



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

28 March 2012\*

(State aid — Loan granted to an airline company and capable of being counted as own capital — Decision declaring the aid incompatible with the common market — Sale of assets of an airline company — Decision finding no aid at the conclusion of the preliminary examination phase — Actions for annulment — Locus standi — Interested party — Admissibility — Serious difficulties — Jurisdiction — Duty to state reasons)

In Case T-123/09,

**Ryanair Ltd**, established in Dublin (Ireland), represented by E. Vahida and I.-G. Metaxas-Maragkidis, lawyers,

applicant,

v

**European Commission**, represented by L. Flynn, D. Grespan and E. Righini, acting as Agents,

defendant,

supported by

**Italian Republic**, represented by G. Palmieri and P. Gentili, avvocati dello Stato,

and by

**Alitalia – Compagnia Aerea Italiana SpA**, established in Fiumicino (Italy), represented by G. M. Roberti, G. Bellitti and I. Perego, lawyers,

interveners,

APPLICATION for partial annulment of Commission Decision 2009/155/EC of 12 November 2008 on the loan of EUR 300 million granted by Italy to Alitalia No C 26/08 (ex NN 31/08) (OJ 2009 L 52, p. 3), and application for annulment of Decision C(2008) 6745 final, of 12 November 2008, concerning State aid N 510/2008 — Italy — Sale of assets of the airline Alitalia,

THE GENERAL COURT (Fifth Chamber),

composed of S. Papasavvas (Rapporteur), President, V. Vadapalas and K. O'Higgins, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 30 June 2011,

gives the following

\* Language of the case: English.

## Judgment

### Background to the dispute

- 1 Alitalia S.p. A is an air transport company in which the Italian State holds a 49.9% stake.
- 2 In December 2006, following several failed attempts to redress Alitalia's financial situation and to form international alliances, the Italian authorities decided to sell their stake in Alitalia's capital. On 29 December 2006, the Italian Ministry of the Economy and Finance published a call for declarations of interest. That procedure was, however, closed on 18 July 2007, since the bids submitted were withdrawn.
- 3 In September 2007, Alitalia appointed a bank as a financial adviser to identify potential partners for Alitalia. Amongst the bids received, the bid submitted by Air France-KLM was regarded by Alitalia's board as the most appropriate. However, since it was unable to reach an agreement with the trade unions, Air France-KLM withdrew its bid on 21 April 2008.
- 4 At a meeting on 23 April 2008, the Italian authorities informed the Commission of the European Communities that the Italian Council of Ministers had approved, through 'Decreto-legge No 80, Misure urgenti per assicurare il pubblico servizio di trasporto aereo' (Decree-Law No 80, Urgent measures to ensure the public service of air transport) (GURI No 97 of 24 April 2008, 'Decree-Law No 80'), adopted on that date, the granting of a loan of EUR 300 million to Alitalia.

### A – Administrative procedure

- 5 Having received no notification prior to the granting by the Italian Republic of a loan of EUR 300 million to Alitalia, the Commission requested the Italian authorities, by letter of 24 April 2008 and pursuant to Article 11(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), to confirm the existence of the loan, supply all useful information enabling such a measure to be assessed in relation to Articles 87 EC and 88 EC, to suspend the granting of the loan and to inform the Commission of the measures taken to comply with that obligation under Article 88(2) EC.
- 6 On 29 April 2008, the applicant, Ryanair Ltd., lodged a complaint with the Commission under Article 20(2) of Regulation No 659/1999, concerning the existence of State aid for Alitalia in the form of a loan granted by the Italian authorities to the latter.
- 7 By letter of 20 May 2008, the Commission replied to the applicant's complaint, informing the applicant that it had requested, by letter of 24 April 2008, information from the Italian authorities and that the Commission would conduct an investigation on the basis of that information and information provided by the applicant in its complaint.
- 8 By letter of 30 May 2008 the Italian authorities informed the Commission of the adoption, on 27 May 2008, of Decreto-legge No 93, Disposizioni urgenti per salvaguardare il potere di acquisto delle famiglie (Decree-Law No 93, Urgent provisions to safeguard the purchasing power of households) (GURI No 124 of 28 May 2008, 'Decree-Law No 93'), which gave Alitalia the option of counting the value of the loan as part of its own capital. On the same date, the applicant referred a new complaint to the Commission concerning the conversion of the loan of EUR 300 millions granted by the Italian authorities to Alitalia into own capital.

- 9 On 3 June 2008, the Italian authorities took further steps with a view to finding one or more buyers for Alitalia through Decreto-legge No 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 (Decree-Law No 97, Urgent measures on the monitoring and transparency of mechanisms for allocating public spending and on taxation and the extension of time-limits) (GURI No 128 of 3 June 2008, p. 5, 'Decree-Law No 97'). This involved selecting one or more qualified companies which would be responsible for promoting, on an exclusive basis and on behalf of third parties or themselves, the presentation of a bid to assume control of Alitalia. At the conclusion of the selection procedure in question, the Italian Council of Ministers selected a bank for that purpose.

*B – Decision to open the formal investigation procedure under Article 88(2) EC*

- 10 By letter of 12 June 2008, the Commission notified the Italian authorities of its decision of 11 June 2008 to initiate a formal investigation procedure pursuant to Article 88(2) EC in connection with the loan granted to Alitalia through Decree-Law No 80 and Alitalia's option of counting the value of the loan as part of its own capital provided for by Decree-Law No 93. On the same date, it replied to the applicant's second complaint, informing it of the adoption of the decision to initiate the above formal investigation procedure and inviting it to submit comments.
- 11 On 18 August 2008 the applicant submitted its comments on the decision to open the formal investigation procedure.
- 12 By adopting Decreto-legge No 134, Disposizioni urgenti in materia di ristrutturazione di grandi imprese in crisi (Decree-Law No 134, Urgent measures for the restructuring of large undertakings in crisis) (GURI No 201 of 28 August 2008, p. 3, 'Decree-Law No 134'), certain amendments were made to the extraordinary administration procedure for particularly large undertakings active in the essential public services sector.
- 13 By derogation from decreto legislativo n° 270, Nuova disciplina dell'amministrazione straordinaria delle grandi imprese in stato di insolvenza, a norma dell'articolo 1 della legge 30 luglio 1998, n° 274 (Legislative Decree No 270, New rules on the extraordinary administration of large undertakings in a state of insolvency, pursuant to Article 1 of the Law of 30 July 1998, No 274) (GURI No 185 of 9 August 1999, p. 11; 'Legislative Decree No 270'), which applies to undertakings in difficulty in Italy, dispensation was granted to allow the immediate admission of undertakings in the essential public services sector to the extraordinary administration procedure, before they were declared insolvent. Further provision was made to allow the option for the financial situation of those undertakings to be redressed by the disposal of their assets by a private contract procedure to acquirers able to guarantee continuity of service in the medium term, rapid intervention and compliance with the requirements of Italian legislation and treaties ratified by the Italian Republic. However, that possibility was coupled with the requirement that an independent expert appointed by the Italian Ministry of Economic Development verify that the assets are sold at a price which is in line with the market price.
- 14 On 29 August 2008, Alitalia requested the Tribunale di Roma (District Court, Rome) to declare that it was in a situation of insolvency. It was placed under extraordinary administration by decree of the Italian Prime Minister of the same date.
- 15 On 1 September 2008, Compagnia Aerea Italiana SpA ('CAI') submitted a preliminary bid for the acquisition of certain assets of companies in the group of which Alitalia formed part ('the Alitalia group'), subject to the agreement of the trade unions to the recruitment of former staff members of that group under new working conditions.

- 16 By Ministerial Decree of 4 September 2008 and in accordance with Article 1(4)(c) of Decree-Law No 134, a bank was appointed as independent expert, responsible for verifying that the assets would be sold at a price which was in line with the market price. On the same date, a monitoring committee was set up, with the purpose, in particular, of agreeing to the sales of assets proposed by the extraordinary administrator.
- 17 On 14 September 2008, CAI withdrew its preliminary bid, following the failure of negotiations with the trade unions.
- 18 On 15 September 2008, the extraordinary administration procedure was extended to the whole of the Alitalia group.
- 19 On 22 September 2008, the extraordinary administrator issued a call for declarations of interest for the purchase of all the assets of the Alitalia group, which was published the following day in the national and international press. In that call for declarations of interest, he indicated his intention to proceed to the sale of those assets in accordance with a private contract procedure. Potential buyers were invited to declare their interest to him before 30 September 2008.
- 20 On 25 September 2008, CAI reiterated its provisional bid on the same conditions as the bid submitted on 1 September (see paragraph 15 above), stating that that bid was valid until 15 October 2008, that deadline being subsequently extended until 31 October 2008.
- 21 On 2 October 2008, the applicant lodged a third complaint with the Commission concerning the adoption of Decree-Law No 134 and other measures relating to the sale of the assets of the Alitalia group.
- 22 By letter of 14 October 2008, the Italian authorities notified the Commission of the procedure for the sale of Alitalia's assets, asking it to confirm, for reasons of legal certainty, that:
- the extraordinary administration procedure described in the notification did not involve the grant of State aid to the buyers of the assets transferred;
  - the potential acquisition by third parties of certain assets of [the] Alitalia [group], on the basis of a bid already formulated, did not involve any elements of economic continuity with the undertaking placed under extraordinary administration capable of resulting in the transfer of Alitalia's liabilities to the buyer and, in particular, the requirement to recover unlawful and incompatible State aid granted to Alitalia.
- 23 At the same time as that notification and in addition to the applicants' third complaint (see paragraph 21 above), the Commission received three complaints lodged by other airlines and the European Low Fares Airline Association (ELFAA).
- 24 On 27 October 2008, Decree-Law No 134 was converted into Law No 166, Conversione in legge, con modificazioni, del decreto-legge 28 agosto 2008, n°134, recante disposizioni urgenti in materia di ristrutturazione di grandi imprese in crisi (Law No 166, converting into law, with amendments, Decree-Law No 134) (GURI No 252, 27 October 2008, p. 4).
- 25 By letter of 30 October 2008, the applicant lodged an additional complaint with the Commission, denouncing certain measures which it described as worrying, namely, in particular, increase of the municipal boarding fee per passenger at Italian airports to EUR 3, with the sole aim, in its submission, of financing severance payments to former Alitalia employees, and an alleged conflict of interest revealed by the press between certain CAI shareholders and certain shareholders of the independent expert, which were said to be identical.

- 26 On 31 October 2008, CAI submitted to the extraordinary administrator a binding bid for the purchase of certain assets relating to Alitalia's air passenger transport business. That bid was sent to the Commission by the Italian authorities on 3 November 2008.

*C – Contested decisions*

*1. Decision concerning the loan granted to Alitalia*

- 27 By Commission Decision 2009/155/EC of 12 November 2008 on the loan of EUR 300 million granted by Italy to Alitalia No C 26/08 (ex NN 31/08) (OJ 2009 L 52, p. 3; 'the first contested decision'), adopted at the conclusion of the formal investigation procedure under Article 88(2) EC, the Commission stated that the said loan, the amount of which could be counted as Alitalia's own capital, constituted unlawful State aid incompatible with the common market, and ordered its recovery from the beneficiary. A copy of that decision was notified to the applicant on 14 January 2009 and received by it on 20 January 2009.
- 28 The Commission first of all pointed out that the loan of EUR 300 million granted to Alitalia by the Italian State was such as to confer on it an economic advantage through State resources, which, given its severely compromised financial situation, both on the date on which the loan was granted through Decree-Law No 80 and on the date of the adoption of Decree-Law No 93, would not have been granted by a prudent private investor. It also stated that the interest rate granted, the almost simultaneous occurrence of the withdrawal of Air France-KLM's bid with the granting of the loan, and the absence of other recovery prospects and of financial intervention from Alitalia's private shareholders alongside that of the Italian State were such as to reinforce that conclusion. It inferred from this that the Italian State had not acted as a prudent shareholder pursuing a structural policy, whether general or sectoral, guided by longer-term prospects of profitability of the capital invested than those of an ordinary investor.
- 29 The Commission therefore concluded that the loan granted by the Italian Republic to Alitalia, the EUR 300 million value of which could be counted as part of its own capital, constituted unlawful aid, which had not been notified in advance and which was incompatible with the common market. It also found that that measure did not fall within the derogations provided for in Article 87(2) and (3) EC, or those provided for in the Commission's guidelines on the application of Articles [87] and [88] EC and Article 61 of the EEA Agreement to State aid in the aviation sector (OJ 1994 C 350, p. 5), as supplemented by the Communication from the Commission on the Community guidelines on financing of airports and start-up State aid to airlines departing from regional airports (OJ 2005 C 312, p. 1).
- 30 Lastly, the Commission considered that, although Alitalia might be classified as an undertaking in difficulty, the measure at issue could not be declared compatible with the common market under the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2). Consequently, the Italian authorities had to take all necessary measures to recover that aid from the beneficiary, Alitalia.
- 31 The operative part of the first contested decision reads 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) [EC], is incompatible with the common market.

*Article 2*

[The Italian Republic] shall recover the aid referred to in Article 1 from the beneficiary.

The sums to be recovered shall bear interest from the date on which they were made available to the recipient until the date of their actual recovery.

... .

*Article 3*

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

*Article 4*

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

- a) the total amount (principal and interest) to be recovered from the recipient;
- b) a detailed description of the measures already taken and planned to comply with this Decision;
- c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. [The Italian Republic] shall keep the Commission informed of the progress of the national measures adopted pursuant to this Decision until the recovery of the aid specified in Article 1 has been concluded. At the Commission's request, it shall immediately submit information on the measures already adopted and planned for the purpose of complying with this Decision. It shall also provide detailed information concerning the amount of aid and interest already recovered from the beneficiary.

...'

*2. Decision concerning the sale of Alitalia assets*

<sup>32</sup> By Decision C(2008) 6745 final, of 12 November 2008, concerning State aid N 510/2008 — Italy — Sale of assets of the airline Alitalia ('the second contested decision'), adopted at the conclusion of a preliminary examination phase, pursuant to Article 88(3) EC, the Commission stated that the notified measure, as amended by the undertakings given by the Italian authorities and defined in that decision, did not involve the granting of State aid to the buyers, subject to full compliance with those undertakings by the Italian Republic, according to which the sale of the assets of the Alitalia group would be carried out at the market price.

<sup>33</sup> In the first place, the Commission has, first, recalled, in paragraphs 21 to 43 of the second contested decision, the legal context of the extraordinary administration procedure to which the Alitalia group has been subjected and the role of the various participants involved in the latter. Next, in paragraphs 44 to 75 of the said decision, it has analysed the procedure for the sale of assets, taking into account, firstly, the market information of the various stages of the sale and the call for declarations of interest (paragraphs 44 to 52); secondly, the bids received for the acquisition of the assets of the Alitalia group and, in particular, that submitted by CAI (paragraphs 53 to 69); thirdly,

the criteria used for the assessment of bids, and, in particular, the undertaking given by the Italian authorities that the main criterion would be conformity of the bid price with the market price (paragraphs 70 to 72); and, fourthly, the aspects concerning human resources (paragraphs 73 and 74). In addition, the Commission examined the mission and role of the agent entrusted with monitoring the operation for the sale of Alitalia group assets. The latter was to be appointed by the Italian authorities in order to ensure that the procedure notified by the latter was fully and effectively applied and that the sale of assets took place at the market price, in accordance with the undertakings given by the Italian Republic. In that respect, he was to submit exhaustive reports to the Commission (paragraphs 76 to 89).

- 34 In the second place, the Commission proceeded, in paragraphs 92 to 151 of the second contested decision, to assess the measure concerning the sale of assets. Its assessment concerned, first, examination of the existence of State aid in favour of the buyers of the assets of the Alitalia group (paragraphs 92 to 127) and, second, the risk of circumvention of the obligation to recover an unlawful and incompatible aid (paragraphs 128 to 151).
- 35 In the first part of its assessment, the Commission confirmed that the extraordinary examination procedure did not lead to the granting of aid in favour of the buyers. Having pointed out, in paragraph 104 of the second contested decision, at the conclusion of the examination as to the openness, transparency and non-discriminatory nature of the notified procedure, that the latter was not sufficiently transparent to guarantee in itself a market price, it nevertheless concluded, in paragraph 117 of the said decision, that such a procedure would lead to a sale at market price, where that procedure was based on an independent assessment by independent parties. It further held, in paragraphs 119, 122 and 126 of that decision that the said procedure did not lead to the imposition of obligations of the public authority on the buyers of assets of the Alitalia group likely to call into question the objective of sale at the market price, either as regards human resources or the conditions for operating the air transport business. It thus concluded, at paragraph 127 of the same decision, that, subject to strict application of the undertakings by the Italian authorities, the measure notified should lead to sale of the assets of the Alitalia group at the market price.
- 36 In the second part of its examination, the Commission concluded, in paragraph 137 of the second contested decision, that, given the scope of the sale of assets and the parcelling of the bids submitted by potential buyers, the procedure implemented by the Italian Republic entailed no economic continuity between Alitalia and the buyers of its assets. However, it considered, in paragraph 138 of the said decision, that, with regard to the bid submitted by CAI, the risk of economic continuity justified a more in-depth examination, given the wide range of assets to which the bid related. Since the shareholders of CAI and Alitalia were not the same, the scope and extent of CAI's activities were smaller than those of Alitalia, CAI pursued its own industrial strategy, and given the condition that the transfer was to be at market price, all of which factors being set out in paragraphs 140 to 145 of that decision, the Commission concluded, in paragraphs 147 and 149 of the same decision that there was no economic continuity between Alitalia and CAI. It therefore found that, in paragraphs 151 to 156 of the decision in question, that, subject to full compliance with the undertakings given by the Italian Republic that the sale would be made at the market price, the notified procedure had the effect neither of circumventing the Italian Republic's obligation to recover under the first contested decision, nor of granting State aid to Alitalia's buyers.
- 37 Therefore, the Commission decided that the notified measure, as amended by the undertakings given by the Italian authorities, did not constitute aid, to the extent that those undertakings were complied with in full.

## Procedure

- 38 By application lodged at the Registry of the General Court on 28 March 2009, the applicant brought the present action.
- 39 By documents lodged at the Registry of the General Court on 23 July and 7 August 2009 respectively, the Italian Republic and Alitalia — Compagnia Aerea Italiana ('Alitalia-CAI') sought leave to intervene in support of forms of order sought by the Commission.
- 40 By orders of 16 September and 19 October 2009, the President of the Eighth Chamber of the General Court granted the Italian Republic and Alitalia-CAI leave to intervene.
- 41 By document of 11 August 2010, Alitalia-CAI requested authorisation to use Italian during the oral procedure, in accordance with Article 35(2)(c) of the Rules of Procedure of the General Court, which authorisation was granted.
- 42 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the present case was, consequently, assigned.
- 43 Upon hearing the Report of the Judge-Rapporteur, the General Court decided to open the oral procedure and to put certain questions to the parties.
- 44 By order of the President of the Fifth Chamber of the General Court of 13 April 2011, the parties having been heard, the procedure was stayed under Article 77(a) of the Rules of Procedure until delivery of the judgment of the Court of Justice in Case C-83/09 P *Commission v Kronoply and Kronotex*.
- 45 By document of 19 April 2011, the applicant applied for measures of organisation of procedure under Articles 49 and 64 of the Rules of Procedure, that the Commission be ordered to produce certain documents.
- 46 The judgment of the Court of Justice in Case C-83/09 P *Commission v Kronoply and Kronotex* [2011] ECR I-4441 having been delivered on 24 May 2011, the procedure in the present case was resumed. The General Court decided to gather the observations of the parties on the consequences to be drawn from that judgment for the admissibility of the present action, at the hearing.
- 47 By documents lodged at the Registry of the General Court on 5 and 6 June 2011 respectively, Alitalia-CAI and the Commission lodged observations on the application for measures of organisation of procedure by the applicant.
- 48 The parties presented oral argument and gave their replies to the questions asked by the Court at the hearing on 30 June 2011.

## Forms of order sought

- 49 The applicant claims that the Court should:
- partially annul the first contested decision, in so far as it does not order recovery of the aid from successors of Alitalia and grants the Italian Republic additional time to implement that decision;
  - annul the second contested decision;
  - order the Commission to pay the costs.



- 50 The Commission contends that the Court should:
- dismiss the appeal as partially inadmissible and partially unfounded;
  - order the applicant to pay the costs.
- 51 Alitalia-CAI claims that the Court should:
- dismiss the action as partially inadmissible and partially unfounded;
  - order the applicant to pay the costs.
- 52 The Italian Republic claims that the Court should:
- dismiss the application as inadmissible, or alternatively as unfounded;
  - order the applicant to pay the costs.

## Law

### D– *The application for annulment of the second contested decision*

#### 1. *Admissibility*

- 53 The applicant submits that it is a party concerned within the meaning of Article 88(2) EC and that it has standing to bring an action for annulment of that decision because, as a competitor of Alitalia and of CAI, its interests were affected by the grant of the loan and the transfer of Alitalia's assets to CAI. It states, moreover, that, by its action, it is seeking to safeguard its procedural rights, bearing in mind the fact that annulment of the second contested decision would have the effect of opening the formal investigation procedure. It states, finally, that its market position has been substantially affected by the said decision.
- 54 Without raising a formal objection of inadmissibility, the Commission, supported by Alitalia-CAI, argues that the action is admissible only in so far as the applicant is seeking, by bringing it, to safeguard its procedural rights, having regard to its capacity as complainant and competitor of the 'companies involved in the process of selling the assets of [the] Alitalia [group]'. By contrast, in so far as the applicant calls into question the merits of the second contested decision, even if the applicant may be regarded as 'concerned' within the meaning of Article 88(2) EC, that cannot suffice for a declaration that the action is admissible, unless the applicant is shown to enjoy a particular status, with the result that its market position was substantially affected by the aid to which that decision relates, which has not been established in this case.
- 55 The Italian Republic considers that the action is inadmissible in its entirety, the applicant having failed to demonstrate that the second contested decision involves direct consequences for its competitive position.
- 56 As a preliminary observation, it should be noted that even if, according to the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, applicable to the General Court pursuant to Article 53 of that Statute, interveners do not have the capacity to raise pleas that do not support those raised by the party they are supporting, in the case of an application to strike out on public policy grounds the admissibility of the action must be examined by the Court of its own motion, pursuant to Article 113 of the Rules of Procedure (see, to that effect, Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraphs 21 to 24).

- 57 Under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if the decision is of ‘direct and individual’ concern to them.
- 58 It should be recalled that, according to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the fourth paragraph of Article 230 EC only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed by such a decision (Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107; Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paragraph 20; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 14).
- 59 It should be recalled at the outset that Article 4 of Regulation No 659/1999 provides for a preliminary examination phase for notified aid measures, the purpose of which is to enable the Commission to form a first opinion on the compatibility of the aid in question with the common market. At the conclusion of that phase, the Commission finds that that measure either does not constitute aid or falls within the scope of Article 87(1) EC. In the latter case, it may be that the measure does not raise doubts as to its compatibility with the common market; on the other hand, it is also possible that the measure may raise such doubts (*Commission v Kronoply and Kronotex*, paragraph 43).
- 60 If, following the preliminary examination, the Commission finds that, notwithstanding the fact that the measure notified falls within the scope of Article 87(1) EC, it does not raise any doubts as to its compatibility with the common market, the Commission is to adopt a decision not to raise objections under Article 4(3) of Regulation No 659/1999 (*Commission v Kronoply and Kronotex*, paragraph 44).
- 61 Where the Commission adopts a decision not to raise objections, it declares not only that the measure is compatible with the common market, but also — by implication — that it refuses to initiate the formal investigation procedure laid down in Article 88(2) EC and Article 6(1) of Regulation No 659/1999 (*Commission v Kronoply and Kronotex*, paragraph 45).
- 62 If the Commission finds, after the preliminary examination, that the notified measure raises doubts as to its compatibility with the common market, it is required to adopt, on the basis of Article 4(4) of Regulation No 659/1999, a decision to open the formal investigation procedure provided for under Article 88(2) EC and Article 6(1) of the said regulation. Under the latter provision, such a decision is to call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which must not as a rule exceed one month (*Commission v Kronoply and Kronotex*, paragraph 46).
- 63 The lawfulness of a decision not to raise objections, adopted under Article 4(3) of Regulation No 659/1999, depends on whether there are doubts as to the compatibility of the aid with the common market. Since such doubts must trigger the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of Regulation No 659/1999 can participate, it must be held that any interested party within the meaning of the latter provision is directly and individually concerned by such a decision. If the beneficiaries of the procedural guarantees provided for in Article 88(2) EC and Article 6(1) of Regulation No 659/1999 are to be able to ensure that those guarantees are respected, it must be possible for them to challenge before the European Union judicature the decision not to raise objections (see, to that effect, *Commission v Kronoply and Kronotex*, paragraph 47).
- 64 Accordingly, the specific status of ‘interested party’ within the meaning of Article 1(h) of Regulation No 659/1999, in conjunction with the specific subject-matter of the action, is sufficient to distinguish individually, for the purposes of the fourth paragraph of Article 230 EC, the applicant contesting a decision not to raise objections (*Commission v Kronoply and Kronotex*, paragraph 48).

- 65 Under Article 1(h) of Regulation No 659/1999, ‘interested party’ means inter alia any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, that is to say, in particular competing undertakings of the beneficiary of that aid. In other words, it means an indeterminate group of addressees (*Commission v Kronoply and Kronotex*, paragraph 63, and case-law cited).
- 66 Where an applicant seeks the annulment of a decision not to raise objections, it essentially contests the fact that the Commission adopted the decision in relation to the aid at issue without initiating the formal investigation procedure, thereby infringing the applicant’s procedural rights. In order to have its action for annulment upheld, the applicant may invoke any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of that measure with the common market. The use of such arguments does nothing, however, to bring about a change in the subject-matter of the action or in the conditions for its admissibility (see, to that effect, Case C-319/07 *3F v Commission* [2009] ECR I-5963, paragraph 35). On the contrary, the existence of doubts concerning that compatibility is precisely the evidence which must be adduced in order to show that the Commission was required to initiate the formal investigation procedure under Article 88(2) EC and Article 6(1) of Regulation No 659/1999 (*Commission v Kronoply and Kronotex*, paragraph 59).
- 67 It is in the light of those considerations that it needs to be assessed whether the applicant has the capacity to bring an action for annulment against the second contested decision.
- 68 In this case, it should be noted that the second contested decision is a decision adopted at the conclusion of the preliminary examination phase, under Article 4(2) of Regulation No 659/1999, whereby the Commission held that the notified measure did not fall within the scope of Article 87(1) EC and did not therefore constitute aid. It must also be noted that, by that decision, the Commission impliedly refused to open the formal investigation procedure. Thus, in the light of the case-law cited in paragraphs 61 to 64 and 66 above, concerning a decision adopted on the basis of Article 4(3) of Regulation No 659/1999, whereby the Commission had decided not to raise objections, it must be held that any interested party must be regarded as being directly and individually concerned by a decision finding the absence of aid at the conclusion of the preliminary examination phase. Even if such a decision has been adopted on the basis of Article 4(2), the beneficiaries of the procedural guarantees provided for in Article 88(2) EC and Article 6(1) of Regulation No 659/1999 can secure compliance with them only if they have the possibility of challenging the decision finding the absence of aid at the conclusion of the preliminary examination phase. Moreover, as regards decisions leading to the formal investigation procedure not being opened, capacity to bring an action for annulment cannot depend on the legal basis on which those decisions were adopted.
- 69 It is therefore necessary to examine whether the applicant has established to a sufficient legal standard that it is, in this case, an interested party.
- 70 In that respect, the applicant indicates that it is present in 22 Italian airports and that its activities coincide with those of Alitalia-CAI on 29 ‘domestic or international routes’ such as Rome-Venice and Rome-Madrid. Moreover, despite the fact that it does not operate from the same airports, it argues that it offers flights to and from the same cities as Alitalia-CAI. It argues that, as a competitor of Alitalia and CAI, its interests are affected by the transfer of the assets of the Alitalia group to CAI, the transfer in question having allowed CAI to resume Alitalia’s passenger air transport business on extremely favourable conditions, with avoiding the withdrawal of Alitalia from the market.
- 71 Those factors are not disputed by the Commission and establish to a sufficient legal standard the existence of a competitive link with Alitalia on the Italian and international passenger air transport market.

- 72 Moreover, the argument of the interveners that, since the applicant is a low-cost airline, it would be difficult to envisage it finding itself in the singular position of resuming the links carried out by a traditional airline such as Alitalia, cannot call into question the fact that the parties are competitors on the Italian and international passenger air transport market. It is apparent from the case-law that, for the purposes of examining admissibility, it is sufficient to note that the applicant is a competitor of the beneficiary of the State aid complained of, in so far as those two undertakings directly or indirectly operate regular passenger air transport services to and from Italian airports, particularly regional airports (see, to that effect, Case T-395/04 *Air One v Commission* [2006] ECR II-1343, paragraph 38).
- 73 In the light of the above, it must be held that the applicant is an interested party as a competitor undertaking of the beneficiary of the alleged State aid — whether the beneficiary is Alitalia or CAI, as it alleges — whose interests may be affected by the granting of that aid. That particular capacity as a party concerned combined with the specific subject-matter of the action as described in paragraph 68 above is sufficient to distinguish it, in accordance with the case-law cited in paragraph 64 above. Therefore, the present action in so far as it is directed against the second contested decision is admissible, without it being necessary to examine the applicant's arguments that its competitive position was substantially affected by the measure notified.

## 2. *The purpose of review by the General Court*

- 74 With regard to the purpose of the review which is to be carried out by the General Court, it is necessary to state that, when an applicant seeks to safeguard his procedural rights pursuant to Article 88(2) EC, he may rely on any of the grounds set out in the second paragraph of Article 230 EC, provided that they are directed at the annulment of the contested decision and, in any event, the initiation by the Commission of the procedure referred to in Article 88(2) EC. On the other hand, it is not for the General Court to rule at that stage of the Commission's procedure for examination of aid on whether aid exists or whether it is compatible with the common market (Case T-388/03 *Deutsche Post and DHL International v Commission* [2009] ECR II-199, paragraph 66).
- 75 According to the case-law of the Court of Justice, State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the EU Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraph 111).
- 76 This is all the more true in view of the fact that, according to settled case-law, if the Commission is unable to conclude, following an initial examination in the context of the procedure under Article 88(3) EC, that the State measure in question either is not 'aid' within the meaning of Article 87(1) EC or, if classified as aid, is compatible with the Treaty, or where that procedure does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to initiate the procedure under Article 88(2) EC, 'without having any discretion in that regard'. That obligation is moreover expressly confirmed by the combined provisions of Articles 4(4) and 13(1) of Regulation No 659/1999 (*British Aggregates v Commission*, paragraph 113).
- 77 It must also be borne in mind that, according to the case-law, the notion of serious difficulties is an objective one. The existence of such difficulties must be sought both in the circumstances in which the contested measure was adopted and in its content, in an objective manner, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market (Case T-73/98 *Prayon-Rupel v Commission* [2001] ECR II-867, paragraph 47; see, to that effect, Case T-49/93 *SIDE v Commission*

[1995] ECR II-2501, paragraph 60). The applicant bears the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of consistent evidence, concerning, first, the circumstances and the length of the preliminary examination procedure and, secondly, the content of the contested decision (Case T-36/06 *Bundesverband deutscher Banken v Commission* [2010] ECR II-537, paragraph 127).

- 78 Although it has no discretion in relation to the decision to initiate the formal investigation procedure, where it finds that such difficulties exist, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. In accordance with the objective of Article 88(3) EC and its duty of good administration, the Commission may, amongst other things, engage in talks with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered (*Prayon-Rupel v Commission*, paragraph 45; *Bundesverband deutscher Banken v Commission*, paragraph 126). That power presupposes that the Commission may bring its position in line with the results of the dialogue it engaged in, without that alignment having to be interpreted, a priori, as establishing the existence of serious difficulties (Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v Commission* [2006] ECR II-4739, paragraph 139).
- 79 It is also apparent from the case-law that if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (Case T-359/04 *British Aggregates and Others v Commission* [2010] ECR II-4227, paragraph 57, and case-law cited).
- 80 In this case, since the second contested decision was adopted without initiating the formal investigation stage, the Commission could adopt it legally only if the preliminary examination did not reveal serious difficulties. If such difficulties existed, the decision could be annulled on that ground alone, because of the failure to initiate the *inter partes* and detailed examination laid down in the EC Treaty, even if it had not been established that the Commission's assessments as to substance were wrong in law or in fact (see, to that effect, *British Aggregates and Others v Commission*, paragraph 58).
- 81 It is therefore appropriate to examine all the applicants' pleas for annulment of the second contested decision, in order to ascertain, in particular, whether they enable any serious difficulty to be identified which should have led the Commission to open the formal investigation procedure under Article 88(2) EC (see, to that effect, Case T 158/99 *Thermenhotel Stoiser Franz and Others v Commission* [2004] ECR II-1, paragraph 91, and in judgment of 20 September 2007 in Case T-375/03 *Fachvereinigung Mineralfaserindustrie v Commission*, not published in the ECR, paragraphs 67 and 77).

### 3. Substance

- 82 The applicant raises seven pleas in law in support of its action seeking the annulment of the second contested decision.
- 83 The first plea alleges failure to open the formal investigation procedure under Article 88(2) EC, despite serious difficulties encountered by the Commission. It should further be noted that, in its first plea, the applicant cites ten errors allegedly vitiating the Commission's examination. It argues that that list — which it describes as 'non-exhaustive' — of gaps or failures vitiating the second contested decision demonstrates that the extent and complexity of the examination carried out by the Commission justified the opening of a formal investigation procedure. In so far as those alleged errors or gaps relate to the other pleas raised in this action, it is appropriate to examine them in the context of the assessment relating to the latter.

- 84 The second plea alleges that the Commission did not have the power to adopt a conditional decision that there was no aid after carrying out a simple preliminary examination. In this plea, the applicant also raises certain arguments which do not concern the power of the Commission to adopt the second contested decision, but which merit an assessment on the substance, namely the allegedly unrealistic character of the undertakings assumed by the Italian Republic according to which the sale of Alitalia group assets would be carried out at the market price.
- 85 The third plea, divided into two parts, claims manifest error of assessment in that the Commission allegedly failed to examine all the relevant characteristics of the contested measures in their context, and an infringement of the duty to state reasons by the Commission, having regard to the lack of justification for that omission.
- 86 The fourth plea, divided into two parts, alleges an error of law, the Commission having allegedly ignored options other than the sale of Alitalia group assets, and an infringement of the duty to state reasons by the Commission, having regard to the lack of justification for that omission.
- 87 The fifth plea, divided into five parts, alleges failure to apply to the sale of assets the criterion of a private investor operating in normal market economy conditions.
- 88 The sixth plea alleges an error in identifying the party which must reimburse the aid.
- 89 The seventh plea alleges infringement of the duty to state reasons as regards, in particular, the incomplete aspects of the Commission's examination referred to in the applicant's third and fourth pleas, namely, first, the lack of any examination of all the characteristics of the measures in their context, and, second, failure to examine options other than the sale of assets.
- 90 For the purposes of examining the pleas set out above, a distinction must be made by classing them into three categories, according to whether they seek a finding that the Commission lacked the power to adopt the second contested decision, claim infringement of the latter's obligation to open the formal investigation procedure, or claim infringement of the duty to state reasons.
- 91 It is therefore necessary first to examine the second plea, claiming the Commission lacked the power to adopt the second contested decision, and then, in succession, the pleas alleging infringement of the obligation to open the formal investigation procedure — namely the first two parts of the third plea, the first part of the fourth plea, the fifth plea, the sixth plea, the first plea, and the arguments raised in the second plea concerning the unrealistic character of the undertakings by the Italian authorities — and, finally, the pleas alleging infringement of the duty to state reasons — namely, the seventh plea, the second and third parts of the third plea, and the second part of the fourth plea.
- a) The second plea, alleging that the Commission lacked the power to adopt a conditional decision after a preliminary examination
- 92 The applicant calls into question the basis on which the second contested decision was adopted, namely Article 4(2) of Regulation No 659/1999, which, in its submission, does not allow the Commission to adopt a 'conditional decision' that there was no aid following a mere preliminary examination, but only at the conclusion of a formal investigation procedure under Article 7(4) of Regulation No 659/1999, in conjunction with a finding of the compatibility of the aid with the common market. It further argues that, having regard to the operative part of the second contested decision, the finding that there was no aid depends on an uncertain event, namely compliance with a number of undertakings as to the behaviour of the Italian authorities which, it maintains, are similar to the conditions flowing from decisions taken by the Commission pursuant to Article 7(4) of the said

regulation. It indicates, finally, that, according to the case-law, lack of jurisdiction on the part of the institution which adopted the contested measure represents a ground for annulment as a matter of public policy, which should be raised by the EU judicature of its own motion.

- 93 It should be recalled, first, that, at the conclusion of the preliminary examination phase and in accordance with Article 4(2) to (4) of Regulation No 659/1999, the Commission may take three types of decision. It may find either that the notified measure does not constitute aid, or that, whilst constituting aid, it raises no doubts as to its compatibility with the common market ('a decision not to raise objections'), or that it raises doubts and decide to open the formal investigation procedure. It should be recalled, next, that the Commission has the power to adopt a positive decision, under Article 7(3) of Regulation No 659/1999 (finding, in some cases after modification by the Member State concerned, that a measure is compatible with the common market), and to accompany it with conditions allowing it to recognise the compatibility of the said measure with the common market and obligations allowing it to monitor compliance with that decision, in accordance with Article 7(4) of the same regulation.
- 94 Thus, it must be held that, unlike decisions taken at the conclusion of the preliminary examination phase, like the second contested decision, Article 7(4) of Regulation No 659/1999 concerns positive decisions, whereby the Commission finds the existence of aid, pursuant to Article 87(1) EC, which it subsequently declares compatible with the common market. That provision does not apply in this case, since the Commission concluded that the measure notified, bearing in mind the undertakings given by the Italian Republic, did not constitute State aid and did not therefore fall within the scope of Article 87(1) EC.
- 95 It follows that the second contested decision cannot be classified as a conditional decision, within the meaning of Article 7(4) of Regulation No 659/1999, imposing conditions or obligations on the Member State, or as a decision which requires amendments to the project notified, but, as the Commission has maintained, as a decision taking account of undertakings as to behaviour voluntarily entered into by the State during the phase of notification of the contested measure in order to clarify certain points. Therefore, those undertakings form an integral part of the measure notified, which is moreover apparent from the operative part of the second contested decision.
- 96 Therefore, contrary to what the applicant argues, the Commission has the power to adopt, on the basis of Article 4(2) of Regulation No 659/1999, a decision, such as the second contested decision, whereby, while finding the absence of State aid, it takes note of undertakings entered into by the Member State.
- 97 The second plea must therefore be dismissed as unfounded.

b) The pleas alleging infringement of the obligation to open the formal investigation procedure

- 98 Concerning this category of pleas, it needs to be determined, in this case, having regard to the claims made in each of the pleas, whether the examination carried out by the Commission was of such a kind as to set aside serious difficulties, so as to render legitimate the decision not to open the formal investigation procedure. In that regard, it is necessary to examine, in succession, the claims made in the third plea, those made in the fourth plea, those made in the fifth plea, those made in the sixth plea and, finally, those made in the first plea, in the context of which the Court will also examine the arguments of the applicant raised in the second plea, not concerning jurisdiction, but concerning the allegedly unrealistic nature of the undertakings entered into by the Italian authorities.

The pleas made in the third plea, concerning failure by the Commission to examine all the relevant characteristics of the measures in their context

- 99 The third plea falls into three parts. The first and second parts allege manifest error of assessment, through failure to examine the whole of the extraordinary administration procedure and the circumstances of the adoption of the amendments made to the said procedure by the Commission. The third part alleges infringement of the Commission's duty to state reasons in that it failed to justify the said lack of examination.
- 100 It is necessary to examine together the claims made in the first two parts of the third plea.
- 101 In the first part, the applicant argues that the Commission made a manifest error of assessment in that it did not examine whether the extraordinary administration procedure, derogating from the rules of ordinary bankruptcy law, had in itself given rise to the grant of aid, but contented itself with examining certain amendments to the procedure introduced by Decree-Law No 134. In the second part, the applicant maintains that the Commission made a manifest error of assessment by deciding not to examine the circumstances surrounding the adoption of the amendments to the extraordinary examination procedure and, in particular, the measures allowing Alitalia and CAI to be relieved of the manpower burdens concerning unemployment and social security which, in the applicant's argument, formed an integral part of the plan for the sale of the assets of the Alitalia group and represented a condition laid down by the trade unions and CAI for their consent to that plan.
- 102 It should be noted, by way of preliminary observation, concerning the examination made by the Commission during the preliminary examination phase, that the latter is required to examine all the facts and points of law which the persons, undertakings or associations whose interests may have been affected by the grant of the aid have brought to its notice (see, to that effect, *Case C-367/95 P Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 51). It is thus in the light of both the information notified by the State concerned and that provided by any complainants that the institution must form its assessment in the context of the preliminary examination instituted by Article 88(3) of the Treaty (see, to that effect, *Case C-204/97 Portugal v Commission* [2001] ECR I-3175, paragraph 35).
- 103 It should also be borne in mind that the lawfulness of a decision concerning State aid falls to be assessed by the European Union judicature in the light of the information available to the Commission at the time when the decision was adopted (*Case C-390/06 Nuova Agricast* [2008] ECR I-2577, paragraph 54; *Case C-290/07 P Commission v Scott* [2010] ECR I-7763, paragraph 91).
- 104 It should further be noted that the Commission is not obliged to examine of its own motion and by way of guesswork what matters might have been brought before it during the administrative procedure (see, to that effect, *Commission v Sytraval and Brink's France*, paragraph 102 above, paragraph 60).
- 105 Concerning the claims made in the first part, it must be held that, as has been pointed out in paragraphs 33 and 34 above, the Commission has, first, examined the legislative context governing the extraordinary examination procedure and the role of the various players on which that procedure was based, and, secondly, assessed the measure of the sale of assets by means of the call for declarations of interest and a private treaty procedure having regard to the regime in derogation from the ordinary law established by Decree-Law No 134.
- 106 It is apparent first of all from paragraph 39 of the second contested decision that the Commission examined whether the expert report carried out in accordance with Decree-Law No 134 was independent, bearing in mind the division of the shareholdings of the establishment to which it was entrusted between various financial institutions (those holding the greater part of the capital being foreign institutions), in such a way that none of the shareholders held a percentage of shares sufficient to have an influence on the decision concerning the assessment.



- 107 Moreover, even if the second contested decision contains no reference as to the details of the verification by the independent expert of the conformity of the sale price of the shares with the market price, it nevertheless contains evidence that the sale had to take place at the market price. Similarly, it must be noted that the Italian authorities entered into a certain number of undertakings to control the action of the various players involved in the procedure for the sale of assets, of which the Commission took note in the second contested decision in order to ensure that the assessment of the bid did not lead to the determination of a price lower than the market price.
- 108 Moreover, the mere fact that the Commission did not have the expert reports at the time the second contested decision was adopted is not in itself sufficient to establish that the latter did not carry out a complete or sufficient examination as regards the extraordinary administration procedure, especially as those reports were not intended to be submitted to it. In this case, those reports were sent to the extraordinary administrator on 5 and 7 November 2008, the latter having to make his final report to the agent entrusted with the control of the operation. The latter was, moreover, required to verify, in particular, the assessments made by the independent experts.
- 109 Finally, it is apparent from paragraph 62 of the second contested decision that the Commission had in its possession the CAI bid sent by the Italian authorities on 3 November 2008, which formed the subject-matter of an analysis in paragraphs 58 to 69 of the said decision. The Commission gave its view only on the independent character of the assessment of the CAI bid by the independent expert, and not on the results of that assessment. The latter were to be sent to the extraordinary administrator who had the final decision on the sale of assets. It also follows from the second contested decision that the conclusions of those reports on the CAI bid had in any case to be confirmed by an agent entrusted with control of the operation of the sale of assets, who had to be appointed by the Italian authorities in order to monitor compliance with the undertakings entered into by the latter, and in particular, the undertaking whereby the sale of assets was to take place at market price. Finally, the said agent had to send the Commission detailed periodic reports concerning compliance with the notified process and compliance with the undertakings by the Italian Republic and, two weeks after his appointment, an exhaustive report as to the conformity of the CAI bid with the market price. According to paragraph 157 of that decision, if the Italian authorities did not comply with the terms of that decision, the Commission reserved the right to initiate the formal investigation procedure, pursuant to Article 88(2) EC.
- 110 In the light of the above, as regards the extraordinary administration procedure, the Commission cannot therefore be accused of carrying out an insufficient or incomplete examination during the preliminary examination phase as to the rules derogating from the ordinary law on bankruptcy.
- 111 Concerning the claims made in the second part, it should be noted, first, concerning the reductions in burdens and other advantages allegedly granted by Italian legislation to CAI, on the matter of unemployment and social security, that, as is apparent from paragraph 73 of the second contested decision, the Italian authorities confirmed to the Commission that Alitalia staff had no right to be recruited by CAI, which was free to acquire assets with or without the associated personnel, in accordance with paragraph 119 of the said decision. Thus, it is difficult to conceive in what way CAI was relieved by the burden of financing unemployment benefits granted to dismissed Alitalia employees, such as those provided for by Decree-Law No 134.
- 112 Moreover, it is apparent from paragraphs 68 and 120 of the second contested decision that, if CAI was to recruit the staff indispensable to its operational activity, bearing in mind the competences necessary to operate the assets acquired, that recruitment was to take place in accordance with new conditions entirely determined by CAI.
- 113 Secondly, the claim by the applicant that the Commission had to examine the measures introduced by Decree-Law No 134, because they allegedly formed part of the plan for the sale of assets of the Alitalia group and were a condition imposed by the trade unions and CAI for their consent to that plan, cannot

succeed, having regard to paragraphs 73 and 74 of the second contested decision. It is apparent from the said paragraphs that the Italian authorities indicated to the Commission that Alitalia staff would benefit from the unemployment insurance measures provided for by the national legislation in force and that Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16) was not applicable in this case, since the procedure for selling the assets of the Alitalia group did not involve the transfer of an economic entity retaining its own identity. Moreover, the Italian authorities indicated to the Commission that, in any event, the provisions concerning the maintenance of workers' rights would not be applicable in the context of a procedure for the complete liquidation of the Alitalia group.

- 114 Finally, it should be noted that, even though the negotiations with the trade unions and CAI had not concluded at the time of the submission of the first preliminary bid by the latter, the latter reiterated its bid on 25 September 2008, on the same conditions (see paragraphs 15, 17 and 20 above). Thus, there is nothing to indicate that the final bid by CAI took account of the trade unions' claims and that therefore the social measures complained of by the applicant formed an integral part of the plan for acquisition of Alitalia group assets.
- 115 It follows that, as regards the circumstances surrounding the adoption of the amendments to the extraordinary administration procedure the Commission cannot be accused of having carried out an incomplete or insufficient examination at the time of preliminary examination phase as regards the reductions in burdens and other advantages allegedly granted by Italian legislation to CAI, since those measures were not relevant to the question whether an advantage could have been granted to the buyer of the assets of the Alitalia group.
- 116 Therefore, since the claims formulated in the context of the first and second parts of this plea do not permit it to be established that the Commission carried out an incomplete or insufficient examination at the time of preliminary examination phase, it must be held that the applicant has not adduced evidence of the existence of serious difficulties in that respect. The said claims must therefore be dismissed as unfounded.
- 117 As for the claim that the Commission infringed the duty to state reasons by not justifying the insufficiency of the examination at the time of the preliminary examination phase, raised in the context of the third part of this plea, that will be examined in the context of the seventh plea.

The claims formulated in the context of the fourth plea, alleging failure to examine options other than the sale of Alitalia group assets

- 118 The fourth plea is divided into two parts, the first alleging manifest error of assessment by the Commission by not examining whether there were options other than the sale of assets, and the second alleging infringement by the Commission of the duty to state reasons, in that the latter did not justify the absence of the said examination.
- 119 In the first part, the applicant submits that the Commission should, in accordance with the case-law and its own practice, have examined, from the perspective of a market economy investor, the alternatives to the sale of the assets, such as judicial liquidation or the injection of fresh capital coupled with the restructuring of Alitalia or with a sale of assets, with a view to determining whether, in similar circumstances, a private investor would have proceeded with such a sale of assets or whether it would have chosen other alternatives. By concluding that it was sufficient, for the purposes of finding that the extraordinary administration procedure did not lead to the granting of State aid to the buyers of Alitalia, for the sale to take place at market price without examining alternatives to the sale of the assets and without justifying that omission, the Commission conducted an insufficient and incomplete examination, and committed a manifest error of assessment.

- 120 It should be noted, by way of preliminary observation, that, although the second contested decision contains no express reference to the private investor principle, the Commission has, in this case, applied that principle by concluding that the sale of assets took place at the market price. Moreover, the Commission has emphasised many times that the objective of the said sale should be the maximisation of the value of the assets, in the interest of Alitalia's creditors, which demonstrates that it took the care to ensure that the conduct of the public authorities was guided by prospects of profitability in the long term. Furthermore, the Commission's conclusion, in paragraph 126 of the said decision, that the notified procedure did not lead to the imposition of public authority obligations on the buyers likely to call into question the objective of sale at the market price, demonstrates that the Commission, essentially, took account of the conduct of a private investor for the purposes of assessing the conduct of the Italian authorities and ensuring that the latter did not pursue economic policy objectives incompatible with the common market.
- 121 In accordance with what has been established in the context of the first part of the third plea (see paragraphs 107 to 110 above), the Commission became convinced that the sale of assets would take place at the market price. Therefore, contrary to what the applicant claims, the Commission was under no obligation to examine options other than the procedure chosen by the Italian authorities.
- 122 Moreover, in so far as CAI, in the context of its bid, proposed to buy groups of assets and the passenger air transport business included the corresponding Alitalia time slots necessary to its exercise, the comparison of revenue generated by such a sale with that possibly generated by a separate sale of assets or Alitalia time slots was not relevant in this case.
- 123 In the light of the above, the Commission cannot be accused of having carried out an insufficient or incomplete examination at the time of the preliminary examination phase as to the existence of options other than the sale of assets, the applicant not having adduced evidence of the existence of serious difficulties in that respect. It follows that the claims formulated in the context of the first part must be set aside as unfounded.
- 124 In the second part, the applicant argues that, by not examining options other than the sale of assets and by giving no reason for that alleged omission, the Commission infringed its duty to state reasons. That part must be examined in the context of the seventh plea.

The claims formulated in the context of the fifth plea, alleging failure to apply the criterion of a private investor operating in normal market economy conditions to the sale of assets

- 125 The fifth plea is in five parts, claiming, first, failure to examine the condition of continuity of service and an infringement of the duty to state reasons in that respect; second, failure to examine the implicit condition of the buyer's nationality and infringement of the duty to state reasons in that respect; third, failure to take account of evidence showing that it was impossible to obtain the market price and infringement of the duty to state reasons in that respect; fourth, failure to take account of evidence establishing the existence of State aid; and, fifth, lack of indication as to the appropriate basis of assessment of the market price.
- 126 It is necessary first to examine the claims formulated in the context of the first and fifth parts together, then those formulated in the context of the second part, and, finally, those formulated in the context of the third and fourth parts together.
- The claims formulated in the context of the first and fifth parts
- 127 In the context of the first part, the applicant maintains that the Commission did not examine the consequences of the continuity of service requirement introduced by Decree-Law No 134 and mentioned in the call for declarations of interest, which led to a public service obligation the cost of

which should have been assessed in accordance with the criteria found by the judgment of the Court of Justice in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('the Altmark judgment'). It argues that, if the Commission had accepted without reserve the conditions placed in relation to the bids, without verifying whether they had an impact on the price offered, that would constitute a failure to act capable of establishing the existence of serious difficulties encountered by the latter. It argues, moreover, that the Commission's failure to verify the seriousness of the risk of losing timetable slots, by reason of their non-use, invoked by the Italian authorities to justify the continuity of service requirement constitutes a manifest error of assessment. Finally, the absence of any justification for having failed to carry out such an examination constitutes a failure to state reasons for the second contested decision in that regard.

- 128 In the fifth part, the applicant argues that the Commission was obliged to fix detailed criteria for determining the price at which the assets of the Alitalia group were to be sold, requiring as a minimum that the price offered by CAI include, first, the EUR 300 million loan granted by the Italian Republic to Alitalia and the other forms of aid received by Alitalia and, second, the cost of complying with the continuity of service obligation. The fact that the Commission did not provide any indication as to the basis on which the assessment of the market price was to be based constitutes, in the applicant's submission, a manifest error of assessment, which led to an undervaluation of the price of the Alitalia group assets.
- 129 It should be recalled, as a preliminary observation, that the question whether the Commission misapplied the private investor test is not to be confused with the question whether there were serious difficulties which required the formal investigation procedure to be initiated. The examination of the existence of serious difficulties is designed not to determine whether the Commission correctly applies Article 87 EC, but to establish whether it had, at the time it adopted the second contested decision, sufficiently full information in order to assess the compatibility of the measure in question with the common market (see, to that effect, *Bundesverband deutscher Banken v Commission*, paragraph 77 above, paragraph 129).
- 130 The fact that the Commission's assessment is, in the applicant's opinion, erroneous, and that it did not reply to certain claims raised by the latter does not imply that it was unable to pronounce on the measure in question on the basis of the information it possessed and that it therefore had to initiate the formal investigation procedure in order to complete its inquiry (see, to that effect, *Bundesverband deutscher Banken v Commission*, paragraph 77 above, paragraph 130).
- 131 In this case, as the Commission maintains, the sale of Alitalia group assets did not raise any question concerning the concept of public service obligation and the continuity of service criterion simply formed part of the criteria for assessing the bids. There is nothing in the documents before the Court to indicate that the buyer of the air passenger transport business was to be burdened with the performance of public service obligations in the context of the notified procedure.
- 132 Similarly, it must be held that, contrary to what the applicant argues, the Commission excluded, in paragraph 118 of the second contested decision, the existence of public authority obligations associated with the procedure for the sale of assets and, in particular, verified that such conditions had not been imposed on the buyers, as had been claimed by the complainants.
- 133 In that regard, concerning, in particular, the conditions for operating the air transport business, it is apparent from paragraphs 123 to 125 of the second contested decision that, contrary to the allegations of the applicant, the Commission examined the relevance of the continuity of transport service condition in the medium term to the price of the assets. It obtained clarifications from the Italian authorities according to which continuity, as mentioned in Decree-Law No 134 and in the call for declarations of interest, did not correspond to public service obligations for the purposes of EU law.

- 134 It must be noted, moreover, that the applicant does not explain in what way the need to ensure continuity of air transport service in the medium term, said to have been imposed by the Italian authorities as a condition which bids must meet through Decree-Law No 134, had the result of diminishing the price of Alitalia group assets below the market price. Moreover, contrary to the applicant's allegations, it is apparent from paragraphs 71 and 102 of the second contested decision that the continuity of service criterion was a secondary criterion in relation to that of price, in the context of the assessment of bids by the extraordinary administrator. Moreover, as the Italian authorities explained to the Commission, the determinant criterion applied by the independent expert was that of price, both Decree-Law No 134 and the call for declarations of interest providing that the sale price of the assets could not be below the market price, as determined by the independent expert. That was, *a fortiori*, guaranteed by the undertaking entered into by the Italian authorities, referred to in paragraphs 71 and 72 of the said decision, that, in any event, assessment of the bid would not lead to the determination of a price lower than the market price, recourse to the financial consultant allowing the extraordinary administrator to assure himself of that.
- 135 Taking account of the above, the ability of operators who had submitted bids to ensure continuity of service could not have exonerated them from the primary obligation to submit a bid equal to or above the market price, as their bid would not have been accepted, in other circumstances.
- 136 Similarly, the applicant's argument that the continuity of service condition in the call for declarations of interest had the effect of deterring potential bidders from participating by thus diminishing the market price cannot succeed. As is apparent from paragraph 53 of the second contested decision, the extraordinary administrator received sixty bids in response to the call for declarations of interest published on 23 September 2008. Moreover, according to paragraph 45 of the said decision, some of the bids, and particularly that of CAI, were submitted even before publication of the said call for declarations of interest, which demonstrates that the presence therein of the continuity of service condition was not decisive for those bids.
- 137 In any event, the fact that the need to ensure continuity of air transport service was inserted into the call for declarations of interest amongst the requirements which the bids received had to meet does not necessarily imply the existence of a public service obligation on the operator whose bid is accepted. Even if such an obligation had been thus imposed, it is not apparent from the application that compensation was included in the price of the assets of the Alitalia group and that it was higher than the net cost engendered by the performance of the public service obligation, so as to confer an economic advantage on the provider within the meaning of the *Altmark* judgment, paragraph 127 above. Thus, it does not in any way follow from the above that the Commission should have taken account of the criteria determined in that judgment for assessing the price.
- 138 Moreover, it must be noted that the evidence put forward by the applicant in support of its claim that the Commission erred in the assessment of the price of Alitalia group assets was not relevant for the Commission's examination. Both the financial situation of Alitalia and the subject-matter and size of those bids were different.
- 139 Concerning the price mentioned in the bid submitted by Air France-KLM in April 2008 for the acquisition of Alitalia, it should be noted that that bid was submitted before Alitalia was declared insolvent and envisaged the acquisition of the whole of Alitalia's assets, not by a transfer of assets but by a transfer of shares. Moreover, since that bid had been withdrawn, the Commission could not take it into consideration, as it was not definitive. As for CAI's bid, it should be remembered that it was submitted in the context of the extraordinary examination procedure to which Alitalia had been made subject in the context of its liquidation and that envisaged the acquisition of only part of the latter's assets. In those circumstances, the applicant's argument that the transfer price offered by CAI should include the amount of the loan cannot succeed. The amount of the loan has no effect on the sale price of Alitalia group assets, of which only a part have been transferred to CAI, at the market price. Finally, concerning the bid submitted in January 2009 for the acquisition of 25% of the shares of

Alitalia-CAI, it must be noted that the total value of the said company had increased following the sale of Alitalia group assets, particularly by reason of the acquisition by that company of another airline and that, in any event, since that bid was subsequent to the date of adoption of the second contested decision, the Commission could not have taken it into account.

<sup>140</sup> Finally, the applicant claims that if Alitalia had stopped operating during the insolvency proceedings, it would not in any event have lost its timetable slots, in accordance with Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1). Thus, the Commission made a manifest error of assessment and infringed the duty to state reasons, by reason of the fact that it allegedly accepted without reserve the risk of loss by Alitalia of its timetable slots in the guise of justification of the need, for the buyer of the assets of the Alitalia group to ensure continuity of service.

<sup>141</sup> It must be held that it is not apparent from paragraph 125 of the second contested decision, to which the applicant refers, that the Commission unconditionally accepted any justification of the continuity of service criterion by the risk of loss of Alitalia timetable slots. In that paragraph, the Commission indicated, in essence, that the value of a sufficiently broad group of assets included the goodwill, a part of which represented the timetable slots necessary to provide the service. That consideration implies that the Commission took into account the continuity criterion out of concern to maximise the value of the assets concerned by the transfer, in order to obtain a higher transfer price in the interest of Alitalia creditors and not in a logic of continuing the activity of a public service. Thus, the applicant's argument finds no foundation in the second contested decision.

<sup>142</sup> In any event, the applicant does not in any way demonstrate to what extent such an examination was necessary to allow the Commission to assess the conformity of the continuity of service condition with the criterion of a private investor operating in normal market economy conditions and thus fails to prove the existence of serious difficulties. It follows that the Commission cannot be accused of any insufficiency of reasoning in that respect.

<sup>143</sup> In those circumstances, the claims formulated in the context of the first and fifth parts of the fifth plea must be dismissed as unfounded.

– The claims formulated in the context of the second part

<sup>144</sup> In the context of the second part of this plea, the applicant submits that the sale of Alitalia's assets was subject to an implied condition that the buyer should be of Italian origin, which allegedly reduced the sale price below the market price and discouraged competing bids. The Commission's failure to examine that factor and draw the consequences from such an examination constituted a manifest error of assessment. Moreover, the lack of any explanation by the Commission in that regard constituted a failure to state reasons.

<sup>145</sup> In this case, it should be noted that the Commission verified that the call for declarations of interest did not contain any discriminatory clause based on the nationality of the bidders. It concluded, moreover, that the latter had been widely publicised both nationally and internationally. As stated in paragraph 136 above, the Commission indicated in the second contested decision, first, that, from the time of his appointment and before the publication of the said call for declarations of interest, the extraordinary administrator resolved to make contact with the principal international airline companies and, second, that 60 bids from Italian and foreign entities were received by the extraordinary administrator.

<sup>146</sup> Moreover, the Commission examined the role of the bank selected in order to promote the submission of a bid to acquire Alitalia in the procedure for the sale of Alitalia assets and concluded, in the footnote on page 34 of the second contested decision, that the latter had relinquished any role as adviser of the competent ministry as from the placing of Alitalia into extraordinary administration,

namely 29 August 2008. Apart from the task entrusted to it prior to the said placing, it is not apparent from the second contested decision that that bank had participated in the estimation of Alitalia's assets and that it could have favoured CAI to the detriment of other bidders. Moreover, it must be remembered that the Italian authorities had entered into an undertaking not to interfere with the action of the extraordinary administrator.

147 Thus, the applicant's arguments claiming a conflict of interests between the bank selected in order to promote the submission of a bid to acquire Alitalia and CAI, imprecision of the call for declarations of interest and short deadlines surrounding the submission of bids procuring an advantage for CAI cannot succeed. As regards the non-discriminatory character of the sale of assets procedure, it must be held that, since the complaints formulated in the context of the second part of the fifth plea do not permit it to be established that the Commission carried out an incomplete or insufficient examination at the time of the preliminary examination procedure or that the latter did not draw the consequences from examination of the conditions of sale of Alitalia group assets, the applicant has not produced evidence of the existence of serious difficulties in that respect. Moreover, the applicant cannot claim that the second contested decision is vitiated by a lack of reasoning in that regard. The complaints formulated in the context of the second part of the fifth plea must therefore be dismissed as unfounded.

– The complaints formulated in the context of the third and fourth parts

148 In the third part, the applicant argues that, since the procedure for the sale of assets was not open, transparent and non-discriminatory, it was not capable of guaranteeing a sale at the market price. It argues that, in any event, the other guarantees of an independent assessment such as the intervention of the independent expert and the agent entrusted with control of the operation were not capable of guaranteeing that the price paid by the buyer corresponded to the market price. The Commission's failure to draw the correct conclusions as to the impossibility of reaching the market price under such circumstances constituted a manifest error of assessment. Moreover, the lack of justification in that regard constituted a failure to state reasons.

149 In the context of the fourth part, the applicant argues that the Italian authorities have reduced the price at which CAI was able to acquire Alitalia by cancelling certain debts and making its bid more attractive to the trade unions. By not taking into account those facts which were known to the Commission and by not finding that they gave rise to the granting of aid to CAI, it committed a manifest error of assessment.

150 As has been recalled in the context of the examination of the complaints formulated in support of the third plea, the Commission took the view that the procedure for sale of assets by private treaty complemented by the call for declarations of interest did not in itself offer a sufficient degree of transparency to ensure that the assets would be sold at the market price. Consequently, the Commission verified that the bid had been subjected to an independent assessment, in order to ensure that the price proposed was not below the market price. Moreover, as concluded in paragraphs 107 to 109 above, the assessment of the assets by the independent expert, corroborated by the verification of the economic value of the bids in relation to the assets, carried out by the independent financial adviser, and the final intervention of the agent entrusted with the control of the operation, offered sufficient guarantees of independence, enabling a sale of the assets at market value to take place.

151 It follows that the complaints formulated in the context of the third part of this plea must be dismissed, as the applicant has not established the existence of evidence of serious difficulties and the Commission cannot be accused of infringing the duty to state reasons in those circumstances.

152 Concerning the fourth part, it should be noted that CAI took over only part of Alitalia's staff, engaged on the basis of entirely new working conditions and contracts, and that the social measures referred to by the applicant did not apply to the staff re-employed by CAI.

153 Therefore, the complaints formulated in the context of the fourth part of the fifth plea must be dismissed. Thus, it must be held that, since the complaints formulated in the context of the fifth plea do not permit it to be established that the Commission carried out an incomplete or insufficient examination at the time of the preliminary examination procedure, the applicant has not adduced evidence of the existence of serious difficulties in that respect. Consequently, the fifth plea must be dismissed in its entirety.

The complaints formulated in the context of the sixth plea, alleging an error in identification of the party having to repay the aid

154 The applicant argues, in essence, that the Commission did not examine the whole of the criteria required by the case-law for the purposes of assessing an economic continuity between Alitalia and CAI, particularly the price at which the transfer of assets took place, the identity of the shareholders of the entity transferred and that of its buyer, the time, the subject-matter and the economic logic of the transfer of assets. It argues that the Commission concentrated its analysis solely on the criterion of the subject-matter of the sale of assets, ignoring the other criteria.

155 Concerning the obligation to recover aid paid to a company in difficulty, it should be recalled that, as is apparent from the case-law, it may be extended to a new company to which the company in question has transferred part of its assets, where that transfer permits the conclusion that there is an economic continuity between the two companies. For a finding of the existence of an economic continuity, the following factors may be taken into consideration: the subject-matter of the transfer (assets and liabilities, maintenance of the workforce, grouped assets), the price of the transfer, the identity of the shareholders or the owners of the undertaking which takes over and of the initial undertaking, the time at which the transfer takes place (after the beginning of the investigation, the opening of the procedure or the final decision) or the economic logic of the operation (see, to that effect, Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and Others v Commission* [2010] ECR I-4749, paragraph 135).

156 It should be noted at the outset that, contrary to what the applicant claims, that case-law does not require the Commission to take into account the whole of the above factors, as is demonstrated by use of the expression 'may be taken into consideration'. It follows that the Commission was not required to examine, in particular and over and above the other criteria, the time at which the transfer of the assets of the Alitalia group to CAI took place, which is one of the factors which 'may' be taken into consideration in order to set aside the economic continuity between those two entities.

157 In any event, it is apparent from the examination of the second contested decision that the Commission concluded that there was no continuity between Alitalia and CAI, on the basis of the subject-matter and the price of the transfer of assets, of the fact that the shareholders were not identical, and of the economic logic of the operation. In this case, the Commission examined the question of the continuity between Alitalia and CAI in paragraphs 128 to 151 of the said decision. The Commission first of all underlined, in paragraph 132 of that decision, that the notified measure as modified by the undertakings entered into by the Italian authorities should lead to a sale of Alitalia group assets at the market price. It then examined whether there was a continuity in the enjoyment of the competitive advantage created by the EUR 300 million loan between Alitalia and the buyers of the assets concerned by the sale of assets procedure.

158 In that respect, the Commission has underlined, in paragraph 135 of the second contested decision, as to the subject-matter of the sale of assets, that those assets had not been offered in a grouped manner in the context of the call for declarations of interest and did not therefore correspond to homogeneous economic units, which could have had the effect of limiting the choice of prospective buyers. It held, in paragraph 136 of the said decision that, conversely, taking account of the very varied declarations of interest corresponding to different assets, at the conclusion of the sale of assets procedure, the



activities of Alitalia were distributed between numerous parties and organised in a different way. Thus, it concluded, in paragraph 137 of that decision, that, having regard to the extent of the sale of assets and the parcelling of the bids of the potential buyers, the sale of assets procedure implemented by the Italian Republic did not involve economic continuity between Alitalia and CAI.

<sup>159</sup> Concerning the shareholders of Alitalia and CAI, the Commission concluded, in paragraph 140 of the second contested decision, that they were not one and the same. It described CAI as being a consortium of private investors who were different from the shareholders of Alitalia and found that the exchange of shares of the latter for shares in the new company was possible only on the basis of legislative provisions concerning the recovery of undertakings in the context of the composition procedure, which were not relevant in the present case.

<sup>160</sup> Next, the Commission found, in paragraph 141 of the second contested decision, that CAI would take over only certain assets relating to the passenger transport business of Alitalia, that it pursued its won strategy as an undertaking and that no automatic transfer of employment contracts took place between Alitalia and CAI. The Commission further noted, in paragraph 142 of the said decision, that CAI would not continue the business of Alitalia, the Italian authorities having warranted that at the conclusion of the process of the sale of assets it would not represent more than 69% of the capacity of Alitalia in terms of passengers transported by kilometre, as calculated at the date of the notification. Moreover, as is apparent from paragraphs 13 and 49 of that decision, the sale of Alitalia group assets to CAI was designed to maximise the value of Alitalia assets before its liquidation, in the interests of creditors.

<sup>161</sup> It follows from the above that, contrary to what the applicant claims, the Commission did not base its reasoning essentially on the subject-matter of the transfer. As is apparent from paragraph 160 above, the Commission examined and confirmed the economic logic of the operation. Moreover, throughout its examination it explained the reasons why it considered that there was no economic continuity between Alitalia and CAI. It thus concluded, in paragraphs 130 to 132 of the second contested decision, that no undue advantage could be transferred to the buyer of the Alitalia group assets, having regard to the fact that all measures were taken to ensure that the transfer took place at a price not lower than the market price. It must therefore be held, in the light of the considerations set out above and in accordance with the case-law cited in paragraph 155 above, that the Commission carried out a sufficient and complete examination and that the applicant has not adduced evidence of the existence of serious difficulties in that respect.

<sup>162</sup> Therefore, since in this case it did not appear necessary for the Commission to take a position on the time of the transfer of the assets, it cannot be accused of a failure to state reasons in that respect.

<sup>163</sup> In the light of the above, the complaints formulated in the context of the sixth plea must therefore be dismissed as unfounded.

The complaints formulated in the context of the first plea, concerning failure to initiate a formal investigation procedure

<sup>164</sup> The applicant argues that by not initiating the formal investigation procedure provided for in Article 88(2) EC, the Commission issued an incomplete decision which should be annulled. It considers, in that regard, that even though the period devoted to the preliminary examination preceding the adoption of the second contested decision was not exceptionally long, serious difficulties could nevertheless have been found by the Commission. Moreover, in its reply, the applicant points out that since the preliminary examination procedure started with the review of the facts in April 2008, it was almost four times longer than the maximum duration of two months laid down by Article 4(5) of Regulation No 659/1999 for the conclusion of a preliminary examination.

- 165 The applicant also provides a non-exhaustive list of the errors made by the Commission, which it claims demonstrates that the complexity of the examination required in this case justified the initiation of the formal investigation procedure.
- 166 It maintains, moreover, that, having regard to the political context of this case, the undertakings entered into by the Italian authorities whereby the sale of Alitalia group assets would be carried out at the market price were unrealistic and that, in any event, they had been imposed too late in the process, after the irreversible happening of the events which they were supposed to concern.
- 167 In the first place, concerning the applicant's arguments in relation to the duration of the preliminary examination phase, it should be noted, as the Commission has argued, that the applicant contradicts itself in its pleadings. Whereas, in the application, it argues that the duration of that phase, less than one month, was not exceptionally long, in the reply it states that the said phase was almost four times longer than the maximum duration of two months laid down by Article 4(5) of Regulation No 659/1999.
- 168 In that respect, it should be recalled that the two-month time-limit prescribed by Article 4(5) of Regulation No 659/1999 for closing a preliminary examination concerns the period between the full notification of the measure and the adoption of the decision pursuant to Article 4(2), (3), or (4), namely, in this case, the period from 14 October to 12 November 2008. The applicant is thus wrong also to take account of the period preceding the date of notification of the procedure for the sale of assets by the Italian authorities, during which the Commission had contacts with them, which began in April 2008.
- 169 It must therefore be concluded in this case that the duration of the preliminary examination phase was less than that laid down by Article 4(5) of Regulation No 659/1999 and thus perfectly reasonable. That duration is, consequently, not of such a nature as to demonstrate the existence of serious difficulties which the Commission could have been confronted with in the context of the preliminary examination, but rather reflects the fact that examination of the measure notified in this case did not raise any particular difficulty (see, to that effect, Joined Cases T-568/08 and T-573/08 *M6 v Commission* [2010] ECR II-3397, paragraph 142).
- 170 In the second place, the applicant's arguments concerning the unrealistic nature of the undertakings integrated into the second contested decision cannot succeed. It should be noted, first, that the call for declarations of interest published on 23 September 2008 provided that the criteria with which bids had to comply had to be in accordance with the requirements of the applicable Italian legislation and, in particular, that the sale price of the assets could not be less than the market price, as determined by an independent expert. Second, the latter had to examine the bids in order to ensure — taking account primarily of the price offered despite the other criteria potentially fulfilled by the bids submitted — that the proposed sale price of the assets was equal to or higher than the market price. Third, at the time of the adoption of the second contested decision, the sale of assets had not yet been approved by the monitoring committee and the final decision of the extraordinary administrator had not yet been taken. The latter was required as a preliminary, in accordance with the extraordinary administration procedure, to obtain authorisation from the monitoring committee and the minister responsible on the sale in question. Thus, the undertaking entered into by the Italian authorities whereby the minister responsible was not to interfere with the action of the extraordinary administrator is not out of time, given the stage of the procedure.
- 171 Moreover, the mention of the said undertakings in the second contested decision cannot constitute an indication of serious difficulties facing the Commission. Those undertakings prove that the Commission took the precautions necessary both to monitor compliance with the said undertakings by the agent entrusted with the monitoring of the operation and to draw the consequences from any non-compliance therewith. In any event, the applicant's arguments concerning the inadequacy of the undertakings are irrelevant, having regard to the fact that the Commission reserved the right to initiate the formal investigation procedure on the measure in question, in the event of non-compliance with the terms of the second contested decision and, in particular, the undertakings entered into by the Italian authorities and endorsed in the said decision.

172 In the third place and finally, concerning the ten errors alleged by the applicant, which are supposed to indicate the existence of serious difficulties, it should be noted that they relate, in reality, to the complaints raised in the context of the third, fourth and fifth pleas, with regard to which those pleas have been examined. Therefore, it is not necessary to examine them separately, in the context of the present plea.

173 Therefore, the complaints formulated in the context of the first plea must be dismissed as unfounded.

174 In the light of all of the above, it must be held that the applicant has not demonstrated the existence of serious difficulties. It follows that the Commission was not required to initiate the formal investigation procedure on the measure of the sale of assets, in accordance with the case-law cited in paragraph 80 above.

c) The pleas claiming infringement of the duty to state reasons

175 The applicant considers that the Commission has not followed its 'consistent decision-making practice' on State aid, particularly as regards examination of all the relevant characteristics of a measure and its context and that of the options other than the sale of assets, in the light of the criterion of a private investor operating in normal market economy conditions. The Commission was thus under a reinforced obligation to state reasons. Moreover, the applicant considers that the second contested decision contains certain conclusions of the Commission that are not supported by sufficient detail, particularly on the independence of the expert and the certainty that the sale of assets would take place at the market price, for which it is not possible to understand the latter's reasoning.

176 It should be recalled that the complaint alleging lack of reasoning of the second contested decision as regards the absence of any examination of the whole of the relevant characteristics of the notified measure and its context coincides with the third part of the third plea. Similarly, the complaint alleging that the second contested decision lacked reasoning as regards methods of recovery which constitute options other than the sale of assets coincides with the second part of the fourth plea. Therefore, as has been indicated in paragraphs 89, 117 and 124 above, the said parts will be examined in the context of the present plea.

177 Moreover, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review (*Commission v Sytraval and Brink's France*, cited in paragraph 102 above, paragraph 63; *Case C-17/99 France v Commission* [2001] ECR I-2481, paragraph 35).

178 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Case C-350/88 Delacre and Others v Commission* [1990] ECR I-395, paragraph 16, *France v Commission*, cited in paragraph 177 above, paragraph 36).

179 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (*Bundesverband deutscher Banken v Commission*, cited in paragraph 77 above, paragraph 45, and case-law cited).

- 180 As regards, more particularly, a Commission decision to terminate the preliminary investigation procedure where it is found that the State aid objected to by a complainant does not exist, the Commission must at least provide the complainant with an adequate explanation of the reasons why the factual and legal material relied on in the complaint has failed to demonstrate the existence of State aid. The Commission is not required, however, to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance (*Commission v Sytraval and Brink's France*, cited in paragraph 102 above, paragraph 64).
- 181 It should be remembered, as regards the nature of the measure at issue, that the second contested decision was adopted at the end of the preliminary stage of the procedure for reviewing aid under Article 88(3) of the EC Treaty, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete compatibility of the aid in question without opening the formal investigation procedure under Article 93(2) of the EC Treaty, which is designed to enable the Commission to be fully informed of all the facts pertaining to that aid (Case C-333/07 *Regie Networks* [2008] ECR I-10807, paragraph 64).
- 182 Such a decision, which is taken within a short period of time, must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market (*Matra v Commission*, cited in paragraph 58 above, paragraph 48; *Regie Networks*, paragraph 65).
- 183 In this case, concerning the context and the circumstances in which the second contested decision was adopted, it is apparent from examination of the first part of the third plea (see paragraphs 105 and 110 above) that the Commission examined the role of the various participants in the extraordinary administration procedure and assured itself that the measure, as notified, would guarantee that the sale of assets took place at the market price. Moreover, it also concluded in the context of the examination of the second part of that plea that the Commission was not required to examine the points which were not relevant for its assessment, such as reductions of burdens and other advantages allegedly granted by Italian legislation to CAI, due to the entry into force of Decree-Law No 134.
- 184 Similarly, it is apparent from examination of the fourth plea that, since the Commission assured itself that the sale had to take place at the market price, it was under no obligation to examine options other than the judicial liquidation procedure.
- 185 Therefore, it must be held that, having regard in particular to the case-law cited in paragraph 179 above, the duty to state reasons did not require the Commission to set out in the second contested decision factors other than the facts and the legal considerations having decisive importance in the context of the decision. Such a statement of reasons is sufficient to inform the applicant of the justifications for the second contested decision and enable the General Court to review its legality on the basis of Article 253 EC.
- 186 Concerning the Commission's conclusions which were allegedly not supported by reasoning, it should be noted that, in paragraph 39 of the second contested decision, the Commission indicated the reasons why it considered that the expert report carried out in accordance with Decree-Law No 134 was independent. Thus, the applicant's complaint that the second contested decision lacked reasoning as regards the presence of certain shareholders of the independent expert in the capital of CAI also cannot succeed.
- 187 Finally, as regards the applicant's argument that, in the second contested decision, the Commission maintained that the fact that one of the shareholders of CAI also had a holding in a company which is an unsecured creditor of Alitalia had no impact on the price proposed by CAI, it is sufficient to note that the Commission did not base its reasoning on that consideration in order to affirm that the price proposed in that bid was in accordance with the market price, so that it was not in any way required to support it.

188 In the light of the foregoing, the present plea must therefore be dismissed. Similarly, the third part of the third plea and the second part of the fourth plea must be dismissed.

189 In those circumstances, the application for annulment of the second contested decision must be dismissed in its entirety, without there being any need to adopt the measures of organisation of procedure sought by the applicant.

*E– The application for partial annulment of the first contested decision*

190 The applicant seeks the partial annulment of the first contested decision in so far as it does not order the recovery of the aid from the buyers of the assets of the Alitalia group and grants the Italian Republic an additional period of four months to implement that decision and to recover the loan of EUR 300 million.

191 The applicant argues, in essence, that the Commission infringed the principle of sound administration and Article 14(3) of Regulation No 659/1999, by granting the Italian Republic a further four months to recover the loan granted to Alitalia and by refraining from ordering the suspension of the aid, pursuant to Article 11 of Regulation No 659/1999. In addition, it argues that the Commission had to order recovery of the aid from CAI and not Alitalia.

192 It should be noted, as a preliminary observation, that Alitalia-CAI and the Italian Republic, without raising a formal objection of inadmissibility, consider that the action against the first contested decision is inadmissible. In that respect, Alitalia-CAI argues in essence that the applicant has no interest in bringing proceedings against the first contested decision. The Italian Republic argues that the applicant is not individually concerned by the said decision.

193 In accordance with the case-law cited in paragraph 56 above, the Court must examine the admissibility of the action of its own motion, in accordance with Article 113 of the Rules of Procedure.

194 Concerning, first, the question whether the applicant is individually affected by the first contested decision, it should be recalled that, in the field of State aid control, a decision closing a proceeding pursuant to Article 88(2) EC is of individual concern to any undertaking which was at the origin of the complaint which led to the opening of the investigation procedure, and whose views were heard during that procedure and largely determined the conduct of that procedure, provided, however, that its position on the market was significantly affected by the aid which is the subject of the decision. However, that does not preclude the possibility that an undertaking may be in a position to demonstrate by other means — by reference to specific circumstances distinguishing it individually as in the case of the person addressed — that it is individually concerned (Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, paragraph 72).

195 In this case, the applicant argues, first, that it lodged complaints and observations during the investigation procedure which led to the adoption of the first contested decision and, second, that its position on the market was substantially affected by the granting of the loan and the first contested decision, inasmuch as, in that decision, the Commission granted the Italian authorities four months to recover that loan. The applicant refers moreover to the complaint of 29 April 2008 addressed to the Commission, in which it maintained that the loan continued to place it at a disadvantage in relation to Alitalia by preventing its expansion on the Italian domestic market and on routes departing from Italy and that it suffered a loss of passenger numbers and revenue by reason of the below-cost fares which Alitalia was in a position to offer following the granting of the loan. Finally, it argues that its interest in seeing the decision partially annulled is to prevent the occurrence of similar infringements by the Commission in the future.

196 It should be noted, at the outset, that the applicant has played an active role in the procedure which preceded the adoption of the first contested decision, by lodging complaints against the granting of the loan to Alitalia and its subsequent conversion into own capital, which were at the origin of the

Commission's inquiry, and that it submitted observations in the context of the formal investigation procedure. Moreover, the observations submitted by the applicant have had an influence on the course of the procedure regarding the said loan, having regard to the fact that the Commission adopted a decision declaring that it constituted an illegal aid incompatible with the common market and that it had to be recovered from its beneficiary.

197 However, it must be held that the applicant has not demonstrated that the fact of ordering immediate recovery of the aid from Alitalia and not CAI has the effect of substantially affecting its competitive position. Similarly, the applicant has not demonstrated that the time granted by the Commission to the Italian Republic, which had allegedly allowed the obligation of the beneficiary to recover the aid to be circumvented, affected its interests. Finally, the applicant has also failed to demonstrate to what extent the fact of not having ordered the suspension of the aid, having the effect of allowing Alitalia to convert it into own capital, affected the applicant.

198 It follows that the applicant has not demonstrated that it is individually concerned by the first contested decision.

199 It should be remembered that the conditions for the admissibility of an action are cumulative. Thus, without having to examine the applicant's interest in bringing an action, the action must be declared inadmissible, in so far as it seeks the annulment of the first contested decision, for lack of individual effect on the applicant (see, to that effect, Case T-326/99 *Olivieri v Commission and EMEA* [2003] ECR II-6053, paragraph 66).

### **Costs**

200 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. In addition, under Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs.

201 Since the applicant has been unsuccessful in its submissions, it must be ordered to pay its own costs, as well as those of the Commission and Alitalia-CAI.

202 Pursuant to Article 87(4) of the Rules of Procedure, the Italian Republic must bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Ryanair Ltd to pay its own costs and those incurred by the European Commission and Alitalia – Compagnia Aerea Italiana SpA;**
- 3. Orders the Italian Republic to bear its own costs.**

Papasavvas

Vadapalas

O'Higgins

Delivered in open court in Luxembourg on 28 March 2012.

[Signatures]

Table of contents

Background to the dispute .....	2
A – Administrative procedure .....	2
B – Decision to open the formal investigation procedure under Article 88(2) EC .....	3
C – Contested decisions .....	5
1. Decision concerning the loan granted to Alitalia .....	5
2. Decision concerning the sale of Alitalia assets .....	6
Procedure .....	8
Forms of order sought .....	8
Law .....	9
D – The application for annulment of the second contested decision .....	9
1. Admissibility .....	9
2. The purpose of review by the General Court .....	12
3. Substance .....	13
a) The second plea, alleging that the Commission lacked the power to adopt a conditional decision after a preliminary examination .....	14
b) The pleas alleging infringement of the obligation to open the formal investigation procedure	15
The pleas made in the third plea, concerning failure by the Commission to examine all the relevant characteristics of the measures in their context .....	16
The claims formulated in the context of the fourth plea, alleging failure to examine options other than the sale of Alitalia group assets .....	18
The claims formulated in the context of the fifth plea, alleging failure to apply the criterion of a private investor operating in normal market economy conditions to the sale of assets ..	19
– The claims formulated in the context of the first and fifth parts .....	19
– The claims formulated in the context of the second part .....	22
– The complaints formulated in the context of the third and fourth parts .....	23
The complaints formulated in the context of the sixth plea, alleging an error in identification of the party having to repay the aid .....	24
The complaints formulated in the context of the first plea, concerning failure to initiate a formal investigation procedure .....	25
c) The pleas claiming infringement of the duty to state reasons .....	27
ECLI:EU:T:2012:164	31

E – The application for partial annulment of the first contested decision .....	29
Costs .....	30