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ΠΡΩΤΟΒΑΘΜΙΑΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΟΙΚΟΝΟΜΙΚΗΣ ΚΟΙΝΟΤΗΤΑΣ
TRIBUNAL DE PRIMERA INSTANCIA DE LAS COMUNIDADES EUROPEAS
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EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

- 415936 -

27/11/2009
T-87/09-24

Case T-87/09

Jørgen Andersen
v
Commission of the European Communities

BG	Връчване на държавите-членки и на институциите по смисъла на член 55 от Статута на Съда (решение/определение от 25/11/2009) (преводи на други езици са достъпни на следния адрес: www.curia.europa.eu)
ES	Notificación a los Estados miembros y a las instituciones conforme al artículo 55 del Estatuto del Tribunal de Justicia (sentencia/auto de 25/11/2009) (otras versiones lingüísticas disponibles: véase la página www.curia.europa.eu)
CS	Doručení členským státům a orgánům Společenství v souladu s článkem 55 Statutu Soudního dvora (rozsudek/usnesení ze 25/11/2009) (další dostupné jazykové verze : viz www.curia.europa.eu)
DA	Forkyndelse til medlemslandene og EU-institutionerne i henhold til artikel 55 i Domstolens statut (dom/kendelse af 25/11/2009) (øvrige foreliggende sprogversioner: se www.curia.europa.eu)
DE	Zustellung an die Mitgliedstaaten und Institutionen gemäß Artikel 55 der Satzung des Gerichtshofs (Urteil/Beschluss vom 25/11/2009) (andere verfügbare sprachliche Versionen: siehe www.curia.europa.eu)
ET	Kättetoimetamine liikmesriikidele ja ühenduste institutioonidele Euroopa Kohtu põhikirja artikli 55 alusel (25/11/2009 kohtuotsus/määrus) (teised olemasolevad keeleversioonid : vaata www.curia.europa.eu)
EL	Κοινοποίηση στα κράτη-μέλη και στα όργανα των Κοινοτήτων σύμφωνα με το άρθρο 55 του Οργανισμού του Δικαστηρίου (απόφαση/διάταξη της 25/11/2009) (διαθέσιμες εκδόσεις στις υπόλοιπες γλώσσες: βλέπε ιστοσελίδα www.curia.europa.eu)
EN	Service on Member States and institutions in accordance with Article 55 of the Statute of the Court of Justice (judgment/order of 25/11/2009) (other language versions available: see www.curia.europa.eu)
FR	Signification aux États membres et aux institutions au titre de l'article 55 du statut de la Cour de justice (arrêt/ordonnance du 25/11/2009) (autres versions linguistiques disponibles : voir sur www.curia.europa.eu)
IT	Notifica agli Stati membri e alle istituzioni ai sensi dell'articolo 55 dello statuto della Corte di giustizia (sentenza/ordinanza del 25/11/2009) (altre versioni linguistiche disponibili: vedi su www.curia.europa.eu)

- 2 -

LV	Nolēmumu izsniegšana dalībvalstīm un iestādēm saskaņā ar Eiropas Kopienų Tiesas Statūtu 55. pantu (25/11/2009 spriedums/rīkojums) (citās valodās pieejamais teksts: skat. vietnē www.curia.europa.eu)
LT	Pranešimas valstybėms narėms ir Bendrijų institucijoms pagal Teisingumo Teismo statuto 55 straipsnį (25/11/2009 sprendimas/nutartis) (kitos prieinamos kalbinės versijos: žr. www.curia.europa.eu)
HU	Kézbesítés a tagállamok és a Közösségek intézményei részére a Bíróság alapokmánya 55. cikkének alapján (25/11/2009-i ítélet/végzés) (egyéb nyelvi változatok a www.curia.europa.eu honlapon érhetőek el)
MT	Notifika lill-Istati Membri u lill-istituzzjonijiet taht l-Artikolu 55 ta' l-Istatut tal-Qorti tal-Gustizzja (sentenza/digriet : 25/11/2009) (verżjonijiet lingwistiċi oħra disponibbli: ara s-sit www.curia.europa.eu)
NL	Betekening aan de lidstaten en aan de instellingen overeenkomstig artikel 55 van het Statuut van het Hof van Justitie (arrest/beschikking van 25/11/2009) (andere beschikbare taalversies: zie www.curia.europa.eu)
PL	Doręczenie państwowym członkowskim oraz instytucjom zgodnie z art. 55 Statutu Trybunału Sprawiedliwości (wyrok/postanowienie z dnia 25/11/2009) (inne dostępne wersje językowe: zob. www.curia.europa.eu)
PT	Notificação aos Estados-Membros e às instituições NOS termos do artigo 55.º do Estatuto do Tribunal de Justiça das Comunidades Europeias (acórdão/despacho do 25/11/2009) (outras versões linguísticas disponíveis : ver em www.curia.europa.eu)
RO	Comunicare statelor membre si instituțiilor in virtutea articolului 55 din statutul Curții de Justiție (hotărâre/ordonanță din 25/11/2009) (alte versiuni lingvistice disponibile : a se vedea www.curia.europa.eu)
SK	Doručenie členským štátom a orgánom Spoločenstiev na základe článku 55 Štatútu Súdneho dvora (rozsudok/uznesenie z/zo 25/11/2009) (či sú k dispozícii iné jazykové verzie: pozri www.curia.europa.eu)
SL	Vročitev državam članicam in institucijam na podlagi člena 55 Statuta Sodišča (sodba/sklep z dne 25/11/2009) (druge razpoložljive jezikovne različice: glej na www.curia.europa.eu)
FI	Tuomioistuimen perussäännön 55 artiklan mukainen tiedoksianto jäsenvaltioille ja yhteisöjen toimielimille (tuomio/määräys 25/11/2009) (muut saatavilla olevat kieliversiot: katso www.curia.europa.eu)
SV	Delgivning till medlemsstater och institutioner i enlighet med artikel 55 i domstolens stadga (dom/beslut av den 25/11/2009) (andra tillgängliga språkversioner: se www.curia.europa.eu)



E. COULON

Секретар – Secretario – Vedoucí soudní kanceláře – Justitssekretær – Kanzler –
Kohusekretär – Γραμματέας – Registrar – Greffier – Cancelliere – Sekretärs – Kancleris –
hivatalvezető – Registrantur – Griffier – Sekretarz – Secretário – Greffier – Tajomník –
Sodnik tajnik – Kirjaaja – Justitiesekreterare





LUXEMBOURG

ΠΡΩΤΟΒΑΘΜΙΑΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
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EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

ORDER OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

25 November 2009 *

-415926-

(State aid – Measures in favour of Danske Statsbaner – Public service obligations
– Decision to initiate the procedure provided for in Article 88(2)
EC – Inadmissibility)

In Case T-87/09,

Jørgen Andersen, residing in Ballerup (Denmark), represented by M. Nissen,
J. Rivas de Andrés and J. Gutierrez Gisbert, lawyers,

applicant,

v

Commission of the European Communities, represented by B. Martenczuk and
C. Urraca Caviedes, acting as Agents,

defendant,

ACTION for annulment of Commission Decision C(2008) 4776 final of
10 September 2008 to initiate the procedure provided for in Article 88(2) EC in
respect of State aid C 41/2008 (ex NN 35/2008), implemented by the Kingdom of
Denmark in favour of Danske Statsbaner,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas (Rapporteur) and
N. Wahl, Judges,

Registrar: E. Coulon,

makes the following

* Language of the case: English.

CERTIFIED A TRUE COPY,

LUXEMBOURG, 27.11.09
REGISTRAR,



Order

Background to the dispute

- 1 The applicant, J. Andersen, operates bus transport services in Denmark and elsewhere under the trade name Gråhundbus v/Jørgen Andersen. His routes include a link between Copenhagen (Denmark) and Ystad (Sweden). Ystad is linked by water route to the island of Bornholm (Denmark).
- 2 On 3 February 2003, the applicant lodged a complaint with the Commission of the European Communities concerning alleged State aid granted by the Kingdom of Denmark to the incumbent operator providing rail transport services in Denmark, namely Danske Statsbaner (DSB).
- 3 That complaint concerned the rail link between Copenhagen and Ystad, which was included in a public service contract between the Danish Ministry of Transport and DSB for the period from 2005 to 2014.
- 4 The applicant argued in his complaint inter alia that the compensation for a public service was unacceptable when the market in question was open to competition, that the Danish Government had to choose the solution which is least costly for the community and that, in any event, the compensation granted had to correspond to the extra cost resulting from the imposition of public service obligations.
- 5 On the basis of the complaint lodged by the applicant and a second complaint lodged in 2006 by a Danish association representing the interests of a number of bus operators, the Commission adopted Decision C(2008)4776 final of 10 September 2008 ('the contested decision'), published in the *Official Journal of the European Union* of 4 December 2008 (OJ 2008 C 309, p. 14) in the authentic language (Danish), preceded by a summary in the other official languages. By the contested decision, the Commission initiated the formal investigation procedure provided for in Article 88(2) EC relating to State aid C 41/2008 (ex NN 35/2008), which the Kingdom of Denmark implemented in favour of DSB.
- 6 According to recital 5 of the contested decision, DSB is wholly owned by the Danish State and provides, inter alia, passenger rail transport services.
- 7 The contested decision concerns, in addition to the measures complained of by the applicant, measures relating to another public service contract for the period from 2000 to 2004, criticised in the second complaint of 2006.
- 8 Recital 58 of the contested decision states that the contract signed by the Danish Ministry of Transport and DSB concerning the link between Copenhagen and Ystad for the period from 2005 to 2014 provides for the payment of several million Danish crowns (DKK) per year to DSB by way of compensation for the performance of public service obligations.

- 9 For the appraisal of the measures provided for by that contract in the light of the provisions relating to State aid, the Commission began by examining whether they were State aid for the purposes of Article 87(1) EC. The Commission was not able to rule out the possibility that those measures did constitute such aid. It thus conducted an initial assessment of the compatibility of those measures with the common market.
- 10 Regarding, more specifically, the classification of the measures in question as State aid for the purposes of Article 87(1) EC, the Commission observed that the payments in question had been made using State resources and that DSB was an undertaking within the meaning of Article 87(1) EC (recitals 66 and 67 of the contested decision). As to whether those measures conferred an economic advantage on DSB, the Commission stated, in recital 68 of the contested decision, that it would examine whether the four criteria laid down in that regard in C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('*Altmark*') were satisfied in the present case.
- 11 With respect to the first criterion, that the recipient undertaking must actually have clearly-defined public service obligations to discharge (*Altmark*, paragraph 89), the Commission observed, first, that the Member States have broad discretion to determine whether a service is of general economic interest. Next, the Commission stated that the reasons put forward by the Danish State, namely territorial continuity and the need for reliability and regularity in traffic between Copenhagen and Bornholm island, the serving of the coastal towns by train routes and the granting of reduced fares to certain categories of passengers, did not show that the decision to include that line in the public service contract was vitiated by a manifest error of assessment. In those circumstances, the Commission took the view that the first *Altmark* criterion was satisfied as regards the link between Copenhagen and Ystad (recitals 70 to 76 of the contested decision).
- 12 As regards the second criterion, that the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (*Altmark*, paragraph 90), the Commission noted that it was satisfied for the period from 1999 to 2008. It expressed doubts in that regard, however, for the period from 2009 to 2014, due to the lack of a forecast budget which would have served as a basis for calculating the compensation to be granted (recital 80 of the contested decision).
- 13 Regarding the third criterion, that the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (*Altmark*, paragraph 92), the Commission stated, in recitals 102 and 103 of the contested decision, that it did not rule out the possibility of there being overcompensation with respect to the link between Copenhagen and Ystad and the entire journey between Copenhagen and Bornholm island.

- 14 As regards the fourth criterion, that, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (*Altmark*, paragraph 93), the Commission expressed doubts as to the methodology used by the Danish authorities (recitals 104 to 107 of the contested decision).
- 15 Moreover, in recitals 108 to 112 of the contested decision, the Commission took the view that the measures in question were likely to affect trade between Member States. In those circumstances, the Commission found that those measures did come within the concept of State aid for the purposes of Article 87(1) EC.
- 16 As to the compatibility of the aid with the common market, the Commission stated, in recitals 116 and 117 of the contested decision, that, following *Altmark*, it was necessary to determine whether Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), or 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), applied to the present case. If one of the two regulations applied to this case, the compatibility of the disputed measures with the common market could be assessed only in the light thereof and not in the light of primary law provisions such as Articles 87 EC or 73 EC.
- 17 Regarding Regulation No 1191/69, the Commission stated, first of all, that the public service contract in question came within the scope of application of Article 14 of that regulation (recital 118 of the contested decision). Next, the Commission stated that Article 17(2) of Regulation No 1191/69 exempted Member States from the obligation of notification under Article 88(3) EC, solely with respect to compensation granted to balance the public service obligations imposed unilaterally by public authorities on transport undertakings. By contrast, the notification procedure applies to payments made under a public service contract for the purposes of Article 14 of that regulation (recitals 119 to 123 of the contested decision).
- 18 The Commission further stated that aid under a public service contract could be declared compatible with the common market and that, given that there were no specific criteria in that regard in Regulation No 1191/69, compatibility should be assessed in the light of the general principles arising from the Treaty, the case-law and its decision-making practice (recitals 126 and 127 of the contested decision).

- 19 The Commission thus referred to the Community framework for State aid in the form of public service compensation (OJ 2005 C 297, p. 4), point 14 of which states:
- ‘The amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations. The amount of compensation includes all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.’
- 20 The Commission expressed doubts as to whether the price paid by the Danish Government included solely what was necessary to cover the costs incurred in discharging the public service obligations (recitals 129 to 131 of the contested decision).
- 21 Regarding the assessment of the compatibility of the disputed measures with the common market on the basis of Regulation No 1107/70, which, according to the Commission, is also applicable in the present case, the Commission stated that the public service contract in question did not fall within any of the cases listed in Article 3(2) and (3) of that regulation and that, consequently, the disputed aid could not be declared compatible with the common market on that basis (recitals 132 to 135 of the contested decision).
- 22 Lastly, the Commission found that the aid in question could not be declared compatible with the common market on the basis of Article 86(2) EC, because Article 73 EC was a specific rule in relation to that provision (recital 136 of the contested decision).
- 23 By letter of 18 December 2008, the applicant asked the Commission to confirm to him that recitals 75 and 76 of the contested decision were a definitive decision that the line between Copenhagen and Ystad was of a public service nature.
- 24 By letter of 8 January 2009, the Commission confirmed to the applicant, *inter alia*, that his understanding of the contested decision was correct in that it did not express any doubts as to the first *Altmark* criterion and that it considered that the Danish authorities had not made any manifest error of assessment in finding that the line between Copenhagen and Ystad had to be covered by the public service contract signed with DSB.

Procedure and forms of order sought

- 25 By application lodged at the Registry of the Court of First Instance on 25 February 2009, the applicant brought the present action.

- 26 By separate document lodged at the Court Registry on 4 June 2009, the Commission raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance. The applicant lodged his observations on that objection on 15 July 2009.
- 27 By documents lodged at the Court Registry on 6 and 16 July 2009, the Kingdom of Denmark and DSB applied for leave to intervene in the present case in support of the form of order sought by the Commission.
- 28 The Commission claims that the Court should:
- dismiss the action as inadmissible;
 - order the applicant to pay the costs.
- 29 The applicant contends that the Court should:
- dismiss the objection of inadmissibility and rule on the substance of the case;
 - annul the Commission's position, as set out in recitals 75, 76 and 145 of the contested decision;
 - in the alternative, annul the contested decision;
 - order the Commission to pay the costs.

Law

- 30 The Commission argues that the action is inadmissible on two grounds. First, the Commission considers that recitals 75, 76 and 145 of the contested decision, the lawfulness of which is challenged by the applicant, do not constitute a challengeable measure because they do not form part of the operative part of the contested decision. Secondly, the Commission argues that the contested decision does not affect the applicant's legal position.
- 31 Should the action be held to be admissible, the Commission requests the Court to ask the applicant to have certain documents in Danish annexed to the application translated into the language of the case.
- 32 The Court finds that it is appropriate to begin by examining the second ground of inadmissibility put forward.

Arguments of the parties

- 33 First, the Commission argues that the classification of the link between Copenhagen and Ystad as a public service does not affect the contract covering

the period from 2000 to 2004 (see paragraph 6 above). In fact only the second contract referred to in the contested decision, namely the one covering the period from 2005 to 2014, concerns that link. Therefore, the applicant has no interest in the annulment of the part of the contested decision relating to the contract covering the period from 2000 to 2004.

- 34 Secondly, the Commission states that although according to the case-law an aid beneficiary or the Member State concerned may bring an action against a decision to initiate the formal investigation procedure in order to challenge the classification of the disputed measure as aid or as new aid, that approach may nonetheless not be applied to the situation of a competitor of the beneficiary of that measure.
- 35 The decision to initiate the formal investigation procedure may have adverse effects only on the beneficiary of the disputed measures, in that it creates the impression that he has received unlawful aid which may have to be recovered. By contrast, such a decision can serve only to benefit a competitor of the beneficiary of the aid and give him the opportunity to comment on the disputed measures.
- 36 The fact that the Commission did not express doubts as to whether the first *Altmark* criterion was satisfied cannot alter that assessment, since the criteria in question must be satisfied cumulatively in order for the measures in question not to be classified as State aid for the purposes of Article 87(1) EC. Consequently, that fact does not prejudice its final position as to whether there is State aid which is compatible or incompatible with the common market in part or in whole.
- 37 It follows, furthermore, from Article 4(4) and Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) that the decision to initiate the formal investigation procedure is to include a preliminary assessment of the aid and set out the Commission's doubts as to its compatibility with the common market. That decision is also intended to allow the Member State concerned and interested parties to submit comments. There is thus nothing to prevent the applicant from submitting comments in respect of the first *Altmark* criterion, even though the Commission has not expressed doubts in that regard. As is apparent from Article 7 of Regulation No 659/1999, there is nothing to prevent the Commission from revisiting the assessments it made in the decision to initiate the formal investigation procedure.
- 38 As to the letter of 8 January 2009, it merely confirms that the Commission had not expressed any doubts as to the first *Altmark* criterion.
- 39 The Commission adds that, in the present proceedings, a final decision pursuant to Article 7 of Regulation No 659/1999 will in any event be adopted. The applicant would thus be able to challenge that decision if it stated that the disputed measures

do not constitute State aid or that they constitute State aid which is compatible with the common market.

- 40 Lastly, the Commission points to the negative 'systemic consequences' of a procedural nature which would ensue if the present action were held to be admissible.
- 41 The applicant, for his part, submits that the contested decision contains the Commission's definitive position on the classification of the link between Copenhagen and Ystad as a public service, which affects his legal position and his interests as a competitor of the beneficiary of the aid, namely DSB. Had the Commission not classified that link as a public service, all of the aid granted to DSB on that basis could have been declared incompatible with the common market. As it was so classified, however, only that amount corresponding to the overcompensation of the public service obligations can be classified as State aid which is incompatible with the common market and recovered.
- 42 It follows that the contested decision produces definitive legal effects which are independent of the final decision since, if the Commission had found that the first *Altmark* criterion had not been satisfied, it would not have been necessary to examine whether the other three criteria were.
- 43 The definitive nature of that position also follows from the Commission's letter of 8 January 2009 (see paragraph 24 above), which made it pointless to submit comments in that regard during the formal investigation procedure. Consequently, the final decision will be merely an act confirming the contested decision on that point and any action brought against would therefore be inadmissible.
- 44 Furthermore, in rejecting definitively the applicant's assertions that there are no public service obligations, the Commission affected irrevocably his interests and legal position. The contested decision may be equated with a decision not to initiate the formal investigation procedure. The present action is therefore admissible in the light of the conditions laid down in the case-law for actions against that type of decision. As the sole competitor of DSB on the line between Copenhagen and Ystad, the applicant fulfils those conditions.
- 45 It is, moreover, precisely the classification of the link in question as a public service which enabled DSB to remain active on that market or to offer its services at a lower cost.
- 46 That classification also affects the possibilities the applicant may have for challenging the disputed measures before the national courts, as it makes it practically impossible to obtain a suspension of those measures or provisional recovery of the full amounts paid.
- 47 As to the Commission's argument that the present action could not affect the contract relating to the period from 2000 to 2004, the applicant observes that it is

probable that the link between Copenhagen and Ystad also received subsidies under that contract. In any event, if the Court finds that this argument put forward by the Commission is well founded, it will entail the dismissal of the action as inadmissible only in so far as it covers that contract.

- 48 The applicant disputes, lastly, the Commission's argument relating to the negative 'systemic consequences' of a procedural nature which would occur if the present action were held to be admissible.

Findings of the Court

- 49 Under Article 114 of the Rules of Procedure, if a party so applies, the Court of First Instance may give a decision on admissibility without going to the substance of the case. Under Article 114(3), the remainder of the proceedings is to be oral, unless the Court decides otherwise. In the present case, the Court considers that it has sufficient information from the documents and explanations provided by the parties during the written procedure and decides, consequently, that there is no need to hear the parties' oral argument.
- 50 It is clear from settled case-law that an action for annulment for the purposes of Article 230 EC is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see Case C-521/06 P *Athinaiki Techniki v Commission* [2008] ECR I-5829, paragraph 29 and case-law cited).
- 51 Thus, in the area of State aid, it is those measures which definitively determine the position of the Commission upon the conclusion of an administrative procedure, and which are intended to have binding legal effects capable of affecting the interests of the complainant, which are open to challenge, and not intermediate measures whose purpose is to prepare for the final decision, which do not have those effects (*Athinaiki Techniki v Commission*, paragraph 42).
- 52 The applicant argues that the contested decision satisfies those criteria, even though, by that decision, the Commission merely initiated the formal investigation procedure provided for in Article 88(2) EC against a measure benefiting his competitor, DSB. According to the applicant, the fact that the Commission found, in that decision, that the Member State concerned had not made a manifest error in finding that DSB actually has public service obligations, and that the first *Altmark* criterion was therefore satisfied, places a definitive limit on the amount of the aid which may be declared incompatible with the common market and accordingly recovered. It would follow that the contested decision produced binding legal effects vis-à-vis the applicant by bringing about a distinct and definitive change in his legal position.
- 53 It must be borne in mind, first of all, that, as is apparent from Article 4(4) and Article 6(1) of Regulation No 659/1999, the decision to initiate the formal

investigation procedure includes a preliminary assessment enabling the Commission to form an initial view on whether the measures being investigated are in the nature of aid within the meaning of Article 87(1) EC and, if so, whether the aid in question is compatible with the common market. It follows that that decision is preparatory in relation to the final decision, which will fix definitively the Commission's position on those aspects.

- 54 The necessarily provisional nature of the assessments contained in the decision to initiate the formal investigation procedure is confirmed by Article 7 of Regulation No 659/1999, which provides that the Commission may decide in the final decision that the notified measure does not constitute aid, that the notified aid is compatible with the common market, that the notified aid may be considered compatible with the common market if certain obligations are complied with or that the notified aid is incompatible with the common market (see, to that effect, Case T-190/00 *Regione Siciliana v Commission* [2003] ECR II-5015, paragraph 48).
- 55 Therefore, contrary to the applicant's assertions, even though the Commission did not express any doubts, in the contested decision, about the decision by the Danish authorities to classify the rail link between Copenhagen and Ystad as a public service, it remains free to alter its position in the light of the comments submitted by the interested parties throughout the administrative procedure. This finding is not affected by the fact that the Commission expressed itself in affirmative terms in the contested decision or even in the letter of 8 January 2009 (see paragraph 24 above).
- 56 It remains to be examined whether, despite the preparatory nature of the contested decision, the position taken by the Commission on the classification of the link between Copenhagen and Ystad as a public service produces legal effects independent of the final decision, which will be adopted on the basis of Article 7 of Regulation No 659/1999. It is clear from the case-law that such effects can provide a basis for the admissibility of the action (Case C-47/91 *Italy v Commission* [1992] ECR I-4145, paragraphs 25 to 30; Case C-312/90 *Spain v Commission* [1992] ECR I-4117, paragraphs 17 to 24; and Case C-400/99 *Italy v Commission* [2001] ECR I-7303, paragraphs 57 to 65).
- 57 In that regard, it should be observed, first of all, that the four *Altmark* criteria concern the classification of the measure in question as State aid for the purposes of Article 87(1) EC and, more specifically, the determination of whether there is an advantage for the beneficiary thereof (see, to that effect, Case T-354/05 *TF1 v Commission* [2009] ECR I-0000, paragraph 130).
- 58 Next, it must be borne in mind, as the Commission stated, that, in order to avoid classification as State aid for the purposes of that provision, a measure must satisfy all of those criteria.

- 59 If, contrary to the second *Altmark* criterion (see paragraph 12 above), the parameters on the basis of which the compensation is calculated have not been established in advance in an objective and transparent manner and if it cannot be concluded that the conditions imposed by the third and fourth criteria (see paragraphs 13 and 14 above) have been complied with, a determination cannot be made as to the extent to which amounts granted exceed what is necessary for the discharge of public service obligations, taking into account also a reasonable profit, and that amount must accordingly be held to be State aid for the purposes of Article 87(1) EC.
- 60 It cannot therefore be accepted that, where a measure satisfies solely the first *Altmark* criterion (see paragraph 11 above), it constitutes State aid which, in the event of incompatibility with the common market, must be recovered solely to the extent that it exceeds what is necessary for the discharge of public service obligations taking into account also a reasonable profit. On the contrary, if the Commission reaches the conclusion that the aid in question is incompatible with the common market, it will have to order that it be recovered in accordance with Article 14 of Regulation No 659/1999.
- 61 It follows from the foregoing, first, that the assessment in recitals 75, 76 and 145 of the contested decision is provisional in nature and, secondly, that it does not produce independent legal effects with respect to the extent to which the amounts paid to DSB may be classified as State aid which is incompatible with the common market and recoverable pursuant to the final decision which will be adopted in accordance with Article 7 of Regulation No 659/1999. Moreover, if the Commission's assessments in the contested decision become definitive in its final decision, the applicant will be able to bring an action for annulment against that decision (see, to that effect, *Regione Siciliana v Commission*, paragraph 49), provided that he can demonstrate a legal interest in bringing those proceedings.
- 62 Those same considerations mean that, contrary to the view taken by the applicant (see paragraph 44 above), the contested decision may not be equated with a decision taken pursuant to Article 4(2) or (3) of Regulation No 659/1999 and finding, in the preliminary examination, that the disputed measures do not constitute State aid or that they constitute State aid which is compatible with the common market.
- 63 It follows that the action must be dismissed as inadmissible, without its being necessary to rule on the first ground of inadmissibility put forward by the Commission (see paragraph 30 above).
- 64 In those circumstances, it is not necessary to rule on the Commission's request concerning the translation of certain annexes to the application (see paragraph 31 above).

- 65 Similarly, it is not necessary to rule on the applications to intervene lodged by the Kingdom of Denmark and DSB in support of the form of order sought by the Commission (see, to that effect, order of 16 February 2007 in Case T-449/05 *Dikigorikos Syllogos Ioanninon v Parliament and Council*, not published in the ECR, paragraphs 86 and 87).

Costs

- 66 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, he must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

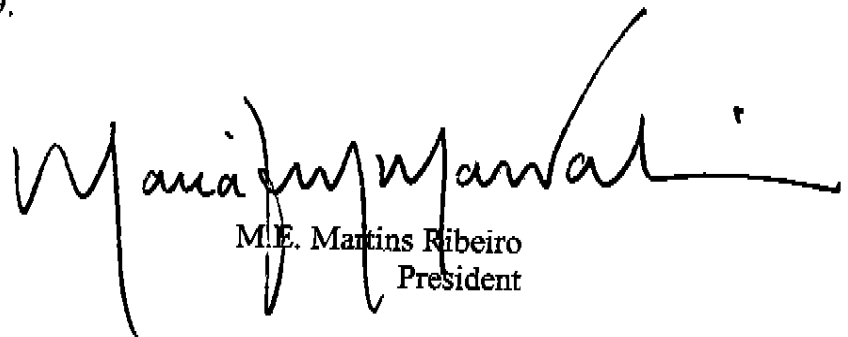
THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**
2. **Mr Jørgen Andersen shall pay the costs.**

Luxembourg, 25 November 2009.


E. Coulon
Registrar


M.E. Martins Ribeiro
President