

# Case T-296/97

**Alitalia — Linee aeree italiane SpA**

**v**

**Commission of the European Communities**

(State aid — Recapitalisation of Alitalia by the Italian authorities —  
Classification of the measure — Private investor test —  
Examination by the Commission)

Judgment of the Court of First Instance (Third Chamber, Extended  
Composition), 12 December 2000 . . . . . II - 3875

## Summary of the Judgment

1. *Actions for annulment — Time-limits — Starting point — Day on which a measure came to the knowledge of the applicant — Subsidiary nature — Date of publication (EC Treaty, Art. 93(2) (now Art. 88(2) EC), and Art. 173, fifth para. (now, after amendment, Art. 230 EC, fifth para.))*

2. *State aid — Definition — Private investor test — Financial assistance from public funds granted to an undertaking at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances — Employees' participation in the undertaking's capital*  
(EC Treaty, Art. 92(1) (now, after amendment, Art. 87(1) EC))
  3. *Actions for annulment — Contested measure — Assessment of legality on the basis of the information available at the time of adoption of the measure*  
(EC Treaty, Art. 173 (now, after amendment, Art. 230 EC))
  4. *State aid — Definition — Private investor test — Commission's power of assessment — Judicial review — Limits*  
(EC Treaty, Art. 92(1) (now, after amendment, Art. 87(1) EC))
  5. *State aid — Commission decision declaring aid incompatible with the common market — Obligation to state reasons — Scope — Reply to the essential arguments of the recipient of the aid from that forming the subject-matter of the only precedent for the Commission's practice when taking decisions*  
(EC Treaty, Art. 92 (now, after amendment, Art. 87 EC) and Arts 93(2) and 190 (now Arts 88(2) EC and 253 EC))
1. According to the actual wording of the fifth paragraph of Article 173 of the 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.
  2. A capital contribution from public funds satisfies the test of a private investor operating in the normal conditions of a market economy and does not imply the grant of 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.

Since the contested decision, which was not notified to the applicant, was published, it is the date of publication that started the period running.

(see paras 61, 63)

The employees' participation in an undertaking's capital, in the form of consent to a change in salary in return for shares in the undertaking corresponding to the annual saving in labour costs, does not in itself show that the capital contribution in the form of public funds satisfies the private in-

vestor test. The conduct of a private investor in a market economy is guided by prospects of profitability, whereas such participation on the part of employees is motivated by the desire to keep their jobs and therefore, above all, by considerations pertaining to the undertaking's viability and survival rather than by prospects of profitability.

(see paras 81-84)

3. In the context of an action for annulment under Article 173 of the Treaty (now, after amendment, Article 230 EC), 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.

(see para. 86)

4. The assessment by the Commission of the question whether an investment satisfies the private investor test involves a complex economic app-

raisal. 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 (now Article 87(1) EC), 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. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision.

(see para. 105)

5. Even though the Commission is not required to answer all the arguments put forward during the administrative procedure by a company which, as a beneficiary of the contested aid measure, is an interested party for the purposes of Article 93(2) of the Treaty (now Article 88(2) EC), 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.

Therefore, having regard to the fact that a decision was the only precedent for the Commission's practice when taking decisions on the calculation of the minimum rate for an investment by the public authorities in an airline, it must be held that the interested party's argument that its situation must be distinguished from that of the company in respect of which the previous decision was taken formed an essential part of its case that the investment

from public funds satisfied the private investor test. In those circumstances, the Commission was required to answer that argument in the contested decision, failing which it failed to fulfil its obligation to state reasons.

(see para. 132)