Combus in order to obtain a more exact picture of which and how relevant aspects (such as trends in results, capital structure, market share, order book, condition of the bus fleet, management resources, potential for operational improvements and synergies etc.) will be given weight by potential buyers in their overall assessment of the company.

Should this process not result in a potential buyer being found who appears attractive in relation to the terms in the two aforementioned alternatives, the State will choose the alternative that it considers most financially attractive and politically suitable at the time.'

(37) Following this advice, the Danish parliament adopted in December 1998 an act allowing the State to dispose of all its shares (100 %) in Combus ([18]).

(38) Alfred Berg then performed a market screening based upon five criteria; the potential buyer should

— be active within public administration,

— have a strong financial position,

— have a certain size (defined as 'operating more than 1 000 buses'),

— have a significant turnover (defined as 'more than DKK 1 billion'),

— be active in similar markets as Combus.

(39) The outcome of Alfred Berg's market screening was a list of 12 potential buyers

(40) The steering committee established then the following time table: Management presentations for 12 pre-selected potential buyers were to be hold in the period 9 to 18 February 1999. The deadline for submitting 'indications of interest' was end of February 1999, and the 'indications of interest' were to be assessed at the beginning of March 1999. Selected buyers were to have access to the data room in the period 10 to 24 March 1999. They then had to submit their final offers on 1 April, and on 8 April the steering committee was to choose a final buyer.

([18]) Act. No 1046 of 23 December 1998.

(41) Out of the 12 potential buyers, 7 participated in the management presentation of Combus. At the presentation, potential buyers received a letter describing the forthcoming acquisition process. Potential buyers were, via this letter, informed that they could get access to Combus' data and also have additional meetings with the management of Combus, if they wished to do so. In order to take advantage of these possibilities, potential buyers had to submit an 'Indication of interest' by the end of February 1999.

(42) Alfred Berg received such indications of interest from 6 pre-selected potential buyers in February 1999. In March 1999, 2 of these were selected to have access to the data room. After the examination of the data room, both potential buyers reduced their price indications so significantly that they corresponded to a negative market value of several hundreds of millions DKK.

(43) Alfred Berg submitted on 9 April 1999 a memo to the steering committee, in which it concluded that Combus A/S could hardly be sold at a positive value. Against this background, Alfred Berg laid down three alternatives to selling the company:

'**Option 1**: For the State to continue ownership in order to carry out a thorough rationalisation and streamlining of Combus and thereby ensure that the company will be profitable within 2-3 years and consequently more saleable. Due to the company's very weak capital structure and large debt burden at this time, this will probably mean the State injecting a nine-figure amount in new equity capital in the short term. There is considerable risk in investing in a "turnaround" of Combus, and is no guarantee of a positive return on the State's investment.

Option 2: To carry out a controlled closure of the company and/or hand over the "key" to the company's creditors. It is doubtful whether Combus, despite the positive book value of capital and reserves, could be wound up while fully covering the company's creditors, and consequently there is a risk of negative coverage of the State's handling of the case by lenders, the press etc.

Option 3: Combus separating the daily bus operations into an independent subsidiary. In other words, the present assets (buses etc.) and liabilities (loans etc.) would be retained in Combus as it stands, whilst the right to the bus contracts etc. would be placed in an [independent] new subsidiary which would then lease the relevant assets (buses etc.) from Combus. An attempt would be made to sell the new subsidiary and use the sale revenue to reduce debt in Combus, which would continue to be 100 % owned by the State. An attempt could then be made to reduce the debt still remaining in Combus using the rent from leasing the current assets to the new subsidiary. This

model does not directly provide any security that the company's creditors will emerge from their commitments with Combus without losses. The creditors are therefore likely to demand some form of State guarantee, etc.'

(44) Based on this assessment of Alfred Berg, the Danish government decided to keep Combus going through a restructuring process with a view to a subsequent sale (option 1 proposed by Alfred Berg). This restructuring process is described in detail in the next sub-section.

(45) On 23 April 1999, Alfred Berg informed the government that a new 'indication of interest' had been received from Arriva with an offer to take over 100 per cent of Combus A/S' share capital for DKK 35 million. Conditions relating to the amount of the equity capital and the company's results were attached to the offer, with a clause for a 'krone for krone' reduction in the event of deviations. The offer was based on the equity capital amounting to DKK 131 million, and Alfred Berg estimated that the equity capital was currently around DKK 10 million lower. Alfred Berg recommended continuing the sales process with this buyer in parallel with the development of the restructuring option. Alfred Berg pointed out that particularly difficult matters still had to be discussed, which could make it difficult to achieve a satisfactory agreement for both parties.

(46) On 27 April 1999, a letter of intent was signed by the Ministry of Transport and Arriva for the takeover of Combus for DKK 45 million, provided that the company's equity capital at the time of transfer was DKK 131 million.

(47) In early June, negotiations with Arriva were so advanced that the advisers considered that a final sales agreement could realistically be concluded in the first half of July 1999. In the remainder of June 1999, however, there was a lot of press coverage on Combus, particularly with regard to statements from several political parties on the need for legal regulation of bus operations in Denmark as regards significant market shares. In the light of the speculations about market caps, Arriva lost interest in acquiring Combus. Arriva stressed, however, that depending on the introduction of any market restrictions, they would be interested in acquiring Combus in the long term.

Restructuring in order to prepare the sale of Combus: the capital injection of May 1999

(48) The restructuring of Combus had become very urgent in April 1999, as, pursuant to the Danish Annual Accounts Act, Combus had to hold its Annual General Meeting (AGM) before the end of May 1999 and to submit its audited accounts for 1998. The annual accounts had to be available to the press and public no later than 14 days before the AGM.

(49) The company's finances had been so strained that the accountants had stated that the annual accounts could not be presented without reservations as to the going concern principle. On the basis of the accountants' examination of the company's contracts, which had demonstrated a need for a provision of approx DKK 65 million to cover loss-making contracts, the company would have to go into administration unless further capital was injected. In addition, there was an imminent risk of a compulsory redemption of loan agreements with a number of financial institutions, all of which contained covenant provisions requiring a minimum capital base of 10 % of the balance sheet total, but no less than DKK 125 million.

(50) In April 1999, the Danish Ministry of Transport appointed a legal adviser, Kromann and Münter, to assist in solving Combus' financial problems. The legal adviser suggested in a memo issued in mid-May 1999 a capital injection of DKK 300 million. Based on this memo, the Ministry of Transport presented on 21 May 1999 a confidential bill to the Finance Committee of the Danish parliament, proposing a capital injection of DKK 300 million. The bill was approved by a majority of the Finance Committee on 27 May 1999 ([19]).

(51) As regards Combus' financial situation, the bill stated that in 1998, the company had had to adjust its expectations regarding the result for 1998 several times. Most recently, after the adoption in December 1998 of the Act on the sale of all shares in Combus, there had been a significant downturn in the company's finances.

(52) The bill furthermore states that Combus was in imminent danger of going into administration or going bankrupt, but that an injection of capital would ensure that the company could be kept going with a view to a sale taking place at a later date. It was estimated that there was a need for a capital injection in the order of DKK 300 million, against the background of the solidity requirement in the company's loan agreements and the need for an appropriate relationship between debt and equity capital.

(53) The bill also foresees that the option of selling Combus would continue to be investigated. It was considered unlikely that the State would recoup the capital injected, in the short term. The capital injection was made with a view to ensuring the future operation of the company and ensuring that it had sufficient capital available.

(54) The bill was approved by a majority of the Finance Committee on 27 May 1999.

([19]) Bill of 21 May 1999 regarding the capital injection of DKK 300 million. Agreed by the Finance Committee on 27 May 1999.

The second, successful attempt to sell Combus

Second market scrutiny

(55) The sales process was resumed in the spring 2000, after Combus' annual accounts for 1999 had been approved at the AGM in May 2000. Alfred Berg would continue to be involved in the sales negotiations as financial adviser, and Kromann and Münter as legal advisor.

(56) In mid July 2000, Alfred Berg presented an indicative evaluation of Combus. Alfred Berg considered that traditional evaluation methods could not be used with regard to Combus due to the high level of uncertainty. The advisers had carried out an evaluation based on a projection of the company's results to 2004 on the basis of a number of weighted assumptions on turnover developments and restructuring measures. The value of the company was calculated at the future date. Account was taken of any profits/deficits in the intermediate period and the effect on the company's negative net balance at the future date. The actual sales value was found by discounting back the future sales value calculated. The following table shows the results of this assessment.

Table 4

Summary of Alfred Berg's evaluation of Combus

	Scenario			
	Worst case	Neutral/negative	Neutral/positive	Best case
Assumption:				
Turnover	Unchanged	Unchanged	Increasing	Increasing
Gross margin	Unchanged	Unchanged	Unchanged	Increasing
Improvement measures	No	Yes	Yes	Yes
Value in DKK millions of equity capital, July 2005	÷ 1 116,2	÷ 431,9	6,0	674,2
Value in DKK millions of equity capital current (10 % disc.)	÷ 693,1	÷ 268,2	3,7	418,6

Source: Indicative valuation from the financial advisers.

(57) The following additional observations are necessary for the understanding of this evaluation: 'Unchanged turnover' assumes that the contracts in the Copenhagen region are not replaced by new contracts when they expire, while contracts in the regions continue unchanged. 'Increasing turnover' assumes that turnover in the other regions is increasing as the existing contracts in the Copenhagen region expire. The result of the effects of improvement measures adopted by the new management was assumed to be DKK 48,7 million annually from 2002. The table shows that the value of Combus had to be assessed as very negative, particularly because the assumptions regarding rising turnover and gross earnings and the implementation of improvement measures within such a short period had to be regarded as difficult.

(58) An important issue for the privatisation process was the political debate on the introduction of market caps for bus operators. The Danish Parliamentary Transport Committee had requested a report on concentration and competition in the Danish bus market, which had been drafted in autumn 1999 by a working group consisting of representatives from the Danish Competition Authority, the Ministry of Finance, and the Ministry of Transport. The report found that the majority of regional and local bus services were subject to public tenders, that the market was characterised by tough competition between contractors, despite an on-going concentration process, and that there were no signs that a single or individual contractor was dominating the market to the detriment of the competition. The working group concluded that their assessment of the Danish bus market had revealed no need to introduce market caps. In reaction to the report, the Transport Committee issued a statement in the autumn 1999, in which it approved the conclusions in the report and re-iterated that it was inappropriate to introduce market caps.

(59) The Danish government then contacted again a number of potential buyers. After a presentation of Combus' finances, two potential buyers announced that they were interested in acquiring 100 % of the shares in Combus. A third buyer made a more cautious expression of interest.

(60) One of the interested buyers was Arriva, whose indicative offer corresponded to a negative sales price of DKK 200-250 million.

(61) The other interested buyer was Metroline. Its offer was, at first sight, more attractive, as it proposed to buy the shares for a positive price in the range of DKK 10-24 million. Metroline had added, however, that during the financial presentation of the company it had become aware of a number of matters that they wished to examine in greater detail.

(62) On 18 October 2000, Alfred Berg informed the Danish government that it had received a revised offer from Metroline, which now proposed to acquire Combus for a negative price of DKK 500 million. In addition, Metroline requested a number of guarantees.

(63) Following the submission of this offer, Alfred Berg recommended cancelling the on-going general discussions with the third interested buyer, as Alfred Berg did not consider the buyer sufficiently interested. The steering group asked Alfred Berg to contact Arriva, whose indicative offer was now clearly better than Metroline's, in order to investigate options for a sale.

Negotiations with Arriva

(64) On 3 November 2000, Arriva announced in a letter to Alfred Berg that the company had carried out the due diligence process, and that they could now suggest how to proceed. In the letter, Arriva pointed out that they had cooperated with Connex in their assessment. Arriva had previously informed the financial advisers of the two bus companies' joint interest.

(65) According to the proposal, Arriva offered to pay DKK 100 for all the shares in Combus. The offer was subject to the condition that the loan capital of DKK 100 million injected by the Ministry of Transport in 1999 was converted into equity capital, and that a further injection of capital amounting to DKK 290 million was being made into Combus. The offer was furthermore subject to the condition that all necessary adjustments to the company's balance sheet items identified during the subsequent due diligence process would be covered by the injection of funds. Arriva mentioned a number of examples for such adjustments, which already amounted to approx. DKK 109 million. Arriva set the Danish government a deadline of 8 November 2000 to reach agreement.

(66) An examination of Arriva's proposal by the financial advisers showed that the offer involved DKK 399 million of new funds being injected into Combus and that the Ministry of Transport was also to convert the subordinated loan of DKK 100 million to equity capital and therefore a total loss of DKK 499 million for the State. In addition, there was the loss of the remainder of the equity capital in Combus, which was estimated at DKK 38 million on 30 September 2000.

(67) The Ministry of Transport and the Ministry of Finance considered Arriva's offer to be low. On the other hand, no other previous serious offer had been better than Arriva's. Metroline had requested the same negative price as Arriva, i.e. approximately DKK 500 million, and the third interested buyer had only made a loose and non-binding offer for a negative price of approx. DKK 350 million.

(68) It was decided that, as a first step, the Ministry of Transport should contact Arriva with a view to increasing the company's price for taking over Combus. At the same time, the Ministry went over several scenarios for winding up/developing Combus. The scenarios were not a direct evaluation of the company, but a calculation of the company's liquidity needs under various conditions compared with Arriva's offer. The result of the calculation, which was approved by Combus, the company's auditors and solicitors, is shown in the following table:

Table 5

Scenarios for winding up/developing Combus

Scenario	Liquidity at the end of the period in DKK million	Comment
Gradual winding up over 5 years	– 331	Uncertain scenario
Continuation with newer, better contracts for 6 years	– 315	More uncertain scenario
Continuation for 1 year without refinancing of due debt	71	Would require, among other things, new bank debts of DKK 107 million. Would win time, but the sales situation thereafter would presumably be unchanged.
Bankruptcy	– 649	Total deficit, dividend 35-40 %. Lenders would lose DKK 280-300 million.
Arriva's offer	– 399	

Source: The Ministry of Transport

(69) According to an internal memo, the Ministry considered that the scenarios illustrated that the creditors had nothing to gain from continuing the company, either with a view to a gradual winding up or continued operation, as none of the scenarios was significantly better than Arriva's offer. The uncertainty for the future would probably lead to the creditors preferring to bring about a quick sale.

(70) In addition, the scenarios illustrated, in the opinion of the Ministry, that Arriva's offer was probably based on Combus' financial situation in the short term rather than an actual evaluation of the company. In summary, against this background, it would probably be difficult to convince Arriva that the Ministry had better alternatives in reserve in the form of a gradual winding up or continued operation.

(71) It was emphasised in the memo that it could not be entirely ruled out that a gradual winding up, combined with the gradual disposal of the bus service contracts in small — geographical — packages to local bus companies, could be a relevant alternative to the scenarios outlined. This scenario was not investigated, but was also very uncertain as, according to Combus, there would probably be several interested local bus companies but, at best, only a few would have sufficient financial strength to take over even smaller parts.

(72) The Ministry concluded that, if Arriva's offer could be reduced to a negative price of DKK 290 million, it would clearly be the best alternative to pursue with the creditors.

(73) These negotiations resulted, on 21 November 2000, in the agreement of a Letter of Intent regarding the sale of Combus to Arriva, which was signed between the Danish Ministry of Transport, acting as seller of Combus, Arriva, acting as buyer of Combus, and the private commercial creditors of Combus.

(74) The letter of intent contained the following main elements:

— The State would receive DKK 100 for the transfer of all shares in Combus (100 %).

— The State would convert in advance the subordinated loan capital of DKK 100 million into share capital.

— Combus' capital base would be strengthened by a further DKK 240 million, either in the form of an injection of new equity capital or the writing down/conversion of bank debt.

— The State would additionally provide limited guarantees amounting to a total of DKK 57,5 million in the form of (i) a guarantee for potential environmental costs of DKK 22,5 million, which would be released to the extent that such costs exceeded the amount of DKK 10 million already allocated in the company for environmental costs and (ii) a guarantee of up to DKK 35 million for all matters including the regulation of the company's equity capital in relation to the balance presented by the management as at the end of September 2000 and further commitments.

— The State would provide unlimited guarantees to Arriva in connection with any tax demands that could result from the period prior to the transfer, for losses as a result of any claims from former employees, for any losses that could result from Combus previous sale of Combus International, and for any financial losses that Arriva could establish originated from the forthcoming audit report.

— The transfer would take place with effect as from 1 January 2001.

— The deal was conditional on both the transport companies and Denmark's Road Safety and Transport Agency approving Combus' bus service contracts being taken over by the new owner and also on the approval of the competition authorities.

(75) The further process, agreed in the letter of intent, meant that the Ministry of Transport and Arriva — after prior approval from the Finance Committee of the Danish Parliament and Arriva's board — subsequently entered into a final agreement in accordance with the above guidelines. The conclusion of the deal would not take place until all necessary external approvals had been obtained, but no later than 1 February 2001.

(76) As an extension of the letter of intent, the Ministry of Transport negotiated with the creditors on the distribution of the injection of DKK 240 million. Agreement was reached that the Danish government would inject new equity capital of DKK 140 million and that the creditors would either convert debts to share capital to an amount equivalent to DKK 100 million or write down the debt by this amount.

(77) In the memorandum, the Danish government had engaged to adjust the sales price (limited to a maximum amount of DKK 35 million), provided the company's balance sheet as per 31 December 2000 revealed a capital reserve of less than DKK 31,8 million, which was the management's expectation when the Letter of Intent between the parties was signed. The capital reserves as per 31 December 2000 turned out to be DKK 10,3 million. Hence, the Danish government was obliged to make a payment of DKK 20,5 million to fulfil its obligations under this guarantee.

(78) Arriva took over the remaining liabilities of Combus, which at the time amounted to DKK 208 million. Arriva paid off these liabilities immediately upon purchasing Combus, and replaced them by a loan contracted from its mother company, Arriva plc.

(79) Compared to the initial offer of Arriva, the Danish government had negotiated the following significant changes:

— Combus's lenders had agreed to participate in the restructuring process, by writing down parts of their debt (in total DKK 100 million);

— The requirement for an injection of DKK 290 million was reduced to DKK 240 million;

— The agreement contained guarantees limited in coverage for a total of DKK 57,5 million and a number of unlimited guarantees;

— The Danish government guaranteed for Combus' net assets value as of 31 December 2000, after adjustment for write-offs etc. under the agreement, amounting to DKK 31,8 million;

— Arriva agreed that the requests for adjustments totalling DKK 109 million (mentioned in the proposal of 3 November 2000) were no longer relevant.

(80) In conclusion, the Ministry of Transport was thereby successful in the negotiations on the content of the letter of intent in significantly reducing Arriva's price demands in relation to the proposal of 3 November 2000.

Approval by the Danish Parliament's Finance Committee and sale to Arriva

(81) In a confidential bill of 13 December 2000, the Ministry of Transport requested the Finance Committee's approval for the State to dispose of all shares in Combus. The majority of the Finance Committee approved the confidential bill on the same day.

(82) The 'Share Sale Agreement' was signed on 15 January 2001; Combus was transferred to Arriva on 2 April 2001, after the initial Commission decision had been adopted, with retrospective effect from 1 January 2001. 'Closing' took place on 2 April 2001 between the Ministry of Transport and Arriva.

(83) An earlier draft of the share sale agreement, sent by the Danish government to the Commission on 18 December 2000, contained a clause, according to which the Danish government was to guarantee Arriva for possible claims from public institutions (e.g. competition authorities and the EU Commission). The Danish government informed the Commission in its letter of 23 January 2001 that this clause had not been included in the final share sale agreement. The reason for this change was that 'the Danish government has chosen to demand approval from the relevant authorities prior to the closing'.

Assessment of the Office of the Auditor General of Denmark

(84) The sales process has also been the object of a special report of the Office of the Auditor General of Denmark ([20]).

(85) The conclusion (page 60) of the report states that:

'The investigation of the Office of the Auditor General of Denmark has shown that Arriva's offer was low, but that no serious offer was better.

The Office of the Auditor General of Denmark has established that the Ministry of Transport's investigations showed that the total sale of shares in Combus was preferable to a gradual dismantling of the company or going into administration.

The Office of the Auditor General of Denmark has established that the Ministry of Transport's considerations, when preparing and conducting the sale of shares, were well founded. The Ministry of Transport managed, by negotiation, to have Arriva's price for taking over the shares reduced and the Ministry also managed, by negotiation, to involve the company's lenders in the shares deal. On the basis of the assessments and information available, the Office of the Auditor General of Denmark conclude that the agreement should be regarded as satisfactory. It was therefore necessary for the State to inject DKK 140 million into Combus and provide guarantees of approx. DKK 58 million for the company in connection with the sales agreement.'

The subsequent sale of 50 % of Combus to Connex

(86) In recital 66 of the decision to initiate the procedure, the Commission had raised doubts as to whether the sales price of Combus to Arriva was the market price. These doubts were in particular founded on the observation that according to the Danish press, the sale of 50 % of Combus to Connex, which took place on 1 May 2001, less than a month after the signing of the sales agreement between the Danish government and Arriva, took place at a sales price of DKK 223 million.

([20]) Report 10/01 on Combus A/S 1995-2001. Pages 49-60 of the report give a detailed description of the sales process, Arriva's offer and the guarantees provided in connection with it.

(87) The Danish government and Arriva have transmitted additional factual information on this point to the Commission.

(88) The process of the negotiations between Arriva and Connex started in 2000. Arriva and Connex agreed on a 'Memorandum of Understanding' at European management level on 10 October 2000, which established the principles for cooperation between the parties in the run-up to the take-over of Combus. The initial idea was that both companies submitted a joint bid.

(89) Prior to the drawing up of this declaration of intent, Connex, as well as Arriva, had taken part in the screening process controlled by Alfred Berg, but the company had chosen not to go further on its own. In accordance with the 'Memorandum of Understanding', both parties were given access to the data room in order to assess the company's value and the risks associated with the purchase.

(90) Arriva and Connex exchanged experiences from the data room and it was clear that there were great differences in the two companies' expectations and assessment of Combus. Thus, Arriva assessed the company as having a negative value of approx DKK 300 million and Connex assessed Combus as having a negative value of approximately DKK 700-1 000 million.

(91) As the parties therefore fundamentally disagreed on the risks associated with the purchase, negotiations on a division of the company were broken off and Arriva continued the negotiations with the Danish State on its own. As described above, these negotiations eventually led to the successful sale of Combus to Arriva in May 2001.

(92) At the end of December 2000, the negotiations between Arriva and Connex were resumed, this time with a view to the sale of certain assets (i.e. contracts and busses) of Combus to Connex. Connex was given full access to the due diligence material that had been compiled and Arriva initiated Connex in the details of a business case drawn up by Arriva. Against this background, the parties entered into an agreement, 'Head of Terms', which was signed on 21 February 2001 with an agreed price of DKK 230 million. This value corresponded to the book value of the actives involved (busses, infrastructure and existing loss-making public service contracts, in particular in the Copenhagen area).

(93) Following further negotiations, which involved in particular a detailed cash-flow analysis, the final price in the sales agreement signed on 30 April 2001 was DKK 113,9 million. The downward adjustment of the sales price is due to the fact that the cash-flow analysis showed that losses from on-going public service contracts were much higher than initially foreseen. As a consequence, Arriva had to make full use of the provisions made in Combus' accounts for the loss-making public service contracts.

(94) In response to recital 118 of the decision to initiate the procedure, where the Commission wonders whether Arriva could sell the contracts, when there were legal clauses to prevent the contracts being terminated, the Danish government explains that the sale of the contracts means a straightforward change in the provider, which requires the consent of the recipient (municipalities and counties) and involves bus operations being maintained at the previously fixed price and on the previously agreed terms. In the case of the transfer of contracts from Arriva to Connex, the municipalities and counties involved gave their consent.

2.1.3. THE 1999 AND 2001 RESTRUCTURING MEASURES

(95) The capital injections of 1999 and 2001 have been accompanied by restructuring measures. These are described in detail in the following sections.

The 1999 Restructuring Measures

(96) The Danish authorities submitted to the Commission in April 2007 four separate notes. Three of the notes, dated 26 April 1999, 15 May 1999, and 18 May 1999, had been written by Kromann and Münter, one, dated 18 May 1999, by KPMG. The Danish authorities consider that the note of KPMG constitutes the operational restructuring plan for the 1999 capital injection, and that the three notes of Kromann and Münter constitute the financial restructuring plan.

KPMG's note

(97) KPMG, one of Combus's accountancy firms, had carried out an examination of the profitability of selected bus contracts in May 1999. In a memo of 18 May 1999, entitled 'Profitability of selected transport service contracts in the period 1999/2001', it transmitted its results.

(98) The examination was based on the operating budgets for Combus for the years 1999-2001, as approved by the board of Combus in November 1998, and corrected with a budget estimate drawn up by the management in April 1999. The accountants stated in the memo that the work carried out was not a budget examination. According to the memo, this meant that the accountants had not assessed whether the budgets as a whole contained all the information that was necessary for an independent assessment of Combus' anticipated development, nor had they assessed whether the budgets reflected the most probable development.

(99) In their memo, the accountants stated that profitability could not be assessed by contract, but rather by bus area. An assessment of the profitability of a bus area was thereby at the same time an indirect assessment of the bus service contracts associated with the bus area. The accountants had examined the operating budgets for 5 bus areas.

(100) The accountants' summary of the examination is shown in Table 6.

Table 6

Accumulated budgets for the period 1999-2001

(in DKK million)

	Net turnover	Result prior to offsetting provisions	Provisions 1998	Result before tax
Copenhagen Bus Area	927,1	– 90,0	60,0 (1)	– 30,0
Sjælland Bus Area	230,4	4,8		4,8
Århus Bus Area	353,3	19,8		19,8
Vejle Bus Area	351,0	0,5		0,5
Fyn Bus Area	371,6	4,7		4,7
Total selected bus areas	2 233,4	– 60,2		– 0,2
Other bus areas in total	725,2	34,4		34,4
Overheads		– 77,4		– 77,4
Bus areas + overheads in total	2 958,6	– 103,2	60	43,2
Streamlining and rationalisation		105,9		105,9
Anticipated subsequent result	2 958,6	2,7	60	62,7

(1) A further provision of EUR 5 million is to be made for 2002.
Source: Memo on the profitability of selected bus service contracts in the period 1999-2001.

(101) The table shows that the board of Combus expected the total result for the period 1999-2001 to be a profit of DKK 62,7 million.

(102) As shown in the table, the operating budgets for the bus areas and for overheads revealed a total deficit of DKK 103,2 million. The management estimated in April 1999, against the background of implemented or planned streamlining and rationalisation measures, that savings of approx. DKK 105,9 could be realised between 1999 and 2001. These cost-saving measures were the following:

— Savings related to civil servants as a result of the change of status from civil servants to normal contracts;

— Reduced sickness pay;

— Improved logistics amongst civil servants;

— Improved planning of duties;

— Reductions in administrative personnel;

— Reductions in maintenance costs;

— Reductions in purchase costs;

— Restructuring of head office.

(103) The estimated savings were not divided into bus areas but, according to the memo, the board considered that a very significant part of the savings could be made in the Copenhagen bus area.

Notes by Kromann and Münter

(104) The three notes by Kromann and Münter state that the law firm and the accountants had examined the profitability of a representative selection of the company's contracts with a view to an assessment of the company's operations, and that following the examination, it was deemed necessary to undertake a further provision of approx. DKK 65 million to cover loss-making contracts for the rest of their term. The company's equity capital accordingly amounted to DKK 47 million. It was therefore obvious that the company could not satisfy the terms in its loan agreements and that the annual accounts could not be presented without reservations from the accountants regarding the going concern principle, unless the situation changed significantly.

(105) In the opinion of the adviser, a reconstruction of the company would require a capital injection in the range of DKK 300 million. This amount was justified as follows:

— The solidity requirement in the different bank loans would increase from 10 % to 20 % on 31 December 1999, rendering necessary an increase in capital ([21]);

— A capital increase of this amount would lead to an appropriate debt/equity ratio.

(106) A capital injection of the amount mentioned would, in the opinion of the adviser, make it possible to resolve the company's financial situation.

The 2001 Restructuring Measures

(107) In parallel with the preparation of the sale of Combus to Arriva, the Danish government had requested Arriva to draw up a business and restructuring plan for Combus. In January 2001, the Danish government submitted this restructuring plan to the Commission. The submission took place in two steps, on 8 and 23 January 2001. These submissions formed part of the on-going Case NN 127/00, which led eventually to the Commission's initial decision.

(108) This restructuring plan consists of the following elements:

— A market study;

— A detailed description of all circumstances that lead to the severe financial difficulties of Combus;

— A detailed description of all changes planned in order to safeguard that the company, on its own, will be able to cover all its costs, inter alia, instalment and financial costs, and to face competition after the restructuring process has been finalised;

— A detailed description of the financing of the restructuring.

Market Study

(109) The market study states that the Danish bus market has stabilised after the deregulation started back in 1990.

(110) Prices for providing transport services by bus had fallen constantly between 1990 and 1997. This development is most likely due to the market opening that started in the early 1990ies. The lowest point of prices seems to have been achieved in 1997; since then, prices have recovered and show a slight, but regularly increase.

(111) The overall Danish market for public bus transport was dominated, in 1999, by four large operators. Together these four operators hold approximately two thirds of the tendered contracts ([22]).

(112) According to a report of the Danish Competition Authority from 2000, which the market study refers to, the Danish bus market is not likely to be characterised by overcapacity. Due to the fact that regional and local authorities subsidise bus routes to an extent of more than 50 %, a bus transport operator will only offer a bus service if it wins a call for tender. Hence, an operator only concludes a deal regarding the amount of buses and bus drivers necessary to perform bus transport, once it has won a public service contract following a tender procedure.

(113) The report of the Danish Competition Authority also concludes that barriers to entry are low; this is due to two factors:

— First, all public service contracts are put up for tender every five years. Accordingly, every year approximately 20 % of the market can be contested by new entrants.

— Second, both buses and employees are not too expensive, and can be easily found on the Danish market.

(114) Consequently, the Danish Competition Authority concluded that the market was characterised by buyer power, a conclusion that was illustrated by the price development subsequent to the deregulation of the Danish bus market.

Detailed description of circumstances that led to financial difficulties

(115) The detailed description of all circumstances that led to the severe financial difficulties of Combus indicates that the company's financial problems were due to Combus' aggressive expansion policy on the Danish bus market, in particular in the Copenhagen area. Combus won contracts at excessively low prices, thus creating financial problems. Consequently to the expansion policy, Combus came to operate a large number of loss-making bus services ([23]).

([21]) These requirements foresaw that the companies equity capital had to be at least 10 % of its balance sheet until 1998, and at least 20 % of its balance sheet as of 1999. At the end of 1998, the company's balance sheet was DKK 1,24 billion and the balance sheet was expected to increase that year (1999). With the expected deficit of around DKK 25 million in 1999, the equity capital would be reduced to DKK 20 million at the end of 1999. If the balance sheet at the end of 1999 was set, for example at DKK 1,3 billion, a requirement for 20 % solidity would mean equity capital of at least DKK 260 million. A capital injection of DKK 300 million would mean there was a reserve of DKK 60 million, which, with the inherent uncertainties, could hardly be considered too high, according to the adviser.

([22]) Combus 28 %, Arriva 25 %, City-Trafik 7 %, Linjebus 10 %.

([23]) See also Combus Judgment, paragraph 87.

Detailed description of changes planned

(116) The submission of 8 January 2001 states, among other things, the measures Arriva would take and the contributions it would make in connection with the purchase of Combus.

(117) In so far as the detailed description of planned changes is concerned, the restructuring plan outlines 6 cost-cutting measures to be taken by Arriva subsequently to Arriva's purchase of Combus. The restructuring plan also foresees an increase in maintenance and fuel costs, as well as some extraordinary costs relating to the restructuring of Combus.

(118) As regards the outlined changes, costs have been divided into operational, financial and exceptional costs in relation to the restructuring of Combus.

Changes in operational costs

(119) Table 7 provides a brief overview of increases and decreases with regards to operational costs.

Table 7

Increases and reductions with regard to foreseen operational costs (DKK p/a)

(DKK million)

Cost increases	
Increase in maintenance costs	– 28,0
Increased fuel prices	– 3,0
	– 31,0
Cost reductions	
Reduction in sickness	3,5
Reduction in the costs of repairs	7,0
Reduction in insurance costs	2,0
Closing and disposal of business premises	3,0
Merger of headquarters	39,0
	+ 54,5
Annual net effect	+ 23,5

Source: Arriva

(120) As disclosed in Table 7, overall operational costs will be reduced by reductions in staff sick days, in the costs of repairs of buses, insurance costs, administrative costs and sales of superfluous infrastructures.

(121) As regards the staff sick days, the restructuring plan confirms that Combus' employees are sick more frequently than Arriva's employees. Arriva intends to introduce its own methods to following up on employees with high sick absence. By doing so, Arriva expects to reduce costs up to an amount of DKK 3,5 million.

(122) As regards the reduction in costs for repairs on buses and insurances, Arriva intends to introduce its own methods and insurance contracts in order to cut Combus' costs on those areas. Thereby, Arriva expects to reduce costs for employees insurances up to an amount of DKK 2 million and as for vehicles insurances up to an amount of DKK 7 million.

(123) In so far as reduction in administrative costs is concerned, Arriva expects the merger of the companies' headquarters will result in cost cuts amounting to DKK 39 million as from 2002.

(124) Finally, Arriva intends to sell four depots which will be superfluous after the merger. By doing so, Arriva expects to cut costs to a level of DKK 3 million p/a. In total, the cost cuts foreseen by Arriva will amount to DKK 54,5 million p/a.

(125) Arriva, however, foresees an increase in maintenance costs. According to information provided by Combus, Combus had maintenance costs amounting to DKK 70 000 per bus in 2000. Arriva anticipates an increase up to DKK 120 000 per city bus and DKK 80 000 per regional bus, resulting in an increase in maintenance costs amounting to DKK 28 million. Furthermore, Arriva foresees a fuel costs increase amounting to DKK 3 million p/a.

Changes in financial costs

(126) As to the expected reduction in financial costs, Arriva is contractually obliged to reimburse the total outstanding debt of Combus to its private lenders.

(127) In this respect, the sales agreement foresees that the Danish State and the private commercial debtors of Combus shall partially write off Combus' debt prior to the sale to Arriva, leaving the undertaking with a debt of DKK 208 million. Arriva then, upon purchase, has to pay immediately this outstanding debt.

(128) The restructuring plan foresees that Arriva replaces the debt from private lenders by an intra-group loan. The annual interest payments for this intra-group loan amount to DKK 13,5 million.

Changes in exceptional costs

(129) As regards the exceptional costs relating to the restructuring of Combus, Arriva estimates that they will be DKK 35,6 million for the period 2001/02. Approximately DKK 15 million relates to necessary dismissals in order to reduce general expenses ([24]). The outstanding amount relates to the integration of the respective companies IT systems (DKK 5 million), to the purchase of new bus driver uniforms (DKK 7,2 million), to legal and economical expenses related to the merger and the restructuring (DKK 7 million) and finally to other small expenses (DKK 2,5 million).

(130) Arriva also intends to cut costs by successively terminating all of Combus' loss-making contracts. Furthermore, Arriva proposes to make reserves in relation to the expiration of the contracts in Copenhagen and Aalborg, due to the risk that these city buses cannot be used to traffic other routes, as they are either out of date (as for Copenhagen, the reserve will amount to DKK 45 million) or too specific to be used in another city (as for Aalborg, the reserve will amount to DKK 18 million).

(131) The restructuring plan foresees that Combus will return to economic viability as from 2006, thanks to the measures taken by Arriva. Table 8 shows the forecasts for the turnover and the profits/losses of Combus for the period 2000 to 2007.

Table 8

Forecasts for the turnover and the profits/losses for period 2000-2007

(in DKK million)

Year	2000	2001	2002	2003	2004	2005	2006	2007
Turnover	1 089	1 055	934	824	696	440	206	60
Profit/ Loss	– 118	– 66	– 59	– 53	– 43	– 21	+ 6	+ 2

Description of the financing of the restructuring

(132) The financing of the restructuring costs is achieved through:

— The restructuring aid granted by the Danish government,

— The restructuring of Combus' debt, and

— The own contribution of Combus and Arriva.

(133) The details of the contribution of the Danish government are explained in the description of the privatisation process above. A table summarising the contributions can be found in the next section.

(134) The contribution of Combus' private creditors consisted in a write-off of debts of DKK 100 million.

(135) The own contribution of Combus and Arriva consisted in the following elements:

Arriva

— The pay-off of the remaining loans immediately after the purchase,

— Direct contribution to the restructuring costs of DKK 33,6 million,

— The sale, at a price of DKK 113,9 million, of 50 % of Combus to Connex by Arriva,

— The sales price of DKK 100.

Combus

— The savings foreseen in the restructuring plan, explained above.

2.1.4. SUMMARY OF THE FINANCIAL SUPPORT OF THE DANISH STATE TO COMBUS

(136) In table 11 of the initial decision and in recital 68 and Table 8 in the decision to initiate the procedure, the Commission summarised the restructuring measure paid to Combus by the Danish State. There is an apparent discrepancy between the numbers, which is explained by the fact that table 7 in the initial decision expresses the amounts in 2001 in net present value, whereas table 8 of the decision to initiate the procedure expresses the amounts in real terms.

(137) The Danish government, in its observations, drew the Commission's attention to the fact that DKK 100 million being shown twice in table 8 of the decision to initiate the procedure was misleading as Combus had only received this amount once ([25]). The Commission, in view of this observation of the Danish government, has adjusted the table, as can be seen in Table 9 below.

([24]) These costs are split as follows: Redundancy costs management DKK 5,2 million, redundancy costs other headquarters DKK 6,7 million, redundancy costs other DKK 2,0 million.

([25]) See row 5, column 3, and row 6, column 3, in Table 8 of the decision to initiate the procedure.

Table 9

Corrected summary of the financial support of the Danish State to Combus, in real terms

Type of support	Year	Amount (in DKK million)
Provision in the opening accounts for civil servants (this payment has been authorised through the part of the initial decision that the CFI upheld)	1995	140
One time payment to civil servants for statute change (this payment has been authorised through the part of the initial decision that the CFI upheld)	1999	100
Capital increase	1999	200
Subordinated loan (This subordinated loan has been written off in 2001)	1999	100
Capital increase	2001	140
Guarantees (see detailed description below table 9)	2001 and following	37,1
Total	1995 to 2001	717,1

(138) In Table 8 of the decision to initiate the procedure, the Commission stated the maximum amount of the guarantees provided in 2001 in connection with the conclusion of the sales agreement with Arriva.

(139) In Table 10 below, in addition to the maximum cover, the Commission shows also for information the actual amounts paid in relation to the guarantees at the end of February 2005.

Table 10

Summary of claims and payments from the guarantees provided

Guarantee	Maximum cover	Amount paid
Environmental costs	DKK 22,5 million	No payments
Reduction in equity capital	DKK 35,5 million	DKK 20,5 million
Further commitments in relation to the equity capital guarantee	DKK 0,9 million	DKK 0,9 million
Tax demand from the period prior to the transfer of Combus	Unlimited	Claims for payment of DKK 6,2 million have been submitted (current case at the National Tax Tribunal)
Losses as a result of civil servants previously employed	Unlimited	No claims or payments
Losses in connection with the sale of Combus International (Comfort Bus Danmark A/S)	Unlimited	DKK 9,5 million (partial repayment of the payment of dividends from Comfort Bus Denmark A/S u/k)
Any losses related to the audit investigation into Combus A/S	Unlimited	No claims or payments
Total		DKK 37,1 million

(140) The two previous tables can be summarised as follows:

Table 11

Summary of State support

Measure and year	Amount (in DKK million)	Comment
Capital increase, 1999	200	
Subordinated loan, 1999	100	Written off in 2001
Capital increase, 2001	140	
Total amount paid under guarantees, 2001	37,1	The cap of limited guarantees was DKK 58,9 million, out of which DKK 21,4 million have been drawn upon; for the unlimited guarantees, a total of DKK 15,7 million has been drawn
Total 1999	300	Expressed in real 1999 terms
Total 2001	177,1	Expressed in real 2001 terms

(141) The above figures slightly deviate from both the figures set out in the initial decision, table 7, and the figures set out in the decision to initiate the procedure. These deviations are explained by the fact that the initial decision had converted the numbers into 2001 net present value, and that both the initial decision and the decision to initiate proceedings were not coherent as to the calculation of the monetary value of the guarantees.

2.1.5. DEVELOPMENT OF ARRIVA/COMBUS AFTER THE PRIVATISATION

(142) After the share sale agreement had been entered into on 2 April 2001 ([26]), Arriva proceeded as follows:

— Combus became a 100 % subsidiary of Arriva.

— In an agreement of 11 April 2001, Arriva Scandinavia A/S, another 100 % subsidiary of Arriva, acquired from Combus assets and financial liabilities in exchange of one share in Arriva Scandinavia, which has a nominal value of DKK 1 000. The assets and liabilities included in this agreement are listed and specified in the sales contract. They cover all assets and all liabilities on the books of Combus on that day.

— On 1 May 2001, 50 % of the assets (i.e. contracts, busses, and infrastructure), owned by Combus at the time of the sale of the company to Arriva, were transferred to Connex by Arriva Scandinavia A/S for a cash price of DKK 113,9 million (see detailed explanation above).

3. THE COMMISSION'S DOUBTS

(143) In recital 121 of the decision to initiate the procedure, the Commission stated five doubts. The first concerns the question of whether the 1999 and the 2001 restructuring measures constitute two separate measures, or whether they should be assessed as one single measure. The subsequent four doubts concern the private investor test, and the assessment of the restructuring measures under the 1994 and/or 1999 restructuring guidelines, in case they constitute State aid.

4. COMMENTS FROM DENMARK AND INTERESTED PARTIES

4.1. *REPLY OF THE DANISH GOVERNMENT*

(144) The comments of the Danish government concern the possibility to terminate Combus' public service contracts, the private investor principle and the compatibility of the aid with the 1999 restructuring guidelines.

([26]) See recital 83.

4.1.1. THE TERMINATION OF COMBUS' PUBLIC SERVICE CONTRACTS

(145) The Danish government considers that, contrary to what the Commission had stated in its decision to initiate the procedure, public service contracts concluded according to Article 14 of Regulation (EEC) No 1191/69 cannot be terminated before their expiry.

(146) The Danish government points out in this respect that the Commission had obviously misinterpreted Article 14(4) of Regulation (EEC) No 1191/69 in its decision to initiate the procedure. It draws the Commission's attention to the fact that, as expressly stated in the provision, a transport service may be terminated in accordance with Article 14(4) only if the transport service is not covered by the contract system or the public service obligation. The contracts that Combus had entered into were covered by the contract system, as they were general contracts won during tendering rounds. This was confirmed by the CFI in paragraph 78 and following of the Combus judgment. The contracts could not, therefore, be terminated on the basis of Article 14(4).

(147) If Combus however had interrupted, discontinued or in any other way sought to end the transport agreements entered into without having any legal basis for doing so in the contracts, the company would in fact have been liable for breach of contract under Danish civil law.

4.1.2. APPLICATION OF THE MARKET ECONOMY INVESTOR PRINCIPLE

(148) The Danish government considers that the measures taken by the Danish government in the present case should be regarded as investments made in accordance with the Market Economy Investor Principle.

(149) In reply to recital 89 of the decision to initiate the procedure, where the Commission had stated that a private investor might have conducted itself as the Danish State did, if it was going to be less costly to restructure the company with a view to a sale than to allow it to go bankrupt, the Danish government concedes that in the case at issue, the direct losses in the event of bankruptcy would not have exceeded the loss made in the sale.

(150) However, despite the fact that at face value, the sale was therefore 'more expensive' than a bankruptcy, a sale was nevertheless preferred by the Danish government. Indeed, the Danish government, following the analysis provided by its advisers, considered that it would probably have been more costly in the long term to allow Combus to go bankrupt than to sell the company, due to latent indirect losses and damage to future privatisations. In order to underline these considerations, the Danish government presents a 'group assessment' of the decision to privatise Combus and argues that, with regard to the prospect of future privatisations, it was important to preserve the State's reputation.

The 'group assessment'

(151) In the view of the Danish government, Member States' investments cannot simply be compared with those of ordinary private investors, as the latter normally require a return on the investment in a far shorter time. In this connection, it considers that the Court of Justice has accepted in many cases that the State as an investor is more likely to act in the same manner as holding companies or private business groups which pursue a more long-term investment policy taking account of a global or sectoral company strategy ([27]). The Danish government quotes in particular Case C-305/89, *Italy* v *Commission* ([28]):

'Although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term.'

(152) The Danish government argues that it was taking the same approach when assessing whether to allow Combus to go bankrupt.

The State's reputation

(153) The Danish government maintains its position, set out in recitals 86 and 87 of the decision to initiate the procedure, with regard to consideration for the State's reputation and the references to Case C-303/88, *Italy* v *Commission*, made in that connection.

(154) The Danish government recalls that the Commission has previously noted — for example in its intervention at the CFI, quoted in the last point of paragraph 106 of the Combus judgment — that 'a rollback of public-sector involvement generally serves to promote free trade'.

(155) For the Danish government, the connection between the State's image as a company owner and the privatisation of public companies is therefore clear: only if the State is allowed to protect its reputation as a company owner and a serious and responsible investor can future privatisation be ensured, leading to increased competition and an improvement in the market situation for operators on that market throughout the EU.

(156) The aid measures in connection with restructuring and privatisation of Combus were, according to the Danish government, very much based on consideration for the State's reputation as an employer, investor and company owner. If the State had allowed Combus to become bankrupt, it would probably have had a negative impact on interest rates and general loan terms for State-owned companies as regards financial institutions in both Denmark and abroad.

(157) In this respect, the Danish government explains that over the last few years, Denmark has privatised a number of State-owned companies, and plans further privatisations. One of the companies converted into a public limited company with a view to privatisation after the privatisation of Combus is Post Danmark A/S ([29]). The Danish State has just entered into a conditional agreement for the sale of 25 % of the shares in the company. The selling price for 22 % of the shares (the last 3 % will be offered to employees) which were sold to Post Invest (part of the CVC Group) is DKK 1,27 billion.

(158) Prior to the conversion into a public limited company and the partial privatisation, the company's civil servants were bought out in 2001. At that time, Post Danmark had a total of approx. 30 000 employees, approx. 11 800 of whom were civil servants. The civil servants were given the offer of moving to employment on a group contract basis, while retaining the right to a civil servant pension. A large majority of 96 % accepted this. This meant that more than 10 500 civil servants chose employment on a group contract basis in accordance with a model that meant a lump sum of DKK 50 000 before tax from Post Danmark. At the same time, they accepted a broader interpretation of the duties they could be transferred to. The other approx. 650 civil servants wanted employment on a group contract basis in accordance with a model that to all intents and purposes gave them the same terms as their civil servant status. This model did not lead to any lump sums. A smaller percentage of the civil servants, approx. 480, wished to retain their civil servant status with the State. When Post Danmark A/S was established, they were therefore seconded from the State to the public limited company.

(159) In connection with the establishment of Post Danmark A/S, an opening balance of approx. DKK 1,7 billion (DKK 1,190 billion after tax) was set aside for an actuarially calculated lump sum payment to the State to bring down future annual pension contributions from 20 % to 12 % of salaries for former and remaining civil servants for whom the company still had to pay pension contributions, etc. The amount was paid in 2002. Equality of treatment regarding pensions was thereby achieved between former civil servants and those employed on a group contract basis.

([27]) Case C-278/92 *Spain* v *Commission* [1994] ECR p. I-4103, paragraphs 13 and 14, and joined cases T-126/96 and T- 127/96 *Breda Fucine Meridionali* [1998] ECR p. II-3437, paragraph 79.

([28]) Case C-305/89 *Italy* v *Commission* [1991] ECR p. I-1603, paragraph 20.

([29]) Post Danmark is one of the biggest employers in Denmark with a turnover of DKK 11 227 million (EUR 1 509 million) in 2004, a pre-tax profit of DKK 836 million (EUR 112 million) and earnings before interest, taxes, depreciation and amortisation (EBITDA) of DKK 1 115 million (DKK 244 million).

(160) In the Danish Government's opinion, its negotiating position with the civil servants in Post Danmark would have been extremely difficult, and the outcome of the negotiations much more costly, if the Danish State had allowed Combus to go bankrupt, thereby leading to massive unemployment of those civil servants who had given up their civil servants status prior to the privatisation of Combus.

(161) In this context, the Danish government points out that employment as a civil servant means that the individual civil servant basically has a guarantee of employment until pension age and a subsequent lifelong pension. These rights are surrendered in transferring to employment on a group contract basis. When State companies are placed under private control, civil servants may regard it as an unjustified transfer and thereby request redundancy. This triggers off a particularly large amount of compensation to the individual civil servant.

(162) This makes it extremely important for Denmark, from a financial point of view, that an agreement can be reached with any civil servants on a transfer to employment on a group contract basis in return for a reasonable amount of compensation prior to privatisation of State-owned companies.

(163) The Danish government considers that the amount of compensation demanded by civil servants is largely dependent on whether they feel reasonable job security after the transfer to employment on a group contract basis. The effect of the State leaving the former civil servants in the lurch by letting the company become bankrupt, shortly after concluding agreements with the civil servants on a transfer to employment on a group contract basis, would most likely be that all civil servants in a similar situation in the future would demand significantly higher compensation before surrendering their status.

(164) In this context, the Danish government also mentions the example of the sale of certain divisions of Banedanmark ([30]). Banedanmark's Advisory Division was sold to WS Atkins International Limited on 1 July 2001 ([31]). The cash selling price was DKK 70 million. In addition to the selling price, the State acquired a cash payment of approx. DKK 35 million.

(165) Banedanmark's advisory division employed 326 employees, 66 of whom were civil servants. In the transfer of the Advisory Division, the civil servants basically remained civil servants in Banedanmark, as, according to their status as civil servants, they had no obligation to transfer to the new employer. There was, however, the option of the individual civil servants voluntarily being seconded to the buyer.

(166) Civil servants who wanted to transfer to employment on a group contract basis with the buyer were offered 15 months' salary from Banedanmark at the time of severance. The offer to buy them out applied for up to a year after the date of transfer. The cost of buying out the civil servants, which was to be defrayed from the proceeds of the sale, could have come to DKK 23 million if all the civil servants had transferred to employment on a group contract basis.

(167) At the moment, Denmark is aiming at the total sale of Banedanmark's Civil Engineering Division ([32]). The civil engineering division had a turnover of approx. DKK 1,3 million in 2004 and employed about 1 470 staff at the end of the year, 740 of whom were civil servants. In the event of a sale of the civil engineering division, the civil servants would not be obliged to transfer to employment with the buyer and a solution to the civil servant issue will therefore have to be found, as with other privatisations.

(168) Another option for privatisation under consideration is the sale of the Danish railway company DSB. DSB is an independent public company that operates passenger transport as a public service after negotiations on the basis of a transport contract entered into with the Danish State. Around half of the company's 8 500 employees are civil servants. The privatisation of DSB would mean the transfer to group contract conditions for all these civil servants.

(169) Denmark considers that, if the State had allowed Combus to become bankrupt after having compensated the civil servants for transferring to group contracts, it would have been impossible to persuade civil servants to go over to group contracts instead of civil service employment in the event of future privatisations.

(170) The State would thereby be prevented from, or in any case have significantly reduced options for privatising State-owned companies with civil servants. Denmark considers that at best, bankruptcy of Combus would have damaged the State's credibility and the civil servants would, as a result, have demanded better terms in the form of significantly higher amounts of compensation to transfer to employment on a group contract basis and renounce their civil servant rights. Using Post Danmark as an example, a doubling of the amount of compensation to individual civil servants in relation to that company alone would have meant a further outlay for the Danish State of DKK 500 million.

([30]) Prior to 1 March 2004, Banedanmark was called Banestyrelsen. Banedanmark manages the State's railway infrastructure and also carries out duties as infrastructure manager on some other parts of the railway network.

([31]) Bill 273 of 27 June 2001.

([32]) The unit, which is called 'Enterprise' is today an independent organisational unit of Banedanmark. The unit sells railway-engineering services by means of turnkey contracts, major contracts, specialist contracts and sub-contracts.

(171) The Danish government also points out in this context that it had already allowed a company, converted to a public limited company a short time before, to become bankrupt, namely Statens Konfektion, which was converted into a public limited company in 1992. Prior to the conversion, all the civil servants were offered employment on a group contract basis in return for financial compensation. When the Armed Forces, which were the company's biggest customer, subsequently decided to invite tenders for their supply contracts, the company's business base disappeared. The company therefore went bankrupt in 1992, which led to harsh criticism of the Danish government including by those now employed on a group contract basis.

(172) The Danish government considers that in the light of experiences from Statens Konfektion, it had no choice in connection with the sale of Combus, as yet another bankruptcy would have been devastating for negotiations with civil servants in connection with preparations for future privatisations.

(173) The Danish government furthermore explains that if it is not possible to transfer civil servants to a group contract in connection with privatisation, making the civil servants redundant is often the only real alternative because it would not be possible to offer them other work within their areas of employment which they would be obliged to accept. It has been estimated in connection with the sale of shares in Post Danmark that it costs DKK 2 million to make a civil servant redundant. Such expenditure per civil servant for future privatisations would be devastating for the State's privatisation plans and the expenditure on this would, to a great extent, undermine the financial benefits of privatisation. It is clear that such expenditure would far exceed the financial burden to the State of the capital injections into Combus.

(174) Beyond the issue of changing the status of civil servants in order to prepare companies for privatisation, Denmark considers that a bankruptcy of Combus would have damaged the State's reputation as a responsible investor and would have had a negative influence on all the State's financial activities and future investment options. In particular, the Danish government considers that a bankruptcy would have had a negative effect on interest rates and general loan terms for other State-owned companies.

(175) In conclusion, it is the Danish government's view that the State — particularly in the light of the special problem that manifested itself in relation to the civil servants — would not have been acting as a responsible and loyal investor if it had chosen to allow Combus to become bankrupt.

(176) With respect to recital 88 of the decision to initiate the procedure, where the Commission stated that the ECJ only accepts consideration for the State's reputation as grounds for an injection of capital if there is a prospect of the company becoming profitable enough to convince a private investor in the same situation to assume the risk at the time of carrying it out, the Danish government observes that Arriva actually assumed the risk for the undertaking when the company purchased Combus.

4.1.3. COMPATIBILITY WITH THE 1999 RESTRUCTURING GUIDELINES

(177) The Danish government considers that the contested measures fulfil all conditions set out in the 1999 restructuring guidelines. With respect to the points where the Commission had raised doubts in its decision to initiate the formal proceedings, the Danish government presents the following observations:

One time, last time aid

(178) As regards the question of whether the aid measures in 1999 and 2001 respectively constitute one or two separate measures, the Danish government asserts that the measures were connected so closely chronologically and in purpose that they should be regarded as one aid measure. As a result of this, the 1999 restructuring guidelines should apply to this aid measure. Denmark justifies this point of view with several arguments.

The CFI judgement does not annul point 3.4.6 of the initial decision

(179) The Danish government notes in connection with this that the Commission stated the following in point 3.4.6 of the initial decision with regard to the question of 'one time, last time' aid:

'In the case of Combus, the chronology and the purpose of the capital injections made by the Danish government, as well as Combus' situation also suggest that the two measures should be treated as part of a continuing restructuring process. In particular, the first injection of capital in 1999 served to reduce the debts of the company that had resulted from the heavy losses in previous years. There had also been efforts to modify drivers' contracts. The clear intention was the privatisation of the company, which forms the final part of the restructuring strategy.'

(180) The Commission maintained this opinion in paragraphs 50 and 54 of the defence it submitted to the CFI. In this connection, the Danish government would point out that the Commission's assessment of the measures as being 'one time, last time' does not appear to have given rise to criticism in the Combus judgment ([33]).

The application of the BP Chemicals jurisprudence shows that the two measures are to be treated as one single aid measure

(181) The Danish government recalls that in Case T-11/95, *BP Chemicals* ([34]), the CFI found that the assessment as to whether it is reasonable to separate one payment from another is to be made taking into account the chronology of the injections of capital, their purpose and the company's situation at the date when the decisions on the individual injections were made.

(182) The two measures had the same purpose. A political agreement on the reorganisation and sale of shares in Combus was entered into on 26 November 1998 when the then government reached an agreement with the opposition on the Budget for 1999) As expressly stated in the Finance Committee's bill of 27 May 1999, the purpose of the injection of capital in 1999 was to reorganise Combus prior to selling the shares, i.e. fully privatising the company.

(183) The reason there was a need for reorganisation with a view to privatisation because a significant deterioration had taken place in the company's economy. This was how it was established that Combus' equity capital as at 31 December 1999 would come to approx. DKK 47 million, which should be seen in relation to a requirement for equity capital of at least DKK 125 million on the part of the company's lenders.

(184) The political agreement on privatisation could therefore only be carried out if the Danish government ensured that Combus had a sufficient capital base to continue operating until a buyer was found.

(185) The aid in 2001 had exactly the same purpose as the injection of capital in 1999. In 2000, a potential buyer was found and the writing off of the subordinated loan from 1999 and the guarantees provided were intended as the last piece in the economic puzzle that would allow the sale of all shares in Combus. The measure in 2001 was therefore the final stage in making the company more saleable.

(186) The purpose of the two measures was therefore exactly the same: to make Combus more saleable with a view to privatisation. There was therefore a direct and obvious connection — legally, financially and logically — between the measures in 1999 and 2001.

(187) The two measures have a close chronological connection. As a result of the political agreement on the privatisation of Combus, the Finance Committee's bill of 27 May 1999 was passed. The Danish government hereby injected capital amounting to a total of DKK 300 million, DKK 100 million of which was subordinated loan capital. The subordinated loan capital was established through a loan agreement of 30 May 1999.

(188) The Finance Committee's bill of 13 December 2000 authorised the Ministry of Transport to sell all shares in the public limited company, Combus, which was fully owned by the Danish State.

(189) The Minister of Transport was also authorised to provide a number of guarantees to buyers in connection with the conclusion of a sales agreement. The guarantees, mentioned in the bill, were part of the basis of the sales agreement of 15 January 2001. The Danish Parliament's Finance Committee was informed of these guarantees in bill 190 of 25 June 2002.

(190) Little more than 18 months passed between the date of the decision to pay the first injection of capital and the sale of Combus. Considering the size and importance of the company to the Danish State and the complicated procedures required to obtain tenders from interested buyers etc., the Danish government is of the opinion that the two capital injections were so closely connected chronologically that there can be no doubt that this was one — and only one — financial measure.

(191) In the opinion of the Danish government, it must be significant that the date of the decision to implement the measure in 2001 depended solely on when the Danish government had a sufficient basis for assessing the need for a capital injection and guarantees etc. in connection with a sale. The date of the measures in 2001 was therefore completely dependent on the duration and result of the sales process.

(192) In this context, the Danish government recalls also the facts of *BP Chemicals*, where the first injection was made on 1 October 1992, the second injection was approved by the Board on 2 December 1993 and the third injection was approved by the Board on 29 June 1994.

([33]) Combus Judgment, paragraph 109.

([34]) Case T-11/95 *BP Chemicals Ltd* v *Commission*, [1998] ECR p. II-3235, paragraph 171.

(193) The Court referred, in paragraph 178 of the judgement, to the decisions on the three capital injections being made over a relatively short period from October 1992 to July 1994. As regards the chronological relationship between the second and third capital injections, the Court commented that these were chronologically very close to each other.

(194) In this context, the Danish government points out that the injection of capital in 2001 could not have been made earlier as the negotiations with the buyer had to be concluded before the extent of the need for capitalisation in connection with the sale could be determined.

(195) Combus's situation at the dates of the capital injections. The Danish government endorses the Commission's description in recital 75 of the decision to initiate the procedure, according to which Combus was in serious financial difficulties in 1999 and 2001, which was mainly due to the company having entered into unprofitable contracts for bus transport in previous years. The Commission concludes that the financial situation in Combus was therefore unchanged at the stated dates.

(196) The Danish government explains furthermore that, in 1998-2000, Combus had a significant accounting deficit, which can be almost exclusively attributed to the loss-making contracts in the Copenhagen area. In addition, in 1998 and 1999, significant amounts of DKK 65 000 000 and DKK 53 637 000 respectively were allocated to the accounts to cover future losses from the loss-making contracts. The requirement for provisions for loss-making contracts was due to the company being bound by the bus service contracts until their expiry.

(197) The Danish government considers that, when the Court in *BP Chemicals* states that the decision as to whether it is one and the same aid measure has to take into account the 'situation at the date when the decisions on the individual injections were made', this must be because it is to be investigated whether, in the period between the individual injections, changes occurred in the company's financial situation that demonstrate that the injections — despite any chronological and relative connection — actually cover different needs. In the view of the Danish government, this is not the case here, for the following reasons:

(198) The injections of capital in both 1999 and 2001 were intended to cover the need for capital that had arisen because the company had entered into loss-making contracts in the period prior to 1999. The fact that this was done in two stages is only because it was not until the conclusion of negotiations with the buyer Arriva that it became clear what the real extent of the need for capital was, although, seen objectively, this need already existed at the time of the first injection of capital in 1999.

(199) Conclusion: It is therefore the Danish government's opinion that all the criteria to which importance was attached in *BP Chemicals* as regards the assessment of whether several chronologically separate injections of capital constitute one and the same financial measure are met. Therefore the requirement for 'one time, last time' aid laid down in the restructuring guidelines is met in relation to the total injections of capital in 1999 and 2001.

Economic viability of Combus

(200) It is the opinion of the Government that, following the injections of capital in 1999 and 2001, Combus was economically viable. The fact that it was not possible to achieve a profit prior to 2006 was only due to the loss-making contracts that Combus had entered into in connection with the licensing rounds.

(201) The sale of all shares in Combus to Arriva is, in the opinion of the Danish government, proof that Combus was entirely viable after the provision of restructuring aid. A private investor such as Arriva would not have taken the significant financial risk of buying Combus unless Arriva had, following an extensive due diligence process, found that Combus was a viable company with a satisfactory future earnings potential in relation to standard market economy terms.

(202) The Government notes that, in recitals 107 and 108 of the decision to initiate the procedure, the Commission raised a question regarding, firstly, the termination of contracts and, secondly, the difference between the accumulated deficit and the aid paid.

(203) The comments of the Danish government with respect to the possibility of terminating public service contracts have already been outlined above.

(204) As regards the question of the difference between the accumulated deficit of DKK 360 million in the period 2000-2005 and the total aid of DKK 291 million paid in 2001, the Government observes that the Commission's statement must be due to a misunderstanding.

(205) The amount stated for the accumulated deficit in the period 2000-2005 is correct but funds were provided to Combus in 2001 exceeding this accumulated deficit. As regards the funds provided by the Government, these amounted to DKK 291 million, cf. the comments that, when calculating the amount of aid paid, it is clearly the actual amount paid under the guarantees that is to be included.

(206) A more important consideration, however, is that the amount paid by the Government should be added to the creditor's debt remission of DKK 100 million. The capital provided in 2001 therefore exceeded the estimated accumulated deficit for the period 2000-2005.

Measures for as far as possible mitigating the adverse effect of the aid on competitors

(207) The Danish government first considers that the 1999 restructuring guidelines must be interpreted to mean that the use of measures to mitigate the competition distorting effect of the aid on competitors is optional and is only to be demanded where such measures are necessary. This is emphasised by the use of the word 'ought' in point 35 of the guidelines and the whole of point 39 ii). Moreover, the Danish government points out that the Commission did not request or demand that Arriva make counter-concessions or implement measures that could mitigate potential distortion of competition in connection with the sale when adopting its initial decision.

(208) Secondly, the Danish government points out that there is no structural overcapacity in the bus transport sector. In addition, it recalls that the Danish competition authorities have stated that there is particularly active and effective competition on the market and that the market is very accessible due to the low access barriers guaranteed by the European rules on tendering. Accordingly, the Danish government considers that there was no need to mitigate the potential adverse effects of the aid as there is no evidence of such adverse effects.

(209) Thirdly, the Danish government points out that the injection of capital into Combus corresponded to the company's negative market price, established in an entirely open round of tenders, where all interested purchasers were able to submit bids, and that the aid measure did not therefore create distortion of competition on the market.

(210) Fourthly, the Danish government considers that the subsequent sale of a number of assets and liabilities to Connex constituted a measure capable of mitigating potential adverse effects on market conditions. By selling at least 50 % of the assets in Combus to Connex, Arriva certainly offset any potential competitive advantages that the company obtained through the purchase of Combus. Through the sale to Connex, Arriva also restricted its market share in the Copenhagen area significantly.

(211) Finally, the Danish government argues that the loss-making contracts will expire in 2006 at the latest and will subsequently be subject to public tenders open to all players on the market. Even if there were to be a negative effect on competition — which in the Danish government's opinion would in any case be minimal — it would be limited in duration.

Aid limited to the strict minimum necessary

(212) The Danish government considers that the aid measures were limited to the absolute minimum and hence consistent with the relevant conditions in the 1999 restructuring guidelines.

(213) The amount of the capital injection in 1999 was suggested by the law firm, Kromann Münter, after a survey by KPMG was carried out in connection with the restructuring of Combus and the Danish government's financial adviser, Alfred Berg, concurred with this assessment.

(214) As regards the injections of capital in 2001, the Danish government clarifies that the amounts were determined both by the company's financial condition and the negotiations the Danish government had with Arriva and other potential buyers. As the amount of capital injection required was established after negotiations with interested buyers — who had registered as part of an open, transparent and non-discriminatory sales procedure — the aid measures were in line with the market price for the company and therefore naturally limited to what was strictly necessary.

Contribution to the restructuring plan

(215) In recital 119 of the decision to initiate the procedure, the Commission stated that the beneficiary itself must make a contribution to the restructuring plan. The Commission has stated that Arriva's take-over of part of Combus' debt constituted such a contribution. In this connection, the Commission asked for information on other contributions made by Combus and/or Arriva.

(216) The Danish government considers that the savings and rationalisations foreseen in the restructuring plans constitute a contribution from the beneficiary pursuant to point 40 of the Restructuring guidelines. Other contributions are, in the view of the Danish government, the sales price of DKK 100, the revenues from the sale of 50 % of Combus to Connex (DKK 113,9 million), and Arriva's direct contribution to the restructuring costs of DKK 33,6 million.

4.2. *COMMENTS SUBMITTED BY DANSKE BUSVOGNMAEND*

4.2.1. RESPECT OF THE MARKET ECONOMY INVESTOR PRINCIPLE

(217) Danske Busvognmaend considers that the prospect of Combus achieving viability and profitability has not been demonstrated. Rather to the contrary, Danske Busvognmaend, referring to paragraph 19 of the Combus judgment, finds it clear that a private investor would not have acted in the way the Danish government did when granting the aid.

(218) In addition to the factual circumstances provided for by the Commission, Danske Busvognmaend refers to three reports presented subsequently to the Combus judgment in Denmark ([35]). According to Danske Busvognmaend, these reports affirm that a private investor would not have acted as the Danish government did in a similar situation.

(219) Danske Busvognmaend recalls that when, in May 1999, the Danish government granted Combus economic aid of DKK 300 million, it based its action on the principle of the investor in a market economy (see page 22, note 36, of the application). The Transport Minister at the time made the following statement:

'In summary, I consider that the injection of capital in Combus A/S by the Transport Minister does not constitute State aid and that this operation therefore does not have to be notified to the Commission, since the Minister had an assessment carried out which showed that the injection was necessary and sufficient, that the undertaking could be restructured to operate profitably, and that the additional capital invested could be expected to provide a return in the form of profit or interest and a repayment. I therefore consider this investment to be in line with the principle of the investor in a market economy'.

(220) Danske Busvognmaend states that the matter was then considered by the Danish Court of Auditors (see Annex A 22) and refers to the Court's conclusions (Chapter V, pages 37 and 39 and, especially, pages 41 and 43) in which the Court explained in particular that:

'The Court of Auditors' investigation has shown that, when the file on the injection of capital into Combus was drawn up, the Transport Minister must have been aware of the undertaking's poor management and the lack of a solid basis for taking any economic decisions, especially as regards monitoring the profitability of the bus transport contracts and the control of general cost trends.'

([35]) 'Beretning om Granskning af Combus A/S', April 2001; 'Advokatundersogelse om Statens Varetagelse af Ejerskabet til Combus A/S', August 2001; 'Beretning fra Rigsrevisionen, April 2002'.

(221) Danske Busvognmaend considers that the uncertainty as to whether the investment would return a profit was such that it is impossible to apply the principle of the investor in a market economy. It takes the view that the injection of DKK 300 million was made in May 1999 to prevent the undertaking from going bankrupt, which it was about to do (see point 38 of the reply and the citations therein).

(222) Danske Busvognmaend takes the view that the subsequent course of events was not that officially stated by the Transport Minister. From spring 2001 onwards, it was necessary to inject new capital and to cancel debt totalling DKK 240 million. Furthermore, private creditors had to find an arrangement for their loans which amounted to DKK 100 million.

(223) Danske Busvognmaend concludes that no investor in a market economy would have acted like the State had done since the capital could not be expected to be repaid. According to Danske Busvognmaend, a normal private investor would have tried to terminate the loss-making contracts and would have let other undertakings take them over, thus ensuring that Combus remained profitable.

(224) In support of this theory, Danske Busvognmaend points out that, in Case T-157/01, the Court of First Instance considers, in paragraph 94, 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 easily be had 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.

(225) For Danske Busvognmaend, it is therefore clear that a private investor would have considered as carefully as possible whether it could transfer the existing contracts or declare the undertaking bankrupt. No such evaluation took place. A whole series of other operators in the bus transport market would clearly have been interested in taking over the bus routes. In the capital region especially, Combus was penalised because its bid was particularly low, and also because it would have to build the facilities which it did not have at its disposal (garages, etc.). It is conceivable that Arriva would have been interested in taking over contracts which Combus prevented it from obtaining since Arriva had the necessary installations at its disposal (garages, infrastructures, etc.), and could therefore run the transport operations at lower cost.

(226) Danske Busvognmaend considers that certain statements by the Court of Justice of the European Communities suggest that it may be consistent with the principle of the investor in a market economy to provide help for an

undertaking when trying to sell it since having the undertaking file for bankruptcy would cost more. However, for such a measure to be justifiable from the point of view of the investor in a market economy, there has to be documentation in the form of reliable economic figures to show that such a measure will provide better results for the public authorities than winding up or bankruptcy. According to Danske Busvognmaend, the Danish authorities have not provided any documents showing that it would have cost the State more to wind up Combus or declare it to be bankrupt than to keep it alive and sell it the way it was sold. On the contrary, it considers that it would have been more beneficial for the State to wind up Combus or declare it bankrupt. Transferring the contracts to other transport undertakings would have allowed the major losses and substantial debts which ensued to be avoided, and equipment and installations could have been sold to the other party at realistic prices.

4.2.2. RESPECT OF THE 1999 RESTRUCTURING GUIDELINES

(227) Danske Busvognmaend considers that the conditions set out in the 1999 restructuring guidelines are not fulfilled.

One time, last time

(228) Danske Busvognmaend considers the aid measures to constitute two separate aid measures. According to them, neither the Danish government nor Arriva has demonstrated that the aid measures should form two tranches of the same aid. Rather, the present case clearly indicates that Combus was a poorly managed company to the well awareness of the Danish government and that the financial support in 1999 was granted to Combus without a proper evaluation and follow-up, hence the need to grant further financial support in 2001.

Restructuring plan

(229) Danske Busvognmaend considers that no restructuring plan has been provided by the Danish government prior to the first capital injection in 1999. In their view, it is not possible to submit a restructuring plan in arrears ([36]). Danske Busvognmaend opposes in this respect the Commission's position as outlined in recitals 36, 48 and 49 of the decision to initiate the procedure.

Economic viability

(230) Danske Busvognmaend contests that Combus would ever have been profitable and, hence, economically viable as a public enterprise. It considers that the economic viability could only be achieved through the sale to Arriva. It refers in this respect to the Commission's decision to initiate the proceedings and the CFI's stance in the Combus judgment, paragraphs 115 to 116.

Measures to mitigate undue distortions of competition

(231) It is Danske Busvognmaend position that the aid measures granted to Combus did *de facto* distort competition on the market, as they created the opportunity for Arriva to acquire market shares of up to approximately 70 % via the purchase of Combus. Consequently, Arriva came to hold a dominant position on the Danish market. Meanwhile, many bus companies found themselves on the verge of bankruptcy. In Danske Busvognmaend perspective, the Danish government did nothing to avoid distortions of competition; Combus did not renounce from any of its contracts when granted aid in 1999, while the aid measures in 2001 even awarded Arriva a profit. As a consequence, Arriva made a profit when selling a part of Combus to Connex, to the disadvantage of its competitors.

(232) In light of the guidelines and the condition to mitigate as far as possible any undue distortions on competition, Combus should at least have renounced from its contracts. In this respect, Danske Busvognmaend shares the stance of the Commission as outlined in the decision to initiate the procedure, recital 112.

Limitation of aid to the strict minimum

(233) Danske Busvognmaend considers that no consideration of this point at all was taken by the Danish government in relation to the sale of Combus and that there is no certainty that the sale took place at the market price, which would be the best way to ensure that the aid was limited to a minimum.

(234) Danske Busvognmaend considers that the Danish government has clearly recognised that there was no monitoring of the measure whereby the aid granted is limited to the minimum necessary. In this regard, it quotes page 6 of Annex K to the Combus case in which the Danish government states: 'The negotiated capital injection, which Arriva has required in order to take over the shares, is based on a business case which is of course not known to the seller'. In Annex I, page 6, it also states: 'The government finds that the required capital injection by Arriva reflects the present market value of the company, etc.'.

([36]) See case C-17/99 *France* v *Commission* [2001] ECR p. I-2481, paragraph 43.

(235) Danske Busvognmaend believes there are good reasons for seriously doubting whether the aid granted to Combus in conjunction with the sale to Arriva was restricted to the minimum. On the contrary, it takes the view that Arriva got a good deal and refers in this regard to Chapter 8 of its memo of 24 February 2003. It comments that the Danish government should have called in independent experts during the sale, as the Commission often provides for during the divestiture of assets, and that the sale was not on transparent terms, nor were the procedures open to all competitors in a given field.

4.3. *COMMENTS SUBMITTED BY ARRIVA*

(236) The Commission received also comments from Arriva Denmark A/S. These concerned only a factual point, namely the sales price agreed between Arriva and Connex, and are thus outlined in part II of the present decision.

5. REPLY OF THE DANISH GOVERNMENT TO THE COMMENTS SUBMITTED BY DANSKE BUSVOGNMAEND AND ARRIVA

5.1. *THE MARKET ECONOMY INVESTOR PRINCIPLE*

(237) First of all, the Danish government considers that by quoting the passage of the report of the Office of the Auditor General of Denmark out of context, Danske Busvognmaend is giving a distorted impression. According to the Danish government, the quoted passage is from page 47 of the report, under the heading 'Remarks by the Office of the Auditor General of Denmark', and relates to the factual information which formed the basis for the bill presented by the Ministry of Transport to the Parliamentary Finance Committee, which was the legal basis for the capital injection of DKK 300 million being made into Combus.

(238) On page 47, the Office of the Auditor General says of the basis for the bill:

'From the information in the bill, it must be understood that, after factoring in a provision of DKK 65 million in the company's annual accounts for 1998, the impression of Combus' financial situation at the end of 1998 was reasonably accurate and thereby also a reasonable starting point for establishing the company's need for capital. But the Ministry of Transport did not state that the financial information on the basis of which the provision of DKK 65 million was fixed was merely derived from budgets, estimates and planned savings according to the company's board. The Office of the Auditor General of Denmark takes the view that the Ministry of Transport was responsible for assessing the material presented with a view to providing the Minister and the Finance Committee with all relevant information in connection with the bill. The Ministry of Transport should not have introduced a bill on the existing basis. Alternatively, the Ministry should have emphasised, taking into account the need for a quick injection of capital into Combus, that the bill was only based on general budgets and estimates drawn up by the company.'

(239) According to the Danish government, the Office of the Auditor General was not therefore criticising the fact that the Ministry recommended the capital injection of DKK 300 million, but rather the fact that it did not emphasise to the Finance Committee that the bill was based on budgets and estimates drawn up by Combus' board. As an injection of capital was urgently required, the Ministry of Transport had no choice but to recommend the capital injection which was considered necessary to avoid bankruptcy and therefore also necessary if Combus was to be sold.

(240) Secondly, the Danish government points out that the comments by Danske Busvognmaend focus exclusively on the question of the extent to which a private investor would have made a similar capital injection in 1999 based on the expectation that a future profit from Combus *in itself* would give a suitable return on the investment.

(241) However, the Danish government's view on the market economy investor principle is not merely based on the direct return which could reasonably be expected on the State's investment. On the contrary, account must be taken of the latent indirect losses and damaging effects on, amongst other things, future privatisations, which bankruptcy would entail.

(242) Thirdly, the Danish government refutes the assertion that there were buyers interested in acquiring the loss-making contracts. Even if there had been any such buyers, a transfer would merely have meant immediate confirmation of the losses on the contracts and thereby immediate, incalculable financial consequences for Combus.

(243) The Danish government also disagrees that any bus operator would have taken on the loss-making contracts at anything above the contracts' negative value. A sale of the contracts would therefore only have been possible for a negative purchase price. In any case, the sale of individual contracts and/or individual fixed assets or operating assets would not be a more profitable solution than an overall sale. This view is supported by the Office of the Auditor General of Denmark ([37]).

([37]) Page 60.

(244) With reference to paragraph 94 in the Combus judgment, Danske Busvognmaend states that other operators could have taken over Combus' transport contracts at short notice in the event of the company going bankrupt. The Danish government considers that this may be correct, but that this has no bearing on the legal assessment of whether the State acted in accordance with the market economy investor principle. The information may, however, be useful with regard to the question of the extent to which Combus going bankrupt would affect the management of public transport and any disruptions to transport services.

5.2. *RESTRUCTURING AID*

One time, last time aid

(245) With respect to the arguments presented by Danske Busvognmaend, the Danish government states that any reservation regarding the payment of aid on subsequent occasions does not affect whether more than one amount of aid can be regarded as a single aid measure paid out in more than one instalment. On the contrary, the decisive factor in this connection is an overall assessment of whether the individual amounts of aid are connected in time and purpose in such a way that they can be regarded as a single aid measure.

The restructuring plan

(246) The Danish government concedes that no restructuring plan had been submitted to the Commission when the capital injection of DKK 300 million was made, or when agreement was reached with Arriva in November 2000 on the principles of the sale.

(247) However, the Danish government does not share the interpretation Danske Busvognmaend makes of the judgment of the Court of Justice in Case C-17/99, *France* v *Commission*, namely that a restructuring plan cannot be submitted to the Commission any longer, once the Member State has granted the aid.

(248) The Danish government first points out that the 1999 restructuring guidelines contain no rules or instructions on the question of when a restructuring plan has to be submitted to the Commission. The only clear condition is that the Commission cannot approve restructuring aid unless it has previously received a restructuring plan.

(249) The Danish government considers that even in cases where an aid measure is implemented without first notifying the Commission, the Commission must check that the aid satisfies the conditions for approval. This is provided for, inter alia, in Article 13(2) of Regulation (EC) No 659/1999 (hereinafter referred to as 'the Procedural Regulation'). It considers that it is therefore perfectly satisfactory for the Commission to receive a restructuring plan which is approved before the Commission decides whether the State aid is compatible with the common market.

(250) With respect to paragraph 43 in Case C-17/99, *France* v *Commission* ([38]), the Danish government points out that according to paragraph 41, the Commission stated, in the decision which was the subject of the case, that 'the French Government did not submit a credible restructuring plan to the Commission' and '[n]or has any such plan been submitted to the Commission by the French authorities since the proceedings were initiated.'

(251) For the Danish government, it is clear from the wording used by the Commission that it would have been sufficient to satisfy the conditions in the 1999 restructuring guidelines for a restructuring plan to submit a restructuring plan after the initiation of formal proceedings. The decisive factor was therefore not the point in time when the restructuring plan is submitted, but the fact that it is submitted before the Commission reaches its final decision.

(252) The Danish government therefore considers that the restructuring plans of 8 and 23 January 2001 were submitted in time, and that they satisfied the conditions in the 1999 restructuring guidelines.

(253) In its submissions of February and April 2007, the Danish government points out that a financial and an operational restructuring plan have been available when the Danish parliaments' finance committee approved the 1999 capital injection.

Mitigating the adverse effects of the aid

(254) The Danish government considers that Arriva's sale to Connex did not result in a profit which exceeded the expectations and calculations of the Danish government and Arriva at the moment of the sale of Combus to Arriva.

Limiting the aid to a minimum

(255) In response to the claim of Danske Busvognmaend, according to which the sale was not subject to a public tender, the Danish government argues that the sales process was particularly protracted, competitive, non-discriminatory and transparent, and the final price did not differ significantly from the original bid.

([38]) See Case C-17/99, cited above.

(256) In response to the claim that there were no independent checks of the market price, the Danish government points out that the sale had to be approved by the Parliamentary Finance Committee on the basis of financial analyses carried out by the financial adviser to the State, Alfred Berg. The Danish government considers that this constitutes a sufficient check. In the view of the Danish government, the passages from the Annex to the CFI case, cited by Danske Busvognmaend, contain no acknowledgement of any failure to check that the aid was kept to a minimum.

(257) The Danish government furthermore explains that after the sale, three independent investigations have been carried out on the sales price, namely the 'Report on the investigation of Combus A/S', the 'Solicitor's investigation on the State's management of the ownership of Combus A/S' and the 'Report from the Auditor General'.

(258) Against this background the Danish government disagrees that no checks were carried out as to whether the aid was limited to a minimum. The reference to Annexes K and I to the case by Danske Busvognmaend has no bearing whatsoever on the matter of whether the aid was limited to a minimum. However, the quotes clearly show that the sale to Arriva was prepared on the basis of a business case, and that the sales price reflected the market price.

(259) Finally, the Danish government does not consider that using independent auditors would have resulted in a different assessment or in a different sale price for the Combus shares. For the Danish government, the decisive test was the market test.

6. **LEGAL ASSESSMENT OF THE COMMISSION**

6.1. *ASSESSMENT OF THE EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 87(1) EC TREATY*

(260) Article 87(1) EC foresees that, 'save as otherwise provided in the EC Treaty, any aid granted by a Member State or through State resources 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 common market'.

6.1.1. PRELIMINARY QUESTION: DO THE 1999 AND THE 2001 MEASURES CONSTITUTE ONE SINGLE OR TWO SEPARATE MEASURES TO BE ASSESSED UNDER ARTICLE 87(1) EC TREATY?

(261) As described above, Combus received financial support from the Danish government in the form of capital injections (in 1999 and in 2001), of a subordinated loan (in 1999), of the subsequent conversion of the subordinated loan into share capital and of guarantees given to the buyer (in 2001). It is therefore important for the application of Article 87(1) EC treaty to establish whether the financial support granted during the privatisation process in 1999 and 2001 respectively constitutes two tranches of a single measure or two separate measures.

(262) The CFI has in *BP Chemicals* considered the following considerations to be relevant in making such a determination:

— The chronology of the capital injections in question;

— Their purpose;

— The situation of the company at the time when the decision to make an injection was made ([39]).

(263) The Commission, in the light of the observations of the Danish government and third parties, will hereinafter assess whether the criteria established by the CFI in *BP Chemicals* are fulfilled in the present case.

Chronology of the measures

(264) The measures were taken respectively on 27 May 1999 and 15 January 2001. Therefore, approximately 18 months elapsed between the two decisions.

(265) The Danish government argues that in the light of the complexity of the privatisation process, 18 months constitute a reasonably short period of time. It also refers in this context to *BP Chemicals*, where the time between the first and the last tranche of the aid was 22 months.

(266) The Commission is not convinced by the arguments put forward by the Danish government. First of all, there is an important factual difference between the *BP Chemicals* file and the present case. In *BP Chemicals*, the public undertaking *ENI* made three capital injections into *ENIChem*, which took place in 1992, 1993 and 1994. The CFI had to verify whether the Commission had rightly qualified the third capital injection as fulfilling the private investor test, whereas the first two had been qualified as State aid. The CFI found with respect to the chronology of the measures that the third capital injection was already foreseen by a restructuring plan, which had been adopted by the board of *ENI* the same day as the second capital injection, in December 1993. The actual decision to authorise the third capital injection had been taken less than a month later, in January 1994.

([39]) Case T-11/95, cited above, paragraph 171.

(267) In the present case, on the contrary, nothing indicates that the Danish authorities planned in 1999, when they decided the first capital injection, to proceed with a second capital injection at a later stage of the restructuring. On the contrary: the first capital injection had been calculated in a way that it should be sufficient to restore in itself the economic viability of Combus. The second capital injection has been decided more than one year and six months after the first capital injection in December 2000, when it became clear that the first capital injection had not been sufficient.

(268) There are, in conclusion, two important arguments from a chronological point of view for considering that the two capital injections constitute two separate measures:

— The second capital injection has not been foreseen by the Danish authorities at the point in time when they decided to make the first capital injection, whereas this had been the case in *BP Chemicals*;

— The second capital injection was decided one year and six months after the first capital injection, whereas in *BP Chemicals*, there was only one month between the two measures.

Purpose of the measures

(269) The Danish government is of the opinion that the 1999 and the 2001 measures had the same purpose, namely to restructure and to recapitalise Combus in view of its successful privatisation.

(270) The Commission does not share this point of view. The detailed description of the facts above shows that the capital injection in 1999 was decided in order to avoid the imminent bankruptcy of Combus. It did not have as a purpose the privatisation of Combus, but rather had become necessary because the first attempt to privatising Combus had failed.

(271) The second capital injection served the purpose of increasing the capital of Combus to a level where the purchaser, Arriva, was willing to pay a symbolic price for the undertaking.

(272) The Commission recognises that both capital injections have been accompanied by restructuring measures, and that both capital injections have been linked to absorbing the losses generated by the contracts for which Combus had made offers which were too low.

(273) Nevertheless, it takes the view that the primary purpose of the two capital injections was different, namely the prevention of bankruptcy in the first case and the preparation of privatisation in the second case.

Situation of the company at the time of the measures

(274) The situation of Combus at the time of the measures had not significantly changed, as it was experiencing losses, mainly due to the public-service contracts concluded at a price at which it could not produce the services.

Conclusion: The 1999 and the 2001 measures constitute two separate measures

(275) In conclusion, the Commission, having taken the submissions of the parties into consideration, and applying the reasoning of the CFI in *BP Chemicals*, finds that the two tranches of restructuring measures taken in 1999 and 2001 respectively constitute two separate measures for the assessment under Article 87(1) EC treaty. Three main reasons motivate this assessment:

— The 2001 capital injection was not foreseen at the time the 1999 capital injection was decided. On the contrary: the Danish authorities assumed that the 1999 capital injection was sufficient.

— There has been a period of one year and six months between the decision to proceed with the first capital injection and the decision to proceed with the second capital injection.

— The purpose of the first capital injection was to avoid the imminent bankruptcy of Combus, whereas the purpose of the second capital injection was to render the privatisation for a symbolic positive value possible.

(276) Accordingly, they will be analysed as two different measures in the reminder of the legal assessment.

6.1.2. STATE RESOURCES AND SPECIFICITY

(277) Denmark financed both measures from its budget. The measures were thus financed from State resources.

(278) The measures concern one single undertaking, Combus, and are thus specific.

6.1.3. EXISTENCE OF AN ADVANTAGE FOR THE BENEFICIARY UNDERTAKING

(279) In order to be qualified as State aid, the measures must confer an advantage on the firm. In this connection, two questions arise:

(i) The measures do not confer an advantage to Combus if the Danish government behaved as a private investor in a market economy.

(ii) The measures do not confer an advantage for Combus, if they serve only to compensate the company for obligations of public service and respect the four *Altmark* criteria.

Applicability of the Market Economy Investor Principle

(280) The essence of the market economy investor principle was established by the Commission in its Communication to the Member States on the application of Articles 92 and 93 of the EU Treaty and Article 5 of Commission Directive 80/723/EEC concerning public companies in the manufacturing sector, (hereinafter referred to as 'the Communication') ([40]). In addition hereto, judgments by the ECJ and the CFI have given the notion further precision ([41]).

(281) According to these texts and judgments, the Commission shall take into account the genuine possibilities for a beneficiary undertaking to obtain equivalent financial resources by having recourse to the normal capital market. State aid is not involved where it is a question of new capital being contributed in conditions which would be acceptable for a private investor operating under the normal conditions of a market economy ([42]).

(282) Paragraph 35 of the Communication applies to capital injections. It states that aid is present where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return on investment (in dividends or capital gains) cannot be expected within a reasonable timeframe from the capital invested.

(283) Paragraph 39 of the Communication sets out similar criteria for loans stating that where an unsecured loan is given to a company which under normal circumstances would be unable to obtain finance (for example because its prospects of repaying the loan are poor) then the loan effectively equates a grant payment and the Commission would evaluate it as such.

(284) The conduct of the public investor should therefore be compared with the hypothetical conduct of a private investor, such as a private holding company or a private group of undertakings pursuing a structural, global or sectoral policy and attracted by prospects of longer-term profitability ([43]). A capital contribution necessary in order to ensure the survival of an undertaking experiencing temporary difficulties but which, where appropriate, following the implementation of the necessary measures would be in a position to return to profitability does not necessarily constitute aid if a private investor would have made the same analysis.

(285) Accordingly, the Commission needs to assess whether a private investor and owner of a company similar to Combus would have acted as the Danish government did when granting the measures under assessment. If the Commission finds that the Danish government did act in accordance with the market economy investor principle for one or for both of the measures, the measure, respectively the measures, do not constitute State aid within the meaning of Article 87(1) EC.

(286) In recitals 82 to 89 of the decision to initiate the procedure, the Commission raised doubts as to whether a private investor would have acted as the Danish government did in a similar situation.

Assessment of the 1999 measure against the Market Economy Investor Principle

(287) The Danish government argues that the 1999 measure respects the private investor principle. This is also the reason why it had not been notified to the Commission prior to its realisation.

(288) The Commission notes that Denmark has at no point in time presented an economic analysis which would demonstrate that it could reasonably expect on this measure a return on investment comparable to the return on investment a private investor in the bus sector would expect.

(289) The Commission furthermore observes that the financial adviser of the Danish government, Alfred Berg, has expressed both in its memo of November 1998 and in its memo of April 1999 its concern that there was 'no guarantee for a positive return on investment' if Denmark decided to continue its ownership of Combus with a view of restructuring it following a capital injection. Also the bill adopted by the Danish Parliament in May 1999, authorising the capital increase, sets out that it was unlikely that the State would be able to recoup the capital it was about to invest in Combus.

([40]) OJ C 307, 13.11.1993, p. 3. See also the earlier Communication to the Member States from the Commission on 17 September 1984 concerning public authorities holdings in company capital, published in the Bulletin September 1984.

([41]) Case C-482/99 *France* v *Commission* (*Stardust*) [2002] ECR I-4397, paragraph 56. See also the Opinion of Advocate-General Geelhoed in Joined Cases C-328/99 and C-399/00 *Italy and Sim 2 Multimedia* v *Commission* [2003] ECR I-4035.

([42]) Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR I-809, paragraph 17.

([43]) Case C-305/89 *Italy* v *Commission* (Alfa Romeo) [1991] ECR I-1603, paragraph 20.

(290) The Commission concludes that Denmark has not provided convincing evidence that the State could reasonably expect a return on its investment comparable to the return a private investor would have requested.

(291) As regards the 'group assessment' reasoning, in accordance with the jurisprudence cited above (Case 303/88), the Commission does not exclude that the State or public companies may bear the losses of one of their subsidiaries in order to enable it to close down its operations under the best possible conditions, if they can prove that the associated cost they bear is lower than the economic damage they would have suffered in other scenarios. For example, the Commission has applied this reasoning in Case C 53/03, *ABX* ([44]), point 196 to 216, in which the Commission took into account costs supported by activities of the rest of the group which were in direct business link with the ailing subsidiary, and for which the relation between the closure of the subsidiary and the effect on the rest of the group had been actually proven. The Commission considers that this is not the case in the present situation, since the Danish authorities have not proven that the link between the economic activity of Combus and the other economic activities of the State (especially as owner of other companies which have no proven particular connection with Combus) is strong enough to reach such a conclusion. In particular, in the absence of other arguments, the Commission is not convinced that the ratings of other public companies, which are normally based on the merits of each individual company, would have been significantly affected by the fate of Combus.

(292) The Commission is not either convinced by the argument that the bankruptcy of Combus would have damaged the reputation of the State as an investor, or would have unduly endangered its privatisation programme by casting a doubt on the job security of its former civil servants. Indeed, as regards the first point, reasonable investors sometimes come to the conclusion that they have to close down unprofitable activities; as regards the second point, it seems rather contradictory to argue that the State had to pay for civil servants to accept private contracts, and, in addition, still had to keep on bearing the costs of ensuring the permanency of their jobs.

Assessment of the 2001 measure against the Market Economy Investor Principle

(293) With respect to the 2001 measure, the Commission notes that the Danish government, following the receipt of Arriva's initial offer in autumn 2000, carried out an evaluation of the different options available to Denmark with respect to Combus, namely a gradual wind-up over 5 years, a continuation with better contracts for 6 years, a continuation for one year without re-financing of debts, an immediate bankruptcy, and Arriva's offer for sale. The results of this study, set out in table 5 of the present decision, show that the option 'continuation for one year' (positive value of DKK 71 million) was by far the most attractive, followed by the gradual wind up over 5 years (DKK – 331 million) and the continuation with newer better contracts for 6 years (DKK – 315 million). The sale at Arriva's initial offer was valued at DKK – 390 million.

(294) There is no indication that the Danish government did again this evaluation following the improvement of the offer of Arriva. Given that the amount of money invested by the Danish government through the 2001 measure, namely DKK 140 million, coupled with unlimited guarantees and guarantees capped to 58,9 million, is substantially higher than the first option assessed in the study, the Commission considers that the Danish authorities, when deciding the 2001 measures, could not reasonably expect that a private investor would have acted in the same manner.

(295) With respect to the group assessment and the protection of the image of the Danish government, the Commission rejects the arguments for the same reason as for the 1999 measures.

(296) In conclusion, the Commission considers that a private investor would not have acted as the Danish government did with respect to the 2001 measure.

Application of the Altmark jurisprudence

(297) According to the *Altmark* judgment 'public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations' ([45]). In relation hereto, the ECJ has defined four conditions to be fulfilled in order for a public subsidy to constitute 'a compensation for a public service obligation'.

(298) The CFI, however, in its Combus judgment, declared that at least one of these conditions were not fulfilled in the present case, as the factors on the basis of which the restructuring measure had been calculated had not been established prior to the conclusion of the public service contracts in an objective and transparent manner ([46]).

([44]) Commission Decision 2006/947/EC of 7 December 2005 concerning State aid granted by Belgium to ABX Logistics (OJ L 383, 28.12.2006, p. 21).

([45]) *Altmark* Judgment, paragraph 95.

([46]) Combus Judgment, paragraph 98.

(299) Accordingly, the Altmark jurisprudence cannot be applied in relation to the restructuring measure granted by the Danish government to Combus ([47]).

Conclusion: presence of an advantage

(300) Accordingly, both the 1999 and the 2001 measure did confer an economic advantage to Combus.

6.1.4. EFFECT ON INTRA-COMMUNITY TRADE AND COMPETITION

(301) Furthermore, the measure must distort competition and affect trade between Member States to be qualified as aid.

(302) In this respect, it must be observed, first, that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide transport services outside its State of origin may nonetheless have an effect on trade between Member States.

(303) In its *Altmark* judgment, the Court held that '[w]here a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State (see, to that effect, Case 102/87 *France* v *Commission* [1988] ECR I-4067, paragraph 19; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 26; and *Spain* v *Commission*, paragraph 40)' ([48]).

(304) Indeed, several Member States have since 1995 started unilaterally to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin ([49]).

(305) In Denmark, the deregulation of the bus market since 1990 has changed the nature of the provision of bus services from a reserved market to one in which competition between undertakings is possible. Both Danish and other EU companies can compete to provide services tendered by regional and local government authorities. Similar conditions apply in other Member States; Arriva operates for example also in Sweden and the Netherlands.

(306) The liberalisation of the bus market in Denmark and other Member States has been accompanied at the Community level by Directive 92/50/EEC, which obliges Member States to tender out public service bus contracts. In the light of Directive 92/50/EEC, the ECJ, in the *Concordia* case, has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the free movement of services and goods ([50]).

(307) As the bus market is partially liberalised within the Community due to the unilateral decision of several Member States to open up their bus markets, which has been accompanied by the entry into force of Directive 92/50/EEC, competition between the bus market suppliers exists.

(308) Consequently, the restructuring measure may improve the position of Combus and its buyer in relation to its competitors in the EU, thereby affecting both competition between undertakings and trade between Member States.

6.1.5. CONCLUSION: PRESENCE OF STATE AID

(309) The Commission concludes that the restructuring measure constitutes State aid in the meaning of Article 87(1) EC treaty.

6.2. *ASSESSMENT OF THE COMPATIBILITY OF THE AID WITH THE COMMON MARKET*

6.2.1. COMPATIBILITY OF THE AID WITH THE COMMON MARKET

(310) According to Article 87(1) EC State aid is in principle incompatible with the common market. The State aid in the present case could nevertheless be compatible with the common market by virtue of Regulation (EEC) No 1191/69 or Article 87(3)(c) EC, as specified by the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty. No other compatibility provision is applicable in the present case.

6.2.2. COMPATIBILITY OF THE 1999 AND/OR THE 2001 MEASURE BY VIRTUE OF REGULATION (EEC) No 1191/69

(311) The decision to initiate the procedure offers (recitals 90 to 96) a brief description why the restructuring measure granted by the Danish State to Combus cannot be considered compatible with the common market by virtue of Article 73 EC and Regulation (EEC) No 1169/91. Neither the Danish government nor third parties have contested the reasoning of the Commission on this point.

([47]) Combus Judgment, paragraph 99.

([48]) *Altmark* Judgment, paragraph 78.

([49]) *Altmark* Judgment, paragraph 79.

([50]) See, inter alia, Case C-513/99 *Concordia Bus Finland* v *Helsingin kaupunki and HKL-Bussiliikenne*, paragraph 56.

(312) The Commission therefore concludes, for the reasons set out in the decision to initiate the procedure, that the restructuring measure cannot be considered compatible with the common market by virtue of Article 73 EC and Regulation (EEC) No 1169/91.

6.2.3. COMPATIBILITY OF THE 1999 MEASURE BY VIRTUE OF ARTICLE 87(3)(C) EC

(313) Article 87(3)(c) EC foresees that, 'aid to facilitate the development of certain economic activities or of certain economic areas, may be considered to be compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

(314) On the basis of this article, the Commission has adopted guidelines for State aid for rescuing and restructuring firms in difficulty. The Commission adopted its original guidelines on State aid for rescuing and restructuring firms in difficulty in 1994 ([51]). A new version of the guidelines was adopted in 1999 ([52]) followed by the latest version of the guidelines dating from 2004 ([53]).

(315) As regards the ratione temporis application of these guidelines, points 103 and 104 of the 2004 guidelines state, as regards non-notified aid:

'The Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the Treaty on the basis of these Guidelines if some or all of the aid is granted after their publication in the Official Journal of the European Union.'

(316) Points 100 and 101 of the guidelines of 1999 have the same content as the guidelines of 2004.

(317) The 1999 measure granted to Combus constitutes non-notified aid. It was granted prior to the coming into force of the 1999 guidelines. Consequently, the 1994 restructuring guidelines apply to the 1999 measure.

(318) Section 3.2.2 of the 1994 restructuring guidelines sets out the following conditions for authorising restructuring aid:

— Restructuring plan. The restructuring aid must be linked to a viable restructuring/recovery programme submitted in all relevant detail to the Commission.

— Economic viability. The viability of the company must be restored.

— Mitigation of adverse effects on competitors. Measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors.

— Proportionality. The aid must be in proportion to the restructuring costs and benefits.

— Annual report and monitoring. The Member State must provide an annual report on the aid to allow the Commission to monitor that the restructuring plan is being implemented properly.

— One time, last time. Restructuring aid should be granted once only.

Restructuring plan and economic viability

(319) With respect to the restructuring plan, point 3.2.2.A of the 1994 restructuring guidelines set out the following requirements:

'The sine qua non of all restructuring plans is that they must restore the long-term viability and health of the firm within a reasonable time scale and on the basis of realistic assumptions as to its future operating conditions. Consequently, restructuring aid must be linked to a viable restructuring/recovery programme submitted in all relevant detail to the Commission. The plan must restore the firm to competitiveness within a reasonable period. The improvement in viability must mainly result from internal measures contained in the restructuring plan and may only be based on external factors such as price and demand increases over which the company has no great influence, if the market assumptions made are generally acknowledged. Successful restructuring should involve the abandonment of structurally loss-making activities.

To fulfil the viability criterion, the restructuring plan must be considered capable of putting the company into a position of covering all its costs including depreciation and financial charges and generating a minimum return on capital such that, after completing its restructuring, the firm will not require further injections of State aid and will be able to compete in the market place on its own merits.'

([51]) OJ C 368, 23.12.1994, p. 12.
([52]) OJ C 288, 9.10.1999, p. 2.
([53]) OJ C 244, 1.10.2004, p. 2.

(320) In 1999, prior to the capital injection, Kromann and Münter had presented to the Danish government a plan for achieving the financial turn-around of Combus, and the management of Combus had prepared an operational restructuring plan, formalised in a memo from KPMG. As Denmark considered at the time that the decision respected the private investor principle, it did not submit these documents to the Commission.

(321) With respect to the restructuring plan and the economic viability of Combus, two questions have arisen in the course of the procedure:

— Danske Busvognmaend considers that no restructuring plan was available when the capital injection of 1999 was made. Further to this, Danske Busvognmaend claims that a restructuring plan cannot be drawn up in arrears,

— Are the conditions set out for a restructuring plan in the 1994 guidelines fulfilled?

Time of availability of the restructuring plan

(322) The Commission considers that with respect to the time of the availability of the restructuring plan, it is necessary to distinguish between the material existence of the plan and its submission to the Commission.

(323) Material existence of the restructuring plan. The ECJ has decided in *France* v *Commission* that the authorities of the Member State granting the restructuring aid have to possess, 'when the disputed aid was granted, a restructuring plan meeting the requirements [of the Rescue and Restructuring guidelines]' ([54]). For the present case, this means that Denmark needed to have in its possession a restructuring plan meeting the requirements of the 1994 restructuring guidelines the latest when the first capital injection in 1999 was made.

(324) As described above, the capital injection in 1999 was based on a calculation of the capital needs of Combus and a restructuring plan, which had been drawn up by the law firm Kromann and Münter and the management of Combus. The restructuring plan foresaw that Combus would return to economic viability in 2001, if a capital injection of DKK 300 million took place and the management of the company would implement the foreseen restructuring measures. The restructuring plan formed the basis on which the Danish ministry for transport prepared the confidential bill of 27 may 1999, which approved the capital injection.

(325) The Commission concludes that the restructuring aid to Combus was granted only after a restructuring plan was available to the Danish government. This leaves the question open as to whether this restructuring plan meets the requirements of the 1994 restructuring guidelines.

(326) Submission of the restructuring plan to the Commission. The Commission has, as rightly pointed out by the Danish government, in its submission to the ECJ in *France* v *Commission*, stated that 'the French Government did not submit a credible restructuring plan to the Commission' and '[n]or has any such plan been submitted to the Commission by the French authorities since the proceedings were initiated' ([55]). It results from this statement, which has not been contradicted by the Court, that the restructuring plan needs to be available to the Commission at the latest at the date the Commission takes its decision.

(327) In the present case, the Danish authorities have submitted to the Commission in April 2007 a total of four notes dated 26 April 1999, 15 May 1999, and twice 18 May 1999. Three of the notes have been written by Kromann and Münter, one by KPMG. The Danish authorities consider that the three notes of Kromann and Münter constitute the financial restructuring plan, and the note of KPMG the operational restructuring plan.

Restructuring plan meeting the requirements of the 1994 guidelines

(328) The Danish government has submitted to the Commission that the four memos of Kromann and Münter and KPMG constitute a restructuring plan meeting the requirements of the 1994 guidelines.

(329) The Commission notes that the memo of KPMG merely restates the intentions of the board and the management of Combus, as they had been decided in November 1998 and April 1999. KPMG points out that they did not perform a budget examination, but worked on the assumptions made by Combus. In other words, KPMG had not verified whether the assumptions on which its work was based were realistic. Therefore, the Commission considers that the restructuring plan does not fulfil the criterion 'based on realistic assumptions', because the Danish government never verified whether the assumptions were realistic.

([54]) See case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 46.

([55]) Case C-17/99 *France* v *Commission* [ECR] 2001, I-2481, paragraph 41.

(330) Furthermore, the Commission notes that the KPMG memo only analyses some of Combus' areas of activity, and does so not based on the individual bus contracts, but based on summary assumptions about bus areas. The restructuring plan is hence incomplete, because it covers only part of Combus' activities, and not detailed enough, as it is not based on the individual contracts, which form the basis of Combus' business.

(331) Finally, the Commission notes that the proposed restructuring measures are neither broken down by bus area, nor are individual saving targets allocated to the individual restructuring measure. In addition, the accountants did not verify whether the cost savings expected by the management were realistic.

(332) The three documents concerning the financial restructuring do not address the operational restructuring at all. Hence, they cannot remedy the missing parts of the KPMG memo.

(333) In view of these elements, the Commission concludes that the four documents presented by Denmark as restructuring plan do not meet the conditions set out in the 1994 guidelines for a restructuring plan.

Conclusion on the 1999 measure

(334) The existence of a restructuring plan meeting the requirements of the guidelines is a condition *sine qua non* for the approval of a restructuring aid. Hence, and without examining the other criteria, the Commission concludes that the 1999 measure cannot be authorised based on the 1994 restructuring guidelines.

6.2.4. COMPATIBILITY OF THE 2001 MEASURE BY VIRTUE OF ARTICLE 87(3)(C) EC

(335) Article 87(3)(c) EC foresees that, 'aid to facilitate the development of certain economic activities or of certain economic areas, may be considered to be compatible with the common market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

(336) On the basis of this article, the Commission has adopted guidelines for State aid for rescuing and restructuring firms in difficulty. The Commission adopted its original guidelines on State aid for rescuing and restructuring firms in difficulty in 1994 ([56]). A new version of the guidelines was adopted in 1999 ([57]) followed by the latest version of the guidelines dating from 2004 ([58]).

([56]) See note 51.
([57]) See note 52.
([58]) See note 53.

(337) As regards the ratione temporis application of these guidelines, points 103 and 104 of the 2004 guidelines state, as regards notified aid:

'Notifications registered by the Commission prior to 10 October 2004 will be examined in the light of the criteria in force at the time of notification.'

(338) Points 100 and 101 of the guidelines of 1999 have the same content as the guidelines of 2004.

(339) The 2001 measure granted to Combus constitutes notified aid. It was notified prior to the coming into force of the 2004 guidelines and after the entry into force of the 1999 guidelines. Consequently, the 1999 restructuring guidelines apply to the 2001 measure.

(340) Section 3.2 of the 1999 restructuring guidelines sets out the following conditions for authorising restructuring aid:

— The company must qualify as a company in difficulty within the meaning of the Guidelines.

— The viability of the company must be restored. Therefore, the granting of the aid is conditional on implementation of the restructuring plan which must be endorsed by the Commission. The company must fully implement the restructuring plan.

— Measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors.

— The aid must be limited to the minimum and a significant contribution is expected from the beneficiary.

— The Member State must provide an annual report on the aid to allow the Commission to monitor that the restructuring plan is being implemented properly.

— Restructuring aid should be granted once only.

Combus as a firm in difficulty

(341) The Commission has established in its decision to initiate the procedure that Combus was a firm in difficulty in the sense of the 1999 restructuring guidelines. Neither the Danish government nor Danske Busvognmaend has contested this finding. Accordingly, the Commission concludes that Combus was a firm in difficulty.

Restructuring plan and restoration of long-term viability

(342) The grant of restructuring aid is conditional on implementation of the *restructuring plan* which must be endorsed by the Commission in the case of all individual aid measures. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State commits itself ([59]).

(343) In particular, the restructuring plan must include:

— a market survey,

— a description of the circumstances that led to the company's difficulties, thereby providing a basis for assessing whether the proposed measures are appropriate. It must enable the firm to progress towards a new structure that offers it prospects for long-term viability and enables it to stand on its own feet,

— a description for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges. The expected return on capital must be enough to enable the restructured firm to compete in the marketplace on its own merits.

(344) The Danish government has transmitted the restructuring plan for Combus on 8 and 23 January 2001 to the Commission (see detailed description in part II).

(345) With respect to the 2001 restructuring plan and the economic viability of Combus, the Commission had raised in its decision to open the procedure doubts as to the economic viability of Combus.

(346) Points 31 to 34 of the 1999 restructuring guidelines set out in this respect that the restructuring plan 'must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions' and further that '[t]he improvement in viability must derive mainly from internal measures contained in the restructuring plan and may be based on external factors such as variations in prices and demand over which the company has no great influence if the market assumptions made are generally acknowledged'. Restructuring must involve 'the abandonment of activities which would remain structurally loss-making even after restructuring'.

([59]) Points 31 and 32 of the Guidelines.

(347) Danske Busvognmaend considers in its submission that Combus was not economically viable as a public company, but only after its sale to Arriva.

(348) In its Combus judgment, the CFI found that 'the Commission's reasoning must be considered as expressing serious doubt as to Combus's viability for the purposes of that article [i.e. article 87 EC treaty] and the Guidelines, a doubt which the Commission did not, however, believe it was bound to clarify since article 73 EC seemed to be a sufficient legal basis for the authorisation of the aid in question. Since that latter provision may not be so relied on (…), the payment of DKK 300 million is no longer validly authorised in the contested decision. (…) Consequently, Combus's viability cannot in any manner be considered as established ([60]).'

(349) These doubts, which the Commission has set out in its decision to initiate the procedure (recitals 106 to 109), related to the fact that the Commission had not established the economic viability of Combus without the part of the State aid which the Commission had authorised, in its initial decision, as public service compensation. As the CFI ruled that this aid could not be authorised as public service compensation, it concluded that the economic viability of Combus was no longer established in the initial decision of the Commission.

(350) As the Danish government points rightly out, the CFI has not carried out an economic analysis of the restructuring plan in order to annul the Commission's initial decision. On the contrary, the reasoning is formal and logical: as the Commission in its initial decision had concluded on the issue of the economic viability on the basis of the part of the aid that it had authorised based on Article 73 EC Treaty (DKK 328 million) as a compensation for public service contracts, and as the CFI had found that this aid could not be authorised on this legal basis, it concluded that the payment of this part of the aid was no longer validly authorised and therefore that the reasoning leading to the conclusion of economic viability was logically deprived of its basis.

(351) Indeed, in its initial decision, the Commission had considered that DKK 328 million out of the DKK 490 million constituted compensation for public service obligations, and only DKK 162 million restructuring aid ([61]). Based on this assessment, the Commission concluded:

([60]) Combus Judgment, paragraphs 114 and 115.

([61]) See Table 7 in the initial decision; as explained above, these figures are expressed in 2001 net present value, rather than real terms.

'Taking into account the restructuring measures and the state aid already discussed under Regulation 1191/69, it could be considered that Combus returns to viability. Nevertheless this viability is not, strictly speaking, compliant with the guidelines because it depends on other state aid.'

(352) In the present decision, the Commission assesses the 1999 and the 2001 measures as two separate measures. The 1999 measure, a capital increase of DKK 200 million and a subordinated loan of DKK 100 million, have been found in the previous section as being unlawful and incompatible State aid, which has to be recovered from Combus. Hence, Combus could not rely on this money for demonstrating the restoration of its economic viability.

(353) Even if the total aid ([62]), foreseen by the 1999 and the 2001 measures together, might have allowed that Combus returns to viability as of 2006 (see forecast of turnover and profits in table 7 above), the return to viability becomes unrealistic if Combus has to repay DKK 300 million to the Danish government, because they constitute illegal and incompatible State aid.

(354) The Commission concludes that even if Combus could be expected to return to economic viability by 2006, based on the restructuring plan presented in 2001, this was no longer realistic once the 1999 measures constituted illegal and incompatible State aid.

(355) The Commission concludes that the restructuring plan does not ensure the economic viability of Combus, because it is based on the incorrect assumption that Combus does not have to pay back to the Danish government the illegal and incompatible State aid it received in 1999.

Avoidance of undue distortions of competition

(356) Point 35 to 39 of the 1999 restructuring guidelines set out the following conditions:

'(c) *Avoidance of undue distortions of competition*

(35) Measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. Otherwise, the aid should be regarded as "contrary to the common interest" and therefore incompatible with the common market.

(36) This condition usually takes the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period.

[…]

(37) The compulsory limitation or reduction of the company's presence on the relevant market(s) represents a compensatory factor in favour of its competitors. It should be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets. The Commission will determine the extent of the limitation or reduction on the basis of the market survey attached to there structuring plan and, where the procedure has been initiated, on the basis of information supplied by interested parties. The reduction in the firm's presence is to be put into effect through the restructuring plan and any conditions attached thereto.

[…]

(39) Compensatory measures can take different forms according to whether or not the firm is operating in a market where there is excess capacity. […] Where […] there is no Community-wide or EEA-wide structural excess of production capacity in a market served by the recipient, the Commission will nevertheless examine whether compensatory measures should be required. Where any such compensatory measures involve a reduction in the capacity of the firm concerned, the necessary reduction could be achieved through the hiving-off of assets or subsidiaries. The Commission will have to examine the compensatory measures proposed by the Member State concerned, whatever form they take, and determine whether they are sufficient in scope to mitigate the potentially distortive effects of the aid on competition. In examining the necessary compensatory measures, the Commission will take account of the state of the market, and in particular its level of growth and the extent to which demand is met.'

(357) In its decision to initiate the procedure (recitals 110 to 115), the Commission raised doubts as to whether the particular circumstances of the case warrant not taking any measures to mitigate any adverse effects of the aid on competitors.

(358) In particular, the Commission envisaged the possibility that Combus put part of its public service contracts on the market. Combus' public service contracts expired gradually. Indeed, by the end of 2003, approximately 50 % of the contracts, measured in terms of contract value, were scheduled to expire. The last contract expired in 2006.

([62]) See Table 7 in the initial decision; as explained above, these figures are expressed in 2001 net present value, rather than real terms.

(359) The Commission underlined in its decision to initiate the procedure (recital 113) that it is important to assess possible undue effects on competition *ex tunc*, i.e. at the moment of the granting of the restructuring aid.

(360) In this respect, the Commission has argued that Combus could have terminated its public service contracts pursuant to Article 14(4) of Regulation (EEC) No 1191/69, and that this might have constituted an appropriate compensatory measure.

(361) Denmark denies, in its reply to the opening letter, that this possibility existed. Indeed, Article 14(4) states:

'Any undertaking which intends to discontinue or make substantial modifications to a transport service which it provides to the public on a continuous and regular basis and which is not covered by the contract system or the public service obligation shall notify the competent authorities of the Member State thereof at least three months in advance. The competent authorities may decide to waive such notification. This provision shall not affect other national procedures applicable as regards entitlement to terminate or modify transport services' ([63]).

(362) Hence, according to Article 14(4), a transport service may be terminated only if the transport service is not covered by the contract system or the imposed public service obligation system. It is clear from the facts of the present case that Combus' contracts were covered by the contract system ([64]). Had Combus terminated its public service contracts unilaterally, it would have faced civil liability suits from the municipal and regional authorities, with which these contracts had been concluded.

(363) The Commission concludes that the Danish government's argument that Combus could not terminate its contracts pursuant to Article 14(4) is valid.

(364) Nevertheless, the Commission observes that it was obviously possible for Combus to sell public service contracts, as Arriva sold approximately 50 % of the contracts to Connex only a few months after acquiring Combus.

(365) At the moment of granting the restructuring aid, Combus has not been obliged by the Danish government to cede a single public service contract, but could keep all its contracts. It results from the memos prepared by the financial adviser to the Danish government, Alfred Berg, that this has been done on purpose, as it was expected that the sale *en bloc* would trigger a higher sales price.

(366) For the assessment of the file, it is without any relevance that Combus has been effectively split in two through the sale of 50 % of its assets to Connex in May 2001. For the reasons already explained in the decision to open the investigative procedure, this split cannot be seen as such as a sufficient compensatory measure ([65]), as Arriva was not legally obliged under the terms of the sales contract to sell part of its assets. In addition, the Commission notes that the sale did not take place through an open, transparent and fair procedure, but through exclusive negotiations between Arriva and Connex.

(367) The Commission concludes that Denmark has not taken any compensatory measures to avoid undue distortions of competition, and this despite the fact that at least one possibility for such measures existed, namely the sale of a certain share of the public service contracts of Combus to competitors through an open, transparent and fair procedure.

(368) In the light of the important market share that both Combus and Arriva held on the Danish bus market at the time of the sale of Combus, the Commission considers that the complete absence of compensatory measures has created undue distortions of competitions on the Danish bus market. Hence, the Commission considers that the 2001 measure does not fulfil the conditions set out in points 35 to 39 of the 1999 restructuring guidelines.

Conclusion: Incompatibility of the 2001 measures

(369) The Commission concludes that the 2001 measures fail to meet at least two of the conditions set out in the 1999 restructuring guidelines, namely the condition 'economic viability' and the condition 'avoidance of undue distortions of competition'.

(370) It is hence not necessary to analyse the remaining conditions for concluding that the 2001 measures are incompatible with the common market.

6.3. *CONCLUSION: THE 1999 AND THE 2001 MEASURE CONSTITUTE INCOMPATIBLE STATE AID*

(371) The Commission considers that the 1999 measure and the 2001 measure implemented by Denmark in favour of Combus are not compatible with the common market under any provision of the Treaty.

([63]) Underline added by the Commission.

([64]) Combus Judgment, paragraph 78 *et seq.*, notably paragraph 88.

([65]) See recital 110 of the opening decision.

7. **RECOVERY**

(372) Article 14 of Regulation (EEC) No 659/1999 stipulates:

> 'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.'

(373) Hence, it has to be verified whether recovery in the present case would be contrary to a general principle of Community law. In the present case, the question arises as to whether the initial decision of the Commission, which authorised the 1999 and the 2001 measure, might have created legitimate expectations for Combus.

(374) In its Decision 2005/786/EC of 2 March 2005 on the State aid implemented by Germany for *Chemische Werke Piesteritz* ([66]), the Commission decided that where a positive Commission decision is challenged within the prescribed time-limits and annulled by the CFI, the general principles of Community law, and in particular the principles of legal certainty and protection of legitimate expectations, do not preclude recovery.

(375) To conclude otherwise would render ineffective the review conducted by the Community courts in accordance with Article 220, the first paragraph of Article 230 and Article 233 of the EC Treaty of the legality of measures adopted by the Community institutions.

(376) The unlawful and incompatible aid must be recovered from the undertakings that actually benefited from it ([67]). In the present case, one beneficiary of the aid was clearly Combus, which continues to exist.

(377) The question then arises whether the recovery needs to be extended to other undertakings. In the present case, the shares of Combus have been sold to Arriva Denmark A/S, and Combus became a 100 % subsidiary of Arriva Denmark A/S.

(378) Subsequent to that transaction, Combus has sold all the assets and liabilities on its books to another 100 % subsidiary of Arriva Denmark A/S, namely Arriva Scandinavia A/S, in exchange of one share in Arriva Scandinavia with a nominal value of DKK 1 000. Subsequent to this transaction, Arriva Scandinavia A/S has sold approximately 50 % of Combus' assets to Connex.

([66]) OJ L 296, 12.11.2005, p. 19.

([67]) Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 57, and Case C-277/00, *Germany* v *Commission* [2004] ECR I-3925, paragraph 75.

(379) The granting of the unlawful and incompatible aid has hence been followed by a share deal and then two subsequent asset deals. The following paragraphs set out the impact of deals on the recovery of the aid.

7.1. *SHARE DEAL BETWEEN ARRIVA DENMARK A/S AND THE DANISH STATE*

(380) The European Courts have given some guidance on the conditions under which the recovery obligation must be extended to companies other than the original beneficiary of the unlawful and incompatible aid. As regards transfer of shares of a company that has to reimburse an illegal and incompatible aid (share deals), the ECJ held that the sale of shares in such a company to a third party does not affect the obligation of the beneficiary to reimburse such aid ([68]). When it can be established that the buyer of the shares paid the prevailing market price for the shares of that company, it cannot be regarded as having benefited from an advantage that could constitute a State aid ([69]).

(381) In the present case, the sale of Combus to Arriva Denmark A/S constituted such a share deal. Therefore, the question arises as to whether Arriva Denmark A/S paid the market price for Combus.

(382) In this context, the Commission first of all notes that the sale was preceded by a transparent, open and non-discriminatory public tender, and Arriva Denmark A/S had submitted the best offer. This constitutes a first strong indication that Arriva Denmark A/S has indeed paid the market price for Combus.

(383) In addition, the Commission has asked an independent financial expert, Ecorys Netherlands BV (hereinafter: Ecorys), to assess the financial value of Combus at the time of the sale to Arriva Denmark A/S. Ecorys Netherlands BV has cooperated on this assignment with Cowi A/S, an independent Danish transportation consultancy.

(384) The valuation report for Combus drawn up by Ecorys is based on the discounted cash flow method, a standard practice for valuing companies. The value of Combus has been assessed as of 1 January 2001, based on the information available at the time to the buyer, that is Arriva Denmark A/S. The information includes in particular the due diligence reports established for Arriva Denmark A/S and the material that had been available in the data room during due diligence.

(385) Ecorys has established three scenarios: a low case, a base case and a high case. These scenarios are defined as follows:

([68]) Case C-328/99 and C-399/00, cited above, paragraph 83.

([69]) Case C-277/00, cited above, paragraph 80.

'In the Base Case scenario it is assumed that the turnover level of Combus will remain stable, the operational efficiency will improve slightly with one percent per year and investments will be made for replacement of over aged buses (8 year for city buses, 12 year others). Banks are willing to finance 50 percent of the funding needs

In the Low Case scenario the market size remains stable, but Combus will fail to win new tenders and Turnover will decline. As a result, no new investments are required as redundant buses will replace the over aged ones. It is furthermore assumed that banks are only willing to finance 25 percent of the funding needs.

In the High Case scenario it is assumed that debt providers are willing to write off DKK 340 mln at the transaction date. The market size will temporarily increase due to the tendering of contract in the Aarhus and Odense region and as the market share of Combus will remain stable, the turnover will slightly increase with one percent per year. Combus will be able to improve operational performance indicators up to industry standards, resulting in an increase of operational efficiency and a reduction of costs. Investments are needed to replace over aged buses and for the expansion of the bus fleet. Banks are willing to fund 50 percent of funding needs.'

(386) Ecorys distinguishes in its valuation report between the firm value and the equity value of Combus. The firm value is defined as the value of Combus as a company under the assumption of efficient financing (in line with comparable companies). The equity value corresponds to the value of Combus' shares, given the actual financing. Ecorys concludes with respect to the firm value:

'The analysis illustrates that the value as per January 2001 of Combus as a company is between DKK 567 mln negative [low case] and DKK 1 297 mln positive [high case], with a most likely value of DKK 426 mln [base case].

This indicates that Combus as a company is in itself viable under the assumption of efficient financing (in line with comparable companies), though certain conditions have to be met in order to achieve its expected return. These conditions are:

1. Combus has to maintain at least a comparable turnover level-a not unrealistic condition in view of its status at the time of being a market leader. Preferably its individual contracts should be profitable, though this is not a prerequisite as the key principle for profit optimisation is whether the marginal revenues exceed the marginal costs. The profitability of a contract needs to be assessed from this economic principle. This analysis is beyond the scope of the underlying study.

2. A second condition to be met is that Combus needs to improve its operating efficiency and bring it more in line with industry standards. Again, this not an unrealistic condition in view of the recent change in the status of its employees enhancing the operational flexibility and enabling cost reductions.'

(387) With respect to the equity value, Ecorys concludes:

'The value of the shares of Combus at the time [i.e. on 1 January 2001] was in the range of DKK 845 negative [low case] and 140 mln positive [high case], with a most likely value of DKK 543 mln negative [base case].

The main reason for the equity value being significantly less than the firm value is that the firm value assumes efficient financing. However, the rapid growth of Combus' business was highly inefficiently financed, namely largely through debt, leading to a gearing which is far from comparable to industry standards.'

(388) Arriva Denmark A/S acquired Combus at a negative purchase price of DKK 340 million. Hence, it accepted to pay a price that was DKK 203 million above the most likely value. Ecorys speculates about the motivation of Arriva, and observes:

'Apparently, Arriva was convinced it would be able to achieve the operational performance improvements and maintain the turnover level, even beyond the most likely value of DKK 534 mln negative as assessed in this study. Most likely Arriva expected possible synergy gains which have not been assessed in this study.'

(389) In view of the above, the Commission concludes that the buyer of the shares of Combus, Arriva Denmark A/S, paid at least the prevailing market price for the shares. Accordingly, it cannot be regarded as having benefited from an advantage that could constitute a State aid.

7.2. *ASSET DEAL BETWEEN COMBUS AND ARRIVA SCANDINAVIA A/S*

(390) The ECJ considers that the recovery order can be extended to a third undertaking, if this undertaking has been set up to circumvent the recovery order ([70]). Typical cases of circumvention are cases where the transfer does not reflect any economic logic other than the invalidation of the recovery order ([71]). As the ECJ points out, 'such is the case

([70]) Case C-277/00, cited above, point 86.

([71]) Case C-415/03 *Commission* v *Greece* ('*Olympic Airways*') [2005] ECR I-3875 and Joined cases C-328/99 and C-399/00, cited above, paragraph 69.

when, following a Commission investigation or decision, the assets and liabilities of the firm as an ongoing concern are transferred to another firm controlled by the same persons at below-market prices or by way of procedures that lack transparency. The purpose of such a transaction can be to place the assets out of reach of the Commission decision and to continue the economic activity in question indefinitely' ([72]).

(391) If the Commission finds that an asset deal has the purpose of circumventing State aid recovery, it has to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms. The analysis of the existence of a circumvention of the obligation to recover such aid is based on a set of objective criteria, including the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets, etc.), the transfer price, the identity of the shareholders or owners of the acquiring firm and of the original firm, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and, lastly, the economic logic of the transaction ([73]).

(392) This has been confirmed by the CFI in a judgment delivered on 1 July 2009 in Case T-291/06 *Operator ARP* v *Commission* ([74]) in which it is stated that the widening of the group of entities required to repay the aid can be justified only if the transfer of assets leads to the risk of circumvention of the effects of the recovery order, and in particular if, as a result of the takeover of assets, the original beneficiary of the aid is left like an 'empty shell' from which it is not possible to secure repayment of the unlawful aid.

(393) In its notice 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' ([75]), the Commission stated that as long as the aid has not been fully recovered, the Member State concerned should oppose any transfer of assets that is not carried out on market terms and/or that is organised so as to circumvent the recovery decision.

([72]) Joined Cases C-328/99 and C-399/00, cited above, point 69.

([73]) Commission Decision 2000/536/EC of 2 June 1999 concerning State aid granted to Seleco SpA (OJ L 227, 7.9.2000, p. 24, recitals 116 and 117). See, in that sense, as regards the control by the CFI of the application of those criteria by the Commission, Case T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179.

([74]) Not yet reported.

([75]) OJ C 272, 15.11.2007, p. 4.

(394) It is therefore necessary to verify, applying these criteria, whether the asset deal between Combus and Arriva Scandinavia A/S had the purpose of circumventing State aid recovery.

(395) The Commission notes that all assets and liabilities were transferred as an on-going concern and that the transfer took place between two companies controlled by the same mother company, Arriva Denmark. In addition, the transfer took place 9 days after the share deal between the Danish State and Arriva Denmark A/S.

(396) Although those indicia are of relevance in the context at hand, the Commission notes that at the time this transaction occurred, the Commission had adopted a decision not to raise objections concerning the notified measures.

(397) Therefore, at that time, any recovery decision by the Commission was purely hypothetical.

(398) Moreover, Arriva had on its books no provisions in regard of possible State aid recovery claims, and that neither the share agreement between the Danish government and Arriva Denmark, nor the sales contract for the asset deal between Combus and Arriva Scandinavia mention possible State aid recovery claims, whereas they do list in exhaustive manner all other litigation-related risks.

(399) Finally, it has to be noted that at the moment the capital injections were granted to Combus, it was already considered that integrating Combus into another undertaking present in the market was the best way of introducing cost-reductions and efficiency-promoting measures which could not be implemented by Combus on its own. Full implementation of the restructuring plan presented to the Commission at the time of the notification of the second tranche of the capital injection, based, inter alia, on increased efficiency and reduced costs, was possible principally because of the integration of Combus activities into Arriva's business, which given in addition the nature of the business in question (network industries) and the economies of scale possible was rational from Arriva's perspective. This explains why the asset deal took place little after the share deal.

(400) In the light of the above, taken into account the very specific circumstances of the case, the Commission therefore considers that there is insufficient indication to form the view that the purpose of the asset deal was to circumvent a recovery order.

(401) This conclusion is strengthened by the fact that at the time the sale agreements were concluded the Commission was consulted by the Danish authorities on their intention to introduce a liability clause according to which the Danish government was to guarantee Arriva for possible claims

from public institutions regarding Combus (e.g. competition authorities and the EU Commission). The Danish authorities were however advised to wait for the adoption of a final decision before proceeding with the sale proceedings in question ([76]).

(402) As a consequence, the Commission considers that there is no reason to extend the recovery order to Arriva Scandinavia.

7.3. *ASSET DEAL BETWEEN ARRIVA SCANDINAVIA A/S AND CONNEX*

(403) The Commission also has no indication that the price paid by Connex to Arriva Scandinavia for the assets was below the market price. This price, which has been agreed between two privately owned undertakings on the marketplace, can be presumed to correspond to the market price. Hence, there is no reason to extend the recovery obligation to Connex.

(404) As a conclusion, the Commission considers that the unlawful and incompatible aid must be recovered from Combus,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which the Kingdom of Denmark has implemented in 1999 and 2001, in the form of capital increase, subordinated loan and guarantees, is incompatible with the common market.

Article 2

1. The Kingdom of Denmark shall take all necessary measures to recover from Combus the aid referred to in Article 1 and unlawfully made available to the latter.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([77]) and to Commission Regulation (EC) No 271/2008 ([78]) amending Regulation (EC) No 794/2004.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. The Kingdom of Denmark shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, the Kingdom of Denmark shall submit the following information to the Commission:

(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. The Kingdom of Denmark shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 13 July 2009.

For the Commission
Antonio TAJANI
Vice-President

([76]) Since the entry into force of the Commission recovery notice of 2007 (cited above), such a case cannot arise anymore. Indeed, it is stated in the latter that 'in the event of a privatisation of a company that received State aid declared compatible by the Commission, the Member State can introduce a liability clause in the privatisation agreement to protect the buyer of the company against the risk that the initial Commission decision approving the aid would be overturned by the Community Courts and replaced by a Commission decision ordering the recovery of that aid from the beneficiary. Such a clause could provide for an adjustment of the price paid by the buyer for the privatised company to take due account of the new recovery liability.'

([77]) OJ L 140, 30.4.2004, p. 1.
([78]) OJ L 82, 25.3.2008, p. 1.