

## II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

## DECISIONS

## COMMISSION

## COMMISSION DECISION

of 12 November 2008

on the loan of EUR 300 million granted by Italy to Alitalia No C 26/08 (ex NN 31/08)

(notified under document number C(2008) 6743)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2009/155/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) At a meeting on 23 April 2008 the Italian authorities informed the Commission that the Italian Council of Ministers had approved, on 22 April 2008, the granting of a loan of EUR 300 million to Alitalia through Decree-Law No 80 of 23 April 2008 <sup>(2)</sup>.
- (2) Since it had not received notification from the Italian authorities prior to the decision to grant this loan, by

letter of 24 April 2008 (D/422119) the Commission asked them to confirm the existence of this loan, to provide any relevant information allowing an assessment of the measure in respect of Articles 87 and 88 of the Treaty, to suspend granting of the loan and to inform the Commission of the measures taken to comply with this obligation in accordance with Article 88(2) of the Treaty.

- (3) In that letter, the Commission also reminded the Italian authorities of the requirement on them to notify all plans to grant or alter aid and not to implement any planned measure before a final decision has been reached in the Commission's investigation procedure.
- (4) By letter of 7 May 2008 the Italian authorities asked for an extension to the deadline which they had been given to reply to the Commission's letter of 24 April 2008. The Commission granted this request by letter of 8 May 2008 (D/423186), asking the Italian authorities to reply by 30 May 2008.
- (5) By letter of 30 May 2008 the Italian authorities replied to the Commission's letter of 24 April 2008. In this letter, the Italian authorities informed the Commission, among other things, of the adoption, on 27 May 2008, of Decree-Law No 93 <sup>(3)</sup>, giving Alitalia the option of counting the value of the aforementioned loan as part of its capital.

<sup>(1)</sup> OJ C 184, 22.7.2008, p. 34.

<sup>(2)</sup> Decreto-legge n° 80, Misure urgenti per assicurare il pubblico servizio di trasporto aereo (Official Gazette of the Italian Republic No 97, 24.4.2008).

<sup>(3)</sup> Decreto-legge n° 93, Misure urgenti per assicurare il pubblico servizio di trasporto aereo (Official Gazette of the Italian Republic No 127, 28.5.2008).

- (6) At the same time, the Commission received several complaints, including from various airlines, regarding the granting of the EUR 300 million loan by the Italian Government to Alitalia.
- (7) By letter of 12 June 2008 (D/203822) the Commission notified the Italian authorities of its decision of 11 June 2008 to initiate the formal investigation procedure pursuant to Article 88(2) of the EC Treaty. In this decision, the Commission asked Italy and other interested parties to submit their comments within a certain time limit. The decision was published in the *Official Journal of the European Union* <sup>(4)</sup>.
- (8) By letter of 12 July 2008 (A/509783) the Italian authorities sent their comments to the Commission. The Commission also received comments from five interested parties. These were sent to the Italian authorities by letter of 3 September 2008 (D/433031). A list of these interested parties is annexed to this Decision.
- (9) The Italian authorities have not commented on the comments from the interested parties.

## 2. DESCRIPTION OF THE MEASURE

- (10) At the meeting on 23 April 2008 the Italian authorities submitted to the Commission the aforementioned Decree-Law No 80, granting a loan of EUR 300 million from the Italian State to Alitalia, a company in which it held a 49,9 % stake.
- (11) The recitals to that Decree-Law state the following:

'Having regard to the financial situation of Alitalia [...], as demonstrated by the information disclosed to the market, and its role as the carrier which provides the largest share of the public air transport service between the national territory and countries not belonging to the European Union, and the onward connections on these routes for passenger and cargo traffic from and to regional catchment areas;

Given the extraordinary need and urgency to guarantee, for purposes of public order and territorial continuity, the aforementioned public air transport service by granting Alitalia [...] a short-term loan from the State, at market conditions, for the duration strictly needed to avoid compromising operational continuity until the new Government takes office, thus enabling it to take, with its full powers, the initiatives chosen to make possible the recovery of the company and completion of its liberalisation process.'

- (12) In order to enable it to meet its immediate liquidity needs, Article 1 of this Decree-Law authorises the granting to Alitalia of a loan of EUR 300 million, which must be repaid as quickly as possible between the 30th day after transfer of its share capital and 31 December 2008. This Article also states that the loan is subject to an interest rate equivalent to the reference rates adopted by the Commission and, in particular, up to 30 June 2008, the rate indicated in the Commission notice on current State aid recovery interest rates and reference/discount rates for 25 Member States applicable as from 1 January 2008 <sup>(5)</sup> and, with effect from 1 July 2008, the rate indicated in the Communication from the Commission on the revision of the method for setting the reference and discount rates <sup>(6)</sup>.
- (13) By letter of 30 May 2008 the Italian authorities informed the Commission that, by means of the aforementioned Decree-Law No 93, the Italian Government had given Alitalia the option of counting the value of the loan as part of its capital, in order to cover its losses (see Article 4(3) of the aforementioned Decree-Law). The intention behind this was to allow the company to maintain the value of its capital, in order to ensure that its losses did not make its share capital and reserves fall below the legal limit, thereby preventing insolvency proceedings (*procedura concorsuale*), and to ensure that the possibility of privatisation remained open and credible.

- (14) The loan repayment terms laid down in Decree-Law No 80 remain applicable in the context of Decree-Law No 93, except for the fact that the interest rate to which the loan is subject has been increased by 1 % (see Article 4(1) and (2) of Decree-Law No 93) and that, in the event of the company being liquidated, the amount in question will be repaid only after all the other creditors have been paid off, jointly and in proportion to the share capital (see Article 4(4) of Decree-Law No 93).

<sup>(4)</sup> OJ C 184, 22.7.2008, p. 34.

<sup>(5)</sup> OJ C 319, 29.12.2007, p. 6.

<sup>(6)</sup> OJ C 14, 19.1.2008, p. 6.

### 3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (15) In its Decision of 11 June 2008, the Commission found that the measure in question (hereinafter referred to as the measure) was a loan granted by the Italian State, the value of which could be counted as part of Alitalia's capital <sup>(7)</sup>.
- (16) On the subject of whether the measure in question could be regarded as aid, the Commission expressed its doubts as to whether the Italian State, in granting Alitalia the measure, acted as a prudent shareholder pursuing a structural policy — whether general or sectoral — guided by longer-term prospects of profitability on the capital invested than those of an ordinary investor.
- (17) In this context, the Commission took the view, on the basis of the information at its disposal, that, irrespective of how the relevant funds were used, the measure in question provided Alitalia with an economic advantage it would not have had under normal market conditions. This assessment was based on the company's financial situation and on the conditions and circumstances under which the measure was granted.
- (18) The Commission also expressed doubts as to whether the measure was compatible with the common market. On the basis of the information at its disposal at that stage of the procedure, it took the view that the measure could not be declared compatible with the common market in accordance with the Community guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter referred to as the 2004 guidelines) <sup>(8)</sup>. It pointed out that Alitalia had already received rescue and restructuring aid.
- (19) Accordingly, the Commission decided to initiate the formal investigation procedure in order to allay its doubts both as to whether the scheme in question constituted State aid and as to its compatibility with the common market.
- (21) They considered that the Italian State had acted as a shareholder whose objective was to ensure that a company in which it held a stake had the financial resources necessary to meet its liquidity needs in the short term. The ordinary shareholder loan granted by Italy thus constituted a simple bridging loan intended to protect the value of the State's holding and would have been granted by any prudent shareholder pursuing a structural policy — whether general or sectoral — guided by longer-term prospects of profitability on the capital invested than those of an ordinary investor. In this context, the interest rates applied in the case in point were consistent with the nature and objectives of a shareholder loan. Although such financing is often not onerous, in the case in point it was considered to be onerous, taking into account the nature of the lender and the setting of the interest rate at a level allowing a direct and appropriate return on the capital.
- (22) With regard to the Commission's claim that the doubts concerning the aid nature of the measure in question were substantiated by the fact that it was adopted at the same time as withdrawal of a takeover bid submitted to Alitalia on 14 March 2008 and by the fact that the existence of 'certain and immediate prospects of Alitalia being purchased by another investor' was not proven, Italy pointed out that the reasons preventing the privatisation process being finalised with the Air France-KLM group had already been made clear. According to the Italian authorities, however, the non-completion of this process did not undermine the prospect of privatisation in a context making best use of the company's assets, while safeguarding its residual value for shareholders.
- (23) Moreover, developments after 30 May 2008 suggested that this course could still reasonably be followed. In this context, the Italian authorities referred to the contract concluded on 9 and 10 June 2008 with which Alitalia charged Intesa Sanpaolo SpA (hereinafter referred to as Intesa Sanpaolo) with seeking out a bid to the Ministry of Economic Affairs and Finance, as shareholder in Alitalia, and to Alitalia, with the aim that one or more industrial or financial investors interested in participating in the recovery, development and relaunching of Alitalia, particularly through its capitalisation, would take lasting control of the company. This mandate had a duration of 60 days and could be extended by 30 days at the company's request.

### 4. COMMENTS BY THE ITALIAN AUTHORITIES

- (20) In their comments, the Italian authorities asserted that the measure in question did not constitute State aid within the meaning of Article 87(1) of the Treaty.

<sup>(7)</sup> The measure covered by this Decision is based on the aforementioned Decree-Laws Nos 80 and 93.

<sup>(8)</sup> OJ C 244, 1.10.2004, p. 2.

- (24) In the alternative, the Italian authorities asserted that, in any event, the measure was compatible with the common market in accordance with the 2004 guidelines.

- (25) Firstly, Alitalia was a firm in difficulty within the meaning of those guidelines. Secondly, the measure in question was reversible and thus complied with the requirement of the 2004 guidelines according to which rescue aid must involve purely temporary forms of support and must not constitute structural measures.
- (26) Thirdly, the process of privatisation of the company, together with the measure in question, which was adopted to allow completion of this process, complied with the requirements of point 25(b) of the 2004 guidelines. The EUR 300 million loan simply guaranteed the survival of the company, without allowing it to implement competitive strategies on the air transport market likely to lead to hypothetical economic consequences.
- (27) Fourthly, with regard to the Commission's assertion that the State had not given an undertaking to communicate, not later than six months after the measure has been implemented, a restructuring plan<sup>(9)</sup> (paragraph 25(c) of the 2004 guidelines), the Italian authorities countered that drafting the plan was part of the process of privatising the company, which Italy had discussed in detail in its letter of 30 May 2008 to the Commission. In this context, the Italian authorities pointed out that, in the alternative case of full repayment of the loan, Decree-Law No 93 laid down that repayment must occur strictly as soon as possible between the 30th day following the date of transfer by the Ministry of Economic Affairs and Finance of its full shareholding, i.e. the date of loss of effective control, and 31 December 2008. They inferred from this that a timetable was indeed submitted at the same time as adoption of the disputed measure and that it substantially satisfied the requirements of the 2004 guidelines in this connection.
- (28) Fifthly, in accordance with the requirements of paragraph 25(d) of the 2004 guidelines, granting of the loan in question was necessary by virtue of the company's immediate liquidity need caused by objective economic difficulties, which were recognised by the Commission in its Decision of 11 June 2008 (see recitals 18 to 20 of the Decision). In this connection, the Italian authorities pointed out that the loan simply aimed to safeguard, in the short term, the survival and assets of Alitalia, in order to allow the privatisation process to succeed. The total amount of EUR 300 million was strictly necessary and proportional to achieving these objectives, as demonstrated by Italy's presentation of the company's economic and financial situation in its letter of 30 May 2008 to the Commission (see pages 6 to 9).
- (29) Sixthly, and lastly, application of the 'one time, last time' principle referred to in paragraph 25(e) of the 2004 guidelines was not contrary to the specific circumstances of the case in point.
- (30) Although Alitalia had already received restructuring aid linked to the recovery plan over the 1996-2000 period, and rescue aid in 2004, it could be exempted from the 'one time, last time' principle. The Italian authorities referred, in this context, to the Commission Decision of 1 December 2004 concerning the State aid which France was planning to implement for Bull<sup>(10)</sup> (hereinafter the Bull Decision).
- (31) They pointed out that application of the 'one time, last time' principle was aimed at avoiding a situation whereby repeated public intervention in favour of certain firms simply 'maintain[ed] the status quo, postpone[d] the inevitable and in the meantime shift[ed] economic and social problems on to other, more efficient producers or other Member States' (paragraph 72 of the 2004 guidelines). The possibility of waiving this principle was dependent on recognition of the existence of cases where these factors were not verifiable and the cumulation of aid granted over a given period to a single beneficiary was not sufficient to consider that the firm '[could] only survive thanks to repeated state support' (paragraph 72 of the guidelines).
- (32) In this connection, privatisation of the company, which remained a possible and credible outcome, could lead, when achieved, to a real change as compared to the existing situation concerning the management of Alitalia, which would be subject to new supervisory bodies, and allow the company to return to profitability through the economic contributions of the shareholders of the new company. The Italian authorities also pointed out that all the external and unforeseen factors which, taken together, had prolonged the privatisation process of Alitalia could undoubtedly be considered exceptional and unforeseen circumstances for which it was not responsible, in accordance with paragraph 73 of the 2004 guidelines.
- ### 5. COMMENTS BY INTERESTED THIRD PARTIES
- (33) Five interested parties submitted their comments to the Commission under Article 88(2) of the Treaty. A list of these interested parties is annexed to this Decision.
- (34) With regard to whether the measure in question constituted aid, four interested parties supported the Commission's position, believing that this measure constituted aid within the meaning of Article 87(1) of the Treaty.

<sup>(9)</sup> Commission Decision of 11 June 2008, previously cited, recital 7.

<sup>(10)</sup> OJ L 342, 24.12.2005, p. 81.

- (35) British Airways (BA) and Sterling Airlines asserted that, without the measure in question, Alitalia would go bankrupt under Italian law. Alitalia would thus lose its air operator's certificate in accordance with the civil aviation regulations and, in consequence, would have to cease operations.
- (36) Neos pointed out, as regards the interest rate applicable to the measure in question for the purposes of repayment, that the 100 basis points added to the reference rate by no means reflected the risks incurred by the Italian authorities in granting the measure. Neos also supported the Commission's assessment in its Decision of 11 June 2008 concerning the lack of prospects for the privatisation of Alitalia when the measure in question was granted. Indeed, this circumstance would later be confirmed by the serious tensions during August between the Italian Ministry of Finance and the company's management board concerning the 'continuity of the company' and the approval of its half-yearly accounts.
- (37) BA and Sterling Airlines recalled that Alitalia had benefited from similar measures in the past. Meanwhile, Ryanair expressed regret that the Commission had limited the scope of the formal investigation procedure initiated on 11 June 2008 to the measure in question, since, in its view, Alitalia had benefited from other illegal State aid measures since November 2005. Analysing these other measures would have reinforced the view that, in the circumstances in question, a private investor would not have agreed to grant the relevant measure.
- (38) Both Neos and Ryanair denounced the distortion of competition which resulted from the support which Alitalia had received from Italy for many years.
- (39) As regards compatibility of the measure in question with the common market, BA believed that the measure constituted rescue aid and must thus comply with the conditions set out in the 2004 guidelines. This aid had not been notified to the Commission before being implemented and did not satisfy the conditions of those guidelines.
- (40) In this connection, BA pointed out that this measure could not be granted without infringing the 'one time, last time' principle in the guidelines (paragraph 25(e) of the 2004 guidelines), since Alitalia had already received restructuring aid approved by the Commission. BA added that the exemption from the 'one time, last time' principle under paragraph 73 of the guidelines was not applicable in the case in point, since Alitalia had not had to deal with unforeseen circumstances for which it was not responsible. In this context, BA and Sterling Airlines made clear that the very difficult situation facing the air sector and linked, in particular, to the increased oil price, affected all the participants in the sector. BA inferred from this that this argument could not be validly invoked by Alitalia as reason to derogate from the 'one time, last time' principle in the 2004 guidelines. The company's need for financing was due to its incapacity to reform with a view to reducing its internal costs, despite the State aid which it had already received.
- (41) Moreover, according to BA, the measure in question was not liquidity support in the form of loan guarantees or loans, but had the characteristics of an injection of capital guaranteeing the Italian Government effective control of the company (paragraph 25(a) of the 2004 guidelines).
- (42) With regard to the condition in the 2004 guidelines linked to the existence of serious social difficulties, BA stressed that the insolvency of Alitalia would not cause serious disruption to passengers, owing to the existence of competitors on both national and international routes. As for adverse spillover effects on its competitors, these resulted from the preservation of Alitalia on the market despite its financial difficulties, the increase in its number of routes, particularly from Rome and Milan to Los Angeles, and the reduction in its fares. These commercial decisions were not rational given the company's financial situation and demonstrated its wish to increase its market share as compared to those of its competitors not in receipt of State aid (paragraph 25(b) of the 2004 guidelines).
- (43) Moreover, the measure in question was not granted to Alitalia for a period limited to six months, as required by the 2004 guidelines (paragraph 25(c)).
- (44) Lastly, BA pointed out that, as this commercial strategy was characterised by non-essential expenses being incurred, it could not be guaranteed that the aid in question was limited to the amount needed to keep the company in business for the period for which it was authorised, as this amount had to be based on the liquidity needs of the company stemming from losses (paragraph 25(d) of the 2004 guidelines).
- (45) Ryanair criticised the Commission for not having already demanded the immediate suspension of the measure and asked that Alitalia be required to immediately repay the EUR 300 million that had already been granted to it by Italy. Ryanair also stressed that, contrary to the claims of the Italian authorities, no motive of public order and territorial continuity could be invoked to justify the granting of the measure in question to Alitalia. In this context, Ryanair referred to the reduction in Alitalia's market share on certain routes.



- (46) By contrast, the European Travel Agents' and Tour Operators' Associations (ECTAA) and the Guild of European Business Travel Agents (GEBTA) considered that granting the measure in question aimed at preventing Alitalia's bankruptcy was likely to protect consumers in the absence of legislation protecting passengers in the event of the company going bankrupt. ECTAA and GEBTA added that granting the loan in question was the only reasonable solution to avoid Alitalia going bankrupt and to help it in its privatisation process. Given the prospects for relaunching the company reported in the press, granting this loan was economically justified in order to lead to a complete restructuring of Alitalia with a view to future profits.

## 6. SUMMARY OF PAST COMMISSION DECISIONS CONCERNING ALITALIA

- (47) For the purposes of analysing the measure in question, it is worth recalling here that the Commission has previously taken the following Decisions in relation to Alitalia:

- Commission Decision of 15 July 1997 concerning the recapitalisation of Alitalia <sup>(11)</sup>: in this Decision, the Commission considered that, subject to certain undertakings being met, the recapitalisation of Alitalia in the form of a capital injection of 2 750 billion Italian lire was State aid compatible with the common market under Article 87(3)(c) of the EC Treaty.
- Commission Decision of 18 July 2001 concerning the recapitalisation of Alitalia <sup>(12)</sup>: since its Decision of 15 July 1997 had been annulled by the Court of First Instance <sup>(13)</sup>, the Commission adopted a new Decision concerning the same recapitalisation. In this Decision, the Commission reached the same conclusion as in its Decision of 15 July 1997, namely that the recapitalisation of Alitalia was State aid compatible with the common market <sup>(14)</sup>.
- Commission Decision of 19 June 2002, C 54/96 and N 318/02 — Third instalment of aid for the restructuring of Alitalia approved by the Commission on 18 July 2001 and new recapitalisation of EUR 1,4 billion <sup>(15)</sup>: with this Decision, the Commission approved the abovementioned third instalment (EUR 129 million) and considered that the new recapitalisation was not State aid within the meaning of Article 87(1) of the Treaty.

<sup>(11)</sup> OJ L 322, 25.11.1997, p. 44.

<sup>(12)</sup> OJ L 271, 12.10.2001, p. 28.

<sup>(13)</sup> Judgment of the Court of First Instance of 12 December 2000 in Case T-296/97, *Alitalia v Commission* (ECR II-3871).

<sup>(14)</sup> The appeal lodged by Alitalia against the Commission Decision of 18 July 2001 was rejected by the Court of First Instance in its judgment of 9 July 2008 in Case T-301/01, *Alitalia v Commission* (not yet published in the ECR).

<sup>(15)</sup> OJ C 239, 4.10.2002, p. 2.

- Commission Decision of 20 July 2004, N 279/04 — Urgent measures in support of the restructuring and relaunch of Alitalia (rescue aid) <sup>(16)</sup>: with this Decision, the Commission authorised rescue aid in the form of a State guarantee for a bridging loan of EUR 400 million <sup>(17)</sup>.
- Commission Decision 2006/176/EC of 7 June 2005 on Alitalia's industrial restructuring plan <sup>(18)</sup>: in this Decision, the Commission considered that the measures in question did not constitute State aid within the meaning of Article 87(1) of the Treaty.

## 7. ASSESSMENT OF THE MEASURE IN THE LIGHT OF ARTICLE 87(1) OF THE TREATY

- (48) Following the formal investigation procedure initiated on the basis of Article 88(2) of the Treaty, and taking account of the arguments submitted in this connection by the Italian authorities and the interested parties, the Commission believes that the measure in question, namely the EUR 300 million loan granted to Alitalia, the value of which can be counted as part of the company's capital, constitutes State aid which is incompatible with the common market within the meaning of Article 87(1) of the Treaty and unlawful within the meaning of Article 88(3) of the Treaty.

### 7.1. Existence of State aid

- (49) According to Article 87(1) of the Treaty, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.
- (50) Classifying a national measure as State aid presupposes that the following cumulative conditions are met: 1. the measure in question confers an advantage through State resources; 2. the advantage is selective; and 3. the measure distorts or threatens to distort competition and is capable of affecting trade between Member States <sup>(19)</sup>.
- (51) It is appropriate to set out the factors which allow the Commission to consider, at this stage, that the measure in question satisfies these cumulative conditions.

<sup>(16)</sup> OJ C 125, 24.5.2005, p. 7.

<sup>(17)</sup> An action for annulment of this Decision has been submitted by Air One and is currently pending before the Court of First Instance (Case T-344/02).

<sup>(18)</sup> OJ L 69, 8.3.2006, p. 1.

<sup>(19)</sup> See, for example, the judgment of the Court of Justice in Case C-222/04, *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze* (ECR I-289, paragraph 129).

7.1.1. *The existence of an advantage conferred through State resources*

- (52) It should first be pointed out that the measure in question is a loan, the value of which can be counted as part of Alitalia's capital <sup>(20)</sup>, directly granted to the company by the Italian State, and thus involving the transfer of State resources. Moreover, this measure is the responsibility of the Italian State, since the decision to grant the loan was adopted by the Italian Council of Ministers on 22 April 2008 and supplemented by Decree-Law No 93 of 27 May 2008.
- (53) As for whether there is an economic advantage, it should be assessed whether, in similar circumstances, a private investor could have been led to provide a capital injection such as that in the case in point. Here, the Court has stated that, although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term <sup>(21)</sup>.
- (54) The Court has also ruled that a private shareholder may reasonably provide the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after restructuring. However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 87 of the Treaty <sup>(22)</sup>.
- (55) It should also be pointed out that, according to settled case-law, both the existence and the amount of aid must be assessed in the light of the situation prevailing at the time it was granted <sup>(23)</sup>.
- (56) In the case in point, for the purposes of applying the private investor criterion and the abovementioned prin-

ciples, it is necessary to take account of Alitalia's financial situation and the characteristics of the State intervention in question.

7.1.1.1. *Alitalia's financial situation*

- (57) With regard to the financial situation of Alitalia, the Commission notes that it was very precarious at the time of granting of the loan in question and adoption of Decree-Law No 93. Indeed, Alitalia recorded consolidated losses of EUR 626 million for the 2006 financial year and EUR 495 million for the 2007 financial year <sup>(24)</sup>.
- (58) Moreover, according to financial information published by the company, Alitalia recorded pre-tax losses of EUR 214,8 million in the first quarter of 2008, a 41 % increase on the same period in 2007. Furthermore, as at 30 April 2008, Alitalia's net debt stood at EUR 1,36 billion, an increase of 13 % on the December 2007 level. At the same time, the liquidity position, including short-term financial loans, was EUR 174 million as at 30 April 2008, a fall of 53 % as compared to the end of December 2007 <sup>(25)</sup>.
- (59) This situation is shown equally clearly by Decree-Law No 80, which states, *inter alia*, that granting the loan in question should make possible the recovery of the company and allow it to meet its immediate liquidity needs (see recitals 57 and 58 above).
- (60) In their reply of 30 May 2008 to the Commission, the Italian authorities also stated that Decree-Law No 93 was adopted as a result of the worsening financial situation of the company and was intended to enable it to safeguard its value and ensure that it remained in business. In this context, they indicated that the measures taken were aimed at ensuring that its losses did not make share capital and reserves fall below the legal limit, thereby preventing insolvency proceedings (*procedura concorsuale*) and the placing of the company in liquidation.
- (61) On 3 June 2008, the Italian authorities adopted Decree-Law No 97 <sup>(26)</sup>, which also referred to the financial situation of Alitalia described above and substantiated this analysis.

<sup>(20)</sup> The measure covered by this Decision is based on the aforementioned Decree-Laws Nos 80 and 93.

<sup>(21)</sup> See, *inter alia*, the judgment of the Court of Justice of 14 September 1994 in Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission* (ECR I-4103, paragraphs 20 to 22).

<sup>(22)</sup> See, for example, the judgment of the Court of Justice of 21 March 1991 in Case C-303/88, *Italy v Commission* (ECR I-1433, paragraphs 21 and 22).

<sup>(23)</sup> See, for example, the judgment of the Court of First Instance of 19 October 2005 in case T-318/00, *Freistaat Thüringen v Commission* (ECR II-4179, paragraph 125).

<sup>(24)</sup> Data sent by the Italian authorities in their letter of 30 May 2008 to the Commission.

<sup>(25)</sup> See the financial results available on Alitalia's website (<http://corporate.alitalia.com/en/investors/financial/index.aspx>).

<sup>(26)</sup> Decreto-legge n° 97, Disposizioni urgenti in materia di monitoraggio e trasparenza dei meccanismi di allocazione della spesa pubblica, nonché in materia fiscale e di proroga di termini (*Official Gazette of the Italian Republic* No 128 of 3 June 2008).

(62) In view of all these factors, it is possible to consider that Alitalia's financial situation was very precarious, both as at the date of granting of the EUR 300 million loan by means of Decree-Law No 80 and as at that of adoption of Decree-Law No 93, as indeed the Italian authorities admitted in their letter of 30 May 2008 to the Commission. The Commission considers it appropriate to point out in this connection that this assessment was in no way questioned by the Italian authorities in their comments on initiation of the formal investigation procedure <sup>(27)</sup>.

(63) In this context, the Commission also considers it appropriate to point out that Alitalia's financial situation has worsened since 1997 and been very precarious since 2001, as demonstrated by the description of the company's financial situation in the Commission Decisions of 18 July 2001, 20 July 2004 and 7 June 2005 (previously cited, see recital 47 above). The State support measures which the company has benefited from since 1997 provide ample proof that the difficulties encountered by the company for almost ten years have been overcome repeatedly through the intervention of the State as shareholder.

#### 7.1.1.2. Characteristics of the State intervention

(64) With regard to the conditions for granting of the measure in question, the Commission notes, firstly, that, according to Decree-Law No 80, the interest rate applicable is that indicated in the Commission notice on current State aid recovery interest rates and reference/discount rates for 25 Member States applicable as from 1 January 2008 and, with effect from 1 July 2008, the rate indicated in the Communication from the Commission on the revision of the method for setting the reference and discount rates <sup>(28)</sup>. This rate was increased by 1 % by Decree-Law No 93 <sup>(29)</sup>.

(65) With regard to the Commission notice on current State aid recovery interest rates and reference/discount rates for 25 Member States applicable as from 1 July 2008 <sup>(30)</sup>, it is important to note that the rates therein are supposed to reflect the average level of the interest rates in force in the various Member States for medium- and long-term loans (five to ten years) where normal security is provided. The Commission considers that, even increased by 1 %, these rates cannot be considered appropriate, since the financial situation of the company in question is very precarious. Furthermore, this notice is based on the 1997 Commission notice on the method

for setting the reference and discount rates <sup>(31)</sup>, which states that 'the reference rate thus determined is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty, or where the security normally required by banks is not provided). In such cases, the premium may amount to 400 basis points or more if no private bank would have agreed to grant the relevant loan'. The Commission believes that even a premium on the reference rate of 100 basis points, as provided for by Decree-Law No 93, does not take sufficient account of the particularly precarious situation of Alitalia at the time of granting of the measure.

(66) As for the Communication from the Commission on the revision of the method for setting the reference and discount rates <sup>(32)</sup>, it is enough to note that, to the extent that it is applicable, since the loan was granted before its entry into force and the classification of a measure as aid is assessed in relation to the time of its granting, the Italian authorities have not replied to the doubts expressed by the Commission in its Decision of 11 June 2008. Accordingly, the doubts expressed by the Commission in this connection remain.

(67) Accordingly, on the basis of the foregoing, the Commission believes that, even if a private investor in a similar situation to that of the Italian State in the case in point had agreed to granting the measure in question to Alitalia, it would not have accepted the interest rate being that applicable to a company in a normal financial situation, even with a premium of 100 basis points.

(68) The Italian authorities' comments in their letter of 12 July 2008 cannot cast doubt over this assessment of the interest rates applicable to the measure in question. Indeed, in their comments the Italian authorities simply stated, without substantiating their position, that the interest rate was set at a level allowing a direct and appropriate return on the capital to be guaranteed.

(69) The Commission notes that the decision of the Italian Government to grant the loan in question was taken on 22 April 2008, following the withdrawal, on the same day, of the bid by the Air France-KLM group to purchase Alitalia <sup>(33)</sup>, and that the adoption of Decree-Law No 93 was motivated by the company's worsening financial situation. Whatever the reasons for withdrawal of the Air France-KLM bid, which were linked, *inter alia*, to Alitalia's financial situation <sup>(34)</sup>, the fact remains that the decision to grant the loan in question immediately followed this decision to withdraw the bid.

<sup>(27)</sup> See paragraph 9 of the letter from the Italian authorities to the Commission dated 12 July 2008.

<sup>(28)</sup> See recital 12 above.

<sup>(29)</sup> See recital 5 above.

<sup>(30)</sup> Previously cited, see footnote 6.

<sup>(31)</sup> OJ C 273, 9.9.1997, p. 3.

<sup>(32)</sup> See footnote 6.

<sup>(33)</sup> A public share swap offer was submitted to Alitalia on 14 March 2008 and approved by its management board on 16 March 2008.

<sup>(34)</sup> See the previously cited letter from the Italian authorities to the Commission dated 30 May 2008.



- (70) In this connection, credence cannot be given to the Italian authorities' unsubstantiated claim that the non-completion of this deal did not undermine the prospect of privatisation in the absence of evidence demonstrating the reality of such a plan as at the time of granting the measure in question. The attempts to privatise the company to which the Italian authorities refer in their letter of 30 May 2008 and which concern the period between the end of 2006 and the end of 2007 are not enough to demonstrate that a real alternative takeover possibility existed when the measure in question was granted.
- (71) With regard to the letter from Mr B. Ermolli to Alitalia, to which the Italian authorities referred in their letter of 30 May 2008 and which, in their view, demonstrated the interest of some Italian entrepreneurs and investors in drawing up a plan to relaunch the company, this can no longer be considered to be a prospect of privatisation<sup>(35)</sup>.
- (72) As for the developments after 30 May 2008 to which the Italian authorities refer in their letters and, more precisely, the contract concluded on 9 and 10 June 2008 between Alitalia and Intesa Sanpaolo, it is sufficient to point out that, for the purposes of assessing the measure in question, account must be taken of the circumstances prevailing as at the time when it was granted. In any case, the Commission would point out that the fact that Alitalia charged Intesa Sanpaolo in June 2008 with seeking a solution for privatisation of the company cannot be considered as a sure and immediate prospect of takeover of the company, as there was no certainty as at that date as to the success of the task assigned to Intesa Sanpaolo.
- (73) It should also be pointed out here that, when the measure in question was granted by the Italian State, none of Alitalia's private shareholders took action to support it alongside the State, in order to enable it to handle its immediate liquidity need.
- (74) The almost simultaneous occurrence of withdrawal of the aforementioned takeover bid and granting of the loan by the Italian Government, the absence of other recovery prospects at the time of granting and the absence of financial intervention from Alitalia's private shareholders alongside that of the Italian State reinforce the conclusion that a shareholder of comparable size would not have agreed to grant this loan, given the seriousness of the situation.
- (75) The Commission also believes that, given Alitalia's very precarious financial situation, such a private investor would not have agreed to grant it any loan, much less a loan the value of which could be counted as part of its capital, which, in the event of liquidation of the company, would not be reimbursed until after all the other creditors had been paid off, jointly and in proportion to the share capital (see Article 4(4) of Decree-Law No 93). Use of the loan initially granted to fill the gap in Alitalia's capital further strengthens the Commission's analysis that the measure in question constitutes State aid.
- (76) In the light of all the foregoing, the Commission believes that, by granting Alitalia the measure in question worth EUR 300 million, the Italian State has not acted as a prudent shareholder pursuing a structural policy — whether general or sectoral — guided by longer term prospects of profitability on the capital invested than those of an ordinary investor<sup>(36)</sup>.
- (77) The Commission concludes from this that, regardless of the use of the relevant funds, the measure in question confers an economic advantage to Alitalia through State resources which it would not have received in normal market conditions<sup>(37)</sup>.
- 7.1.2. Selective nature of the measure*
- (78) The granting of this loan gives Alitalia an economic advantage of which it is the sole beneficiary. Accordingly, the measure in question is selective.
- 7.1.3. Effect on trade between Member States and distortion of competition*
- (79) The Commission considers that the measure in question affects trade between Member States, as it concerns a company whose transport activity, by its very nature, directly concerns trade and covers several Member States. It also distorts or threatens to distort competition within the common market, as it is granted to only one company which is in competition with other Community airlines on its European network, particularly since the entry into force of the third air transport liberalisation package on 1 January 1993<sup>(38)</sup>.

<sup>(35)</sup> As stated in the Alitalia press release of 13 May 2008: 'The Board expressed its appreciation for the communication from Mr Bruno Ermolli and awaits a clear statement of intent which proves to be in line with the above indications in order to agree to the requested due diligence' (<http://corporate.alitalia.com/en/press/press/index.aspx>).

<sup>(36)</sup> See, for example, judgment of the Court of First Instance of 15 September 1998 in Cases T-126/96 and T-127/96, *Breda Fucine Meridionali v Commission* (ECR II-3437, paragraph 79).

<sup>(37)</sup> See, for example, judgment of the Court of Justice of 11 July 1996 in Case C-39/94, *SFEI* (ECR 3547, paragraph 60).

<sup>(38)</sup> Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community carriers to intra-Community air routes, Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ L 240, 24.8.1992, p. 1).

- (80) Having regard to all of the foregoing, the Commission believes, on the basis of the information it has at this stage, that the measure worth EUR 300 million granted to Alitalia by the Italian State constitutes State aid within the meaning of Article 87(1) of the Treaty.

## 7.2. Classification of the aid measure as unlawful aid

- (81) Under Article 88(3) of the Treaty, Member States must notify any plans to grant or alter aid. The Member State concerned may not put its proposed measures into effect until this procedure has resulted in a final decision.
- (82) The Italian Government decided to grant the EUR 300 million loan on 22 April 2008 by means of Decree-Law No 80. The funds were thus made available to Alitalia on that date, as indeed the Italian authorities themselves confirmed at their meeting with the Commission on 23 April 2008. For its part, Decree-Law No 93, which provided for the option of counting the value of the loan as part of the company's capital, was adopted on 27 May 2008.
- (83) However, the Commission notes that this measure was not notified to it by Italy either on the date of adoption of Decree-Law No 80 or on that of adoption of Decree-Law No 93. Accordingly, the Commission believes that Italy has acted unlawfully in granting the aid in question contrary to Article 88(3) of the Treaty.

## 7.3. Compatibility of the aid measure with the common market

- (84) Since the Commission considers that the measure in question constitutes State aid within the meaning of Article 87(1) of the Treaty, it is necessary to assess whether it is compatible with the common market in the light of the exceptions provided for in paragraphs 2 and 3 of that Article. In this connection, it is necessary to bear in mind that the beneficiary of the aid measure is in the air transport sector.
- (85) The Commission notes that the exceptions provided for in Article 87(2) of the Treaty, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany, are irrelevant in the current context.
- (86) As for the exception in Article 87(3)(b) of the Treaty, it is sufficient to note that the aid measure in question is not an important project of common European interest and

does not seek to remedy a serious disturbance in the Italian economy. Nor does it seek to promote culture and heritage conservation within the meaning of the exception in Article 87(3)(d) of the Treaty.

- (87) The Commission takes the view, in relation to the exception provided for in Article 87(3)(c) of the Treaty, which authorises aid to facilitate the development of certain economic activities where such aid does not affect trading conditions to an extent contrary to the common interest, that there is no basis for considering that the aid in question is compatible with the common market. Indeed, none of the exceptions provided for in this connection by the Commission's guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector<sup>(39)</sup>, as supplemented by the Commission Communication (concerning) Community guidelines on financing of airports and start-up aid to airlines departing from regional airports<sup>(40)</sup>, appear to apply in the case in point.
- (88) Moreover, although, as an exceptional measure, the Commission has authorised some operating aid schemes in the air transport sector on the basis of the 1998 guidelines on national regional aid, as amended in 2000<sup>(41)</sup>, to airlines operating from the outermost regions, with a view to offsetting the additional costs arising from the permanent disadvantages facing those regions, as identified in Article 299(2) of the Treaty, this exception is not relevant in the current context.
- (89) The Commission would point out that, in their letters, the Italian authorities did not assert that the aforementioned exemptions were applicable in the case in point.
- (90) As for the Italian authorities' argument concerning the need to guarantee the public service provided by Alitalia for reasons of public order and territorial continuity, the Commission notes that this unsubstantiated assertion alone is not sufficient to enable it to consider that the aid measure in question is compatible with the common market.
- (91) Lastly, the Commission believes that the aid measure in question cannot be declared compatible with the common market pursuant to the 2004 guidelines. Although Alitalia could be classed as a firm in difficulty within the meaning of those guidelines, the other cumulative conditions allowing the loan in question to be considered rescue aid are not met in the case in point.

<sup>(39)</sup> OJ C 350, 10.12.1994, p. 5.

<sup>(40)</sup> OJ C 312, 9.12.2005, p. 1.

<sup>(41)</sup> OJ C 258, 9.9.2000, p. 5.

- (92) Firstly, the Commission notes that the Italian authorities have not demonstrated that the measure in question would not have adverse spillover effects in other Member States<sup>(42)</sup>. In relation to this point, the Italian authorities merely asserted that the privatisation process and the granting, in this context, of the measure in question was a process of a general nature, since granting of the measure did not enable Alitalia to implement competitive strategies. The Italian authorities in no way detailed the serious social difficulties justifying granting of the measure in question.
- (93) Secondly, the Italian authorities have not given an undertaking to send, not later than six months after the measure has been implemented, either a restructuring plan, a liquidation plan or proof that the loan has been repaid in full<sup>(43)</sup>. In their letters, the Italian authorities referred to the existence of both a restructuring plan and a timetable for repayment of the measure in question. However, the Italian authorities' assertion that drafting of the restructuring plan is part of Alitalia's privatisation process undertaken since 2006 is not sufficient for it to be considered that the Commission has received a formal undertaking concerning sending of an actual plan for restructuring the company within six months of granting of the measure.
- (94) Moreover, the supposed timetable for repaying the loan set out in Decree-Law No 93 does not allow the Commission to consider that the condition in paragraph 25(c) of the 2004 guidelines has been met. Indeed, the fact that the loan in question must be repaid as quickly as possible between the 30th day after transfer of Alitalia's share capital and 31 December 2008 does not allow it to be considered that the Italian authorities have undertaken to send proof of its full repayment within six months of granting of the measure by Decree-Law No 80, i.e. by 23 October 2008 at the latest.
- (95) In any case, the Italian authorities glossed over the fact that Article 4(4) of Decree-Law No 93 states that, in the event of liquidation of the company, the amount in question will be repaid only after all the other creditors have been paid off, jointly and in proportion to the share capital, which, if this possibility came about, would undermine any prospect of repayment. Reference in this Decree-Law to the possibility of liquidation of the company cannot be considered as an undertaking by Italy to send a liquidation plan not later than six months after implementation of the measure.
- (96) Thirdly, the Italian authorities have not demonstrated that the value of the aid in question is justified for the purposes of keeping the company in business (paragraph 25(d) of the 2004 guidelines). Indeed, the Italian authorities merely asserted, in their letters, that the total value of the intervention in favour of Alitalia was strictly necessary and proportional to the aim of safeguarding the survival and assets of the company. In this context, contrary to the Italian authorities' assertion, the description of the company's financial situation in their letter of 30 May 2008 to the Commission does not allow such a conclusion to be drawn.
- (97) Fourthly, and in any event, it cannot be considered that Alitalia has complied with the condition linked to the 'one time, last time' rule<sup>(44)</sup> — whether the aid is considered rescue aid or restructuring aid. It should be recalled that, according to the 2004 guidelines, if a company has already received rescue or restructuring aid in the past and if fewer than ten years have passed since granting of the rescue aid, since the end of the restructuring period, or since the end of implementation of the plan, the Commission will not authorise new rescue or restructuring aid.
- (98) However, Alitalia has already received restructuring aid which was approved by the Commission by Decision of 18 July 2001<sup>(45)</sup> and rescue aid in the form of a State guarantee for a EUR 400 million bridging loan approved by the Commission by Decision of 20 July 2004<sup>(46)</sup>. Since ten years have not passed since the latter aid was granted, Alitalia cannot receive the aid in question in the case in point.
- (99) It is nevertheless true that the 2004 guidelines provide for exceptions to the 'one time, last time' rule. However, the Commission notes that the conditions of paragraph 73(a) and (b) have not been met in the case in point. Moreover, the Italian authorities have not asserted that these exceptions are applicable in the case in point.
- (100) Furthermore, the Commission believes that the exception provided for in paragraph 73(c) of the 2004 guidelines linked to the existence of exceptional and unforeseeable circumstances for which the company concerned is not responsible does not apply in the case in point.
- (101) Indeed, it should be pointed out that, for several years, Alitalia's financial difficulties have been recurrent, meaning that the difficulties encountered by the company and used to justify granting of the measure cannot be classified as exceptional, unforeseeable and beyond the control of the company.

<sup>(42)</sup> See paragraph 25(b) of the 2004 guidelines.

<sup>(43)</sup> See paragraph 25(c) of the 2004 guidelines.

<sup>(44)</sup> See section 3.1.1, paragraph 25(e) and section 3.3 of the 2004 guidelines.

<sup>(45)</sup> Commission Decision of 18 July 2001 (previously cited, recital 47).

<sup>(46)</sup> Commission Decision of 20 July 2004 (previously cited, recital 47).

- (102) In this context, it is appropriate to refer to the description of Alitalia's financial situation given in the Commission Decisions of 18 July 2001, 20 July 2004 and 7 June 2005 (previously cited), which refer to the company's situation as being difficult since 1997 and worrying after 2001<sup>(47)</sup>. Furthermore, Alitalia's very precarious financial situation as at the date of granting of the measure in question demonstrates the failure of the restructuring plan notified to the Commission in 2004, which was the subject of the latter's decision of 7 June 2005<sup>(48)</sup>.
- (103) The support measures granted to Alitalia by the Italian authorities in recent years are further proof of the recurrent nature of this precarious financial situation (see section 7 above)<sup>(49)</sup>.
- (104) In this context, the very difficult situation facing the air transport sector, which is linked in particular to an acceleration in the increase in the price of oil during the first six months of 2008, does not, on its own, explain the particularly precarious financial situation of Alitalia for many years. It should be recalled, in this connection, that, according to the aforementioned Decree-Law No 80 of 23 April 2008, the reason for granting the loan was the company's financial situation and its immediate liquidity need and that Decree-Law No 93 was adopted as a result of the company's worsening financial situation and was intended to enable it to safeguard its value, thereby ensuring that it remained in business<sup>(50)</sup>.
- (105) While there is thus no doubt that the current economic situation is contributing to accentuating the difficulties facing Alitalia, the fact remains that its economic difficulties existed earlier and, moreover, that the current situation affects all air carriers.
- (106) Accordingly, in the case in point, it is not possible to derogate from the 'one time, last time' principle of the 2004 guidelines.
- (107) Italy's reference to the Bull Decision does not cast doubt on this analysis.
- (108) In that Decision, the Commission considered that, in the specific circumstances of the case in point, the 'one time, last time' principle did not prevent authorisation of the aid notified by France, even though the period of ten years before granting of new restructuring aid had not passed. According to the Commission in that Decision, the philosophy of that principle, namely to prevent any unfair support, had been respected, since France had not propped Bull up artificially in the face of difficulties of a recurrent nature.
- (109) However, it should be pointed out that the guidelines applicable to Bull were the 1999 guidelines rather than, in the current case, the 2004 guidelines<sup>(51)</sup>. Unlike the 1999 guidelines, those for 2004 provide for account to be taken, for the purposes of application to rescue or recovery aid of the 'one time, last time' principle, not only of restructuring aid, but also of rescue aid previously granted to the company concerned. The Commission also points out that, under the 2004 guidelines, in order to prevent firms from being unfairly assisted when they can survive only thanks to repeated State support, rescue or restructuring aid should be granted once only (see paragraph 72).
- <sup>(47)</sup> The Decision of 18 July 2001 states the following: '[F]or, despite the improvements following adjustments to the restructuring plan in February and June 1997, as notified to the Commission on 26 June 1997, Alitalia must still be considered a company with a very high specific risk. In this respect, it should be noted that: [...] the company is in an extremely difficult and precarious financial situation. With its own resources at virtually zero at the beginning of 1996 and a high level of indebtedness, the company only avoided bankruptcy thanks to a capital injection of ITL 1 000 billion in June 1996. Considering the size of the company and the anticipated amount of the investment, this insecure financial situation is a factor which may in itself discourage any investor operating according to the principles of the market economy.' It can also be seen from the Decision of 20 July 2004 that, after 2001, Alitalia's financial situation continued to be worrying, and that an indication of the increasing seriousness of the situation was that the company's shares were suspended on 4 May 2004 after falling by 15 % to EUR 0,1995 and that Alitalia's auditors had noted a deterioration in its financial situation and indicated that, in the absence of incisive and appropriate measures, this financial situation would mean that a new solution, including possibly liquidation, would have to be found. Lastly, see the Decision of 7 June 2005, where the company's situation as at July 2004 is referred to again.
- <sup>(48)</sup> It is worth remembering that the restructuring plan submitted to the Commission in 2004 provided for 'an annual improvement of around EUR 1 billion by 2008, including EUR 200 million as a result of the load factor and some EUR 770 million from other aspects of the plan; among the most significant improvements brought about by the latter are [...] savings on purchases, commercial expenses and staff expenses' (see recital 203 of the Decision of 7 June 2005).
- <sup>(49)</sup> The 2004 guidelines state that 'if rescue aid is granted to a firm that has already received restructuring aid, it can be considered that the beneficiary's difficulties are of a recurrent nature and that repeated State interventions give rise to distortions of competition that are contrary to the common interest. Such repeated State interventions should not be permitted' (end of paragraph 72).
- <sup>(50)</sup> See recital 57 above.
- <sup>(51)</sup> See the footnote 9 of the Bull Decision (previously cited).



(110) Furthermore, unlike the specific circumstances of the Bull case <sup>(52)</sup>, the difficulties facing Alitalia and used to justify granting of the measure in question are not, as has previously been noted, linked to the current unfavourable situation in the air transport sector. Moreover, these difficulties are undoubtedly of the same nature as those which the company previously faced, as demonstrated by the description of its financial situation since 1997 (see recitals 57 and 58 above) and, unlike the facts in the Bull case <sup>(53)</sup>, are recurrent in nature.

(111) Lastly, contrary to what the Commission noted in the Bull Decision <sup>(54)</sup>, Alitalia received both restructuring aid and rescue aid in the form of a State guarantee, and the period which has been running since the granting of these aid measures is not close to completion.

(112) It follows from this that, even supposing that the other cumulative conditions under the 2004 guidelines allowing the loan in question to be considered rescue aid had been satisfied — which is not the case — the condition linked to the ‘one time, last time’ principle has not been satisfied in the case in point and it is not possible to derogate therefrom by applying one of the exceptions provided for in paragraph 73 of the guidelines.

(113) It follows from all of the foregoing that the aid measure in question is not compatible with the common market.

#### 7.4. Recovery

(114) The Commission would point out that, pursuant to Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty <sup>(55)</sup>, any aid which is unlawful and incompatible with the common market must be recovered from the beneficiary.

(115) Since the measure in question was granted unlawfully to Alitalia and is incompatible with the common market, it must be recovered from it <sup>(56)</sup>.

<sup>(52)</sup> See recital 71 to the Bull Decision (previously cited).

<sup>(53)</sup> See recital 73 to the Bull Decision (previously cited).

<sup>(54)</sup> See recital 74 to the Bull Decision (previously cited).

<sup>(55)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(56)</sup> The Commission would point out that the conditions enabling it to adopt a decision requiring Italy to provisionally recover the measure in question before adoption of this Decision were not met in the case in point, particularly as the existence of a serious risk of substantial and irreparable damage to a competitor of Alitalia was not demonstrated (see Article 11(2) of the previously cited Regulation (EC) No 659/1999).

(116) The Commission would point out again that, given Alitalia's very precarious financial situation and the conditions for granting of the measure in question, a private investor would not have agreed to grant it any loan, much less a loan the value of which is to be counted as part of its capital. Given the nature of the measure in question and the circumstances of its granting, the Commission believes that the aid to be recovered is the entirety of the loan.

(117) For the purposes of such recovery, account must also be taken of interest, from the date on which the aid in question was made available to the company, i.e. 22 April 2008, until the date of actual recovery <sup>(57)</sup>.

#### 7.5. Conclusion

(118) The Commission finds that Italy has unlawfully implemented an aid measure comprising a loan of EUR 300 million granted to Alitalia, which can be counted as part of the company's capital, contrary to Article 88(3) of the Treaty.

(119) In consequence, Italy must take all the necessary measures to recover this State aid which is incompatible with the common market. It must recover this aid from its beneficiary, namely Alitalia,

HAS DECIDED AS FOLLOWS:

##### Article 1

The EUR 300 million loan granted to Alitalia and capable of being counted as part of its capital, which was implemented by Italy contrary to Article 88(3) of the Treaty, is incompatible with the common market.

##### Article 2

1. Italy shall recover the aid referred to in Article 1 from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiary until they are actually recovered.

<sup>(57)</sup> See Article 14(2) of Regulation (EC) No 659/1999 (previously cited) and recitals 80, 83 and 113 above.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 <sup>(58)</sup> and Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004 <sup>(59)</sup>.

#### Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Italy shall ensure that this Decision is implemented within four months following the date of its notification.

#### Article 4

1. Within two months following notification of this Decision, Italy shall notify the following information to the Commission:

- (a) the total amount (principal and interest) to be recovered from the beneficiary;
- (b) a detailed description of the measures already taken and those planned to comply with this Decision;

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<sup>(58)</sup> OJ L 140, 30.4.2004, p. 1.

<sup>(59)</sup> OJ L 82, 25.3.2008, p. 1.

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

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

#### Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 12 November 2008.

*For the Commission*

Antonio TAJANI

*Vice-President*

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#### ANNEX

##### **List of interested parties who submitted comments to the Commission under Article 88(2) of the Treaty**

1. Sterling Airlines A/S
  2. British Airways plc
  3. Ryanair
  4. Neos SpA
  5. The European Travel Agents' and Tour Operators' Associations and the Guild of European Business Travel Agents
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