JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

12 December 2000 *

In Case T-296/97,

Alitalia — Linee aeree italiane SpA, established in Rome, Italy, represented by F. Sciaudone and G.M. Roberti, of the Naples Bar, M. Siragusa, of the Rome Bar, G. Scassellati Sforzolini, of the Bologna Bar, M. Beretta, of the Bergamo Bar, and F.M. Moretti, of the Venice Bar, and initially by A. Tizzano, of the Naples Bar, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss and Prussen, 2 Place Winston Churchill,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou, of its Legal Service, acting as Agent, with A. Abate and E. Cappelli, of the Rome Bar, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Italian.

supported by

Air Europe SpA, established in Gallarate, Italy, represented by L. Pierallini and A. Costantini, of the Rome Bar, with an address for service in Luxembourg at the Chambers of A. Lorang, 51 Rue Albert 1er,

and by

Air One SpA, established in Chieti, Italy, represented by M. Merola, of the Rome Bar, and A. Sodano del Foro Adele, of the Naples Bar, with an address for service in Luxembourg at the Chambers of A. Lorang, 51 Rue Albert 1er,

interveners,

APPLICATION for annulment of Commission Decision 97/789/EC of 15 July 1997 concerning the recapitalisation of the company Alitalia (OJ 1997 L 322, p. 44),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: K. Lenaerts, President, J. Azizi, R.M. Moura Ramos, M. Jaeger and P. Mengozzi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 27 June 2000,

gives the following

Judgment

Facts of the case

1 The applicant is an airline whose capital was held on 1 July 1996 as to approximately 90% by the Italian State finance company Istituto per la Ricostruzione Industriale SpA (hereinafter 'IRI'), the rest being held by private investors.

2 The applicant is the fifth largest European airline in terms of passenger-kilometres after British Airways, Lufthansa, Air France and KLM. Its turnover, in the order of ITL 7 830 billion in 1996 (approximately EUR 4 billion), is comparable to that of SAS and slightly less than that of Swissair. Although the applicant's network mainly covers Italy and Europe, it also includes almost 40 intercontinental destinations in North and South America, Africa, the Middle East and the Far East.

3 The applicant has holdings in other airlines. It has 100% control of Avianova, which in July 1996 became Alitalia Team SpA (hereinafter 'Alitalia Team') and has a 45% holding in the charter company Eurofly and a 27.61% holding in Air Europe. When the action was brought it had a 30% holding in the Hungarian national airline Malev.

4 The applicant also owns a limited number of shares in the capital of companies whose business is related to air transport. However, the carriage of passengers and goods by air accounts for 92% of total group turnover.

5 At the beginning of the 1990s the applicant suffered from under-capitalisation. During the same period it had to face up to difficulties connected with the Gulf War, the recession in the airline sector in 1992 and 1993 and increased competition resulting from the liberalisation of the air transport market. As a consequence, the applicant's average yield fell by 22% between 1990 and 1995. The applicant therefore reduced its costs and improved its productivity, in particular by reducing its ground staff. The operating costs per tonne-kilometre thus fell by 13% and the number of available tonne-kilometres rose by 60% during the period 1990 to 1995.

6 Despite those efforts, the applicant was unable to return to profitability. Its debt increased from ITL 653 billion in 1990 to ITL 3 420 billion in 1995, giving rise to substantial financial costs.

7 On 31 March 1996, the applicant's cumulative losses amounted to ITL 905 billion and its net assets had fallen to ITL 150 billion. In the light of that situation, the applicant adopted in July 1996 a restructuring plan for the period 1996 to 2000, accompanied by a plan for large capital injections by IRI.

8 The restructuring plan consisted of two phases, a restructuring phase (1996 to 1997) and a development phase (1998 to 2000).

9 The restructuring phase was designed to reduce the applicant's operating costs and to bring its ratio of debt to equity down to a reasonable level. It therefore comprised a financial component and a management component. The management component was intended to make the company competitive in the short term by pursuing three main aims: reducing costs, maximising receipts and selling non-strategic activities.

10 The reduction in costs, in particular, was to be achieved by productivity improvements and wage freezes. The agreement reached between the company and the trade union representatives on 19 June 1996 was to save costs, during the five-year period from 1996 to 2000, of more than ITL 1 000 billion. In return for that reduction in wage costs, the applicant's staff were to receive Alitalia shares to a value of ITL 310 billion (representing for the company a cost of ITL 520 billion with tax and social charges), corresponding to the annual saving achieved in labour costs. The plan also provided for the formation of a self-contained company, wholly controlled by Alitalia, which would engage new cabin personnel on less expensive terms. This new company, Alitalia Team, was set up on 23 July 1996.

11 The financial component of the plan notified to the Commission in July 1996 provided for capital injections totalling ITL 3 310 billion: ITL 1 500 billion to be provided by IRI by the end of 1996, 1 500 billion to be the subject of a second instalment to be paid in 1997 and ITL 310 billion for staff to have a stake in the company's capital, as stated in paragraph 10 above. Of the ITL 1 500 billion corresponding to the first instalment, ITL 1 000 billion had already been advanced to the applicant by IRI in June 1996.

12 The development phase was chiefly based on bringing the Malpensa hub into service as from 1998. According to the plan, the development of Malpensa airport would enable the applicant to reposition itself on one of the most

important and richest markets in Europe, namely that of Northern Italy. The creation of the Malpensa hub was to be accompanied by restructuring of the terminal at Rome-Fiumicino Airport, which at the time was the hub of the applicant's network. During the development phase, the applicant also planned to introduce shuttle services on the main domestic Italian routes, to reorganise its international network, to develop a series of alliances with foreign partners and to expand its fleet.

Administrative procedure

13 By letter of 29 July 1996 the Italian authorities sent the Commission the restructuring plan. According to the Italian authorities, the plan was essentially intended to prepare for the privatisation of the applicant. It did not contain any State aid components.

14 By letter of 9 August, the Commission notified the Italian authorities that the intervention would be examined in the light of the provisions of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and in the framework of the procedure provided for in Article 93(2) of the EC Treaty (now, after amendment, Article 88(2) EC).

15 On 9 October 1996, the Commission decided to initiate the procedure provided for in Article 93(2) of the Treaty concerning the increases in capital envisaged in the plan. It notified the Italian authorities of its decision by letter of 21 October 1996, which was the subject of a notice published in the *Official Journal of the European Communities* on 16 November 1996 (OJ 1996 C 346, p. 13; hereinafter 'the notice of 16 November 1996').

16 In the notice of 16 November 1996 the Commission explained that its reason for initiating the procedure was the nature of the capital injections by IRI, which might be classified as State resources within the meaning of Article 92(1) of the Treaty, and its serious doubts concerning:

— the existence of aid, in view of the low probability of IRI's financial aid being satisfactorily recompensed;

— the possibility of applying one of the derogations provided for in Article 92(2) and (3) of the Treaty to any aid.

17 The Commission called on the services of an independent firm of consultants (Ernst & Young) to gather information on several of the questions about which it had expressed doubts.

18 By letter of 21 November 1996, the Italian authorities submitted their observations on the initiation of the procedure provided for in Article 93(2) of the Treaty.

19 The United Kingdom, Danish, Norwegian and Swedish Governments, eight airlines in competition with the applicant and two associations submitted observations following the initiation of the procedure.

20 On 11 December 1996, the consultants appointed by the Commission sent the Commission a report on the initial plan. They considered that the restructuring

plan had more the appearance of a turnaround plan than that of a business plan, so that the minimum annual rate of return, or hurdle rate, required by an investor in such a situation was between 30% and 40%. The internal rate of return (hereinafter 'the internal rate') on the capital injection of ITL 3 000 billion, as recalculated after adjustment of the information presented by the applicant, varied between -12.5% and +25.7%, depending on the various scenarios used (inclusion or exclusion of insolvency costs, funding of the early retirement programme by the State or the company, differing assumptions with regard to the growth rate of the cash flow after 2000 and the share of the applicant's capital held by IRI by 2000). In the consultants' view, it was therefore less than the minimum level required, given the risks being taken by the investor.

21 In their report, the Commission's consultants also maintained that the early retirement programme provided for the applicant's employees and funded by the Italian State in the amount of some ITL 160 billion might include some components of State aid.

22 The consultants' report was sent to the Italian Government on 12 December 1996. In a document dated 20 December 1996 the Italian authorities set out their observations on the report.

23 The comments submitted by the States and the third parties concerned following the notice of 16 November 1996 were also sent to the Italian authorities, who replied by letter of 15 January 1997, in which they reiterated their argument that the applicant's restructuring plan contained no State aid component.

24 On the basis of all the information in its possession on 11 December 1996, and in particular the consultants' report, the Commission informed the Italian

authorities and the applicant's directors, by letter of 22 January 1997, that the company's restructuring plan did not appear to be adequate to warrant a positive decision, and that it would be essential to obtain additional information in order to examine the necessary adjustments. A meeting on that subject was held in Rome on 24 January 1997 between the Commission, the applicant and their respective consultants.

25 In February 1997 the applicant sent the Commission an adjusted version of the restructuring plan. The principal points included were as follows:

— the number of routes and frequencies operated by the applicant would be reduced by almost 10% from 1997, the total number of flights cancelled being approximately 27 000 per annum;

— the fleet would be maintained at the current level until the end of the restructuring plan;

— the total amount of the proposed capital increase would be reduced from ITL 3 000 billion to ITL 2 800 billion because, essentially, there would be less need for investment;

— the applicant would dispose of its shares in the Galileo reservation system;

— the method used to depreciate the applicant's aircraft would be aligned to that used by other major Community companies.

26 On 21 February 1997, the Commission's consultants sent a draft report on the adjusted plan. That draft report concluded that, although the February 1997 plan was indeed more cautious than the initial plan and much less expansionist, it was nevertheless still based on several generous assumptions. The consultants therefore believed that the minimum rate could not be less than 30%, since the operation still entailed major risks. Again according to the consultants, that rate was still broadly higher than the internal rate although the latter, at between 13.2% and 26.9%, was considerably better as a result of the adjustments made.

27 The Italian authorities submitted their comments on the consultants' draft report of 21 February 1997 in a document sent to the Commission on 25 March 1997 and also in a letter of 3 April 1997.

28 At a meeting between the Commission and the applicant held in Brussels on 8 April 1997, the applicant stated that it was prepared to meet the direct costs of the early retirement programme if the Commission considered that the operation satisfied the test of the investor in a market economy (letter from the applicant to the Commission dated 15 April 1997). By letter of 17 April 1997, the Italian Minister for Transport again confirmed that 'Alitalia [had] informed the European Commission that it was prepared to fund the entire early retirement programme over the period 1995 to 1997, if that is the condition of the increase in capital being approved as an operation satisfying the test of the investor in a market economy'.

29 By letter of 18 April 1997, the Commission informed the applicant and the Italian Government that it was not in a position to adopt a positive decision on

the matter based on the principle of the investor in a market economy. Following that correspondence, a number of meetings were held between the Italian authorities, the applicant and the Commission.

30 With a view to the meeting of 16 May 1997, the Commission sent the applicant an informal document on 14 May 1997 containing, on the one hand, possible changes to improve the applicant's restructuring plan in order to achieve a reasonable degree of certainty as to its feasibility and, on the other hand, an indication of the conditions to which authorisation of State aid to the applicant would be subject. One of the 'questions to be resolved' referred to in that document was '[t]he treatment of the costs of early retirement'. It stated in that respect:

'The Italian Government must give an assurance that those costs will be directly assumed by Alitalia for the period 1995 to 2001 inclusive. The amounts already paid in that regard by the Italian State will be repaid with interest before the Commission adopts its decision.'

31 The meetings held in May and June 1997 concerned, in particular, the following changes to the restructuring plan:

— the labour cost reduction to be accelerated by transferring the applicant's employees to Alitalia Team more quickly than originally planned;

— the amount of the proposed capital increase to be reduced to ITL 2 750 billion, and the capital increase to be divided into three instalments: the first, amounting to ITL 2 000 billion (including the ITL 1 000 granted as an

advance in June 1996), to be paid immediately following the adoption of a positive decision; the second, amounting to ITL 500 billion, to be paid in May 1998; and the third, amounting to ITL 250 billion, to be paid in May 1999;

— the applicant to dispose of its shares in the Hungarian company Malev and in six regional Italian airports (Genoa, Naples, Rimini, Florence, Lamezia Terme and Turin).

32 On 18 June 1997, the Commission's consultants sent it a report on the adjusted restructuring plan. This was the final version of the report of 21 February 1997 (see paragraph 26 above).

33 On 26 June 1997, the Italian authorities sent the Commission the final version of the applicant's restructuring plan, 'which contain[ed] the additional adjustments requested by the Commission'. The final plan includes all the adjustments described in paragraph 31 above. In its letter of 26 June 1997, 'the Italian Government acknowledge[d] that the [restructuring] plan [was] accompanied by measures of State aid' and undertook to observe certain conditions.

34 On 4 July 1997, the Commission's consultants submitted an additional report which took into account the most recent changes to the restructuring plan and the Italian authorities' letter of 26 June 1997. In their report, the consultants concluded that 'the plan contains no elements such as to render it unrealistic..., it may be regarded as feasible and it allows the company to return to satisfactory profitability'. They further considered that the amount of the capital injection 'may be regarded as essential and adequate for the objectives of the plan and the needs generated by the restructuring effort'.

35 On 4 July 1997, the applicant paid the sum of ITL 56.6 billion into a blocked account opened at the Banca Nazionale del Lavoro, in accordance with the undertaking given to the Commission by the Italian Government concerning the early retirement programme. On 14 July, it appointed two Rome notaries as escrow agent to pay that sum to the Italian State by way of restitution of the incentives to take early retirement paid to 700 employees during the period 1995 to 1997.

The contested decision

36 On 15 July 1997, the Commission adopted Decision 97/789/EC concerning the recapitalisation of the company Alitalia (OJ 1997 L 322, p. 44, hereinafter 'the contested decision', which may be summarised as follows.

37 After describing the worrying financial situation in which the applicant found itself in 1996, which led to the adoption of the restructuring plan, the Commission describes its content and the adjustments made to it during the administrative procedure.

38 The Commission observes that in the course of its negotiations with the Italian Government, the latter gave a series of undertakings concerning the implementation of the applicant's restructuring plan. Those undertakings are set out, in the form of conditions, in the operative part of the contested decision.

39 The Commission considers that the capital injection totalling ITL 2 750 billion which IRI proposes to provide for the applicant constitutes State aid within the meaning of Article 92(1) of the Treaty and Article 61(1) of the European Economic Area Agreement (hereinafter 'the EEA Agreement'). In that regard, the

contested decision states that 'the internal rate... for IRI on the investment of ITL 2 750 billion in Alitalia's capital is close to 20%, bearing in mind that the early retirement costs are being directly met by Alitalia. This internal rate... is still below the [minimum rate] which an investor acting in accordance with the laws of the market would demand before injecting the capital concerned. In view of this, the Commission believes that the criterion of an investor in a market economy is not met in this case' (point VII, eighth paragraph).

40 After precluding the application of other provisions derogating from the Treaty and the EEA Agreement, the Commission ascertains to what extent the criteria laid down in Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement are satisfied.

41 In that regard, it considers whether the increase in the applicant's capital of ITL 2 750 billion satisfies the various conditions laid down in the Commission notice concerning the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ 1994 C 350, p. 5, hereinafter 'the notice concerning the aviation sector').

42 The Commission notes that the aim of the restructuring plan to whose full implementation the Italian authorities have committed themselves is to restore the applicant's competitiveness and to enable it to be privatised. According to the Commission, the capital increase will substantially reduce the company's debt and help it to achieve a financial structure comparable to that of most of its competitors. The Commission further states that the plan is in itself sufficient to ensure the applicant's survival and prosperity. Furthermore, the Commission considers that all the undertakings given by the Italian authorities answer the concerns which it expressed when it initiated the administrative procedure.

43 The Commission believes that the aid will not lead to the overcapitalisation of the applicant. The total amount of ITL 2 750 billion is in fact necessary both to cover the costs of the restructuring proposed in the plan, estimated at ITL 900 billion, and at the same time to reduce the company's debt, which was ITL 3 420 billion at the end of 1995 as compared with ITL 422 billion in its own capital, to a reasonable level. The Commission considers, moreover, that the information in its possession does not show that the grant of the aid will produce a result that would be contrary to the specific provisions of the Treaty.

44 Last, in general terms and with regard to the Community interest, the Commission believes that 'the recapitalisation and restructuring of Alitalia will contribute to the development of business in the air transport sector within the Community and the [EEA] since, in particular, Alitalia would seem to be the main carrier in a significant part of the Community and the existence of several large Community airlines guarantees the maintenance of a balanced competitive situation' (contested decision, point VIII, final paragraph).

45 According to Article 1 of the contested decision, the aid granted by Italy to the applicant in the form of a capital injection totalling ITL 2 750 billion for the restructuring of the company in conformity with the plan notified to the Commission on 29 July 1996 and adjusted on 26 June 1997 is deemed to be compatible with the common market and the EEA Agreement pursuant to Article 92(3)(c) of the Treaty and Article 61(3)(c) of the EEA Agreement provided that the Italian authorities fulfil 10 undertakings listed in that article. However, the Commission regrets the fact that, in disregard of Article 93(3) of the EC Treaty (now Article 88(3) EC), the Italian Government granted the applicant an advance of ITL 1 000 billion in June 1996, to be set against the first instalment of ITL 2 000 billion.

46 Article 2 of the contested decision provides that payment of a second instalment (ITL 500 billion) and a third instalment (ITL 250 billion) is to be subject to compliance with the undertakings referred to in Article 1 and the actual

implementation of the restructuring plan and achievement of the expected results. The Italian Government is ordered to submit to the Commission, before the release of the second and third instalments in May 1998 and May 1999, a report to enable it to express comments with the assistance of an independent consultant.

47 Article 3 of the contested decision provides that the undertakings and requirements set out in Article 1 are to bind both the applicant and Alitalia Team.

48 The contested decision was notified to the Italian Government by letter of 31 July 1997 and published in the Official Journal on 25 November 1997.

Procedure and forms of order sought by the parties

49 By application lodged at the Registry of the Court of First Instance on 26 November 1997, the applicant brought an action for annulment of the contested decision.

50 By a separate document, lodged at the Registry on 22 December 1997, the Commission raised a plea of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance.

51 By order of 15 July 1998, the Court of First Instance (Fourth Chamber, Extended Composition) decided to join that plea to the substance of the action.

52 By order of 18 May 1999, the President of the Third Chamber (Extended Composition) of the Court of First Instance granted Air Europe, Air One and Lauda Air leave to intervene in support of the form of order sought by the Commission. However, by order of the President of the Third Chamber (Extended Composition) of the Court of First Instance of 1 February 2000, Lauda Air was removed as an intervener.

53 By letter of 16 July 1999, Air One informed the Registry that it did not propose to submit written observations. Air Europe lodged its statement in intervention on 11 October 1999 and the main parties duly submitted their observations thereon.

54 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put various questions in writing, which were answered within the prescribed period.

55 The main parties presented oral argument and answered the questions put to them by the Court at the hearing on 27 June 2000. The interveners, Air Europe and Air One, did not attend the hearing, to which they had been invited.

56 The applicant claims that the Court should:

— declare the contested decision void in its entirety;

— in the alternative,

— declare void the conditions of the authorisation of the aid referred to in Article 1(2) to (8) of the contested decision;

— declare void the condition requiring the applicant to meet the costs arising under the early retirement scheme provided for in Decree No 546/1996;

— order the Commission to pay the costs.

57 The Commission contends that the Court should:

— declare the action inadmissible or unfounded;

— order the applicant to pay the costs.

58 Air Europe contends that the Court should:

— give judgment for the Commission in the terms sought by it;

— order the applicant to pay the costs, including those of the intervener.

Admissibility

59 In support of its plea of inadmissibility, the Commission maintains that the application was out of time. It observes that, according to a consistent line of decisions, first, it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period and, second, the period for bringing an action can begin to run from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action (Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761; order of 5 March 1993 in Case C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801, paragraph 19; Opinion of Advocate General Cosmas in Case C-309/95 *Commission* v *Council* [1998] ECR I-655, at p. 657, paragraphs 35 and 38; and Case T-465/93 *Consorzio Gruppo di Azione Locale 'Murgia Messapica'* v *Commission* [1994] ECR II-361).

60 As regards the applicant's precise knowledge of the content of the contested decision and of the reasons on which it was based, it is apparent from a letter of 1 August 1997 from the Italian Permanent Representative to the Commission referring to the confidential information in the contested decision concerning the applicant that the applicant must then have had knowledge of the full text of the contested decision. That precise knowledge of the content of the decision and of the reasons on which it was based is also apparent from the applicant's letter to the Italian Permanent Representative dated 9 September 1997. In the alternative, the Commission claims that the applicant did not request communication of the contested decision within a reasonable time. The Commission observes that it issued a press release on 15 July 1997. Since there were imperative reasons dictated by the urgency of completing the restructuring plan, the applicant should have immediately requested communication of the contested decision, if need be by approaching the Commission's officers.

61 In that regard, the Court observes that, according to the actual wording of the fifth paragraph of Article 173 of the EC Treaty (now, after amendment, the fifth

paragraph of Article 230 EC), the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point for the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35; Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 42).

62 The Commission has committed itself to publishing in the L Series of the Official Journal the complete text of decisions granting conditional authorisation for State aid taken, as in this case, at the end of the procedure provided for in Article 93(2) of the Treaty (see 'Règles applicables aux aides d'État', *Droit de la Concurrence dans les Communautés Européennes*, Volume II A, 1995, p. 43, paragraph 53, and p. 55, paragraph 90(d)).

63 In the present case, the Commission did not notify the contested decision to the applicant. Since the contested decision was published in the Official Journal of 25 November 1997, it is that date which started the period running as against the applicant.

64 It follows that the present action, which was instituted on 26 November 1997, was brought within the period prescribed in the fifth paragraph of Article 173 of the Treaty.

65 The argument that the action is inadmissible must therefore be dismissed.

Substance

66 The applicant puts forward three pleas in law in support of its action. The first alleges that the Commission misapplied the principle of the investor in a market economy (hereinafter 'the private investor test'). The second plea alleges that the conditions imposed in Article 1 of the contested decision are excessive. The third plea alleges a breach of the rights of the defence.

First plea, alleging misapplication of the private investor test

Preliminary observations

67 It should be observed at the outset that IRI, which recapitalised the applicant, is an Italian State finance company. The applicant does not deny that the Italian public authorities directly participated in the increase in capital proposed in its restructuring plan. However, it maintains that the Commission erred in classifying IRI's capital injection of ITL 2 750 billion as State aid. The applicant contends that IRI's investment satisfies the private investor test or, in other words, that in similar circumstances a private investor would have been willing to provide financial support of that magnitude.

68 It is therefore necessary to determine in the present case whether the Commission was entitled to conclude that the capital injection of ITL 2 750 billion which IRI proposed to make at the time of the adoption of the contested decision, and which had already been paid in part at that time (see paragraph 11 above), constituted State aid within the meaning of Article 92(1) of the Treaty

69 The plea consists of three parts. In the first part, the applicant claims that IRI's investment in itself satisfies the private investor test because private investors have participated in its capital. In the second part, the applicant maintains that the Commission made manifest errors of appreciation in calculating the minimum rate and the internal rate, thus infringing Article 92(1) of the Treaty and the principle of equal treatment, and that it did not provide an adequate statement of the reasons for its decision in that respect. In the third part, the applicant criticises the purely mathematical approach taken by the Commission to the private investor test, contrary to the principles described in the Commission Communication to the Member States of 13 November 1993 on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector (OJ 1993 C 307, p. 3).

70 Although the Commission does not formally challenge the admissibility of this plea, it contends that the applicant cannot call in question the classification of IRI's capital injection as State aid, since the Italian authorities themselves acknowledged in their letter of 26 June 1997 that the financing of the applicant's restructuring plan by IRI contained State aid components (see paragraph 33 above).

71 First of all, in that regard, that statement of 26 June 1997 must be placed in its context. In their letter to the Commission of 29 July 1996 (see paragraph 13 above), the Italian authorities had maintained that IRI's proposed investment in the applicant's capital did not constitute State aid, since, in their view, it satisfied the private investor test. Until 26 June 1997 the Italian authorities maintained that position (letter from the Italian Minister of Transport to the Commission dated 23 December 1996, letter from the Italian authorities to the Commission dated 15 January 1997 (contested decision, point IV, 11th and final paragraphs), document sent to the Commission by the Italian authorities on 25 March 1997 (contested decision, point VI, third paragraph), letter from the Italian authorities to the Commission dated 3 April 1997 (contested decision, point VI, third paragraph)). Throughout the administrative procedure, moreover, the applicant maintained that IRI's investment satisfied the private investor test.

72 It was only at the close of the administrative procedure that the Italian authorities acknowledged that the plan contained aid components in order to obtain a decision from the Commission approving the plan and to be able to proceed with the capital injection. It follows from the letter of 26 June 1997 that the Italian authorities made that declaration 'for the purposes of proceeding with the recapitalisation of Alitalia' ('allo scopo di conseguire la ricapitalizzazione dell'Alitalia').

73 In any event, the Commission's exercise of its powers under Article 92(3) of the Treaty assumes the existence of a measure of State aid within the meaning of Article 92(1) of the Treaty. Therefore, independently of the classification given by the Member State concerned to the measure notified to the Commission, the latter is required, before adopting a decision pursuant to Article 92(3) of the Treaty, to ascertain whether the measure constitutes State aid within the meaning of Article 92(1) of the Treaty.

74 In the present case, the fact that the Commission, in the contested decision, classified IRI's investment in the applicant as State aid clearly operated to the applicant's detriment. It meant that the Commission was able, in the contested decision, to examine the compatibility of the measure with the common market and to impose conditions directly affecting the applicant's operations. In addition, that classification led the Commission to find that there had been an infringement of Article 93(3) of the Treaty and, accordingly, that the payment of ITL 1 000 billion made in June 1996 was unlawful.

75 It therefore follows that the applicant is entitled to a review by the Community judicature of the Commission's classification in the contested decision of IRI's investment. The Commission's argument must therefore be rejected, and the Court must examine the various parts of the present plea.

First part: the participation of private investors in the recapitalisation

76 The applicant maintains that the participation of private investors in its recapitalisation effort is sufficient to show that that recapitalisation satisfies the private investor test. The Commission has clearly overlooked that point. The contested decision states that 'no private investor is taking part in the capital increase of ITL 2 750 billion' (point VII, fifth paragraph).

77 First, the applicant observes that the company's employees, who are private investors, had agreed to subscribe to the increase in capital to an amount of ITL 310 billion, which represents approximately 20% of its capital. Second, it observes that the company is quoted on the Italian Stock Exchange and private shareholders already held 13.6% of its capital on 1 July 1996. It points out that, under Italian law, shares which existing shareholders have not exercised an option to purchase must be offered on the Stock Exchange. Since, apart from the advance of ITL 1 000 billion already paid on 1 July 1996, IRI merely stated that it was prepared to participate in the various phases of the applicant's recapitalisation, it was only in the absence of any private participation that it would subscribe the entire increase in capital.

78 Furthermore, the Italian Government expressed its firm intention to privatise the applicant without delay once authorisation to increase its capital had been obtained (letter of 20 December 1996 from the President of the Italian Council of Ministers to the President of the Commission, annex 13 to the application), by repealing in 1996 the statutory provision that 51% of the company's capital must be held by the public sector.

79 The applicant then observes that IRI paid it ITL 2 000 billion (ITL 1 000 billion in June 1996 and ITL 1 000 billion in 1997). IRI then received the proceeds of the

sale of 18.4% of the company's capital to private investors for approximately ITL 787 billion. A further capital increase, ITL 1 000 billion of which was subscribed by private investors, was decided upon in January 1998. The applicant therefore maintains that, even ignoring the amount subscribed by its employees, IRI's total investment (ITL 1 213 billion) in its restructuring is less than the amount subscribed by private shareholders (ITL 1 787 billion). The applicant further states that, at the time it filed its reply, IRI held 53% of its capital and private shareholders held 47%. Last, the applicant maintains that the success of private participation in the increase of its capital was such that the second and third instalments payable by IRI (ITL 500 billion and ITL 250 billion respectively) and authorised in the contested decision were not paid. It refers again to the report of the Commission's consultants of 27 May 1998, in which they observe that 'the amount invested by IRI is lower and the profitability proportionately higher than the forecasts of the plan'. The Commission therefore made a manifest error in assessing the restructuring plan, in so far as the plan, from its first version and in the light of the situation then existing and the developments foreseeable in the short term, was capable of satisfying the private investor test.

80 The Court observes that the test based on the conduct of a private investor operating in normal market-economy conditions ensues from the principle that the public and private sectors are to be treated equally, pursuant to which capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, hereinafter '*ENI-Lanerossi* judgment', paragraph 20; Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 70).

81 A capital contribution from public funds must therefore be regarded as satisfying the private investor test and not constituting State aid if, *inter alia*, it was made at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances (see, in that regard, *Air France*, cited in paragraph 80 above, paragraphs 148 and 149).

82 As regards, first, the employees' participation in the applicant's capital, it was reasonable for the Commission to decide that it 'cannot be taken into consideration since the conditions under which this works are very different' from those applicable to IRI's contribution (contested decision, point VII, fifth paragraph).

83 In that regard, it should be observed that, under the agreement concluded on 19 June 1996, the applicant's employees consented to a change in salary. In return, they were to receive shares in Alitalia to the amount of ITL 310 billion, corresponding to the annual saving in labour costs.

84 In those circumstances, the employees' actual participation in the applicant's capital does not itself show that IRI's contribution satisfies the private investor test. It must be emphasised, in that regard, that the conduct of a private investor in a market economy is guided by prospects of profitability (Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, hereinafter '*Alfa Romeo*', paragraph 20, Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraphs 20 to 22, and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 79). The employees' participation was motivated by the desire to keep their jobs and therefore, above all, by considerations pertaining to the applicant's viability and survival rather than by prospects of profitability.

85 As regards, next, the participation of private investors, the Commission stated in the contested decision that 'even [if] it is assumed that the... share of Alitalia's capital held by private investors may be deemed to have real economic

significance, no private investor is taking part in the capital increase of ITL 2 750 billion' (point VII, fifth paragraph).

86 It should be observed that, in the context of an action for annulment under Article 173 of the Treaty, the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In particular, the complex assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made (Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 34; Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 81, and *Salomon*, cited in paragraph 61 above, paragraph 115).

87 Throughout the administrative procedure, the Italian authorities and the applicant proceeded, for the purpose of calculating the efficiency of the investment, on the assumption that IRI alone would subscribe to the planned increases in capital.

88 It should be noted, in that regard, that the initial plan envisaged a capital injection of ITL 3 000 billion by IRI and a participation in the capital by the applicant's employees of ITL 310 billion. Having regard to the share already held by minority shareholders, it was estimated that IRI's share of the capital at the end of the operation would be approximately 80%. That point was confirmed in the Italian authorities' reply of 6 September 1996 to a request for information from the Commission, in which it is stated:

'In order to simplify the calculation, it was assumed that, at the end of the recapitalisation process, existing minority shareholders will hold a very small share of the company's capital. The employees will receive shares in return for

lower wages and increased productivity. In that context, it may be foreseen that the employees will hold approximately 20% of the shares and IRI the remaining 80%'.

89 Furthermore, according to the applicant, an 80% participation in its capital by IRI at the end of the restructuring period was a minimum estimate. The applicant stated during a presentation which it made to the Directorate-General for Transport (DG VII) on 23 October 1996: '[The] 80% assumption is a "worst case" scenario'. During that presentation, it also stated: '[E]xisting minority shareholders (currently approximately 10%) will be massively diluted, probably to less than 1%... [and] employees will have some 20% of the ordinary equity but are expected to only have an effective equity share of 12% to 15%'.

90 On the basis of the figures notified to the Commission, the latter's consultants observed in their report of 11 December 1996: '[T]he plan assumes that the entire [ITL] 3 000 billion recapitalisation will be subscribed only by IRI' (Section IV C 2). They also stated: 'According to the Plan, the IRI share of equity capital was assumed to be 80%... It appears more likely that IRI's equity interest in Alitalia will be higher than the forecasted 80% interest in 2000' (Section IV C 2).

91 Far from contradicting those assertions, the applicant acknowledged, in a document dated 19 December 1996 communicated to the Commission by the Italian authorities by letter of 20 December 1996, that the Commission's consultants' that 'IRI's share of Alitalia's capital at the end of the plan [would] probably be higher than forecast in the "submission" of July last'. The applicant again informed the Commission, by letter of 15 April 1997, that IRI was going to subscribe the entire increase in capital, which at the time was fixed at ITL 2 800

billion. The letter states: 'IRI is forecast to pay ITL 2 800 billion with a planned timing of ITL 1 000 billion in July 1996, ITL 500 billion in July 1997 and the balance of ITL 1 300 billion in December 1997. No other public authority funding is being considered.'

92 In those circumstances, the Commission was entitled to consider in the contested decision that '... no private investor is taking part in the capital increase of ITL 2 750 billion'. Even if, according to the Italian Government, 'the prime objective of the restructuring plan [was] to establish the basis for the privatisation of the company' and that, for that purpose, it was considered possible that private investors might subscribe part of the second instalment of the recapitalisation forecast (the restructuring plan of July 1996), that was a mere assumption which the applicant itself did not take into account in calculating the efficiency of IRI's investment.

93 Last, the fact that the restructuring plan was intended to establish conditions favourable to the applicant's privatisation does not show that IRI's investment satisfies the private investor test. Even though the possibility of private-investor participation was envisaged in the restructuring plan and although, effectively, such participation in the applicant's capital did come about following the adoption of the contested decision, such circumstances, in the absence at the time when the contested decision was adopted of a formal commitment by a private investor to make a capital contribution of real economic significance, do not show, in the light of what was stated in paragraph 86 above, that IRI's conduct satisfied the private investor test.

94 It follows from all the foregoing that the first part of the first plea in law must be rejected.

Second part: manifest errors of assessment in calculating the minimum rate and the internal rate, entailing infringement of Article 92(1) of the Treaty and the principle of equal treatment, and failure to provide an adequate statement of reasons

— Preliminary observations

95 It should be remembered that 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 Community 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 92(1) of the Treaty (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25).

96 It has been held that, in order to determine whether the intervention by a public investor in the capital of an undertaking constitutes State aid, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the public investor might have provided capital of such an amount. It has been stated in that regard that although the conduct of a private investor with which the intervention of a public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term (*Alfa Romeo*, cited in paragraph 84 above, paragraph 20, *Spain* v *Commission*, cited in paragraph 84 above, paragraphs 20 to 22, and *BFM and EFIM*, cited in paragraph 84 above, paragraph 79).

97 In accordance with those principles, the Commission explained in its notice concerning the aviation sector its methodology for resolving the question as to whether public funds granted to airlines constitute State aid within the meaning of Article 92(1) of the Treaty. Thus, in point 28 of the notice concerning the aviation sector, the Commission states: 'The [private investor test] will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private enterprise, can be expected within a reasonable period.' The Commission also states in point 28 of that notice: 'A market economy investor would normally provide equity finance if the present value of expected future cash flows from the intended project (accruing to the investor by way of dividend payments and/or capital gains and adjusted for risk) exceed the new outlay.'

98 Next, it should be observed that in order to determine whether IRI's investment satisfied the private investor test and therefore in order to assess whether the investment contained components of State aid within the meaning of Article 92(1) of the Treaty, the Commission was guided by the principles set out in its notice on the aviation sector. In the contested decision (point VII) the Commission compared the amount of IRI's investment with the value of expected future cash flows from the project discounted at the minimum rate which a private investor would require. It concluded that, in the present case, the internal rate was still below the minimum rate and that, accordingly, the investment did not satisfy the private investor test.

99 The method which the Commission employed in the contested decision cannot be criticised as such. It follows from a consistent line of decisions that the Commission may lay down for itself guidelines for the exercise of its discretionary powers by way of documents such as the notice on the aviation sector, provided that they contain directions on the approach to be followed by that institution and do not depart from the Treaty rules (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 34 and 36; Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57; Case

T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 61; and Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 79).

100 Furthermore, the applicant does not dispute the method which the Commission employed in assessing whether IRI's investment satisfied the private investor test. The Commission and the applicant are agreed that the question whether IRI's investment satisfies the private investor test must be assessed by comparing the internal rate with the minimum rate.

101 In order to fix the minimum rate and the internal rate, the Commission called on the services of independent consultants, Ernst & Young (contested decision, point V, first paragraph), who drew up a number of reports (see paragraphs 20, 26, 32 and 34 above).

102 On the basis of the information thus gathered, the Commission adopted a minimum rate of 30% in the contested decision. Although, as the applicant claims, the part of the contested decision entitled 'Legal Assessment' does not quantify the minimum rate, it is apparent from the part entitled 'The Facts' (points V, second paragraph, and VI, second paragraph) and from the pleadings filed in the course of the proceedings that the Commission fixed the minimum rate at 30%.

103 As regards the internal rate, the Commission states in the contested decision that for the investment of ITL 2 750 billion that rate 'is close to 20%' (point VII, eighth paragraph). Following a written question put by the Court, the Commission stated that 'this is an average value, between the rates of 13.1% and 24.8%, which represent the minimum and maximum values of the [internal rate] calculated by [Ernst & Young]: see pp. 13 and 14 of the report of 18 June 1997, "Section IV-A. Calculation of the IRR"'.

104 However, the applicant contends that the Commission did not correctly fix the internal rate and the minimum rate in the contested decision, so that the conclusion which it reached, namely that IRI's investment did not satisfy the private investor test, is vitiated by illegality.

105 In that regard, it must be remembered that the assessment by the Commission of the question whether an investment satisfies the private investor test involves a complex economic appraisal (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraphs 10 and 11; *Air France*, cited in paragraph 80 above, paragraph 71; and *BFM and EFIM*, cited in paragraph 84 above, paragraph 81). When the Commission adopts a measure involving such a complex economic appraisal, it enjoys a wide discretion and judicial review of that measure, even though it is in principle a 'comprehensive' review as to whether a measure falls within the scope of Article 92(1) of the Treaty (*France* v *Ladbroke Racing and Commission*, cited in paragraph 95 above, paragraph 25), is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (*Belgium* v *Commission*, cited above, paragraph 11, and the case-law cited there). In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (*AIUFFASS and AKT*, cited in paragraph 99 above, paragraph 56, *BFM and EFIM*, cited in paragraph 84 above, paragraph 81, and *British Airways and British Midland Airways*, cited in paragraph 86 above, paragraph 79).

106 It is in the light of those considerations that the arguments put forward by the parties in the present case must be assessed.

— The complaints relating to the factors on which the Commission and its consultants relied in fixing the minimum rate

107 For the purpose of fixing the minimum rate, the contested decision refers to the reports of the Commission's consultants (points V and VI). In that regard, the reasons on which the contested decision is based are therefore the same as those on which the consultants' reports were based.

108 In their reports of 11 December 1996 and 18 June 1997, the Commission's consultants state that they fixed the minimum rate as follows:

'In order to determine the rate of return that a rational investor in a market economy would expect in investing in Alitalia's equity, we

— reviewed the characteristics of the plan so as to assess whether the actions planned are in the nature of a "turnaround" or a "business plan", as well as the burden or risks related to these actions

— interviewed several investors and analysts, and

— read prior Commission decisions (Iberia case).'

109 The applicant criticises each of the factors on which the Commission's consultants relied when they adopted a minimum rate of 30% and states that that rate should be no higher than 20% in this case.

110 It should be pointed out, first of all, that the Commission cannot claim that the applicant contradicts itself by stating that the minimum rate of 30% is disproportionate because, in the report of 9 September 1996 which it sent to the Commission, it stated: 'It follows from discussions with financial analysts and investors in airlines that, in the case of an airline in difficulties, the return required for a fresh injection of capital is between 30% and 40%.' The Commission takes that extract out of its context. The applicant had stated in its report that because its restructuring showed a slight probability of failure, the minimum rate in this particular case was closer to the normal return of 14.78% than to the 'restructuring' rate of return required for an investment in an airline in difficulties which, according to the applicant, is between 30% and 40%.

111 First, the applicant claims that the classification of the restructuring plan as a strategic plan or a turnaround plan has no relevance to the fixing of the minimum rate. The risks inherent in such a plan do not depend on its classification.

112 However, it must be held that the applicant's argument is based on an incorrect reading of the consultants' reports and the contested decision.

113 The consultants' reports indicate that they 'reviewed the characteristics of the plan so as to assess whether the actions planned [were] in the nature of a turnaround or a business plan' (reports of December 1996 and June 1997, section IV, point E.1). The Commission states, in that regard, that the applicant's restructuring plan envisaged more than 30 significant and important projects involving a break with the existing arrangement or optimisation, or combining the characteristics of both. Next, the Commission's consultants state that they examined, for each of the various actions envisaged by the plan, 'the level of risk associated with those actions' (reports of December 1996 and June 1997, section IV, point E.1).

114 The applicant cannot claim therefore that the Commission's consultants, after 'blindly' classifying its restructuring plan as a turnaround plan, fixed the minimum rate at a high level as a result of that classification. On the contrary, the Commission and its consultants analysed the various components of the plan and the risks associated with those components before deciding that the plan was a turnaround plan, and then fixed a high minimum rate which took account of the risks associated with the various actions envisaged in the plan.

115 The applicant's argument must therefore be rejected.

116 Second, the applicant contends that the investors and analysts consulted by Ernst & Young were not sufficiently familiar with its financial situation and its restructuring plan to be able to give a valid opinion on the minimum rate for IRI's investment. In order to be able to verify, first, whether the persons consulted by the Commission's consultants were able to form a valid and reliable opinion as to the minimum rate to be applied and, second, the accuracy and exhaustiveness of the inquiry carried out, the applicant considers it essential that the Court ask the Commission's consultants to specify the type of experts consulted, the questions put to them, the information provided to them and the answers received.

117 The applicant further states that it had specially prepared a document for the Commission's consultants containing the non-confidential information necessary for a proper appraisal of its restructuring plan. It suggested that that information be sent to the investors consulted. It therefore considers it unacceptable that the Commission's consultants did not take that document into consideration.

118 In response to the applicant's argument, the Commission produces a letter from its consultants dated 28 October 1998, in which they state that they have contacted their colleagues in London, Paris, Madrid and Frankfurt in order to fix

the minimum rate for IRI's investment. In turn, the local representatives of Ernst & Young contacted 'world-wide well known investors and banks usually involved in this kind of evaluation'. The investors they consulted based their replies 'on their knowledge of the company and on the information [the consultants] were authorised to disclose'. The Commission says that it has no recollection of receiving the document which the applicant prepared for Ernst & Young.

119 In the context of the measures of organisation of procedure adopted on 25 April 2000, the Court requested the applicant to produce the document which it claims to have prepared for the consultation of investors by Ernst & Young.

120 By letter of 24 May 2000, the applicant sent a document entitled 'briefing sheet for talking to investors about Alitalia'. That document, which consists of a single page, contains, first, the applicant's 'key figures' for 1995 (actual figures) and 2000 (estimated figures) and then refers to the 'key elements' of the plan, namely the installation of new management, a capital increase of ITL 3 300 billion, the Malpensa hub, the formation of Alitalia Team and the historic agreement concluded with the unions.

121 However, none of the matters put forward by the applicant gives any reason to doubt that the experts consulted by Ernst & Young did not have the information necessary to assess the minimum rate in the present case.

122 In that regard, it must be observed that in its notice of 16 November 1996, which had been published in the Official Journal (see paragraphs 15 and 16 above), the Commission had announced that it was to 'obtain the views of one or more independent consultants' in order to ascertain whether the restructuring plan satisfied the private investor test (OJ 1996 C 346, in particular p. 22). The investors consulted by Ernst & Young must therefore have been aware of the content of that notice at the time when the consultations took place.

123 It should be observed that the notice of 16 November 1996 contains five pages of information on the applicant's structure, the change in its financial situation between 1990 and 1995, the figures for 1995 (which, in any event, had already been published then), the broad outlines of the restructuring plan and the developments envisaged for the period 1996 to 2000. The information in the notice of 16 November 1996 concerning the applicant's financial situation and its restructuring plan are much more detailed than the information in the document 'briefing sheet for talking to investors about Alitalia'. According to the applicant, that document already contained 'the information necessary for a proper appraisal of the company's plan'. In those circumstances, the applicant's argument must be rejected, without its being necessary to adopt other measures of organisation of procedure.

— The failure to state reasons in relation to the fixing of the minimum rate

124 The applicant claims that the Commission has not provided adequate reasons for applying the minimum rate adopted in Commission Decision 96/278/EC of 31 January 1996 concerning the recapitalisation of the Iberia company (OJ 1996 L 104, p. 25, hereinafter 'the Iberia decision') to IRI's investment. In that regard, the applicant states that Iberia's situation when the Iberia decision was adopted was completely different from its own situation when the contested decision was adopted.

125 The Commission replies that the applicant's argument must be declared inadmissible since it is based on confidential information which its consultants obtained during the administrative procedure preceding the adoption of the Iberia decision. The applicant's consultants acted as consultants to the Commission in the Iberia case. In any event, the Commission was not required to provide specific explanations in the contested decision comparing the applicant's restructuring plan with Iberia's (*British Airways and British Midland Airways*, cited in paragraph 86 above, paragraph 443).

126 The Court considers that the Commission's allegation that the applicant's argument is inadmissible is irrelevant since, for the purposes of examining the applicant's argument (see paragraphs 127 to 137 below), it will be appropriate to rely solely on matters which are not in any way confidential *vis-à-vis* the applicant, namely extracts from the Iberia decision, which was published in the Official Journal (see paragraph 124 above), and passages from the Commission's consultants' reports, which the Commission sent to the applicant.

127 First of all, the Commission cannot claim that merely because the applicant and Iberia are two different companies restructured at different times it was not required to provide in the contested decision specific explanations comparing the applicant's restructuring plan with Iberia's. Both the Commission and its consultants referred, for the purpose of fixing the minimum rate for IRI's investment, to the Iberia decision (see paragraphs 107 and 108 above) and thus underlined the relevance of comparing the applicant's situation with Iberia's situation in that regard.

128 Next, in the Iberia decision the Commission fixed the minimum rate at 30% on the basis of the following considerations:

'The Commission ... takes the view that the [minimum rate] that an investor acting on market principles would require before injecting the capital in question is at least 30%, given the amounts involved and in particular the risks. This rate of at least 30%, which is apparently very high and far higher than market rates, reflects the distinct possibility that the programme will not go as planned and the real return at the end of the day will be lower. In fact, the rate has to be higher than the cost of equity since the latter does not take account of all the risks connected with the company. Despite the virtual disappearance of the risks inherent in its involvement with Arsa and the substantial improvements in its operating result in 1994 and the first six months of 1995, Iberia is still a company with a very high specific risk. The following uncertainties militate against the

continued recovery of the company, its long-term profitability and the financial projections through to 1999 taken as a basis to calculate the value of the company by then:

— the adaptation programme has not been completed; in particular, the staff reductions envisaged have not yet begun,

— the company has recently had a certain amount of industrial unrest, this being reflected in particular by frequent strikes by pilots. Apart from the direct cost to Iberia this damages the image of the company and could make it difficult to achieve the productivity gains envisaged by the programme,

— in its present form the programme finishes at the end of 1996, by which time Iberia will not yet have achieved the level of productivity and efficiency of its main Community competitors. A new cost-reduction plan will thus have to be drawn up and negotiated with the two sides of industry. The outcome of these negotiations cannot be predicted at the present time,

— doubts concerning the existence and modes of intervention of future external partners still to be chosen,

— the effects on the long-term profitability of Iberia of the liberalisation of air transport and handling activities in Europe cannot yet be fully evaluated.'

129 In the Iberia decision, the Commission went on to decide that the investment in the capital of that company satisfied the private investor test provided that the internal rate of 30% was also the minimum rate.

130 The Commission acknowledges that at the time of the administrative procedure preceding the adoption of the contested decision the Iberia decision was the only decision in which it had applied the test involving a comparison between the internal rate and the minimum rate in order to determine whether an investment in an airline satisfied the private investor test. In that regard, the Commission states that that was the only other case in which the parties concerned disputed the classification of the measure. In those circumstances, the Iberia decision was clearly a suitable precedent for the calculation of the minimum rate in the present case.

131 The applicant is aware of that fact and throughout the administrative procedure maintained that its situation was not comparable with Iberia's situation as described in the Iberia decision and that, consequently, the high minimum rate adopted in that decision could not be applied to it (applicant's presentation to DG VII of the Commission of 23 October 1996 (p. 80); applicant's document of 19 December 1996, sent to the Commission by the Italian authorities on 20 December 1996; letter from the applicant's consultants to the Commission dated 31 January 1997; document sent to the Commission for the meeting of 8 April 1997; studies carried out by the applicant in preparation for the meeting of 8 April 1997). The applicant insisted, in particular, that the elements of uncertainty characteristic of the Iberia case did not apply in its case.

132 As regards the duty to state reasons which the Commission owes to the applicant, which, as the beneficiary of the contested measure, is a 'party concerned' within the meaning of Article 93(2) of the Treaty, it should be remembered that, while the Commission is not required to answer all the arguments put forward during the administrative procedure by an interested party, it is none the less required to provide in its decision an adequate statement of the reasons why the essential arguments of such a party cannot be upheld (see, on that point, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 63

and 64). Having regard to the fact — recognised by the Commission (see paragraph 130 above) — that the Iberia decision was the only precedent for making decisions on the calculation of the minimum rate for an investment by the public authorities in an airline, it must be held that the applicant's argument that its situation must be distinguished from Iberia's situation formed an essential part of its case that IRI's investment satisfied the private investor test. In those circumstances, the Commission was required to answer that argument in the contested decision.

133 However, both in the contested decision and in the reports drawn up by the Commission's consultants to which the decision refers, note is taken of certain special features of the applicant's situation which had been put forward by the applicant in order to distinguish its situation from that of Iberia.

134 Thus, the consultants' report of December 1996 states, in connection with the evaluation of the minimum rate, that an agreement has been concluded with the unions and that certain important projects, including in particular that relating to the 'highly competitive carrier', namely Alitalia Team, have already started (point IV.E.2).

135 Furthermore, in the contested decision it is confirmed that '[t]he plan... has been approved by the company's management and trade unions' (point II, third paragraph; see also point II, sixth paragraph) and that 'Alitalia Team... was set up on 23 July 1996' (point II, sixth paragraph). The contested decision continues: '[The] aim [of the restructuring plan] is to restore Alitalia's competitiveness and to enable it to be privatised in the new context of the liberalised Community market. With this dual objective in mind, the capital increase will substantially reduce the company's debt and help it to return to a financial structure comparable to that of most of its competitors. Restructuring the balance sheet liabilities will also substantially reduce the financial expenses. Furthermore, the plan provides for the continuation of the efforts already made by Alitalia with regard to productivity and costs. Moreover, the Commission notes that the productivity level of the company's staff is currently the same as that of its main

Community competitors...' (point VIII, seventh paragraph). The contested decision also states: '[T]he plan, as improved and adjusted since January 1997, is realistic and will allow Alitalia to return to a satisfactory level of profitability by the year 2000' (point VI, seventh paragraph; see also point VIII, eleventh paragraph). In addition, the Commission states: '[T]he extremely positive results expected by the year 2000 should both meet the company's needs in terms of working capital and funding of investments essential for long-term business and open up the prospect of long-term viability. They should also inspire confidence in investors and pave the way for the development of alliances with other companies' (point VIII, ninth paragraph).

136 It follows from the foregoing that the statement of reasons in the contested decision for the calculation of the minimum rate does not clearly and unambiguously reveal the Commission's reasoning so as to enable the applicant to ascertain the matters justifying the measure adopted so that it can defend its rights and the Community judicature can carry out its review (see, in that regard, Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraphs 64 and 65, and the case-law cited there). The Commission did not explain in the contested decision why it considered it necessary to apply to IRI's investment the same minimum rate of 30% as it had adopted in the Iberia decision although the findings made in the contested decision give the impression, in particular, that a number of the risk factors which led the Commission, in the Iberia decision, to fix the minimum rate at that level, which was 'very high and far higher than market rates', were not present, or were present to a lesser extent, in the Alitalia case (compare paragraphs 128 and 135 above).

137 It must therefore be concluded that the contested decision is vitiated by an error of reasoning in so far as it adopts for IRI's investment the same minimum rate as that determined in the Iberia decision.

— The complaints relating to the matters used in the calculation of the internal rate

138 First, the applicant claims that the Commission made a manifest error of assessment by excluding the insolvency costs from the calculation of the internal rate. The insolvency costs are obtained by calculating the difference between the amount of the loans granted, which will be repaid in full in the case of a fresh injection of capital, and the value of the repayment of those same loans in the event of insolvency. By ignoring those costs, the Commission departed from the financial rules normally followed by undertakings, from the opinion of its consultants and from its own practice when taking decisions. The applicant observes that Cofiri, a company in the IRI group, had granted it loans on market conditions in the order of ITL 1 600 billion. The insolvency costs for the loans granted by Cofiri thus came to ITL 1 140 billion. In calculating the insolvency costs, it is also necessary to take account of the lower credit rating that IRI would be given should the applicant be wound up.

139 The applicant maintains that the fact that ITL 900 billion were immediately repaid to Cofiri, and therefore to IRI, following payment of the first instalment of ITL 1 000 billion by IRI in June 1996 (see paragraph 11 above) is relevant to the calculation of the internal rate. Even if that operation constituted a conversion of debt into capital, such a finding would be immaterial for the purposes of the application of Article 92(1) of the Treaty.

140 The Commission replies that whether insolvency costs should be included has no bearing on the classification of the investment as State aid. According to its consultants' calculations, the internal rate most favourable to the applicant, including insolvency costs, was 24.8%. As regards the matters which justified excluding the insolvency costs when calculating the internal rate, the Commission refers to point VII, seventh paragraph, of the contested decision. The Commission considers that the advance of ITL 1 000 paid by IRI in June 1996 (see paragraph 11 above), which was used to repay the loans granted by Cofiri, must be treated as a conversion of loans into capital.

141 The Commission further claims that the grant of the loans to the applicant, even on normal market terms, by Cofiri, a public undertaking, raises questions as to whether they were in the nature of State aid, since the applicant, which is also a public undertaking, by implication enjoys an unlimited guarantee by the State. The Commission states that it could not bring subsidies of questionable legality into the calculation of the present value of cash flows.

142 The Court finds, first, that in the contested decision the Commission states that, for the purpose of calculating the internal rate, 'in the present circumstances, it is not necessary to include, in the expected revenue, the costs which IRI will have to bear in the event of Alitalia's bankruptcy' (point VII, seventh paragraph).

143 The applicant cannot claim that in adopting that approach the Commission departed from the opinion expressed by its consultants. At no time during the administrative procedure did the Commission's consultants claim that insolvency costs should be included in the calculation of the internal rate. In their report of 18 June 1997, they stated (p. 23): '[T]he rates of return may be calculated to include the remuneration to IRI loans.' The consultants thus evaluated the internal rate by excluding the insolvency costs in their calculation on one occasion (p. 13) and by including them on another occasion (p. 14).

144 The Commission gives the following reasons for excluding the insolvency costs from the calculation of the internal rate:

'[T]hese insolvency costs are for the most part due to the loss of short-term loans granted to Alitalia by the financial company Cofiri, a subsidiary of IRI, before June 1996. They have been repaid since June and July 1996 through the payment, at the same time as the advance, of a sum of ITL 1 000 billion, which in practice also enables this double operation to be regarded as a conversion of [loans into

capital]. However, a private investor guided by the prospects of profitability in the longer term would not base his decision on the consideration of a possible immediate advantage if the company's true situation was not sufficiently good to justify long-term commitments' (point VII, seventh paragraph).

145 It is not disputed that the main part of the capital injection of ITL 1 000 billion made in 1996 was used to repay to IRI loans amounting to approximately ITL 900 billion and that that operation can be regarded as a conversion of loans into capital.

146 Furthermore, that conversion of loans into capital is wholly consistent with the aims of the applicant's restructuring plan. One of the main aims pursued by the plan was to reduce the ratio of 'debt to equity' (point II, 4th, 11th and 12th paragraphs, and point VIII, 7th paragraph, of the contested decision).

147 The Commission cannot claim, however, that such a 'conversion' brings only an immediate advantage. As it recognises in the contested decision, a reduction in borrowing reduces the applicant's financial costs (point II, 12th paragraph, and point VIII, 7th paragraph). A reduction in financial costs increases the applicant's profitability, which contributes to the financing of the investments essential to its long-term activities.

148 The Commission's argument that the loans granted by Cofiri might constitute State aid must also be rejected. The contested decision puts forward no reason to justify excluding the insolvency costs from the calculation of the internal rate. Furthermore, in their report of 18 June 1997, the Commission's consultants stated that, during the period March 1994 to March 1996, the applicant 'was able to obtain new credit lines by private financial institutions' and that the

'conditions applied by Cofiri' during that period showed 'no substantial differences with the market' (section IV, F.2).

149 Furthermore, the Commission's reasoning concerning the insolvency costs is circular. In the contested decision it calculates the internal rate in order to determine whether a private investor would have made an investment of ITL 2 750 billion in the applicant's capital. However, the explanation put forward by the Commission to justify its decision to exclude the insolvency costs from the calculation of the internal rate is already based on the premiss that a private investor would not make the investment in question. It follows from that explanation that the Commission considered that 'the company's true situation was not sufficiently good to justify long-term commitments' by 'a private investor guided by the prospect of profitability in the longer term' (point VII, seventh paragraph).

150 In the present case, the Commission made a manifest error of assessment in considering, on the basis of the reasons put forward in the contested decision, that the insolvency costs relating to the loans granted by Cofiri should be excluded from the calculation of the internal rate.

151 Last, the Commission's argument that whether the insolvency costs should have been included is irrelevant (see paragraph 140 above) must be rejected. The fact that the Commission explains when assessing the private investor test (point VII of the contested decision) that, in the present case, the insolvency costs must be excluded, is sufficient evidence that that question is relevant to the evaluation of the question whether IRI's investment constitutes State aid. Furthermore, in an action for annulment, it is not for the Court to reassess the internal rate for the investment and to determine whether that rate, on the assumption that the insolvency costs should have been included in its calculation, is still lower than the minimum rate (*AIUFFASS and AKT*, cited in paragraph 99 above, paragraph 56, *BFM and EFIM*, cited in paragraph 84 above, paragraph 81, and *British Airways and British Midland Airways*, cited in paragraph 86 above, paragraph 79).

152 Second, the applicant claims that the Commission arbitrarily required it to assume the cost, which under Decree-Law No 546 of 23 October 1996 (converted into Law No 640 of 20 December 1996) was to be borne by the State, of the early retirement of 700 of its staff, reducing by at least two points, according to the calculations of the Commission's consultants, the profitability rate of IRI's investment.

153 As the Commission rightly observes, however, the applicant gave an irrevocable commitment, before the contested decision was adopted, to assume the costs of the early retirement of 700 employees (see paragraphs 28 and 35 above). For that reason, the legal assessment and the operative part of the contested decision contain no trace of the applicant's decision to bear those costs. The Commission only takes note of them in the part of the contested decision entitled 'The Facts'.

154 Although the applicant initially gave the commitment in question on condition that the final decision recognised that the recapitalisation constituted an investment which satisfied the private investor test, that commitment became irrevocable when it placed the relevant funds in escrow in July 1997 (see paragraph 35 above). The Commission should therefore have ascertained whether the investment satisfied the private investor test in the light of that new situation.

155 Last, during the administrative procedure the applicant could have resisted the pressure allegedly brought to bear by the Commission to give the commitment in question or, in the alternative, it could, as for the other 'conditions', have avoided giving an irrevocable unilateral commitment. If the applicant had taken that approach during the administrative procedure, the Commission would have adopted a position on the question of the costs of the early retirement of 700 employees in the contested decision or in another decision whose legality would have been open to review by the Court.

156 It follows that the applicant's argument that the internal rate was incorrectly calculated because the Commission obliged it to assume the cost of the early retirement of 700 of its staff must be rejected.

— The complaint that the final version of the restructuring plan was not taken into account in the calculation of the minimum rate and the internal rate

157 The applicant criticises the fact that following the final amendments to the restructuring plan in June 1997 the Commission's consultants and the Commission saw no reason to recalculate the minimum rate and the internal rate. It contends that the final amendments had a direct effect on the risks associated with the investment and its profitability.

158 The Court recalls that, in their first report of December 1996, prepared on the basis of the restructuring plan sent to the Commission in July 1996, the consultants calculated a minimum rate of between 30% and 40%. They considered that the minimum rate was closer to the lowest end of the range, and that the internal rate varied between -12.5% and +25.7% (report of 11 December 1996, section IV; contested decision, point V, second paragraph).

159 The adjusted restructuring plan of February 1997 was analysed in the draft report of 21 February 1997, the final version of which was dated 18 June 1997 (see paragraph 32 above). In that report, the consultants explain that the minimum rate should be fixed at 30%. The internal rate varied between +13.1% and +24.8% (report of 18 June 1997, Section IV; see also contested decision, point VI, second paragraph, and point VII, eighth paragraph).

160 Next, as the Commission observes in the contested decision, a number of meetings were held in May and June 1997, which led to further improvement of the restructuring plan on the following points: speeding up the cost reduction by transferring Alitalia employees to Alitalia Team faster than originally planned; reducing the amount of the proposed capital increase to ITL 2 750 billion; and disposing of shares held by Alitalia in the Hungarian company Malev and in six regional airports (contested decision, point VI, fifth paragraph). The latter adjustments to the restructuring plan were notified to the Commission by the Italian authorities by letter of 26 June 1997. However, the Commission's consultants did not recalculate the minimum rate and the internal rate in their further report of 4 July 1997 on the basis of these final adjustments to the restructuring plan in June 1997.

161 It is common ground that the minimum rate and the internal rate adopted in the contested decision are those calculated by the Commission's consultants in their report of 18 June 1997 on the basis of the penultimate version of the restructuring plan. The Commission fixed the minimum rate at 30% (contested decision, point VI, second paragraph, and point VII, eighth paragraph). The internal rate, which was fixed at a rate 'close to 20%' (contested decision, point VII, eighth paragraph), is, as the Commission confirmed in answer to a written question, the average of the values put forward in the report of 18 June 1997 (see paragraph 103 above).

162 It follows therefore that, in the contested decision, the Commission did not reassess the minimum rate and the internal rate on the basis of the final version of the applicant's restructuring plan.

163 The Commission states in its defence, however, that: '[B]y their very nature, [the final] adjustments [to the restructuring plan] could not have a decisive impact on the unknown elements of the investment of risk capital from the aspect of a private investor operating in accordance with the laws of the market economy .... Following the adjustments made in June 1997, the conditions which would have

made it possible subsequently to reduce the [minimum rate] were not present; that rate, which had been estimated at between 30% and 40% in the first version of the plan, had already been reduced to a minimum level of 30% in the second version.' In order to emphasise the risks associated with the restructuring plan, the Commission states that the checks carried out in April 1998 revealed that the restructuring plan had not been complied with as regards staff productivity and the procedure for reducing staff. Furthermore, the applicant did not observe various conditions imposed by the contested decision (see the Commission's communication of 3 June 1998 concerning the second instalment of the aid for the restructuring of Alitalia approved by the Commission on 15 July 1997 (OJ 1998 C 290, p. 3)). As regards the internal rate, the Commission asserts in its rejoinder that that rate, recalculated on the basis of the final version of the plan, is no more than 26.1%, even including the insolvency costs (points 58 to 60 of the rejoinder and annex III thereto). The internal rate is thus still below the minimum rate. The Commission also refers to the poor results which the applicant obtained in 1999.

164 In order to assess the legality of the contested decision, the Court takes into consideration only the matters which the Commission had at its disposal when it adopted the contested decision (*Germany* v *Commission*, cited in paragraph 86 above, paragraph 34, *British Airways and British Midland Airways*, cited in paragraph 86 above, paragraph 81, and *Salomon*, cited in paragraph 61 above, paragraph 115). Any argument of the Commission relating to events which occurred after the adoption of the contested decision must therefore be disregarded.

165 In the contested decision the Commission considered, entirely in accordance with the guidelines which it had set out in its notice for the aviation sector (see paragraphs 96 to 99 above), that the method to be applied in order to evaluate whether IRI's investment satisfied the private investor test consisted in comparing the internal rate with the minimum rate of the investment (point VII, seventh and eighth paragraphs).

166 The minimum rate, as described by the Commission in its defence, 'consists of the risk premium which a private investor requires in order to give a certain financial commitment. This rate is therefore directly proportionate to the risk inherent in

the investment'. As regards the internal rate, the Commission explains that it expresses 'the underlying internal rate of return' (contested decision, point VI, second paragraph).

167 However, the Commission itself stated in the contested decision that the final improvements to the restructuring plan in June 1997 'reduce the risks inherent in the restructuring plan and further increase the profitability of the capital injection' (point VI, seventh paragraph). It is apparent, therefore, that those final amendments are of such a kind as to cause the internal rate to rise (increased profitability) and the minimum rate to fall (reduced risks).

168 In those circumstances, the Commission should have reassessed the minimum rate and the internal rate on the basis of the final version of the restructuring plan in order to be able to make an accurate assessment of whether IRI's investment satisfied the private investor test.

169 Therefore, the Commission made a manifest error of assessment in considering that the adjustments made to the restructuring plan in June 1997, which, on its own admission, reduced the risks inherent in that plan and further increased the profitability of the undertaking, had no impact on the calculation of the minimum rate and the internal rate and, accordingly, on the appraisal of whether IRI's investment satisfied the private investor test.

170 As regards the Commission's argument that a re-evaluation of the minimum rate and the internal rate on the basis of the final version of the restructuring plan would show that a private investor would not have made the investment in question, it must be remembered that, in an action for annulment, the Court

adjudicates on the assessments made by the Commission in the contested decision. It is not for the Court, in such an action, to reassess the minimum rate and the internal rate for the investment or to decide whether a private investor would have made the investment which IRI proposed to make at the time when the contested decision was adopted (*AIUFFASS and AKT*, cited in paragraph 99 above, paragraph 56, *BFM and EFIM*, cited in paragraph 84 above, paragraph 81, and *British Airways and British Midland Airways*, cited in paragraph 86 above, paragraph 79).

171 Having regard to the failure to state reasons established in paragraph 137 above and to the manifest errors of assessment established in paragraphs 150 and 169 above, the Court must grant the form of order sought by the applicant and annul the contested decision, without its being necessary to adjudicate on the other arguments relating to the first plea and on the other pleas in the application.

Costs

172 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. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay the applicant's costs, as applied for in the latter's pleadings.

173 Pursuant to Article 87(4) of the Rules of Procedure, the interveners will be ordered to pay their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision 97/789/EC of 15 July 1997 concerning the recapitalisation of the company Alitalia;**

2. **Orders the Commission to bear its own costs and to pay those incurred by the applicant;**

3. **Orders Air One SpA and Air Europe SpA to bear their own costs.**

Lenaerts Azizi Moura Ramos

Jaeger Mengozzi

Delivered in open court in Luxembourg on 12 December 2000.

H. Jung
Registrar

J. Azizi
President