

Brussels, 27 June 2024  
Case No: 92206  
Document No: 1457796  
Decision No 094/24/COL

Ministry of Trade, Industry and Fisheries  
P.O. Box 8090 Dep 0032 Oslo  
Norway

**Subject: Norway's participation in the restructuring of SAS**

## 1 Summary

- (1) The EFTA Surveillance Authority ("ESA") wishes to inform Norway that, having assessed the write-off of an unsecured claim held by Norway against entities within the Scandinavian Airlines Group ("SAS") in return for shareholding and cash ("the Measure"), it considers that the Measure does not constitute State aid<sup>1</sup> within the meaning of Article 61(1) of the EEA Agreement. ESA has based its decision on the following considerations.

## 2 Procedure

- (2) The Norwegian authorities notified the Measure on 21 May 2024<sup>2</sup> and sent an updated notification on 26 June 2024<sup>3</sup>. In their view, the Measure adheres to the Market Economy Operator Principle and, therefore, does not constitute State aid. They nevertheless notified the Measure for legal certainty.

## 3 Background

### 3.1 The Norwegian COVID-19 Guarantee Scheme for Airlines

- (3) The COVID-19 outbreak in early 2020 led to drastic travel restrictions and lockdown measures across the world. As a result, airlines experienced a sudden and sharp decline in operations, leading to liquidity shortages and insolvency risk.
- (4) To remedy the serious disturbance in the airline sector, the Norwegian authorities introduced a liquidity support scheme, which provided for guarantees for unsecured loans obtained by airlines from commercial banks ("the Guarantee Scheme").
- (5) ESA approved the Guarantee Scheme by Decision No 029/20/COL of 30 March 2020,<sup>4</sup> based on Article 61(3)(c) of the EEA Agreement and the then-applicable

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<sup>1</sup> Reference is made to Article 4(2) of the Part II of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

<sup>2</sup> Document No 1457766 (notification memorandum), and Annexes 1-8, and clarifications provided following the notification (Documents No 1459314, Document No 1461532 and 1458575).

<sup>3</sup> Document No 1466526.

<sup>4</sup> ESA Decision No [029/20/COL](#) of 30 March 2020 on COVID-19 Guarantee scheme for airlines.

temporary framework for State aid measures to support the economy during the COVID-19 outbreak.<sup>5</sup> The Norwegian authorities later amended and prolonged the scheme, which ESA approved in three separate decisions.<sup>6</sup>

- (6) Under the scheme, airlines operating under a Norwegian Air Operator Certificate could obtain guarantees covering up to 90% of the loan principal provided certain conditions were fulfilled, or 100% in case of 10% commercial contributions.
- (7) The Guarantee Scheme was managed by the Norwegian Export Credit Guarantee Agency (“GIEK”), the predecessor of Export Finance Norway (“Eksfin”),<sup>7</sup> a State financial enterprise under the Norwegian Ministry of Trade, Industry and Fisheries.

### 3.2 The SAS Group

- (8) SAS originated in 1946 as a cooperation on intercontinental traffic between national airlines established in Denmark, Norway and Sweden. The collaboration was formalised as a consortium in February 1951, to manage all traffic operations for the founding airlines (“the SAS Consortium”).
- (9) The SAS Consortium is based on the Consortium Agreement of 8 February 1951, as amended.<sup>8</sup> At present, the SAS Consortium is owned by SAS Danmark A/S, SAS Norge AS, and SAS Sverige AB (collectively, “the SAS Consortium Entities”).
- (10) SAS AB, a Swedish public limited liability company, was created in 2001 as a group holding company. It is currently the parent company of the SAS Consortium Entities, and a number of other subsidiaries located in various countries, dedicated to activities such as aircraft management, cargo operations, ground handling, technical services, etc. SAS AB, the SAS Consortium, the SAS Consortium Entities, and the other subsidiaries will be jointly referred to as “SAS”.
- (11) SAS shares are listed on Nasdaq Stockholm, with secondary listings on the Copenhagen and Oslo stock exchanges. SAS currently has around 7.3 billion listed shares and 218 817 shareholders. Both the Swedish and Danish States hold around 21.8% of the shares. The remaining shares are held by private shareholders. The Norwegian State divested its shareholding in 2018.<sup>9</sup>
- (12) SAS’s main traffic flows are to, from, and within Scandinavia, with main hubs at the Copenhagen Kastrup, Oslo, and Stockholm Arlanda airports. In the fiscal year

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<sup>5</sup> Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 911, 20.3.2020, p. 1, as amended by Commission Communication C(2020) 2215 (OJ C 1121, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 35), and C(2020) 4509 (OJ C 218, 2.7.2020, p. 3). After the adoption of the Initial Decision, the Temporary Framework was amended by Commission Communication C(2020) 7127 (OJ C 3401, 13.10.2020, p. 1), C(2021) 564 (OJ C 34, 1.2.2021, p. 6), C(2021) 8442 (OJ C 473, 24.11.2021, p. 1) and C(2022) 7902 (OJ C 423, 7.11.2022, p. 9).

<sup>6</sup> ESA Decision No [089/20/COL](#) of 10 July 2020 on COVID-19 Amendment and renewal of the guarantee scheme for airlines; ESA Decision No [118/20/COL](#) of 15 October 2020 on COVID-19 Prolongation of guarantee scheme for airlines; and ESA Decision No [136/20/COL](#) of 24 November 2020 on COVID-19 3rd amendment and prolongation of the guarantee scheme for airlines.

<sup>7</sup> For simplicity, ESA refers to Eksfin also when an action is attributable to its predecessor GIEK.

<sup>8</sup> [SAS Consortium Agreement](#) of 8 February 1951 (as amended).

<sup>9</sup> SAS Annual Report. [Fiscal Year 2018](#), page 4.

2023, SAS operated a fleet of 134 aircraft, served 125 destinations, carried around 24 million passengers, and operated over 216,000 flights.<sup>10</sup>

### 3.3 The State Guarantee to SAS AB

- (13) In December 2020, Eksfin issued SAS AB a guarantee (“the SAS Guarantee”), enabling SAS AB to obtain financing from four commercial banks (“the Lenders”).<sup>11</sup>
- (14) As part of issuing the SAS Guarantee, Eksfin entered into airline credit guarantee agreements with each of the Lenders on 17 December 2020 (“the SAS Guarantee Agreements”).<sup>12</sup> Under a separate agreement dated 18 December 2020, the Lenders committed to making available a loan facility to SAS AB (“the Loan”), which Eksfin guaranteed up to NOK 1 500 million (“the Loan Facility Agreement”).<sup>13</sup>
- (15) The SAS Guarantee Agreements are governed by Norwegian law, and any dispute shall be resolved by the Norwegian courts, with the Oslo District Court serving as the court of first instance. The same principles apply to the Loan Facility Agreement. However, under the latter agreement, the Lenders retain the right to initiate proceedings in any court with jurisdiction.
- (16) According to the SAS Guarantee Agreements, the Lenders had the right to call on the guarantee and receive payment from Eksfin should SAS AB not fulfil its payment obligations due under the Loan Facility Agreement. Furthermore, according to the SAS Guarantee Agreements, in case of payment by Eksfin to a lender, the lender was obliged to assign or transfer its rights in respect of such amounts to Eksfin.
- (17) Furthermore, under the Loan Facility Agreement, the SAS Consortium guaranteed SAS AB’s debt. In turn, under the SAS Consortium Agreement, the SAS Consortium Entities were jointly and severally liable for the SAS Consortium’s obligations.<sup>14</sup>

### 3.4 The financial situation of SAS

- (18) The Norwegian authorities consider SAS to have been in good financial health prior to the COVID-19 outbreak. As evidenced by the 2019 annual report, revenues increased throughout the financial year 2019 and it had positive end-of-year earnings before tax.<sup>15</sup> However, with the travel restrictions imposed in early 2020, SAS’s financial situation became precarious.
- (19) In June 2020, SAS launched a business transformation plan to address the financial impact of the pandemic. The plan entailed implementing a broad range of measures to deliver cost improvements of SEK 4 billion by 2022.<sup>16</sup> However, as explained by the Norwegian authorities, the measures were not sufficient to restore the group’s equity position. Therefore, in October 2020, SAS completed a recapitalization initiative, which increased liquidity by SEK 12 billion, decreased liabilities by SEK 2.25 billion, and strengthened the equity by SEK 14.25 billion.<sup>17</sup>

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<sup>10</sup> SAS Annual and Sustainability Report. [Fiscal Year 2023](#), page 147.

<sup>11</sup> Danske Bank A/S; Nordea Bank Abp; Skandinaviska Enskilda Banken AB, and Swedbank AB.

<sup>12</sup> Document No 1458575. The terms of all four guarantee agreements are identical.

<sup>13</sup> Document No 1458575.

<sup>14</sup> The Consortium Agreement, paragraph 2. See footnote 8.

<sup>15</sup> SAS Annual and Sustainability Report. [Fiscal Year 2019](#).

<sup>16</sup> SAS Annual and Sustainability Report. [Fiscal Year 2020](#), page 21.

<sup>17</sup> SAS Annual and Sustainability Report. [Fiscal year 2020](#), page 7.

- (20) While the recapitalization temporarily improved the financial situation, SAS incurred additional losses during the fiscal year 2021, and its equity position gradually deteriorated.<sup>18</sup> In response, SAS launched the “SAS FORWARD” business transformation plan in February 2022, to secure its long-term competitiveness.<sup>19</sup>
- (21) The SAS FORWARD plan entailed implementing further efficiency measures and capital restructuring initiatives. Building on the annual cost reduction target of SEK 4 billion set out in the 2020 plan, the SAS FORWARD plan aimed to reduce annual costs by an additional SEK 3.5 billion by 2026, bringing the total reduction to around SEK 7.5 billion when compared to the 2019 cost base. The measures targeted several business areas and included a new operational model, phasing out less fuel-efficient planes, contract improvements, union negotiations, digitalization, and measures aimed at improving efficiency in relation to external suppliers.
- (22) Given these measures, the financial projections indicated that SAS’ operational profitability (EBIT) would turn positive in the fiscal year 2024, followed by a return to positive net income in the fiscal year 2025. Combined with a de-levering of its capital structure, SAS’ equity position would turn positive in the fiscal year 2024.<sup>20</sup>
- (23) However, the implementation of the plan stalled when negotiations on voluntary arrangements with key stakeholders failed in June 2022. To proceed with the plan, SAS thus initiated a court-supervised reorganization procedure in July 2022 (see section 3.6, below). As described by the Norwegian authorities, through such a procedure, SAS aimed to reach agreements with stakeholders, restructure its debt, reconfigure its aircraft fleet, and emerge with a significant capital injection.

### 3.5 Eksfin’s claim against SAS

- (24) The Norwegian authorities have explained that when negotiations between SAS and stakeholders failed in June 2022, it became evident to Eksfin that a filing for a court-supervised reorganization was imminent. Indeed, shortly thereafter, SAS filed for Chapter 11 of the US Bankruptcy Code (see section 3.6.2 below).
- (25) Filing for such a procedure qualified as an “event of default” under the Loan Facility Agreement,<sup>21</sup> entitling the Lenders to declare the loan immediately due and payable and thereby triggering their right to call on the SAS Guarantee (see paragraph (16)). Realising the imminence of default, Eksfin considered it better to position itself as a creditor instead of a right-of-recourse holder prior to the filing.<sup>22</sup> On 23 June 2022, Eksfin thus acquired the claim from the Lenders.<sup>23</sup>

### 3.6 The SAS Chapter 11 reorganization procedure

#### 3.6.1 The legal framework

- (26) A reorganization procedure under Chapter 11 of the US Bankruptcy Code is a court-supervised process that enables financially distressed businesses to restructure their debts and obligations while continuing operations, aiming to return to viability.

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<sup>18</sup> Figures on equity position and profits are available at [Interim Reports - SAS \(sasgroup.net\)](https://www.sasgroup.net/interim-reports).

<sup>19</sup> SAS Annual and Sustainability Report. [Fiscal Year 2022](#), pages 11-12.

<sup>20</sup> See the Disclosure Statement Exhibit D.

<sup>21</sup> See point 22.6 of the Loan Facility Agreement. Document No 1458575.

<sup>22</sup> See section 3.6.1 as regards the Unsecured Creditors Committee.

<sup>23</sup> On the SAS Guarantee terms. Document No 1458574.

Based on the information submitted by the Norwegian authorities, the main elements of this legal framework are summarized below.<sup>24</sup>

- (27) A Chapter 11 filing triggers an “automatic stay”, whereby all judgments, collection activities, foreclosures, and repossessions are temporarily suspended for claims that arose before the filing. The existing management usually remains in control of the entity as the debtor-in-possession (“DIP”) which may, subject to court approval, obtain interim financing to maintain operations (so-called “DIP financing”).
- (28) During the procedure, the debtor proposes a reorganization plan outlining how it intends to repay creditors, restructure its operations, and return to viability. Together with the plan, the debtor must file a disclosure statement providing adequate information on the debtor's assets, liabilities, and business affairs to allow creditors to make an informed judgment about the reorganization plan.
- (29) Creditors must submit a proof of claim to the court to establish their right to recover the debt owed to them. Interest and claim holders are assigned to groups according to priority, such as secured creditors,<sup>25</sup> unsecured creditors entitled to priority, general unsecured creditors, and equity security holders. The latter two may form committees to represent their interests by negotiating with the debtor and participating in formulating the plan. For example, an Unsecured Creditors' Committee (“UCC”) may be appointed to safeguard the interest of all such creditors.
- (30) In the reorganization plan, claims and interests are assigned to classes for purposes such as voting and distribution. Claims or interests placed in the same class must be substantially similar, i.e., share similar legal characteristics or rights. The order of priority of the classes generally determines who gets paid first and who might not get paid at all if there are insufficient funds. As a result, based on the stipulated recovery under the reorganization plan, the various classes can be unimpaired or impaired. While unimpaired classes receive full recovery of their claim or interest, impaired classes receive only partial or no such recovery.
- (31) Once the reorganization plan has been formulated, it is submitted to creditors and interest holders for a vote. Generally, these have the right to vote to accept or reject a plan. However, fully impaired classes are deemed a priori to *reject* the plan, as their lack of recovery effectively constitutes a rejection. Conversely, unimpaired classes are deemed a priori to *accept* the plan, as their claims or interests are not adversely affected. As a result, only partially impaired classes vote on the plan.
- (32) An entire class of claims is deemed to accept a plan if it is accepted by creditors holding at least two-thirds of the total amount and more than one-half of the number of claims in the class. If all impaired classes accept the plan, the court can confirm the plan. However, even if one or more impaired classes vote against it, the plan can still be confirmed by the court under a so-called “cram-down”, provided that at least one impaired class has accepted it.<sup>26</sup> To confirm a plan through cram-down, the court must, *inter alia*, ensure that the plan (i) does not unfairly discriminate against each impaired, non-accepting class and (ii) is fair and equitable.

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<sup>24</sup> See also information about the Judicial Branch of the U.S. Government, [Chapter 11 - Bankruptcy Basics](#).

<sup>25</sup> Secured creditors are creditors whose claim is secured by specific assets.

<sup>26</sup> Excluding insiders, see section 1129(a)(10) of the US Bankruptcy Code

- (33) Regarding the first criterion, a plan unfairly discriminates if a class of equal priority recovers more under the plan than the non-accepting class without justification. Regarding the second criterion, for a plan to be fair and equitable, the general rule is that no class junior to the non-accepting class can receive recovery unless the non-accepting class is paid in full, and no creditor can recover more than their claim.
- (34) The proposed plan must further meet the “best interests of creditors” test, requiring that each holder of impaired claims or interests must either (i) have accepted the plan or (ii) receive at least as much value under the plan as they would receive if the debtor were liquidated. A reorganization plan therefore typically includes a liquidation analysis to simulate a hypothetical bankruptcy scenario in which all assets are liquidated, and the resulting proceeds are distributed accordingly.
- (35) If the plan satisfies all the requirements of the Bankruptcy Code, including having received the required support from creditors and interest holders, and after having held a confirmation hearing, the court can issue an order confirming the plan.

### 3.6.2 *The SAS Chapter 11 Filing*

- (36) On 5 July 2022, SAS AB and its debtor-subsidaries<sup>27</sup> filed voluntary petitions for relief under Chapter 11 of the US Bankruptcy Code (“Chapter 11”) at the US Bankruptcy Court of the Southern District of New York (“the Bankruptcy Court”).<sup>28</sup> Each entity petitioned separately, but the cases were jointly administered for procedural reasons. The SAS Consortium and the SAS Consortium Entities were, however, substantively consolidated (hereafter “the Consolidated Consortium”).<sup>29</sup>
- (37) On 22 July 2022, the Trustee appointed the official UCC. The members comprised an aircraft manufacturer (Airbus SAS), a representative of the commercial hybrid bondholders (Dr. Malte Daniels), an aircraft leasing company (Jackson Square Aviation Ireland Ltd.) and a food catering supplier (Flying Food Group LLC.) Neither the Danish or Swedish State nor Eksfin was appointed to the UCC.
- (38) In August 2022, SAS secured DIP financing of USD 700 million from Apollo Global Management.<sup>30</sup> This financing, along with operational proceeds, was intended to enable SAS to meet its obligations during the course of the procedure. SAS’ operations and flight schedules were unaffected by the Chapter 11 filing, and its Board of Directors and management continued to manage the affairs.

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<sup>27</sup> These included the SAS Consortium, the SAS Consortium Entities and the following SAS Group companies: Scandinavian Airlines of North America Inc., Gorm Asset Management Ltd., Gorm Dark Blue Ltd., Gorm Deep Blue Ltd., Gorm Sky Blue Ltd., Gorm Warm Red Ltd., Gorm Light Blue Ltd., Gorm Ocean Blue Ltd., and Gorm Engine Management Ltd.

<sup>28</sup> The Court filings and other related documents are available on a separate website administered by SAS’ claims agent, Kroll Restructuring Administration LLC at <https://cases.ra.kroll.com/SAS>.

<sup>29</sup> Substantive consolidation means that (a) all assets of the SAS Consortium Entities are pooled, (b) each claim against any of the SAS Consortium Entities is deemed a claim against, and a single obligation of, the Consolidated SAS Consortium, (c) any joint or several liability of any of the Consortium Entities is one obligation of the Consolidated SAS Consortium and any claim based upon such joint or several liability is treated as one claim against the Consolidated SAS Consortium, and (d) any guarantee of a Consortium Entity of the payment, performance, or collection of an obligation of another Consortium Entity is eliminated and cancelled.

<sup>30</sup> [SAS Secures USD 700 Million in Debtor-in-Possession Financing](#), SAS Press Release, 14 August. On 15 November 2023, SAS refinanced the original DIP loan with a new DIP loan of USD 500 million from Castlelake.

- (39) Eksfin filed an unsecured claim in the Chapter 11 procedure, dated 16 December 2023, for not less than NOK 1 502 637 672.92 (around USD 150 million) against SAS AB, the SAS Consortium and the SAS Consortium Entities (“Eksfin’s Claim”).<sup>31</sup> Whereas SAS AB is the main obligor for Eksfin’s Claim, the SAS Consortium is the guarantor, and the SAS Consortium Entities are jointly and severally liable for the SAS Consortium’s obligations.
- (40) SAS carried out a competitive equity solicitation procedure between 15 May and 25 September 2023 to secure new capital. Within this procedure, the highest or otherwise best bid would be selected, and, in case of multiple equivalent bids, an auction would take place. On 3 October 2023, SAS selected a bidding consortium comprising Castlake, L.P.,<sup>32</sup> Air France-KLM S.A.,<sup>33</sup> and Lind Invest ApS.,<sup>34</sup> together with the Danish State as new investors (“the New Investors”).<sup>35</sup> The Danish State did not participate in the bidding procedure but subscribed to new shares on the same terms, including price, as the non-State New Investors.<sup>36</sup>
- (41) Subsequently, on 4 November 2023, SAS concluded an agreement with the New Investors,<sup>37</sup> which entailed new capital totalling USD 1 175 million, consisting of USD 475 million in unlisted equity and USD 700 million in secured convertible debt. All of SAS’ common shares and other securities would be cancelled and delisted.<sup>38</sup>
- (42) The New Investors also committed to funding up to USD 325 million in distributions to general unsecured creditors, through a combination of USD 250 million in cash and the remaining approximately USD 75 million through equity in the reorganised SAS AB, representing around 13.6% of the new unlisted shares.

**Table 1:** Capital structure post-reorganization

Post-emergence Holdings – New shares and convertible notes		
Holder	New shares (approx.)	New convertible notes
Castlake	32.0%	55.2%
Danish State	25.8%	30%
Air France-KLM	19.9%	4.8%
Lind Invest	8.6%	10%
New Shares Distribution Pool	13.6%	N/A

- (43) On 19 December 2023, the SAS entities filed their joint plan of reorganization, setting forth the terms of the reorganization and the related disclosure statement.

<sup>31</sup> Proof of Claim dated 16 December 2022. See Document No 1458575. In addition to the NOK 1 500 million claim acquired from the Lenders, the claim includes interest.

<sup>32</sup> Castlake is an investment manager focused on investments in aviation, specialty finance and real assets across the risk spectrum, from value-oriented to income and investment grade credit.

<sup>33</sup> Air France-KLM is a leading airline group in terms of international traffic on departure from Europe, with hubs at Paris-Charles de Gaulle and Amsterdam-Schiphol airports.

<sup>34</sup> Lind Invest is an independent long-term investor and business owner.

<sup>35</sup> [SAS reaches major milestone in SAS FORWARD – announces the winning consortium, including details of the transaction structure](#), SAS Press Release, 3 October 2023.

<sup>36</sup> See the Order approving (i) equity solicitation procedures and (ii) form and manner of notice related thereto. 15 May 2023. Docket No 1155. Available at <https://cases.ra.kroll.com/SAS>.

<sup>37</sup> The Disclosure Statement, section I.A.

<sup>38</sup> The Disclosure Statement, page 29.

Subsequently, these documents were amended and re-submitted on 23 January and 8 February 2024.<sup>39</sup> This latest submission will be referred to as “the SAS Chapter 11 Plan” or “the Plan” and “the Disclosure Statement”, respectively.

- (44) Under the Plan, claims or interests were placed in a particular class for all purposes, including voting, confirmation, and distribution. In total, 11 different classes were defined. See Tables 2 (a) and (b) below for an overview of the classes relevant in relation to SAS AB and the Consolidated Consortium.
- (45) In accordance with the Bankruptcy Code, administrative expense claims that arose during the Chapter 11 procedure, priority tax claims, and DIP financing claims were not assigned to a particular class as they were granted special priority status.<sup>40</sup> Under the Plan, such claims are to be paid in full. Following these claims, other secured claims (Class 1) and other priority claims (Class 2) are also to be paid in full (100% recovery). Conversely, holders of subordinate bonds (Class 8 and 10) and equity security holders (Class 11) will receive no distributions (0% recovery).
- (46) Furthermore, four classes of unsecured creditors will receive partial recovery. For each group of claimants or class of claims entitled to a distribution, the recovery is calculated pro rata based on the total amount of claims. Some of these classes will receive cash only (Classes 5 and 6), while others will receive a combination of cash and equity (Classes 3 and 4). The timing of the payouts also differs. The amount, timing and form of such recovery has been negotiated among SAS, the New Investors, and the UCC.<sup>41</sup>
- (47) The distributions to claimants will come from three sources: (i) the New Shares Distribution Pool (USD 75 million), (ii) a reserve of available cash (approximately USD 30 million), and (iii) a reserve of cash currently placed in escrow pending the outcome of certain litigation proceedings (approximately USD 220 million).<sup>42</sup>
- (48) For Eksfin’s Claim, the initial recovery from SAS AB is expected to be in the range of 6.9 –9.4% in equity, with the possibility of receiving an additional cash distribution of up to 15.6% (up to 25.0% cumulatively). Furthermore, the initial recovery from the Consolidated Consortium is expected to be within the range of 1.7 – 2.7% in equity, with the possibility of receiving an additional cash distribution of up to 5.0% (up to 7.7% cumulatively). The combined expected recovery is therefore in the range of 8.6%–12.1% in equity and 20.6% in cash (up to 32.7% cumulatively).<sup>43</sup>
- (49) With regards to both SAS AB and the Consolidated Consortium, Eksfin’s foreseen recovery is the same as those stipulated for aircraft lease, trade and union claims

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<sup>39</sup> The second amended joint Chapter 11 Plan of reorganisation of SAS AB and its subsidiary debtors. Docket No 1936. Available at <https://cases.ra.kroll.com/SAS>.

<sup>40</sup> See section 1123 (a)(1) of the Bankruptcy Code.

<sup>41</sup> See, for instance, the “Findings of fact, conclusions of law, and order confirming second amended joint chapter 11 plan of reorganization of SAS AB and its subsidiary debtors”. 22 March 2024. Docket No 2347, page 8. Available at <https://cases.ra.kroll.com/SAS>.

<sup>42</sup> SEK 2.2 billion (approximately USD 220 million) is set aside pending a definitive resolution on whether SAS AB is liable to pay interest related to the State aid received in connection with the 2020 recapitalization to the Danish State and the Swedish State, as well as the amount of such potential payment obligation. Under the Chapter 11 Plan and the Swedish Reorganisation Plan, these funds are distributed to general unsecured creditors once that issue is definitively solved. See the Swedish Reorganisation Plan, page 25.

<sup>43</sup> See footnote 42 for the conditions to which the cash distribution is subject.



(Class 3) and commercial hybrid bonds (Class 5). However, in the latter case, the distribution will be in cash only. With regards to the Consolidated Consortium, Eksfin's foreseen recovery is also equivalent to that stipulated for the other claimants within the same class (Class 2), namely the Swedish and Danish loans.

**Table 2 (a):** Classes of claimants, SAS AB

Class and Designation		SAS AB		
		Impairment	Entitled to vote	Recoveries
Class 1	Other secured claims	Unimpaired	No (deemed to accept)	100%
Class 2	Other priority claims	Unimpaired	No (deemed to accept)	100%
Class 3	Aircraft lease claims	Impaired	Yes	6.9%-9.4%, max: 25%
	Trade claims			
Class 4	Eksfin's Claim	Impaired	Yes	6.9%-9.4%, max: 25%
Class 5	Commercial hybrid bonds	Impaired	Yes	6.9%-9.4%, max: 25%
	Other general unsecured claims			
	Intercompany claim			
Class 8	Swiss Bond Claim	Impaired	No (deemed to reject)	0%
Class 10	State Hybrid Bond claim	Impaired	No (deemed to reject)	0%
	Danish State Hybrid Bond			
Class 11	Existing equity interests	Impaired	No (deemed to reject)	0%

**Table 2 (b):** Classes of claimants, the consolidated SAS Consortium

Class and Designation		The Consolidated Consortium		
		Impairment	Entitled to vote	Recoveries
Class 1	Other secured claims	Unimpaired	No (deemed to accept)	100%
Class 2	Other priority claims	Unimpaired	No (deemed to accept)	100%
Class 3	Aircraft lease claims	Impaired	Yes	1.7%-2.7%, max: 7.7%
	Trade claims			
	Union claims			
Class 4	Danish State Loan claim	Impaired	Yes	1.7%-2.7%, max: 7.7%
	Swedish State Loan claim			
	Eksfin's Claim			
Class 5	Other general unsecured claims	Impaired	Yes	1.7%-2.7%, max: 7.7%
Class 6	Convenience class claims	Impaired	Yes	10%
Class 8	Swiss Bond claims	Impaired	No (deemed to reject)	0%



General Unsecured Creditors



Classes eligible to vote

- (50) During the Chapter 11 procedure, SAS prepared a report to determine the expected recovery from a hypothetical bankruptcy of SAS as an alternative to the Plan. In this study, SAS first estimates the cash proceeds a liquidation of assets would generate

in a bankruptcy filing, the amount of claims in such a scenario, and finally, the distributions of proceeds based on the amount of claims and their ranking.

- (51) According to this analysis, the total liquidation proceeds available for distribution to creditors stand at USD 17 million for SAS AB and USD 1 301 million for the Consolidated Consortium. However, as shown in Table 3, higher-ranking claims would absorb all available proceeds, leaving nothing for general unsecured creditors. As a result, SAS considers that the Plan will provide all impaired creditors with a recovery that is not less than what they could have obtained in bankruptcy and consequently, the Plan is the best alternative in terms of maximizing recoveries.

**Table 3:** Outcome of hypothetical bankruptcy

	SAS AB		SAS Consortium	
Liquidation proceeds	USD	17 million	USD	1 301 million
DIP financing claims	USD	7 million	USD	510 million
Administrative expense claims	USD	1 035 million	USD	1 176 million
Priority claims	USD	7 million	USD	208 million
General unsecured claims	USD	2 312 million	USD	2 538 million

- (52) On 14 March 2024, the UCC issued a statement in support of the Plan, declaring it believed that the plan was in the best interests of the debtors' estates and holders of general unsecured claims as a whole.<sup>44</sup> Accordingly, the UCC strongly urged holders of general unsecured claim holders to vote to accept the Plan.
- (53) On 19 March 2024, with regards to SAS AB, two classes of impaired general unsecured creditors voted to accept the Plan in the numbers and amounts required by the law (classes 3 and 5), while one class abstained and was therefore deemed non-accepting. The latter comprised Eksfin (class 4).<sup>45</sup> With regards to the Consolidated Consortium, three classes of impaired general unsecured creditors voted to accept the Plan (classes 3, 5 and 6), while one class abstained and was therefore deemed non-accepting (class 4). The latter class comprised the Danish and Swedish State loans and Eksfin's Claim. For both debtors, the non-impaired creditors were deemed to accept the Plan (classes 1 and 2), while the fully impaired creditors and interest holders were deemed to reject it (classes 7, 8, 10 and 11).
- (54) Accordingly, confirmation of the Plan was sought through a cramdown on the non-accepting and rejecting classes (see paragraph (32)). In this regard, on 22 March 2024, the Bankruptcy Court confirmed the plan,<sup>46</sup> holding that it did not discriminate unfairly because holders of claims or interests with similar legal rights would not receive materially different treatment under the Plan, and, that the Plan was fair and

<sup>44</sup> See "Statement of the official committee of unsecured creditors in support of debtors' plan of reorganization". 15 March 2024. Docket No 2317. Available at <https://cases.ra.kroll.com/SAS>.

<sup>45</sup> The Norwegian authorities have explained that Eksfin abstained from voting due to certain public international law considerations and its non-inclusion in the UCC.

<sup>46</sup> See "Findings of fact, conclusions of law, and order confirming second amended joint chapter 11 plan of reorganization of SAS AB and its subsidiary debtors". 22 March 2024. Docket No 2347, page 8. Available at <https://cases.ra.kroll.com/SAS>. See also [SAS receives court approval of chapter 11 plan](#), 19 March 2024 Press Release.

equitable with respect to each non-accepting class because no holders of claims or interests junior to such classes would receive or retain any value.

- (55) Concerning the 'best interest of creditors' test, the Bankruptcy Court held that the liquidation analysis was persuasive and credible and established that each holder of an impaired claim or interest had either voted to accept the Plan or would receive value under the plan that was not less than what it would receive in liquidation.
- (56) With regard to the valuation of the reorganized SAS, the Bankruptcy Court held that the equity solicitation process run by SAS ensured that the transaction represents the highest and best offer for the new shares and the new convertible notes and provides the best measure of the value of the reorganized SAS.
- (57) The effectiveness of the SAS Chapter 11 Plan remains subject to various conditions precedent, including approvals from regulatory authorities and the completion of a Swedish reorganization at the SAS AB level (see Section 3.7 below). At present, SAS foresees the completion of the proceedings during the summer of 2024.<sup>47</sup>

### 3.7 The Swedish Reorganisation Procedure

- (58) As a condition precedent for the SAS Chapter 11 Plan, SAS AB must complete a reorganization procedure in Sweden ("the Swedish Reorganisation Procedure"). As explained by the Norwegian authorities, this is needed to legally bind certain creditors, including the commercial hybrid bondholders, and cancel the listed stock.
- (59) On 27 March 2024, SAS AB filed for reorganisation at the Stockholm District Court in Sweden.<sup>48</sup> In the Swedish Reorganisation Procedure, Eksfin submitted a claim for NOK 1 706 million (approximately USD 169 million).<sup>49</sup> This amount corresponds to Eksfin's Claim in the Chapter 11 Process, plus interest accrued until 27 March 2024.
- (60) On 10 June 2024, SAS AB announced its reorganisation plan in the Swedish court procedure ("the Swedish Reorganization Plan"),<sup>50</sup> which was distributed to the affected parties.<sup>51</sup> This Swedish Reorganization Plan proposes a debt settlement schedule corresponding, in principle, to that set out in the Chapter 11 Plan.<sup>52</sup>
- (61) Furthermore, the Swedish Reorganization Plan sets out the corporate actions that SAS AB must take for the Chapter 11 Process to become effective. These actions include *inter alia* the cancellation of the existing SAS AB's shares and the issuance of new shares in favour of the New Investors (see paragraph (40)) and the other eligible subscribers, namely those eligible for claim set-off and in-kind issuance.
- (62) Regarding the subscribers eligible for set-off, they consist of SAS AB's creditors receiving SAS AB's shares in exchange for the debt write-off, including Eksfin, aircraft lessors, suppliers, and other SAS AB's counterparties to agreements that

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<sup>47</sup> [Plan of reorganization in SAS AB's company reorganization announced](#), 10 June 2024 Press Release.

<sup>48</sup> Document No 1457772.

<sup>49</sup> See the Swedish Reorganization Plan, page 27.

<sup>50</sup> [SAS AB - Plan of Reorganization incl appendices 10 June 2024](#).

<sup>51</sup> [Plan of reorganization in SAS AB's company reorganization announced](#), 10 June 2024.

<sup>52</sup> See the Administrator's Report, p. 3, Appendix 1 to the [Swedish Reorganization Plan](#).

have not been discontinued. These creditors stand to receive shares worth at least 6.9% of the nominal value of their claim.

- (63) Regarding the subscribers eligible for in-kind issue, they consist of creditors who, pursuant to the Chapter 11 Process, stand to receive SAS AB's shares in exchange for writing off their claim against SAS AB's subsidiaries. These creditors include Eksfin, aircraft lessors, suppliers, as well as the Danish and Swedish States.
- (64) Moreover, similar to the Chapter 11 Plan, the Swedish Reorganization Plan finds that the general unsecured creditors would receive no or only marginal recovery in a bankruptcy scenario.<sup>53</sup> This finding is supported by a liquidation analysis carried out by the case administrator,<sup>54</sup> which relies on the same approach as the Chapter 11 liquidation analysis (see paragraph (50)) but assumes that the hypothetical bankruptcy takes place in Sweden rather than in the US.<sup>55</sup>
- (65) The Swedish liquidation analysis<sup>56</sup> estimates gross liquidation proceeds of between SEK 613.3 million and SEK 758.2 million. After satisfying DIP financing claims, the proceeds available to unsecured creditors, including Eksfin, range between SEK 67 and SEK 104.7 million. Given the total value of unsecured claims is between SEK 18 477.9 and SEK 23 419.2 million, the study finds that unsecured creditors will obtain a recovery in the range of 0.3% – 0.6% of the nominal amount of their claim.
- (66) The Swedish reorganization plan is currently scheduled for a court hearing and a vote by the affected parties at the Stockholm District Court on 12 July 2024.<sup>57</sup> As explained by the Norwegian authorities, following the creditors' approval, the Swedish bankruptcy court will confirm the Swedish Reorganization Plan. Once confirmed by the court, the plan is binding on SAS AB and its creditors.<sup>58</sup>

### 3.8 The notified Measure

- (67) The Measure notified by the Norwegian authorities consists of a write-off of Eksfin's Claim against SAS AB, the SAS Consortium and the SAS Consortium Entities in the context of the Chapter 11 filing and the Swedish Reorganisation Procedure. In the latter procedure, Eksfin's claim against SAS AB includes interest accrued until 27 March 2024<sup>59</sup>
- (68) Eksfin's Claim is written off in return for receiving an initial recovery from SAS AB at present estimated in the range of 7.9 – 10% in equity, with the possibility of receiving an additional cash distribution of up to 18.6%, and an initial recovery from the Consolidated SAS Consortium at present estimated in the range of 2 – 2.5% in equity, with the possibility of receiving an additional cash distribution of up to 4.6%.

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<sup>53</sup> The Swedish Reorganization Plan, page 6.

<sup>54</sup> The Swedish Reorganization Plan, Appendix 1, page 8.

<sup>55</sup> Like the Chapter 11 analysis, the Swedish liquidation analysis considers a group-wide insolvency scenario, meaning that the SAS entities included in the hypothetical Swedish liquidation cover all the same entities that filed for Chapter 11.

<sup>56</sup> Document No 1461532.

<sup>57</sup> [Date for plan hearing in SAS AB's company reorganization announced](#), 12 June 2024.

<sup>58</sup> Document No 1457770, page 17.

<sup>59</sup> See paragraph (59) as regards the interest accrued until 24 March 2024.

The combined expected recovery is therefore at present estimated in the range of 9.9%–12.5% in equity and up to 23.3% in cash.<sup>60</sup>

- (69) The Norwegian authorities do not consider the Measure to constitute State aid within the meaning of Article 61(1) of the EEA Agreement. In particular, they hold that by maximising the recovery and choosing the same course of action as the other general unsecured creditors, Eksfin acted as a Market Economy Operator.<sup>61</sup>

## 4 Presence of State aid

### 4.1 Introduction

- (70) Article 61(1) of the EEA Agreement reads as follows: “Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”
- (71) The qualification of a measure as aid within the meaning of this provision requires the following cumulative conditions to be met: (i) the measure must be granted by the State or through State resources; (ii) it must confer an advantage on an undertaking; (iii) favour certain undertakings (selectivity); and (iv) threaten to distort competition and affect trade.
- (72) In the case at hand, ESA finds it appropriate to begin the assessment by analysing whether the second criterion is met, which involves determining whether the Measure conferred an advantage on SAS. Should the Measure not amount to an advantage, there would be no need to assess the remaining conditions of Article 61(1) of the EEA Agreement.
- (73) The qualification of a measure as aid requires that it confers an advantage on the recipient undertaking. An advantage, within the meaning of Article 61(1) of the EEA Agreement, is any economic benefit that an undertaking could not have obtained under normal market conditions.<sup>62</sup>
- (74) The concept of “advantage”, for the purpose of Article 61(1) of the EEA Agreement, includes not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which would normally be included in the

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<sup>60</sup> These recovery rates do not correspond precisely to those set out in sections 3.6.2 and 3.7 as they vary with the exchange rate USD/SEK and the value of the general unsecured claims that are entitled to distributions, some of which have been contested.

<sup>61</sup> The Norwegian authorities refer, among other arguments, to the clarification by the Norwegian Minister of Trade and Industry on 28 June 2022 that the primary aim of Norway’s participation in the Chapter 11 Process would be to recover as much as possible of Eksfin’s claim. See [Staten går ikke inn med ny kapital i SAS](#). Press release, 28 June 2022.

<sup>62</sup> EFTA Surveillance Authority Decision No 3/17/COL of 18 January 2017 amending, for the one-hundred and second time, the procedural and substantive rules in the field of State aid by introducing new Guidelines on the notion of State aid as referred to in Article 61(1) of the Agreement on the European Economic Area [2017/2413], OJ L 342, 21.12.2017, p. 35–84 and EEA Supplement No. 82, 21.12.2017, p. 1, paragraph 66.

budget of the recipient undertaking or undertakings and which, therefore, are of the same character as subsidies and have the same effect.<sup>63</sup>

- (75) The Court has established that the characterisation of such an advantage as existing is, in principle, carried out by applying the market economy operator principle (“MEOP”), unless there is no possibility of comparing the State conduct at issue in a particular case with that of a private operator because that conduct is inseparably linked with the existence of infrastructure that no private operator would ever have been able to create, or the State acted in its capacity as a public authority.
- (76) In respect of that latter point, the Court observed that the mere exercise of the prerogatives of a public authority, such as the use of means that are legislative or fiscal in nature, does not by itself render that principle inapplicable. It is the economic nature of the State intervention at issue and not the means put into effect for that purpose that renders that principle applicable.<sup>64</sup>
- (77) The Court has also established that the application of the MEOP itself involves the use, on a case-by-case basis, of various specific tests which each aim to compare, in the most appropriate and adequate manner possible, the State measure at issue in a given case, taking account in particular of its nature, with a measure that might have been adopted by a private operator in a situation that is as alike as possible and acting under normal market conditions.<sup>65</sup> Those tests include, *inter alia*, the private creditor test, as outlined in section 4.3 below.<sup>66</sup>

## 4.2 The applicability of the MEOP

- (78) As explained by the Norwegian authorities, the Measure is implemented with a view of maximising the recovery of Eksfin’s Claim (see section 3.8). Furthermore, other general unsecured creditors in the Chapter 11 Process have opted for write-offs.
- (79) Therefore, financial claim write-offs with a view of maximising recovery are a course of action that could be considered by private creditors and, indeed, in this case, is actually resorted to by private creditors. Under these circumstances, and in accordance with the case law,<sup>67</sup> ESA concludes that the analysis of whether the Measure amounts to an advantage is to be assessed by applying the MEOP.
- (80) Pursuant to the Court of Justice’s case-law, when a public creditor grants payment facilities in respect of a debt payable to it by an undertaking, that assessment is done by applying, in principle, the “private creditor test”.<sup>68</sup> Consequently, ESA will assess whether the Measure amounts to an advantage by applying the private creditor test as outlined in section 4.3.
- (81) ESA notes that the Norwegian State, via Eksfin or other entities, neither holds any shares in SAS nor plans to invest new capital in SAS. The participation of Norway in the reorganisation is therefore confined to maximising recovery. In this regard,

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<sup>63</sup> Judgment of the Court of 17 November 2022, [C-331/20 P and C-343/20 P](#), *Commission v Italy*, EU:C:2022:886, paragraph 104, and the case-law cited.

<sup>64</sup> Judgment in *Commission v Italy*, *supra*, paragraph 108, and the case-law cited.

<sup>65</sup> Judgment in *Commission v Italy*, *supra*, paragraph 109.

<sup>66</sup> Judgment in *Commission v Italy*, *supra*, paragraph 110, and the case-law cited.

<sup>67</sup> Judgment in *Commission v Italy*, *supra*, paragraphs 108-110, and the case-law cited.

<sup>68</sup> Judgment of the Court of 20 September 2017, C-300/16, [Commission v Frucona Košice](#), EU:C:2017:706 (“Frucona Košice II”), paragraph 28, and the case-law cited.

ESA further notes that the position of Norway differs from that of Denmark and Sweden, which will also participate in the restructuring of SAS. First, while Norway exited from SAS in 2018, the Danish and Swedish States were shareholders prior to the Chapter 11 filing. Second, both States had supported SAS through recapitalization measures<sup>69</sup> in addition to liquidity support.<sup>70</sup>

### 4.3 The application of the Private Creditor Test

#### 4.3.1 Initial considerations

- (82) The Court of Justice has held that payment facilities constitute State aid where, taking account of the significance of the economic advantage thereby granted, the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor and seeking to recover sums due to it by a debtor in financial difficulty.<sup>71</sup>
- (83) Based on the above, ESA will apply the private creditor test by comparing the conduct of Eksfin to that of a hypothetical private creditor of SAS in a situation as close as possible to Eksfin's ("Private Creditor").<sup>72</sup> If such a Private Creditor would not have chosen to pursue the Measure but instead resorted to another more profitable course of action in its dealings with the debtor, could confer an advantage on SAS. It is therefore necessary to compare, on the one hand, the expected recovery of Eksfin's Claim under the Measure and, on the other hand, the expected recovery under plausible counterfactual scenarios.
- (84) In this regard, the Court's case-law<sup>73</sup> recognizes several factors relevant to applying the private creditor test. These factors can be grouped into two sets. The first set includes the position of Eksfin as a creditor (seniority of the claim, level of security) and SAS' position as a debtor (viability prospects). The second set consists of the advantages and disadvantages of the alternative courses of action (in terms of recovery, duration of the procedure, and risk of losses).

#### 4.3.2 Eksfin's position as a creditor

- (85) As explained in section 3.5, Eksfin became a creditor on 23 June 2022, after having acquired the Loan to SAS from the Lenders. Subsequently, on 5 July 2022, Eksfin became a claimant when SAS filed for Chapter 11 and thus defaulted on the loan.
- (86) The Chapter 11 filing triggered an automatic stay of all enforcement proceedings towards the debtors (see paragraph (27)). To protect its exposure, Eksfin therefore submitted its claim to the US Bankruptcy Court on 16 December 2022 (see

<sup>69</sup> The recapitalization measures have been approved by the European Commission. See the Commission Decision C(2023) 8356 final of 29 November 2023 on State aid SA.57543 and SA.58342 (2020/NN) (ex 2020/N), implemented by the Kingdom of Denmark and the Kingdom of Sweden for Scandinavian Airlines System AB (not yet published).

<sup>70</sup> See the Disclosure Statement, pages 30-32.

<sup>71</sup> Judgments of the Court of 24 January 2013, *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32 ("Frucona Košice I"), paragraph 71, and *Frucona Košice II*, *supra*, paragraph 28.

<sup>72</sup> Judgments of the Court in *Frucona Košice I*, *supra*, paragraphs 78-80, and in *Frucona Košice II*, *supra*, paragraph 60.

<sup>73</sup> Judgment of the General Court of 16 March 2016, T-103/14, *Frucona Košice v Commission*, EU:T:2016:152, paragraph 136 and case law cited.

paragraph (39). Subsequently, on 27 March 2024, Eksfin submitted its claim also in the Swedish Reorganization Procedure (see paragraph (59)).

- (87) Thus, the position of Eksfin is that of an unsecured creditor seeking repayment of its claim against a distressed debtor subject to in-court restructuring procedures in two different jurisdictions. Moreover, in the Chapter 11 procedure, unsecured creditors were represented by a UCC, which may exert influence on the formulation of the plan (see section 3.6.1). However, as described in paragraph (37), Eksfin was not appointed to the UCC.
- (88) In light of the above, ESA considers that Eksfin, as a general unsecured creditor without direct representation in the UCC, had minimal, if any, influence on the negotiations concerning the conditions of the Chapter 11 Plan. As explained in paragraph (46), these conditions were negotiated among the UCC, the New Investors and SAS.

#### 4.3.3 SAS' position as a debtor

- (89) As described in section 3.4, despite efforts to restore its financial health after the COVID-19 outbreak through cost-saving measures and restructuring, SAS continued to incur losses during 2021, and its equity position gradually deteriorated.
- (90) However, as described in section (21), SAS announced the SAS FORWARD Plan in February 2022, which entailed a significant business transformation strategy. In particular, the plan set out a range of efficiency-enhancing measures to reach a cost-saving target of SEK 7.5 billion by 2026. Given these measures, financial projections indicated that SAS' operational profitability would turn positive in the fiscal year 2024, followed by a return to positive net income in the fiscal year 2025. Combined with a de-levering of its capital structure, SAS' equity position would turn positive in the fiscal year 2024.<sup>74</sup>
- (91) When efforts to implement the plan halted in July 2022, SAS filed for a Chapter 11 restructuring. During the course of the procedure, SAS signed a new collective bargaining agreement with the pilot's unions in July 2022,<sup>75</sup> and renegotiated the terms of its lease contracts in January 2023<sup>76</sup>— both key elements for achieving the cost-saving target under the SAS FORWARD plan. Furthermore, SAS obtained support from private financiers in the form of DIP financing in August 2022 (see paragraph (38)), new private capital in November 2023 (see paragraphs (40) - (41)), and approval of the Chapter 11 Plan by the classes composed of private general unsecured creditors in March 2024 (see paragraph (53)).
- (92) Given the implementation of crucial cost-saving measures and the support of private creditors and investors, ESA considers that SAS, at the time leading up to the Measure, had credible prospects of a viable turnaround.

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<sup>74</sup> See the Disclosure Statement, Exhibit D. SAS prepared financial projections for the period from 1 November 2023 to 31 October 2027, assuming that the effective date of the Chapter 11 reorganization is 31 July 2024.

<sup>75</sup> See SAS Interim Report, [quarter three of 2022](#).

<sup>76</sup> See the Disclosure Statement, section IV.K, page 46.



#### 4.3.4 *The expected recovery under the Measure*

- (93) The Measure consists of the write-off of Eksfin's Claim in exchange for shares in the reorganised SAS AB and a potential cash distribution (see section 3.8).
- (94) Eksfin will obtain its shares as of the effective date of the Chapter 11 Plan, i.e., the date by which all condition precedents have been fulfilled. According to the Norwegian authorities, that date is expected to be by the end of summer 2024 (see paragraph (57)). The Norwegian authorities have further explained that the cash distribution is conditional on the final resolution of certain State claims.<sup>77</sup> According to the Chapter 11 Plan, once the reorganized SAS AB determines that all such claims are resolved, or at the latest by 31 December 2033, the residual cash amount will be distributed.<sup>78</sup>
- (95) With regard to the share capital, as described in paragraphs (41) - (42), the New Investors committed USD 475 million in share capital and will distribute around USD 75 million to general unsecured creditors in the form of shares in the reorganized SAS AB. The total value of the equity in the reorganized SAS AB is approximately USD 550 million. ESA observes that around 75% of the capital provided by the New Investors comes from private sources, with the remaining proportion provided by the Danish State.<sup>79</sup> Denmark did not participate in the equity solicitation process as a bidder but invested on the same terms as the new private investors (see paragraph (40)). Notwithstanding, ESA considers that since the private investors were selected through a competitive process, the valuation reflects the private investor's assessment and is not influenced by Denmark's participation. As mentioned in paragraph (56), the US Bankruptcy Court also held that the equity solicitation process run by SAS ensured that the agreement with the New Investors provides the best measure of the value of the reorganized SAS.
- (96) Concerning the cash distribution, as explained in section 3.6.2, the timing and amount of the cash distribution are not certain. Given this uncertainty, ESA considers that a Private Creditor would find it difficult to formulate a reasonable expectation of the cash distribution and calculate its present value. ESA thus takes the view that a Private Creditor would limit its expectation to the equity distribution, while positively noting the potential upside in cash. In the following, the alternative courses of action will thus primarily be compared to the value of the new shares allocated to Eksfin under the Measure, i.e., a recovery in the range of 9.9% – 12.5%.

#### 4.3.5 *The expected recovery under alternative courses of action*

- (97) In applying the Private Creditor Test, ESA will examine the alternatives available to Eksfin in terms of maximising the recovery of its claim from SAS. In particular, ESA has identified the following alternative actions that a Private Creditor could, in ESA's view, plausibly have considered: (a) judicial enforcement of Eksfin's Claim outside the US and (b) a liquidation of SAS.<sup>80</sup>

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<sup>77</sup> See footnote 42.

<sup>78</sup> See the Disclosure Statement, page 61.

<sup>79</sup> See section 3.6.2.

<sup>80</sup> ESA notes that Eksfin received inquiries from investment banks about potentially acquiring the claim. Indicative offers were below the expected recovery under the plan at the time. However, no binding offers materialised.

#### 4.3.5.1 Option (a): Judicial enforcement

- (98) As detailed in section 3.5, the Chapter 11 filing qualified as an “event of default” under the Loan Facility Agreement and Eksfin’s Claim is therefore open for judicial enforcement through a filing of legal action in civil proceedings.<sup>81</sup> In ESA’s view, a Private Creditor would evaluate the merit of pursuing such a course of action to recover its claim compared to pursuing the Measure, taking into account the risks and benefits associated with this alternative approach.
- (99) In this regard, as set forth in section 3.3, Eksfin’s Claim is governed by Norwegian law, with Norwegian courts having exclusive jurisdiction over disputes unless a lender chooses to bring the dispute to other courts with jurisdiction. The debtors liable for Eksfin’s Claim are five SAS entities established in three Nordic countries: Norway, Sweden, and Denmark (see paragraph (17) and (36)). Moreover, one of the debtors – the SAS Consortium – has an unconventional corporate structure, with its rights, liabilities, and assets split among the three SAS Consortium Entities according to certain contractually agreed-upon proportions (see section 3.2).<sup>82</sup>
- (100) The rules governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between EU Member States and Iceland, Switzerland and Norway are set out in the 2007 Lugano Convention.<sup>83</sup> For determining which national court(s) ha(ve)s jurisdiction over a contractual dispute, the convention’s Title II, sections 1 and 2 set out general and special rules. Relevant to the claim at issue, the choice of jurisdiction is based on the seat of either the plaintiff or the defendant and the place of performance of the contract in question. As there are a number of potential defendants in several jurisdictions, the convention Title II, section 9 rules on related actions (*lis pendens*) are also relevant in deciding whether to file a legal action. Against this background, ESA observes that determining the international jurisdiction of a dispute like the one underpinning the Measure in question can by itself be a legally demanding exercise.
- (101) Moreover, ESA considers the duration of civil proceedings to be another important factor to consider when assessing whether a Private Creditor would have opted to attempt judicial enforcement.<sup>84</sup> In this regard, the defendants’ seat and assets are likely to play a role in choosing the venue of litigation. ESA observes that, as of 30 June 2022, the assets and liabilities of SAS Norge AS’s amounted to approximately USD 0.6 billion and USD 1 billion<sup>85</sup>, while SAS AB’s assets and liabilities stood at

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<sup>81</sup> These proceedings entail a creditor bringing a legal action against a debtor in a competent national court with a claim to recognize and enforce a payment obligation that has fallen due.

<sup>82</sup> See the Consortium Agreement, paragraphs 2 and 5.

<sup>83</sup> [Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters](#). See also [Lov om mekling og rettergang i sivile tvister \(tvisteloven\)](#). Konvensjon om domsmyndighet og om anerkjennelse og fullbyrdelse av dommer i sivile og kommersielle saker, vedtatt i Lugano 30 okt 2007.

<sup>84</sup> See the Judgment of the Court in *Frucona Košice I*, supra, paragraph 100 as regards the duration of proceedings as a factor liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor.

<sup>85</sup> See “Schedules of Assets & Liabilities for SAS Norge AS (Case No. 22-10927).” Filing date 3 August 2022. Docket No 155, page 16. Available at <https://cases.ra.kroll.com/SAS/Home-Index>.

USD 2.5 billion and 3.5 billion<sup>86</sup> and the SAS Consortium's at USD 5.2 billion and 4.8 billion<sup>87</sup>, respectively.

- (102) Given the multiple jurisdictional venues under the applicable agreements and private international law, ESA considers that since SAS AB, the SAS Consortium and one of the SAS Consortium Entities are seated in Sweden, and a large share of the SAS Consortium's assets do not appear to be held by SAS Norge AS, it is appropriate to examine the duration of civil proceedings in Sweden.
- (103) In this regard, according to the Swedish Bar Association,<sup>88</sup> the duration of ordinary civil proceedings in Sweden<sup>89</sup> was 14.6 months in the court of first instance in 2021, and 20.9 months in the court of second instance (an increase compared to 2018). Given the complex factual circumstances of Eksfin's Claim, ESA considers that judicial enforcement could entail proceedings lasting even longer. In comparison, the Measure is expected to result in partial recovery by the end of summer 2024. Moreover, as further elaborated in section 4.3.5.2 below, obtaining a final judgment after lengthy proceedings would ultimately be of limited (if any) use to Eksfin as an unsecured creditor. ESA also takes note of the Disclosure Statement,<sup>90</sup> confirmed by the Bankruptcy Court,<sup>91</sup> recognizing the potentially lengthy and ineffective multi-jurisdictional enforcement.
- (104) Furthermore, as explained in section 3.5, Eksfin's Claim fell due simultaneously with the Chapter 11 filing, which also triggered an automatic stay. However, in this regard, the Norwegian authorities have stressed that the recognition of foreign insolvency proceedings is subject to case-by-case assessment under national insolvency rules. As a result, it is not clear whether a competent national court would permit an enforcement action to proceed while the automatic stay is in effect.
- (105) Finally, as explained by the Norwegian authorities, insolvency proceedings in the Nordic countries are governed by a convention,<sup>92</sup> requiring national courts to respect the initiation of proceedings in these countries.<sup>93</sup> In this regard, ESA observes that, at the time of the Chapter 11 filing, Eksfin's Claim was the fourth largest claim against SAS AB.<sup>94</sup> As a result, payment of such a claim could have further deteriorated SAS' financial situation, jeopardized the Chapter 11 Procedure and, ultimately, SAS' prospects of returning to viability (see section 4.3.3). Consequently, if faced with a judicial enforcement action, SAS could have stayed

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<sup>86</sup> See "Schedules of Assets & Liabilities for SAS AB (Case No. 22-10925)." Filing date 3 August 2022. Docket No 153, page 16. Available at <https://cases.ra.kroll.com/SAS/Home-Index>.

<sup>87</sup> See "Schedules of Assets & Liabilities Scandinavian Airlines System Denmark-Norway-Sweden (Case No. 22-10929)." Filing date 4 August 2022. Docket No 191, page 16. Available at <https://cases.ra.kroll.com/SAS/Home-Index>.

<sup>88</sup> [Kommersiella tvistemål handläggs för långsamt i domstol](#). Advokaten Nr 7 2023 Årgång 89.

<sup>89</sup> *Idem.*, 75<sup>th</sup> percentile of the ordinary civil cases (excluding family cases).

<sup>90</sup> The Disclosure Statement, pages 161 and 162.

<sup>91</sup> See paragraph (54).

<sup>92</sup> [Konvensjon mellom Norge, Danmark, Finland, Island og Sverige om konkurs](#), in force since 1933.

<sup>93</sup> In the EU Member States, Article 6 of the [Directive on restructuring and insolvency](#) also establishes a stay of individual enforcement actions. See Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

<sup>94</sup> See "Voluntary Petition for Non-Individuals Filing for Bankruptcy". 5 July 2022. Docket No 1, page 9. Available at <https://cases.ra.kroll.com/SAS/Home-Index>.

the enforcement proceedings under the Nordic bankruptcy convention, by initiating reorganization or other insolvency proceedings.

#### 4.3.5.1.1 Conclusion on Option (a)

(106) In ESA's view, the factual and legal circumstances set out above, involving multiple defendants and several jurisdictions, and given the uncertainties regarding the relevant jurisdiction, the legal effects of the automatic stay under the Chapter 11 procedure and the risk of a stay under the Nordic bankruptcy convention, point to potentially costly, complex and lengthy judicial enforcement. Moreover, even if a legal action would have been allowed by a court to proceed, resulting in a final ruling in its favour, Eksfin, as an unsecured creditor, would have limited (if any) perspective of obtaining recovery under such a ruling. Consequently, ESA finds it unlikely that a Private Creditor would have pursued judicial enforcement instead of pursuing the Measure.

#### 4.3.5.2 Option (b): SAS Liquidation

(107) An alternative to the Measure would be to liquidate the SAS assets and distribute the proceeds to the claimants and interest holders. In this regard, as explained in sections 3.6.2 and 3.7, a liquidation analysis was carried out both in the context of the Chapter 11 procedure as well as in the Swedish Reorganization Procedure. The results of these analyses are materially similar, and both conclude that general unsecured creditors would *not* be better off in a liquidation.

(108) ESA observes that general unsecured creditors other than Eksfin voted for the Chapter 11 Plan, preferring a write-off of their claim on the same conditions as the Measure over liquidation. These creditors, such as the aircraft leasing companies in class 3 (see paragraph (49)), are private undertakings. Furthermore, ESA takes note of the Bankruptcy Court confirmation of the Chapter 11 Plan, on the basis, *inter alia*, that it satisfies the "best interest of creditors" test (see paragraph (55)).

(109) While these facts support the argument that Norway acted in accordance with MEOP by pursuing the Measure, ESA will nonetheless test the robustness of the finding that Eksfin is not worse off under the Measure rather than liquidation. In this regard, the Norwegian authorities have submitted a spreadsheet containing the underlying data and calculations of the Chapter 11 liquidation analysis.<sup>95</sup> Based on this data, ESA will carry out various sensitivity checks on the result of the analysis, with regard to the following elements: *i*) the liquidation value of the assets, *ii*) the nominal value of the claims, and *iii*) the ranking of the claims.

##### 4.3.5.2.1 The estimated liquidation value of the assets

(110) As described in paragraph (51), the Chapter 11 liquidation analysis finds that the proceeds from a hypothetical sale of assets would be USD 17 million for SAS AB and USD 1 301 million for the Consolidated Consortium.<sup>96</sup> In the analysis, these liquidation proceeds are estimated for each asset category reported on the balance sheets. For some asset categories, such as property and equipment and intangible assets, the analysis uses financial appraisal, while the remaining assets are valued as a fraction of book values, from 0% (total loss) to 100% (cash).

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<sup>95</sup> Document No 1458575.

<sup>96</sup> Net of certain liquidation costs.

- (111) To examine the robustness of the asset valuations, ESA will conduct a sensitivity analysis using data from 15 airline restructuring cases. Those cases can be divided into three samples: (a) 10 cases submitted by the Norwegian authorities,<sup>97</sup> (b) 9 cases from academic papers,<sup>98</sup> and (c) the combined total of 15 unique cases. For each sample, ESA calculates recovery rates as the ratio of the reported proceeds to book value for the standardised asset categories: cash and cash equivalents, account receivables, property and equipment and inventories.<sup>99</sup> For the remaining asset categories, ESA calculated a combined aggregate recovery rate.<sup>100</sup>
- (112) Table 4 below reports the median recovery rates for the samples, as well as those used for SAS AB and the Consolidated SAS Consortium in the Chapter 11 liquidation analysis. The table shows that while the recovery rate of account receivables, and inventories is higher in the sample cases compared to those used for the Consolidated SAS Consortium, the aggregate recovery rate and rate for property and equipment in the two samples is lower. Conversely, the aggregate recovery rate for SAS AB is lower than those found for the sample cases.

**Table 4.** Sample median and SAS AB and SAS Consortium asset recovery rates.

Sample	Statistics	Aggregate	Cash	Accounts Receivables	Inventories	Property and Equipment
Sample (a)	Median	13.5%	100.0%	29.2%	54.7%	17.6%
Sample (b)	Median	3.0%	100.0%	48.8%	38.9%	49.4%
Sample (c)	Median	10.2%	100.0%	30.8%	49.0%	25.0%
SAS AB		0.9%	100.0%	n/a	n/a	n/a
SAS Consortium		17.9%	100.0%	20.0%	10.0%	32%

- (113) As a result, ESA conducted a simulation of claim recovery by replacing the asset recovery rates in the Chapter 11 liquidation analysis with the highest median rates from the samples (when higher). The simulation shows that general unsecured claimants would still obtain no recovery from liquidation, as the estimated proceeds would be fully absorbed by more senior claims. Thus, the result of the liquidation analysis appears robust to changing assumptions regarding asset recovery rates.

#### 4.3.5.2.2 The valuation of the claims

<sup>97</sup> This sample includes the Chapter 11 cases concerning the following airlines: Frontier Airlines Holdings, Pinnacle Airlines, AMR Corporation, Delta Air Lines, Aeromexico (AMX), Air Canada, Ata Airlines, MESA Air Group, UAL Airlines, and Norwegian Airlines.

<sup>98</sup> This sample includes the Chapter 11 cases concerning the following airlines: Trans World Airlines, US Airways Group, Global Aviation Holdings, Republic Airways Holdings, CHC Group, Frontier Airlines Holdings, Pinnacle Airlines, AMR Corporation, and Delta Air Lines. The authors wrote two papers relying on a dataset which included these cases: "Asset Specificity of Non-Financial Firms", published in the Quarterly Journal of Economics in 2023, and "Two Tales of Debt", which is not yet published in an academic journal.

<sup>99</sup> These are the same asset categories for which Professors Kermani and Ma calculate a liquidation value, which they then employ for the analyses in their papers. ESA calculates recovery rates as the ratio of estimated recovery proceeds and book value of each asset category. For most Chapter 11 cases, the liquidation analyses contain a high and low estimate of the recovery values, while only a central estimate is available in other cases. For the former cases, ESA focuses on the average recovery rate (based on the high and low estimate) to ensure comparability with the latter cases.

<sup>100</sup> That is, total assets, excluding cash and cash equivalents, inventories, accounts receivables and property and equipment.

- (114) As explained in paragraph (51), the Chapter 11 liquidation analysis further estimates the amount of claims in a bankruptcy scenario. In this regard, ESA notes that certain claims are assumed to arise only in bankruptcy. These claims might include aircraft lessors' entitlement to damages in case of early termination of contracts, potential employee claims (severance), refunds for prepaid tickets etc. Such claims would not materialise to the same extent in a restructuring, as SAS would continue as a "going concern". There will also be additional administrative expenses in a bankruptcy scenario as it would require the appointment of a trustee and attorneys, accountants, and other professionals to assist with the procedure.
- (115) While some of these claims can be estimated based on balance sheet information (e.g., prepaid tickets), other claims require valuation. Such valuation relies on assumptions. For example, damages claims are estimated, *inter alia*, based on contractual information and market leasing rates sourced from a third-party analyst.
- (116) Overvaluing claims could result in underestimating recovery from liquidation. ESA therefore performed a sensitivity check on Eksfin's estimated recovery by removing damages claims from the recovery estimate. When taking the expected liquidation proceeds as given, and subtracting DIP financing claims, administrative and priority claims *net* of damages, ESA finds that there would still be no distribution left for general unsecured creditors. Consequently, the result of the liquidation analysis with regard to Eksfin's estimated recovery appears robust to claim valuation.

#### 4.3.5.2.3 The ranking of the claims

- (117) As explained in paragraph (51), the liquidation analysis assumes that proceeds would first be distributed to DIP lenders, then to creditors with administrative claims, further to creditors with priority claims and finally to general unsecured creditors.
- (118) Given the large size of certain claims within the categories ranked above general unsecured creditors, ESA has examined the sensitivity of the estimated recovery rate from the study to an alternative order of claim priority. This check consists of simulating unsecured creditors' recovery from liquidation when de-ranking the largest sub-categories of claims with priority over general unsecured claims.
- (119) In particular, in the liquidation analysis, the largest claims ranked above general unsecured claims are aircraft-related claims for SAS AB (USD 1 016 million) and net unearned transportation revenue (including pre-paid tickets) for the Consolidated Consortium (USD 732 million). De-ranking these claims to the level of general unsecured claims does not affect the proceeds available to SAS AB's general unsecured creditors but increases the proceeds available to SAS Consortium's general unsecured creditors from zero to USD 139 million. However, in the latter case, the recovery rate from liquidation would only be 4.2%. Consequently, the result of the liquidation analysis with regard to Eksfin's estimated recovery appears robust to the priority order of the claims.

#### 4.3.5.2.4 Conclusion Option (b)

- (120) Overall, the result of the sensitivity checks indicates that Eksfin's recovery from the Measure would indeed be higher than that which would result from liquidation. The vote in favour of the Chapter 11 Reorganization Plan of the classes of private unsecured creditors supports this finding, which is further corroborated by the similar conclusion of the Swedish liquidation study (paragraph (65)). ESA observes

that the Chapter 11 Plan was confirmed by the US Bankruptcy Court, on the condition that it, *inter alia*, was in the best interest of creditors. ESA also notes that the expected recovery of unsecured creditors from liquidation was zero in 11 out of the 15 restructuring cases examined above (see section 4.3.5.2.1). In fact, the highest observation of estimated recovery to general unsecured creditors in the samples was 3.4% (Mesa Air Group), well below the minimum that Eksfin stands to obtain under the Measure.

(121) In conclusion, ESA therefore considers that a Private Creditor would not have pursued a liquidation of SAS instead of pursuing the Measure.

#### 4.3.6 Conclusion on the Application of the Private Creditor Test

(122) As described above, ESA identified the following alternative actions that a Private Creditor could, in ESA's view, plausibly have considered over taking the Measure: (a) judicial enforcement of Eksfin's Claim outside the US and (b) liquidation of SAS.

(123) As regards alternative (a), ESA found the factual and legal circumstances of Eksfin's Claim would lead to potentially costly, complex and lengthy judicial enforcement with limited or no perspective of recovery. As a result, ESA considered it unlikely that a Private Creditor would have attempted to recover the claim through judicial enforcement instead of pursuing the Measure (see paragraph (106)).

(124) Concerning alternative (b), ESA found the result of the liquidation analysis to be robust to changing assumptions and that Eksfin's recovery from liquidation would, therefore, most likely be lower than that expected under the Measure. As a result, ESA considered it unlikely that a Private Creditor would have chosen to liquidate SAS instead of pursuing the Measure (see Section 4.3.5.2).

(125) In conclusion, ESA considers that a Private Creditor would not have chosen an alternative course of action over the Measure in question. The Measure thus meets the Private Creditor Test and does not, therefore, confer an advantage on SAS.

## 5 Conclusion

(126) On the basis of the foregoing assessment, ESA considers that the notified Measure<sup>101</sup> does not constitute State aid within the meaning of Article 61(1) of the EEA Agreement. Since no doubts are raised, ESA has no objections to its implementation.

(127) If this letter contains confidential information which should not be disclosed to third parties, please inform ESA **by 19 July 2024**, identifying the confidential elements and the reasons why the information is considered to be confidential. In doing so, please consult ESA's Guidelines on Professional Secrecy in State Aid Decisions.<sup>102</sup> If ESA does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter on ESA's website: <http://www.eftasurv.int/state-aid/state-aid-register/>.

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<sup>101</sup> See above Section 3.8.

<sup>102</sup> [OJ L 154, 8.6.2006, p. 27](#) and EEA Supplement No 29, 8.6.2006, p. 1.

For the EFTA Surveillance Authority,

Yours faithfully,

For Arne Røksund  
President  
Responsible College Member

Stefan Barriga  
College Member

Árni Páll Árnason  
College Member

For Melpo-Menie Joséphidès  
Countersigning as Director,  
Legal and Executive Affairs

*This document has been electronically authenticated by Arni Pall Arnason, Sigrun Ingibjorg Gisladdottir.*