



2023/2160

20.10.2023

COMMISSION DECISION (EU) 2023/2160

of 27 March 2023

on State aid in favour of Alitalia (new loan to Alitalia) SA.55678 (2019/NN), implemented by Italy

(notified under document C(2023) 1713)

(Only the Italian version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(2), first subparagraph, thereof,

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

After giving notice to the parties concerned to submit their comments pursuant to those provisions ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) In May 2017 Alitalia – Società Aerea Italiana S.p.A. ('Alitalia SAI') and Alitalia Cityliner S.p.A. ('Cityliner'), a regional subsidiary fully owned by Alitalia SAI, were placed under extraordinary administration in accordance with the national insolvency rules by Decree of the Italian Ministry of Economic Development respectively on 2 and 12 May 2017 and declared insolvent by the Court of Civitavecchia on 11 and 26 May 2017, respectively. Alitalia SAI and Cityliner will be jointly referred to as 'Alitalia' for the purposes of the present Decision.
- (2) On 26 October 2019 Italy adopted Decree-law No 124 on '*Urgent tax provisions for non-deferrable expenditure*' ⁽²⁾ ('Decree-law 124/2019'), entered into force on 27 October 2019, Article 54 of which provided for the granting of a EUR 400 million loan in 2019 ('the 2019 loan') in favour of Alitalia.
- (3) On 7 November 2019, an undertaking which wishes to remain anonymous ('the first complainant') submitted a complaint ('the first complaint') to the Commission alleging that, by providing the 2019 loan, Italy had granted unlawful and incompatible State aid to Alitalia. On 27 November 2019, the Commission received an 'addendum' to the first complaint, together with its annexes.
- (4) On 7 and 27 November 2019 the Commission registered the complaint and the addendum.
- (5) On 12 November 2019, the Commission sent a request for information to the Italian authorities regarding the alleged State aid to Alitalia and enclosed the first complaint for their comments.
- (6) On 27 November 2019, another undertaking which wishes to remain anonymous ('the second complainant') submitted a complaint ('the second complaint') to the Commission containing allegations similar to those contained in the first complaint, namely that the 2019 loan constituted unlawful and incompatible State aid to Alitalia.

⁽¹⁾ OJ C 256, 20.7.2018, p. 4.

⁽²⁾ Decreto-legge 26 ottobre 2019, n. 124 – Disposizioni urgenti in materia fiscale e per esigenze indifferibili (GU Serie Generale n. 252, 26.10.2019), converted into law with amendments by Legge 19 dicembre 2019, n. 157 (in G.U. Serie Generale n. 301, 24.12.2019), which did not include Art. 54, as the provision was repealed and replaced by Art. 1 of Decree-law 137/2019, see recital 7 in the text of the present Decision.

- (7) On 2 December 2019, Decree-law No 137 'Urgent measures to ensure the continuity of the service performed by Alitalia – Società Aerea Italiana S.p.A. and Alitalia Cityliner S.p.A. in extraordinary administration' ⁽³⁾ ('Decree-law 137/2019') repealed Article 54 of Decree-law 124/2019 ⁽⁴⁾ and replaced it with a similar provision which confirmed the award of the 2019 loan 'in view of the extraordinary need and urgency to ensure the continuity of the service provided' by Alitalia SAI and Cityliner. The loan was disbursed by an implementing Decree of 21 December 2019 issued by the Ministry of the Economic Development in agreement with the Ministry of Economy and Finance.
- (8) On 3 December 2019, the first complainant made an additional submission to the Commission. On 16 December 2019, the Commission sent to the Italian authorities a letter forwarding the second complaint for their comments and requesting a reply to the request for information sent on 12 November 2019.
- (9) On 6 January 2020, Italy replied to the Commission's letter of 16 December 2019.
- (10) On 9 January 2020, the first complainant submitted a second addendum to the first complaint.
- (11) On 30 January 2020, Law No 2 'Conversion into law, with amendments, of Decree-law of 2 December 2019, No 137, laying down urgent measures to ensure the continuity of the service performed by Alitalia – Società Aerea Italiana S.p.A. and Alitalia Cityliner S.p.A. in extraordinary administration' ('Law 2/2020') amended Decree-law 137/2019 and converted it into law ⁽⁵⁾.
- (12) On 28 February 2020, the Commission adopted a decision ('the Opening Decision') to open an in-depth investigation into the compatibility of the 2019 loan under Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU'). In that decision, the Commission invited the Italian authorities to submit their relevant comments.
- (13) On 25 March 2020, the first complainant made an additional submission to the Commission.
- (14) As the Italian authorities did not submit comments on the Opening Decision, the Commission, by letter of 8 March 2021, again invited Italy to submit comments and requested additional information, requesting a reply by 22 March 2021.
- (15) On 23 March 2021, the Commission sent letters to the first and second complainants, inviting them to comment on the Opening Decision.
- (16) On 27 March 2021, the Commission received Italy's reply to the Commission's letter of 8 March 2021.
- (17) On 20 May 2020, the Commission services had a conference call with representatives of the Italian authorities.
- (18) The Commission's Opening Decision was published in the *Official Journal of the European Union* on 29 July 2021. The Commission invited interested parties to submit their comments on the Opening Decision.

⁽³⁾ Decreto-legge 2 dicembre 2019, n. 137 – Misure urgenti per assicurare la continuità del servizio svolto da Alitalia – Società Aerea Italiana S.p.A. e Alitalia Cityliner S.p.A. in amministrazione straordinaria (GU Serie Generale n. 282, 2.12.2019).

⁽⁴⁾ Art. 54 was into force from 27 October 2019 to 3 December 2019, when it was replaced by Art. 1 of Decreto-Legge 2 dicembre 2019, n. 137.

⁽⁵⁾ Legge 30 gennaio 2020, n. 2 – Conversione in legge, con modificazioni, del decreto-legge 2 dicembre 2019, n. 137, recante misure urgenti per assicurare la continuità del servizio svolto da Alitalia – Società Aerea Italiana S.p.A. e Alitalia Cityliner S.p.A. in amministrazione straordinaria (GU Serie Generale n. 25, 31.1.2020, n. 25).

- (19) By letter dated 23 August 2021, Ryanair Designated Activity Company ('Ryanair') submitted comments on the Opening Decision.
- (20) On 10 September 2021, the Commission adopted Decisions C(2021) 6659 ⁽⁶⁾ and C(2021) 6665 ⁽⁷⁾ in two other cases related to Alitalia SAI and the new company Italia Trasporto Aereo S.p.A. ('ITA') created by the Italian State ⁽⁸⁾. By its Decision C(2021) 6659 the Commission found that aid in the amount of EUR 900 million to Alitalia SAI was incompatible with the internal market and that Italy was to recover it from Alitalia SAI. By its Decision C(2021) 6665 the Commission found that the transfer of certain assets of Alitalia SAI to ITA would not lead to economic continuity between Alitalia SAI and ITA, as well as that the capital injection into ITA in the amount of EUR 1,35 billion would not create an advantage for ITA and therefore did not constitute State aid.
- (21) By a letter of 15 September 2021, the Commission sent Ryanair's comments to the Italian authorities inviting them to submit their observations by 15 October 2021. Since Italy did not respond within that time limit, on 29 October 2021, the Commission services sent a reminder to Italy, to which the Italian authorities did not respond.

2. DESCRIPTION OF THE 2019 LOAN AND PERTINENT FACTS

2.1. The 2019 loan granted by the Italian State

- (22) The 2019 loan was provided for in Article 54 of Decree-law 124/2019 (see recital 2). It consisted of a EUR 400 million loan granted in favour of Alitalia and was financed from the State budget.
- (23) According to Article 54 of Decree-law 124/2019, the 2019 loan was provided in order to allow for the sale of the business units comprising Alitalia. Under that article the loan enjoyed priority over all other debt incurred by Alitalia within the extraordinary administration and all debts prior to Alitalia being placed under extraordinary administration in May 2017 (recital 1). The interest rate applicable to the 2019 loan was the 6-month Euribor rate plus 1 000 basis points, and the loan was to be repaid in six months.
- (24) Art. 54 of Decree-law 124/2019 was in force from 27 October 2019 to 3 December 2019, when it was repealed and replaced by Art. 1 of Decree-Law 137/2019 (recital 7), enacted, *inter alia*, to prolong the timeline of the extraordinary administration for the sale of Alitalia's assets (recitals 25 to 27) ⁽⁹⁾, given that no binding offer had been submitted (Section 2.7) ⁽¹⁰⁾. Decree-law 137/2019 reproduced, in essence, the provisions underpinning the 2019 loan of EUR 400 million for 6 months and added that the purpose of the loan was to facilitate the completion of the disposal of Alitalia's assets.

⁽⁶⁾ Commission Decision C(2021) 6659 of 10 September 2021 on the State aid in favour of Alitalia SA.48171 (2018/C) (ex 2018/NN, ex 2017/FC) implemented by Italy.

⁽⁷⁾ Commission Decision C(2021) 6665 of 10 September 2021 – Italy – Newco ITA SA.58173 (2021/N) (ex 2018/NN, ex 2017/FC) implemented by Italy..

⁽⁸⁾ In Decision C(2021) 6659 and Decision C(2021) 6665 of 10 September 2021 the term 'Alitalia' is used to refer to 'Alitalia – Società Aerea Italiana S.p.A in amministrazione straordinaria' and its subsidiaries, see recitals 1 and 36 and Art. 1 of Decision C(2021) 6659 and recital 1 of Decision C(2021) 6665 .

⁽⁹⁾ Decree-law 137/2019, as converted by Law 2/2020, also established reporting obligations on the extraordinary administration Commissioners of Alitalia *vis-à-vis* the Italian Parliament (Art. 1, comma 2-bis), see for further details the dossier of the Senate published in April–May 2020, www.senato.it/service/PDF/PDFServer/BGT/01157061.pdf.

⁽¹⁰⁾ The negotiations with Ferrovie dello Stato S.p.a., which was willing to buy 30 % of the capital shares of Alitalia, alongside the State Treasury (15 %) and the US airline, Delta Air Lines (15 %), had reportedly failed as no another investor was found to pay the EUR 400 million necessary to acquire the remaining 40 % of Alitalia, see *inter alia* <https://www.ilfattoquotidiano.it/2019/04/02/alitalia-ferrovie-chiede-al-mef-un-altro-mese-di-tempo-ma-manca-ancora-un-socio-che-ci-metta-400-milioni-di-euro/5081505/amp/>.

- (25) Decree-law 137/2019 also provided that the sales programme was to be combined with a reorganisation plan aimed at restructuring and streamlining Alitalia's business activities, to be drawn up by the extraordinary commissioner and approved by the Ministry of Economic Development pursuant to Article 60 of Legislative Decree No 270 of 8 July 1999 '*New regulation of the extraordinary administration for large companies in insolvency, pursuant to Article 1 of Law No 274 of 30 July 1998*' ⁽¹¹⁾ (Legislative Decree 270/1999). The procedure enabling the disposal of Alitalia's assets following the implementation of that reorganisation plan was to be carried out by 31 May 2020 (recital 28). The Italian Government explained publicly that the measure was the only alternative to declaring the company bankrupt and splitting and sale separate assets ⁽¹²⁾.
- (26) By Decree of the Ministry of Economic Development of 21 December 2019, in agreement with the Ministry of Economy and Finance, the 2019 loan was 'disbursed' (*disposto l'erogazione*) in full to Alitalia. As stated in the preamble of the Decree, 'in order to avoid the risk of interruption of the operational activity' of Alitalia, the full disbursement of the 2019 loan was made 'in the shortest possible time' by the State Treasury through cash advance. The urgency, as reported by the press, was connected to the Alitalia's pressing liquidity needs: in particular, without counting the advances for tickets sold for future flights (estimated at between EUR 200 million and EUR 300 million), Alitalia's cash was estimated as negative; the EUR 900 million of public funding already disbursed by the Italian government in 2017 had been spent or absorbed by the losses, except for the 103 million deposit in guarantee with IATA, whereas Alitalia's losses for the year 2019 were predicted by financial analysts at around EUR 600 million ⁽¹³⁾. Considering the previous 2017 loans and the interests accrued up to 31 May 2019, equalling EUR 145 million (from 1 June 2019 interests were no longer due on the 2017 loans), with the additional EUR 400 million State support paid to Alitalia, the overall public financing to the air carrier was thus estimated to amount to approximately EUR 1,45 billion ⁽¹⁴⁾.
- (27) On 30 January 2020, Law 2/2020 converted Decree-law 137/2019 into law. Law 2/2020 amended Decree-law 137/2019 by (i) clarifying that the deadline for the reimbursement of the loan and of the interest was set for six months from its disbursement; and (ii) providing that the programme drawn up by the extraordinary administration was to take into account the employment levels and the operational unity of the business activities. Law 2/2020 stated that the beneficiaries of the 2019 loan were Alitalia SAI and Cityliner ⁽¹⁵⁾.
- (28) Already on 8 January 2020, in a public hearing before the Transport Committee of the Chamber of Deputies of the Parliament, the Ministry of the Economic Development, Mr Patuanelli, stated that '[...] the Government – is convinced that the availability of cash, with the disbursement of this last loan tranche of 400 million and the reformulation of the interest payment of the MEF, which frees up further cash for 150 million, [...] would allow the company to reach the conclusion of the sale procedure' within 31 May 2020 (emphasis added) ⁽¹⁶⁾, thus admitting that the interest on the loan would not be paid by Alitalia on the terms originally established. On 16 July 2020, Decree-law 76/2020, converted into law on 11 September 2020 by Law 120/2020, extended the maturity date of

⁽¹¹⁾ Decreto legislativo 8 luglio 1999, n. 270 – Nuova disciplina dell'amministrazione straordinaria delle grandi imprese in stato di insolvenza, a norma dell'articolo 1 della legge 30 luglio 1998, n. 274 (GU Serie Generale n. 185, 9.8.1999).

⁽¹²⁾ Interview with the Minister of the Economic Development, Mr Patuanelli, reported *inter alia* by the press agency Aska on 25 November 2019, https://www.askanews.it/economia/2019/11/25/alitalia-patuanelli-valutiamo-varie-possibilita-no-spezziato-pn_20191125_00299/.

⁽¹³⁾ <https://www.ilsole24ore.com/art/alitalia-governo-versa-400-milioni-nuovo-prestito-lufthansa-camera-7-gennaio-ACWPNH8>.

⁽¹⁴⁾ See reference in previous footnote. In terms of aggregated amount of principals and interests stemming from the 2017 loans and the 2019 loan, Alitalia's debt v the Italian State was estimated in 2022 at EUR 1,6 billion, see https://www.repubblica.it/economia/2022/10/09/news/ita_airways_certares_quote_di_mercato-369029742/.

⁽¹⁵⁾ Decree-law 124/2019 in its Article 54 provided that the loan was granted to Alitalia – Società Aerea Italiana S.p.A. in extraordinary administration and to the other companies of the same group, also in extraordinary administration, while its repealing Decree-law 137/2019 expressly refers to 'Alitalia SAI and Alitalia Cityliner in extraordinary administration' as loan beneficiaries.

⁽¹⁶⁾ XVIII Legislatura, IX Commissione, Resoconto stenografico, Seduta n. 11 di Mercoledì 8 gennaio 2020, Audizione del Ministro dello sviluppo economico, Stefano Patuanelli, nell'ambito dell'esame del DL 137/2019 recante «Misure urgenti per assicurare la continuità del servizio svolto da Alitalia – Società Aerea Italiana S.p.A. e Alitalia Cityliner S.p.A. in amministrazione straordinaria», https://www.camera.it/leg18/1058?idLegislatura=18&tipologia=audiz2&sottotipologia=audizione&anno=2020&mese=01&giorno=08&idCommissione=09&numero=0011&file=indice_stenografico.

the 2019 loan to 31 December 2020. By Decree-law 183/2020, converted into law on 26 February 2021 by Law 21/2021, the maturity date of the 2019 loan was further extended to 30 June 2021. Subsequently, Decree-law 73/2021, converted into law on 23 luglio 2021 by Law 106/2021, postponed the date of reimbursement of capital and interest on the 2019 loan until 16 December 2021 ⁽¹⁷⁾. Finally, a new deadline to complete Alitalia's sale process has been set at 31 December 2023 by Art. 12(1) of Decree-law 29 December 2022, n. 198, which also states that the proceeds of the liquidation 'after deduction, until 31 December 2023, of the costs of completing the liquidation and the costs of the structure, management and operation of the extraordinary administration, and compensation to holders of travel documents, vouchers or similar securities issued by the extraordinary administration [...], are primarily earmarked for pre-deduction of claims against the State, including recovery claims for State aid declared unlawful by the European Commission' ⁽¹⁸⁾.

2.2. Context in which the 2019 loan was granted to Alitalia

2.2.1. Factual background to the 2019 loan

- (29) The 2019 loan was granted following two other loans, which Italy had granted to Alitalia in 2017. Specifically, on 2 May 2017, the day on which it was placed under extraordinary administration (recital 1), Italy granted to Alitalia SAI a EUR 600 million loan (the 'first loan'), which in October 2017 was supplemented by an additional EUR 300 million loan (the 'second loan', the first and the second loan being jointly referred to as the '2017 loans'). Those 2017 loans were to be repaid by 5 November 2017 and by 31 December 2018, respectively.
- (30) In order to draw up the programme referred to in Article 54 of Legislative Decree 270/1999, the extraordinary commissioners published in May 2017 a call for expressions of interest to purchase or restructure Alitalia's business activities ⁽¹⁹⁾. In August 2017, the extraordinary commissioners launched a sales procedure, initially attempting to Alitalia's assets via a tendering procedure. The deadline for the completion of the tendering procedure to allow the disposal of Alitalia's business activities was postponed several times, and that procedure was subsequently converted into a negotiated procedure. The maturity dates for the repayment of the 2017 loans were then synchronised ⁽²⁰⁾ and prolonged several times. Ultimately, Decree-law No 34 of 30 April 2019 ⁽²¹⁾ provided, *inter alia*, for the prolongation of the repayment of the 2017 loans until after Alitalia's assets had been sold by the extraordinary administration and stopped any further accrual of interest on the 2017 loans.
- (31) Each time the maturity dates for the repayment of the 2017 loans were prolonged, the deadline for the completion of the sales procedure of Alitalia's assets was correspondingly postponed. The deadline to submit the binding offers was postponed several times. Due to the lack of binding offers by that deadline, the sales procedure was deemed to have failed, as confirmed by the Italian authorities on 6 January 2020 ⁽²²⁾. In their reply of 27 March 2021, the

⁽¹⁷⁾ Art. 11-quater, comma 1, of Decreto-Legge 25 maggio 2021, n. 73 (GU Serie generale n. 123, 25.5.2021), as converted into Legge 23 luglio 2021, n. 106 – Misure urgenti connesse all'emergenza da COVID-19, per le imprese, il lavoro, i giovani, la salute e i servizi territoriali (GU Serie Generale n.176, 24.7.2021).

⁽¹⁸⁾ Decree-Law 29 December 2022, n. 198, Urgent provisions on legal deadlines (GU General Serie n. 303 of 29.12.2022), as modified and converted into Law 24 February 2023, n. 14, Conversion into law, with amendments, of the decree-law of 29 December 2022, n. 198, containing urgent provisions regarding legislative deadlines. Extension of deadlines for the exercise of legislative powers. (23G00021) (GU General Series n. 49 of 27.2.2023).

⁽¹⁹⁾ In accordance with the guidelines laid down by Article 27(2), points (a), (b) and (b bis), of Legislative Decree 270/1999.

⁽²⁰⁾ By Decree-law Law No 38 of 27 April 2018.

⁽²¹⁾ Decreto-legge 30 aprile 2019, No. 34 – Misure urgenti di crescita economica e per la risoluzione di specifiche situazioni di crisi (GU Serie Generale n. 100, 30.4.2019). Decree-law 34/2019, was converted into law by Legge 28 giugno 2019, n. 58 – Conversione in legge, con modificazioni, del decreto-legge 30 aprile 2019, n. 34, recante misure urgenti di crescita economica e per la risoluzione di specifiche situazioni di crisi (2019, GU Serie Generale n. 151, 29.6.2019 – Suppl. Ordinario n. 26).

⁽²²⁾ In their submission of 6 January 2020, point 2, (b), the Italian authorities declared that no final offer had been received by the deadline laid down by law. This was also reported by the press: see *Il Corriere della sera*, 21 November 2019 'Alitalia, il salvataggio salta ancora: ottavo rinvio per la cordata'; *La Repubblica*, 20 November 2019 'Si ferma la cordata Fs-Atlantia. Alitalia verso l'ottavo rinvio'; *La Repubblica*, 26 November 2019 'Alitalia, la resa del governo'. Patuanelli: 'La soluzione di mercato non c'è'.

Italian authorities confirmed that by February 2021 no Alitalia assets had been sold. At present, the evidence in the case file and the publicly available information suggests that a few Alitalia assets have been sold (recitals 82 and 83) ⁽²³⁾.

- (32) On 2 December 2019, Decree-law 137/2019 provided that a new sales process would be combined with a reorganisation plan to reorganise and improve the business structure and activities of the beneficiaries, and that the procedures necessary for the disposal of Alitalia's assets following the implementation of that reorganisation plan were to be carried out by 31 May 2020. At last, the deadline for the completion of the commissioners' activities has been extended by Decree-law 29 December 2022, n. 198, until 31 December 2023 (recital 28) ⁽²⁴⁾.

2.2.2. The Commission decision on the 2017 loans

- (33) Following a number of complaints, in April 2018, the Commission initiated the procedure provided for in Article 108(2) TFEU in respect of the 2017 loans ⁽²⁵⁾. The investigation was terminated by decision of 10 September 2021 ⁽²⁶⁾, whereby the Commission found that the 2017 loans were incompatible with the internal market and that Italy was to recover the incompatible aid from Alitalia SAI.
- (34) In particular, in its Decision C(2021) 6659, the Commission found that the EUR 600 million and the EUR 300 million loans constituted a single measure given that (i) they were chronologically granted in a quick succession; (ii) they had the same purpose, i.e. the completion of the restructuring of Alitalia SAI and the sale of its assets, as well as the ensuring of continuity of the service offered by Alitalia SAI; and (iii) that Alitalia SAI's financial situation and risk profile remained the same at the time when Italy decided to grant both loans (the main elements being that Alitalia SAI was insolvent throughout the period, the terms of the loans were the same, Alitalia SAI was unable to generate positive cash flow and all liquidity it had at the time of the second loan came from the first loan, which was used for covering its operating expenses).
- (35) In that regard, the Commission also pointed out that at the time of the granting of the first loan, in view of Alitalia SAI's liquidity needs, it was foreseeable that the second loan would be needed if the sale or the restructuring did not take place within six months.
- (36) Moreover, the fact that Italy never acted in a manner as to recoup its investment or even entertained that possibility, as evidenced by the automatic prolongation of the maturities of the loans and, related to that, the absence of payment of interest, further demonstrated that the aim of the loan was to keep Alitalia SAI operating until its assets were sold.
- (37) Regarding the market economy operator test (the 'MEO test'), the Commission considered that it was not applicable to the 2017 loans as Italy did not act as a market economy operator but as a public authority. Specifically, the Commission pointed out that Alitalia SAI was in a grave financial situation with little prospect of becoming profitable and that there was no evidence that any private investor was willing to invest in Alitalia SAI. Moreover, the Commission found that the aim of the 2017 loans was to guarantee Alitalia SAI's uninterrupted service. Thus, the Commission found that Italy provided funding to Alitalia SAI in the form of the 2017 loans for reasons of public policy rather than on the basis of the financial interests of the Italian state as a market economy operator.
- (38) The Commission also pointed out that the regular postponements of the maturity dates of the loans without *ex ante* assessments of the probability of repayment, the failure to claim payment of interest and the discontinuation of the accrual of interest are elements demonstrating that Italy acted in its public power remit.

⁽²³⁾ <http://www.alitaliaamministrazionestraordinaria.it/?cat=4>.

⁽²⁴⁾ Art. 12(1) of Decree-Law 29 December 2022, n. 198 (GU Serie Generale n. 303, 29.12.2022), converted with amendments into Law 24 February 2023, n. 14, see footnote 18.

⁽²⁵⁾ State aid — Italy — State aid SA.48171 (2018/C) (ex 2018/NN, ex 2017/FC) — Alleged State aid in favour of Alitalia — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 256, 20.7.2018, p. 4).

⁽²⁶⁾ Decision C(2021) 6659.

- (39) Finally, the Commission stated that, under the case law of the Union courts, for a Member State to be considered acting as a private investor it must show that it carried out an assessment of the profitability of the measure prior to or at the same time as conferring economic advantage to an undertaking. While Italy provided various documents related to Alitalia SAI's financial position prior to the granting of the loans, the Italian authorities were unable to provide evidence that they had carried out an *ex ante* assessment of the profitability, the likelihood of repayment of the loans or the appropriate pricing of the 2017 loans. On that basis, the Commission concluded that Italy did not act as a market operator, but as a public authority and that therefore the MEO test was inapplicable.
- (40) In any event, as a subsidiary argument, the Commission found that, even if the MEO test were applicable, it was not met. As the Commission stated, in order to assess whether the 2017 loans provided an economic advantage to Alitalia SAI the Commission had to check whether a hypothetical private lender in the same situation would have granted those two loans at the same conditions.
- (41) Although the Commission found no evidence that Italy had carried out a specific *ex ante* assessment, it based its MEO test on the documents provided by Italy which were available to the Italian authorities at the time of granting the 2017 loans and which could have been used to perform a MEO test. For the completeness of its assessment, the Commission also assessed other information that became available to Italy after the granting of the first loan.
- (42) Moreover, the Commission assessed whether Italy's prior exposure to Alitalia SAI as an indirect shareholder and lender was relevant for its MEO test and concluded that in the circumstances of the case it was not, given the limited size of the Italian State's indirect exposure (Section 5.1.4.2.3.2 of Decision C(2021) 6659). The Commission found that a private investor in the situation of the Italian State would have carried out a stand-alone assessment.
- (43) The Commission's MEO test entailed analysis of (i) whether at the time of the granting of the loans Alitalia SAI was expected to generate enough cash by the time of the maturity date of the loans to repay them; (ii) the riskiness of the loans and the appropriate interest which reflected that risk; (iii) the options open to the extraordinary commissioners, in particular the possibility of restructuring or sale of Alitalia SAI's assets; as well as (iv) Alitalia SAI's past performance, assets and liabilities and expected future cash flows.
- (44) For the purposes of the MEO test in its Decision C(2021) 6659, the Commission considered three scenarios: a restructuring scenario, a sale scenario and a liquidation scenario.
- (45) In the restructuring scenario ⁽²⁷⁾, the Commission found that the Italian authorities could have assessed Alitalia SAI's historic performance, which showed negative cash flow for 2015 and 2016, worsening in 2017 and then, taking into account the additional headwind from the uncertainty of placing Alitalia SAI into extraordinary administration, would have shown that Alitalia SAI was unlikely to be able to repay the loan. Furthermore, the Commission held that the same conclusion would have been reached if Italy used the extraordinary administration's cash flow projections for Alitalia SAI for the period May–October 2017, which were attached to the extraordinary administration's application for the first loan and which showed a cash need of EUR 671 million for the first six months of extraordinary administration and would have ended the period with a cash balance of EUR minus 597 million.
- (46) In the sale scenario ⁽²⁸⁾, the Commission considered that at the maturity date (the end of the six-month period after disbursing the first loan) Alitalia SAI's cash balance would have fallen far short of the amounts due on the loan and the interest and, thus, that the repayment would have depended on selling Alitalia SAI's assets at a price amounting to at least EUR 627 million. Regarding the sale, the Commission argued that a market economy lender would have

⁽²⁷⁾ Section 5.1.4.2.3.3 of Decision C(2021) 6659.

⁽²⁸⁾ Section 5.1.4.2.3.4 of Decision C(2021) 6659.

considered, in the first place, that it was unrealistic to expect Alitalia SAI's assets to be sold within six months given that, according to studies, the average time such sales take for companies placed into extraordinary administration under Italian law is two to three years. In an *ex ante* assessment, based on the book value of the assets and the equity of AlitaliaSAI and on estimations of the discounted future cash flows of the company, in the Commission's assessment a market economy lender would have valued the sales price of Alitalia SAI well below EUR 627 million. In an *ex post* assessment ⁽²⁹⁾ based on a study prepared for the extraordinary administration and the actual (non-binding) offers from other airline companies (Lufthansa, Easyjet) ⁽³⁰⁾, the Commission reached the same conclusion. Furthermore, the Commission's independent assessment based on the 'multiples method', i.e. comparing Alitalia SAI's financials to the parameters of similar companies ⁽³¹⁾, confirmed the conclusion that a sale of Alitalia SAI's assets would have brought an amount well below EUR 627 million, which would have been needed to repay the first loan ⁽³²⁾.

- (47) In the liquidation scenario ⁽³³⁾, the Commission considered a scenario where Alitalia SAI's assets were sold in a piecemeal manner and its liabilities were subtracted from the amount obtained this way. In that scenario, Alitalia SAI's net value would have been roughly EUR minus 1,5 billion, according to the Turnaround Plan described in recital 56. The Commission, therefore, concluded that also in that scenario a market economy operator would not have lent to Alitalia SAI the first loan.

- (48) For completeness of assessment, in its Decision C(2021) 6659 the Commission applied the MEO test to the second loan in isolation ⁽³⁴⁾. In that scenario, Alitalia SAI's financial position in October 2017 would have been essentially the same as it was in May 2017, i.e. characterised by an inability to generate positive cash flow and all of its available liquidity coming from the first loan and thus, no market operator would have granted the second loan.

- (49) Overall, in its Decision C(2021) 6659 the Commission considered that the MEO test was not applicable to the 2017 loans and that in any event it was not met. Therefore the 2017 loans conferred an advantage to Alitalia SAI equal to the combined nominal amount of the two loans, i.e. EUR 900 million ⁽³⁵⁾.

2.3. The beneficiaries

- (50) The beneficiaries of the 2019 loan is Alitalia as referred to in recital 1, namely Alitalia SAI and Cityliner. Law 2/2020, amending Decree-law 137/2019 and converting it into law, clearly identifies those undertaking as the beneficiaries.

- (51) Alitalia SAI is headquartered in Fiumicino, Rome, operating in the air transport sector. Alitalia SAI and Cityliner are both part of the Alitalia Group whose shareholding structure is shown on chart 1 ⁽³⁶⁾. The shareholders of Compagnia Aerea Italiana S.p.A ('CAI') ⁽³⁷⁾, the parent entity holding indirectly 51 % of shares in Alitalia SAI, as of 16 October 2017 are shown in Table 1.

⁽²⁹⁾ Section 5.1.4.2.3.4.3.2 of Decision C(2021) 6659.

⁽³⁰⁾ Section 4.2.2.3 of Decision C(2021) 6659.

⁽³¹⁾ Section 5.1.4.2.3.4.3.3 of Decision C(2021) 6659.

⁽³²⁾ Recital 328 of Decision C(2021) 6659.

⁽³³⁾ Section 5.1.4.2.3.4.3 of Decision C(2021) 6659.

⁽³⁴⁾ Section 5.1.4.2.4 of Decision C(2021) 6659.

⁽³⁵⁾ Recital 349 of Decision C(2021) 6659.

⁽³⁶⁾ Chart 1 is drawn on the basis of the information contained in Decision C(2021) 6659 (see recital 40 and Chart 1 of that decision).

⁽³⁷⁾ Other shareholders with a stake equal to or below 1 % include Factorit S.p.A. (1 %), Macca Srl (0,96 %) and residual share of Air France-KLM (0,73 %, compared to a stake of 25 % in 2009).

Chart 1

Ownership structure of the Alitalia Group on 23 January 2018

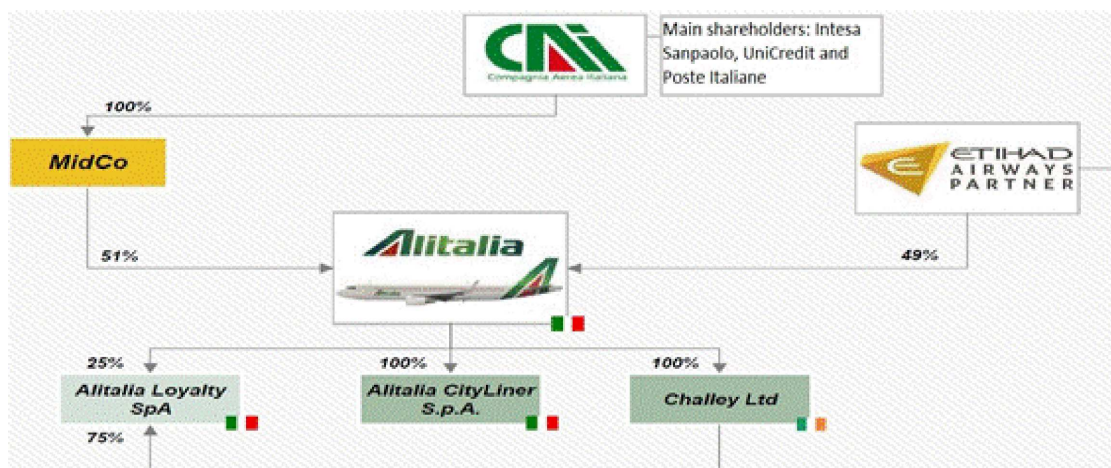


Table 1

Shareholders of CAI in May 2019 (to the Commission's best knowledge, the shareholder structure remains unchanged to date)

Shareholders of CAI, May 2019	Ownership %
Unicredit S.p.A	36,59
Intesa Sanpaolo	27,48
Banca Popolare di Sondrio Societa Cooperativa per Azioni	9,11
Atlantia S.p.A	6,52
Banca Monte dei Paschi di Siena S.p.A	6,11
MPS Leasing & Factoring S.p.A	3,97
IMMSI S.p.A	2,18
Poste Italiane S.p.A	2,02
Pirelli & C.S.P.A.	1,4
Other shareholders below 1 %	4,62
Total	100

- (52) When it was placed in extraordinary administration, Alitalia SAI owned the entire share capital of Cityliner and of Challey Ltd. Cityliner operated as Alitalia SAI's transport capacity provider ⁽³⁸⁾ covering part of the short-haul network. Challey Ltd is a sub-holding based in Ireland, which, itself, controlled other companies, also based in Ireland ('Irish subsidiaries'), that owned the entire fleet of aircrafts used by Alitalia SAI and Cityliner, as well as minority interests in other part-owned companies ⁽³⁹⁾. Challey Ltd and the Irish subsidiaries are not in extraordinary

⁽³⁸⁾ See point 85 at page 55 et seq. of the Report on the causes of insolvency of Alitalia and Cityliner ('Relazione sulle cause di insolvenza di Alitalia e Cityliner') drawn up on 26 January 2018 by the extraordinary commissioners and published on the website of Alitalia's extraordinary administration: http://www.fallcoweb.it/home/pdf/alitalia/relazione_cause_insolvenza.pdf.

⁽³⁹⁾ Recital 39 of Decision C(2021) 6659.

administration. Alitalia SAI together with its subsidiaries accordingly form the Alitalia Group ⁽⁴⁰⁾ ('the Alitalia Group'). Since Alitalia SAI accounts for the overwhelming majority of the Alitalia Group's activities and employed 97 % of the total headcount of the Alitalia Group ⁽⁴¹⁾, any evaluation pertaining to the group covers *mutatis mutandis* Alitalia SAI.

- (53) Alitalia SAI is 49 % owned by Etihad Investment Holding Company LLC and 51 % owned by MIDCO S.p.A. ('Midco'), which, itself, is 100 % owned by CAI.

2.4. Alitalia's financial position

2.4.1. The period until the granting of the 2017 loans

- (54) Alitalia SAI's financial position up until the granting of the 2017 loans, i.e. before November 2017, is described in detail in Decision C(2021) 6659 (see in particular Sections 4.1 and 5.1.4.2.3.1). This section recalls briefly the Commission's findings in that decision.
- (55) Since its acquisition by CAI in 2008, Alitalia SAI has been continually loss-making. As described in the ambitious Turnaround Plan (see Section 4.2.1.1 of Decision C(2021) 6659) drawn up by Alitalia SAI's shareholders in 2017, the company generated losses of nearly EUR 2 billion for the period 2009–2014. Moreover, the Turnaround Plan indicated that during the period 2010–2013 the airline industry in aggregate grew and generated profits. As the Commission noted in the abovementioned decision, that showed that Alitalia SAI's problems were not due to the general macroeconomic conditions but rather specific to the company.
- (56) In that unsustainable situation, Alitalia SAI sought a new industrial partner and as a result Etihad acquired 49 % of Alitalia in 2015. However, in 2015 and 2016 Alitalia SAI generated a loss of EUR 648 million, which, excluding one-off items, came to the even higher figure of EUR 1,2 billion in losses.
- (57) The Turnaround Plan attempted to improve Alitalia SAI's position in early 2017 with an ambitious cost-cutting plan involving more than EUR 1 billion in cost reductions, which was supposed to pave the way for additional financing (EUR 2 billion including EUR 900 million of new money), mainly led by its existing shareholder Etihad. The Turnaround Plan was to be put in place through a pre-insolvency procedure ⁽⁴²⁾. That procedure ⁽⁴³⁾ required the agreement of the workforce ⁽⁴⁴⁾ as major cost-cutting measures would have affected them. However, the agreement was rejected in the workers' referendum held on 24 April 2017 because of the planned measures to cut labour costs, which envisaged amongst others an average wage cut of 33 %. As the Turnaround Plan could not be implemented, and the shareholders did not provide additional funding, Alitalia SAI faced bankruptcy under Italian bankruptcy law.

⁽⁴⁰⁾ See http://corporate.alitalia.com/static/upload/201/0000/20160325_alitalia_sai_mogc-231_general-section.pdf.

⁽⁴¹⁾ See Section 1.2.2 at page 20 of the EA Programme published on the website of Alitalia's Extraordinary Administration: http://www.fallcoweb.it/home/pdf/alitalia/programma_0418.pdf.

⁽⁴²⁾ Article 67 of Regio decreto 16 marzo 1942, n. 267 – Disciplina del fallimento, del concordato preventivo, dell'amministrazione controllata e della liquidazione coatta amministrativa (GU Serie Generale n. 81, 6.4.1942) ('the Italian Bankruptcy Law').

⁽⁴³⁾ Under Article 67, third paragraph, point (d), of the Italian Bankruptcy Law, a 'piano attestato di risanamento' is a procedure for companies that are experiencing reversible financial difficulty, i.e. the financial difficulty has chances to be reversed because of its specific reparable nature and the availability of adequate resources. Under that procedure, the recovery efforts are managed by the company and not by the judicial authority.

⁽⁴⁴⁾ According to the report of the extraordinary commissioners of 11 July 2018 (see footnote 20), on 31 December 2017 there were 11 755 employment contracts entered into by Alitalia Group, corresponding to 10 871 full time employees at Alitalia S.p.A and CityLiner. On 31 December 2016, according to the KPMG report (see Section 4.2.1.2), there were 10 781 full time equivalent employed by Alitalia Group (also including the Irish subsidiaries).

- (58) At the beginning of 2017, even before its rejection at the workers' referendum, the turnaround plan was reviewed by two independent business experts (KPMG and Roland Berger) ⁽⁴⁵⁾ who considered it ambitious in light of Alitalia SAI's history. In addition, KPMG considered that in order for the plan to be sustained over several years significant financing would be needed. They also emphasised the sensitivity of the plan in respect of a financial assumption upon which it was based.
- (59) On 28 April 2017, a certification report ⁽⁴⁶⁾ of the Turnaround Plan was prepared in which it was stated that Alitalia SAI was in a crisis because (i) it was an independent carrier in competition with network carriers that had achieved critical mass; (ii) large-scale penetration of the domestic market by low-cost carriers compared to other European countries; (iii) it had a small long-haul market share; (iv) it suffered from an inefficient cost structure; and (v) was constrained in the development of long-haul routes as a result of joint venture agreements.

2.4.2. The period after the granting of the 2017 loans and before the granting of the 2019 loan

- (60) According to the information provided by the Italian authorities, Alitalia continued to suffer from negative cash flows since being put into extraordinary administration, generating a negative free cash flow of EUR 296 million in 2018 and negative EUR 198 million for the period Q1 to Q3 2019.

Table 2

Alitalia's free cashflow including debt service payments and cash position (in millions of euros)

	Q1 2018	Q2 2018	Q3 2018	Q4 2018	2018	Q1 2019	Q2 2019	Q3 2019	Q1 2019 - Q3 2019
Free Cash Flow	-79	35	-135	-122	-296	-27	-44	-127	-198
Cash	728	763	628	506	506	480	436	310	310
	Q1 2018	Q2 2018	Q3 2018	Q4 2018	2018	Q1 2019	Q2 2019	Q3 2019	Q1 2019 - Q3 2019
Free Cash Flow	-79	35	-135	-117	-296	-27	-44	-127	-198

Note: Alitalia's cash position in Q1 2018 includes EUR 300 million in State loan (the second loan of the 2017 loans).

- (61) Moreover, Alitalia generated negative EBITDA of EUR 120 million and EUR 14 million in 2018 and 2019 respectively.

Table 3

Alitalia's EBITDA

	2018	2019
EBITDA	(120)	(14)

- (62) The publicly available information for 2019 shows equally that Alitalia continued to be in a difficult financial situation. According to reports in the press ⁽⁴⁷⁾, Alitalia was loss-making in October 2019 ⁽⁴⁸⁾. On 26 November 2019, the press cited Italian Minister of Economic Development, Mr Patuanelli, saying that 'at the moment there is no market solution' for Alitalia, while in December 2019 he was reported saying that Alitalia was losing EUR 2 million per day, clarifying that the daily loss fluctuated during the year ⁽⁴⁹⁾.

⁽⁴⁵⁾ The reviews of the two independent business experts are described in greater detail in Section 4.2.1.2 of Decision C(2021) 6659.

⁽⁴⁶⁾ The certification report was required under the Italian Bankruptcy Law (see Section 4.2.1.3 of Decision C(2021) 6659).

⁽⁴⁷⁾ See <https://www.reuters.com/article/alitalia-rescue-loss-idUSL8N28T4OB>.

⁽⁴⁸⁾ See <https://www.reuters.com/article/alitalia-rescue-atlantia/alitalia-set-for-temporary-reprieve-as-rescue-deadline-nears-sources-idUSL5N26Z4I6>.

⁽⁴⁹⁾ <https://www.ilsole24ore.com/art/alitalia-sale-conto-la-compagnia-patuanelli-perde-2-milioni-giorno-ACQ1wO7>. In the same interview, the Minister of Economic Development also explained that, after the negotiations to sell Alitalia to a consortium including Ferrovie dello Stato, Atlantia and the US airline company, Delta Airlines, had failed, on 2 December 2019 there were only two options: the liquidation of the company or a new sale procedure, https://www.ilmessaggero.it/economia/news/alitalia_ilva_patuanelli_intervista_messaggero_oggi_21_dicembre_2019-4939335.html.

- (63) In a report to the Italian Parliament of 3 March 2020, the extraordinary administration commissioner, Mr Leogrande, explained the economic and financial performance of the administration in 2019 as compared to 2018 by pointing to the fact that, notwithstanding increased operating traffic revenues (+ 2 %) and slightly reduced operating costs (– 1,3 %), Alitalia still suffered from an increase in costs (fuel and technical equipment, traffic and stopover, maintenance, audit and staff costs) and showed ‘a balance of EUR 586 million, with an improvement of EUR 86 million, also thanks to the new government loan of December 2019 amounting to EUR 400 million’ ⁽⁵⁰⁾.

2.5. The extraordinary administration procedure under which Alitalia was placed in May 2017

- (64) In May 2017, the Italian Ministry of Economic Development placed Alitalia SAI and, several days afterwards, Cityliner under extraordinary administration ⁽⁵¹⁾. Later the same month, the Court of Civitavecchia declared both Alitalia SAI and Cityliner insolvent.
- (65) In their submission of 20 March 2019, the Italian authorities stated that, because of the admission of Alitalia to the extraordinary administration procedure, the private shareholders had been deprived of all the powers of management and supervision of Alitalia.
- (66) Under the relevant Italian law, the management of Alitalia was entrusted to the extraordinary commissioners until the adoption by the Minister of Economic Development of an extraordinary administration programme (‘the EA programme’), whereupon the commissioners would be authorised to sell Alitalia’s assets under the supervision of the Ministry of Economic Development.
- (67) On 26 January 2018, Alitalia’s extraordinary commissioners provided to the Ministry of Economic Development a programme aiming at the sale of Alitalia’s assets in operation ⁽⁵²⁾. In May 2019, the time limit for the completion of the asset sale programme was postponed to 23 March 2020.
- (68) The sale procedure laid down by the authorised EA programme covered the assets relating to the business of Alitalia and also included the possibility to purchase the aircrafts owned by Alitalia SAI’s Irish subsidiaries.

2.5.1. Extraordinary administration and special rules applying to very large companies ⁽⁵³⁾

- (69) Under Italian law (Legislative Decree 270/1999 and Decree-law No 347 of 23 December 2003 ⁽⁵⁴⁾), an extraordinary administration is an insolvency procedure for large companies aimed at rescuing them, preserving their value through the continuation of their activities until restructuring or sale of their assets, provided that it seems possible that they return to sufficient profitability.
- (70) Under that procedure, previous shareholders are deprived of their decision-making powers, while the company continues operating. Management of the business and the administration of the company’s assets are taken over by the extraordinary commissioners appointed by the insolvency court.
- (71) When the extraordinary administration procedure takes effect, the debts incurred prior to the procedure are frozen and become subordinated to the debts incurred during the extraordinary administration as a result of the continuation of the business operation. The status of the debts incurred during the extraordinary administration as ‘super senior’ is provided by an explicit provision of law.

⁽⁵⁰⁾ ‘Relazione recante i dati aggiornati al 31 dicembre 2019 relativi alla situazione economico-finanziaria delle società Alitalia – Società Aerea Italiana S.p.A. e Alitalia Cityliner S.p.A.’, <https://www.senato.it/service/PDF/PDFServer/BGT/1170672.pdf>.

⁽⁵¹⁾ Pursuant to Decree-law 347/2003 read in conjunction with Legislative Decree 270/1999.

⁽⁵²⁾ Under Article 4 of Decree-law 347/2003 in combination with Article 27(2), point a, and Article 54 et seq. of Legislative Decree 270/1999.

⁽⁵³⁾ For more details see recitals 43 to 49 of Decision C(2021) 6659.

⁽⁵⁴⁾ Decreto-legge 23 dicembre 2003, n. 347 – Misure urgenti per la ristrutturazione industriale di grandi imprese in stato di insolvenza (GU Serie Generale No 298, 24.12.2003) (‘Decree-law 347/2003’).

- (72) For very large companies, such as Alitalia, additional special rules apply. Specifically, very large companies may request to be placed under extraordinary administration even before a court decision. In that event the Ministry of Economic Development appoints and controls the extraordinary commissioners. In that case the extraordinary administration can last a maximum of 36 months. In addition, for companies operating essential public services, the extraordinary commissioners have the power to sell the business assets through a negotiated procedure, provided that the sale price agreed by the extraordinary commissioners with the buyer is not lower than the market value established by an independent expert's report.

2.6. Public statements by members of the Italian government

- (73) On 28 November 2019, the Minister of Economic Development stated that Alitalia 'will not fail, I feel I can guarantee it' ⁽⁵⁵⁾.
- (74) On 17 December 2019 the same Minister was reported to have said that 'there are critical issues [concerning Alitalia] to be tackled in a serious way', starting from the fact that 'I do not take into consideration the idea of putting airplanes on the ground' ⁽⁵⁶⁾.
- (75) On 24 December 2019, Alitalia's extraordinary commissioner was reported to have said that there is a 'risk of interruption of the activity' of Alitalia. The media referred to the preamble to Decree-law 137/2019, which stated that 'in order to avoid the risk of interruption of Alitalia's operational activity, it was requested, as soon as possible, to grant the financing and pay it in full' ⁽⁵⁷⁾.

2.7. The sales process of Alitalia and its extensions

- (76) Article 1 of Decree-law 55/2017, which granted the 2017 loans, provided that, in order to draw up the EA programme, the extraordinary commissioners had to explore the possibility of selling by way of tender Alitalia's business activities within a certain time limit.
- (77) Hence, in August 2017 the extraordinary commissioners organised a tender process to sell the assets of the companies in extraordinary administration (Alitalia SAI and Cityliner) as operating units.
- (78) However, the tender was unsuccessful ⁽⁵⁸⁾ and in December 2017 the extraordinary commissioners opened a new negotiated procedure ⁽⁵⁹⁾ to sell Alitalia's assets. In that procedure only the offer of the Italian rail company Ferrovie dello Stato was deemed valid, whilst the other offers were rejected on grounds of their incompleteness or non-binding nature ⁽⁶⁰⁾.
- (79) After the failure of the sales procedure, Decree-law 137/2019 established a new deadline for the sale of Alitalia's assets, fixing it at 31 May 2020. However, according to Italy, on 26 March 2020 the sales process was suspended because of the COVID-19 outbreak.

⁽⁵⁵⁾ https://www.ilmessaggero.it/economia/news/alitalia_patuanelli_non_fallira_nazionalizzazione_non_negativa-4892078.html.

⁽⁵⁶⁾ http://www.rainews.it/dl/rainews/articoli/Alitalia-Leogrande-domani-entrero-in-azienda-non-faro-disastri-45f19058-ff0f-42d2-9532-5446204b197d.html?refresh_ce.

⁽⁵⁷⁾ See the Sole 24 Ore, <https://www.ilsole24ore.com/art/alitalia-governo-versa-400-milioni-nuovo-prestito-lufthansa-camera-7-gennaio-ACWPNH8>.

⁽⁵⁸⁾ As reported at page 133 of the EA programme, no offer submitted (among others, by Lufthansa, EasyJet and Airport Handling S.p.A.) complied with the procedural rules. In particular, according to page 17 of the extraordinary commissioners' presentation at a hearing before the joint IX and X Committees of the Chamber of Deputies on 27 March 2019, those offers lacked binding elements and essential elements (bid bond, contractual documents or industrial plan).

⁽⁵⁹⁾ The possibility to have a negotiated procedure is provided for by Article 4(4-quarter) of Decree-law 347/2003, as an alternative to a call for tender. The negotiated procedure must be carried out without prejudice to compliance with the principles of transparency and non-discrimination.

⁽⁶⁰⁾ Footnote 33 and Section 4.2.2.3 of Decision C(2021) 6659, as well as recital 25 and footnote 9 of the present Decision.

- (80) As part of the efforts to find a solution, on 9 October 2020, the Italian state launched a new state-owned company, ITA.
- (81) On 10 September 2021, the Commission adopted Decision C(2021) 6665 finding that the transfer of certain assets, as described in that decision, if carried out in compliance with the commitments undertaken by Italy, would not lead to economic continuity between Alitalia SAI and ITA. In the same decision the Commission found that a capital injection of EUR 1,35 billion into ITA did not create an advantage for ITA and therefore did not constitute State aid.
- (82) Following Decision C(2021) 6665, the Alitalia extraordinary administration tendered the Alitalia brand and, in mid-October 2021, awarded it to ITA. In parallel, the Alitalia extraordinary administration and ITA reached an agreement on the transfer of Alitalia's aviation business, consisting of 52 aircraft, related slots and other assets ⁽⁶¹⁾.
- (83) By the end of 2022, the Alitalia extraordinary administration was expected to have also sold through tenders the Alitalia loyalty programme, as well as Alitalia's maintenance and groundhandling businesses in compliance with the commitments undertaken by Italy ⁽⁶²⁾. While the groundhandling service in Fiumicino airport was awarded to Swissport in May 2022 and Alitalia's maintenance business was acquired by Atitech in September 2022 ⁽⁶³⁾, other activities, including Alitalia's loyalty programme, are still under tendering procedure. Hence, in December 2022 the extraordinary administration procedure was prolonged to the end of 2023, in order to allow for the liquidation of those assets not yet sold (recitals 28 and 32).

2.8. The complaints

- (84) In their submissions concerning the 2019 loan the complainants argued that it constituted unlawful and incompatible State aid.
- (85) The complainants argued that the 2019 loan constituted State aid since the Italian Government did not act as a market economy operator. Given Alitalia's economic situation, which, despite the 2017 loans, had not improved and given its history, the complainants argued that the doubts already expressed by the Commission in the 2018 Opening Decision on the 2017 loans would apply *a fortiori* in respect of the 2019 loan ⁽⁶⁴⁾. In particular, they argued that no market economy operator driven by concerns of profitability would have been willing to increase its credit exposure by providing such fresh financing without any guarantee of return on the investment.
- (86) According to the complainants, the 2019 loan conferred an advantage on Alitalia, having a material impact on trade between Member States and distorting competition, as Alitalia was in competition with other EU airlines. In their opinion, the 2019 loan allowed the company to maintain operations despite its persistently unhealthy financial situation, preserving and even increasing its market share by increasing capacity and opening certain routes, allowing it to continue pricing more aggressively than it would be able to without the 2019 loan, causing severe damage to competitors operating on those routes without public subsidies.
- (87) The complainants highlighted in particular that, despite the significant subsidies it has received, Alitalia had been unable to carry out any restructuring, failing to become profitable, decrease its costs or reduce its debts. They also submitted that there were no credible offers for Alitalia's assets, thus putting into doubt the plans for their sale. In this regard, the complainants submitted that the only offer came from Lufthansa but it was subject to among others significant restructuring of Alitalia in the form of reduced workforce and aircraft fleet and did not materialise.
- (88) The complainants argued that the 2019 loan was incompatible with the internal market and that a number of the compatibility criteria, set out in the Rescue and Restructuring Guidelines, have not been met.

⁽⁶¹⁾ See Section 2.2.3.1 of Decision C(2021) 6665.

⁽⁶²⁾ See Section 4.3 of Decision C(2021) 6665.

⁽⁶³⁾ https://www.swissport.com/en/news/press-release/2022/20220523_media-release_swissport-expands-to-italy-rome_it and <https://www.atitech.it/atitech-takes-over-alitalia-em-from-alitalia-in-as/>.

⁽⁶⁴⁾ The complainant provides a copy of an interview of the Vice President of the European Investment Bank, published by Radiocor Economia on 26 September 2019, reporting that 'Alitalia has not the characteristics to be bankable yet'.

2.9. Summary of the Opening Decision

- (89) In the Opening Decision, the Commission provisionally concluded that the 2019 loan is separable from the 2017 loans and that it may constitute State aid within the meaning of Article 107(1) TFEU.
- (90) Regarding the separability of the 2019 loan from the 2017 loans, the Commission pointed out that the legal acts whereby the 2019 loan was granted did not explicitly state that that was an increase of the previous loans, unlike what the legal act granting the second of the two 2017 loans stated. The Commission also considered that the two-year time period between the 2019 loan and the 2017 loans was significant and that the 2019 loan was not reasonably foreseeable when Alitalia was placed under extraordinary administration. Finally, the Commission considered that the 2019 loan's maturity date was fixed to six months and that interest on it was payable, unlike the 2017 loans whose maturity date was prolonged until the sale of Alitalia's assets and on which interest was no longer accruing. Based on those elements, the Commission provisionally concluded that the 2019 loan was separable from the 2017 loans.
- (91) On the existence of aid, the Commission considered that the 2019 loan may have conferred an economic advantage on Alitalia for the purposes of Article 107(1) TFEU. The Commission provisionally concluded that the MEO test was not applicable to the 2019 loan, as Italy failed to submit any documentary evidence that it had carried out an assessment prior to granting the 2019 loan of the potential return on investment and likelihood of repayment of that loan.
- (92) In any event, the Commission considered that if it was doubtful that a private operator would have provided the initial 2017 loans when Alitalia was expected to be sold by November 2017, *a fortiori* it was even more doubtful that such a lender would have provided any further loan in 2019 given that the sales process had failed in its entirety at the time when the Opening Decision was adopted.
- (93) In relation to the compatibility of the aid, the Commission considered that Alitalia was a firm in difficulty within the meaning of the Rescue and Restructuring Guidelines and came to the provisional conclusion that there were serious doubts as to the compatibility of the 2019 loan with the internal market under Article 107(3), point (c), TFEU.
- (94) In particular, the Commission had doubts on whether the 'one time, last time' principle had been complied with given that before the 2019 loan Alitalia benefitted from rescue aid in 2017 ⁽⁶⁵⁾ through the 2017 loans.
- (95) Furthermore, the Commission stated that Italy did not provide evidence that would allow the Commission to assess the proportionality of the 2019 loan viewed as rescue aid, nor could the Commission assess the loans as rescue aid in the absence of a rescue plan. The Commission also pointed out that Italy did not provide any evidence that would demonstrate that the conditions for approving a potential rescue aid were complied with.

3. COMMENTS FROM INTERESTED PARTIES

- (96) Ryanair was the only third party that submitted comments on the Opening Decision (see recital 19).
- (97) On the existence of aid, Ryanair submitted that it generally agrees with the Commission's assessment. Moreover, Ryanair indicated that, contrary to the requirements of the Rescue and Restructuring Guidelines, Italy did not pursue a well-defined objective of common interest. Furthermore, Ryanair explained that the EUR 400 million aid could not have been either rescue or restructuring aid given that in October 2019 Alitalia was already for more than two years in insolvency proceedings and there was no realistic prospect of restoring Alitalia's long-term viability, given Alitalia's record of more than a decade of losses with no sign of improvement after 2017. Ryanair further pointed out that Alitalia's below the industry average load factor, its aging fleet which was a source of rising costs and its constant erosion of market share were evidence that the EUR 400 million aid provided by Italy in 2019 could not have been restructuring aid.

⁽⁶⁵⁾ Italy notified the 2017 loans subsequent to granting as rescue aid. However, the 2017 loans have not been repaid after six months or turned to restructuring aid by submitting a viable restructuring plan as required by the Rescue and Restructuring Guidelines.

- (98) Finally, Ryanair indicated that the EUR 400 million loan to Alitalia breached the 'one time, last time' principle as there were attempts to restructure Alitalia in 2013 and 2015 where the transfer of shares and ownership, in which Poste Italiane was involved, may not have satisfied the market economy investor test, and also because in 2017 Alitalia had received aid from the Italian State through the 2017 loans.

4. INFORMATION PROVIDED BY ITALY

4.1. Information provided by Italy before the Opening Decision

- (99) Prior to the Opening Decision, Italy claimed that the compatibility of the 2019 loan should be assessed as part of the investigation initiated by the 2018 Opening Decision concerning the 2017 loans ⁽⁶⁶⁾, but it provided no additional information allowing the Commission to assess the compatibility of the 2019 loan.
- (100) On 6 January 2020, Italy responded to a number of points raised in the complaints, while at the same time accepting that the 2019 loan is a financial support in favour of Alitalia SAI and Cityliner.
- (101) Italy explained that, in the absence of a definitive bid by Ferrovie dello Stato by the deadline of 21 November 2019, in view of the timeline laid down by the law to complete the transfer procedure, Alitalia did not have access to the financing provided for by Decree-law 124/2019, which was aimed at supporting the sale of Alitalia's assets within such timeframe ⁽⁶⁷⁾. Therefore, on 3 December 2019, Decree-law No 137/2019 entered into force repealing the legal basis for the disbursement of the 2019 loan and providing for the organisation of a new transfer procedure. In this regard, on 6 December 2019, Mr Giuseppe Leogrande was appointed as 'Special Administrator' of Alitalia, replacing the previous college of three extraordinary commissioners.
- (102) Italy claimed that the legal instrument that was the object of the complaints, namely Art. 54 of Decree-law 124/2019, had not been converted into law; the lack of conversion into law, therefore, rendered the provision void *ab initio* and the complaints groundless. Italy contended that the legal instrument underpinning the 2019 loan is Art. 1 of Decree-law 137/2019, the subject-matter of which differed from that of Decree-law 124/2019, in so far as the fresh financing provided therein was contingent on the return to long-term profitability through the sale of a restructured company. The complaints were therefore without object.
- (103) Italy argued that the 2019 loan to Alitalia did not constitute unlawful aid. Contrary to the allegations of the complainants, the 2019 loan was based on Decree-law 137/2019, which had been in force since 3 December 2019, a date following both complaints, and its conditions were materially distinct from those previously laid down in the initial Decree-Law 124/2019. The 2019 loan constituted the prerequisite for the finalisation of a viable, coherent and far-reaching restructuring process aimed at restoring the long-term viability of the company, through the transfer of its business branches under market conditions.
- (104) Italy contended that the 2019 loan was not unlawful aid but constituted an additional instalment of the aid notified in January 2018, representing therefore an extension of the 2017 loans; however, Italy did not provide additional information that would have allowed the Commission to assess the compatibility of the 2019 loan. According to Italy, the 2019 loan was therefore not subject to the standstill obligation under Article 108(3) TFEU. Accordingly, Italy argued that the 2019 loan should be examined in the ambit of the investigation initiated by the 2018 Opening Decision in Case SA.48171 on the two 2017 loans (of EUR 600 million and EUR 300 million). Italy further stated that the measures introduced by Decree-law No 137/2019 were fully consistent with the first loan of EUR 600 million and its extension by the second loan (of EUR 300 million). According to Italy, the 2019 loan was the third instalment of a single public support measure, whose legitimacy and compatibility with the single market are the same as the aid notified in 2018.

⁽⁶⁶⁾ Case SA.48171 on the alleged State aid in favour of Alitalia, see recital 20 and footnote 6 of the present Decision.

⁽⁶⁷⁾ See also the reply submitted by Italy on 27 March 2021, p. 10.

- (105) Italy provided the first part of a technical study provided by the consulting firm PricewaterhouseCooper ('PwC') related to the theoretical liquidation value of Alitalia on 2 May 2017 ⁽⁶⁸⁾.

4.2. Italy's submissions after the Opening Decision

- (106) On 27 March 2021, Italy replied to the Commission letter of 8 March 2021 (see recital 16) providing additional information. In its submission, Italy reiterated that the 2019 loan was part of the aid measure provided to Alitalia in 2017 with the aim of avoiding interruption of the service provided by Alitalia and disruption in the Italian air transport. Specifically, the Italian authorities re-confirmed that they considered the 2019 loan to be a third tranche of a single loan, part of the 2017 loans to Alitalia. However, Italy did not provide any evidence demonstrating that the 2019 loan was a third tranche to the 2017 loans, nor that the granting of the 2019 loan was reasonably foreseeable in 2017 when the first and the second loans were granted.
- (107) The Italian authorities also confirmed that the 2019 loan had not been repaid, no interest had been paid and the maturity date had been extended twice, most recently until 16 December 2021 (see recital 28).
- (108) The Italian authorities claimed that the 2019 loan, disbursed in December 2019, was used to streamline Alitalia's business, in particular by improving its flight schedule, network and the structure of its costs. According to the Italian authorities, that was reflected in Alitalia's growth in terms of passengers and of revenues from sold tickets, and in an increase in EBIT by EUR 10,61 million year over year for the month of January 2020. The Italian authorities explained that that trend continued in February 2020 until the start of the COVID-19 outbreak in Italy in late February 2020. The Italian authorities explained that, as part of its efforts to streamline the business, in early 2020 Alitalia changed its fleet composition, renegotiated its IT (e.g. software maintenance) and fuel supply contracts and took other measures, all resulting in cost savings.
- (109) To the question whether Italy carried out any assessment of the profitability and risks related to the repayment of the 2019 loan before granting it as well as to provide evidence in that regard, the Italian authorities replied that the 2019 loan had been granted in order to ensure the business continuity of the company, as well as taking into consideration the public service obligations, in order to avoid the interruption of both national and international flights. In that regard the Italian authorities explained that to the best of their knowledge, at the end of 2019, Alitalia had no access to alternative sources of finance at the same conditions as the 2019 loan.
- (110) Furthermore, to the question whether Italy had carried out an *ex post* assessment of the profitability and risks related to the repayment of the 2017 loans and, if so, whether they had used that assessment to decide on whether to grant the 2019 loan, the Italian authorities explained that the profitability and risks related to the repayment of the 2017 loans were considered in the comprehensive assessment of the whole procedure and financial situation of the company. Despite the Commission request, the Italian authorities did not provide evidence of such assessment. They did however explain in this regard that Alitalia is in extraordinary administration and that repayment of such loans is governed by law.
- (111) In the Italian authorities' view there has been no change in Alitalia's risk profile since the granting of the 2017 loans. The risk profile of the company remained characterised by Alitalia's status as an insolvent company under extraordinary administration.
- (112) Regarding the sale of Alitalia's assets Italy stated that after the failure of the attempt to sell Alitalia's assets to Ferrovie dello Stato (see recital 78), the Italian legislation set a new deadline for the disposal of Alitalia's assets, fixed at 31 May 2020. The Italian authorities explained that, on 6 March 2020, a call for expression of interest in buying Alitalia's assets was published. However, according to the Italian authorities, on 26 March 2020 the tender process was suspended because of the COVID-19 outbreak. In this regard the Italian authorities specified that in the period from December 2019 to February 2021, the extraordinary administration conducted negotiations with third parties for the sale and lease back of a number of narrow body aircraft, but, at the time of the submission of Italy's comments, that process had not been finalised.

⁽⁶⁸⁾ PwC study dated 5 December 2019.

5. ASSESSMENT OF THE AID

5.1. Existence of aid within the meaning of Article 107(1) TFEU

- (113) For a measure to be qualified as State aid within the meaning of Article 107(1) TFEU, the following cumulative criteria must be met: (i) it must be granted by the State and through State resources; (ii) it must confer an advantage upon an undertaking; (iii) it must be selective, i.e. favour certain undertakings or the production of certain goods; (iv) it must distort or threaten to distort competition and it must affect trade between Member States.

5.1.1. Notion of undertaking

- (114) Alitalia SAI and Cityliner are private companies operating in the air transport sector established in Italy. They are undertakings for the purposes of Article 107(1) TFEU since they carry out economic activities by offering services on a market ⁽⁶⁹⁾.

5.1.2. State resources and imputability to the State

- (115) As has been stated by the Court of Justice ('Court') ⁽⁷⁰⁾, for measures to be qualified as State aid within the meaning of Article 107(1) TFEU, (i) they have to derive from State resources, either directly or indirectly by an intermediary body acting by virtue of powers conferred on it; and (ii) they have to be imputable to the State ⁽⁷¹⁾.
- (116) Since the 2019 loan results from acts of the Italian Government and Parliament, it is imputable to the Italian State (see recitals 2 and 7). In addition, the 2019 loan was financed from the State budget and was thus clearly granted through State resources (see recital 22).

5.1.3. Selectivity

- (117) To be considered State aid, a measure must be selective in that it favours only certain undertakings or the production of certain goods.
- (118) The 2019 loan was granted to two companies, Alitalia SAI and its fully-owned subsidiary Cityliner, whose economic activities are complementary and integrated as part of the Alitalia Group. Thus, it was granted on an *ad hoc* basis to two corporate entities, part of the same group and undertaking, and was not available to other companies active in the Italian air transport sector in a comparable legal and factual situation, or in other sectors. No comparable companies were eligible for measures similar to those granted to Alitalia and thus no such companies received a comparable financing. The 2019 loan was therefore selective.

5.1.4. Advantage

- (119) An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit that an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention ⁽⁷²⁾.
- (120) According to the case-law of the Union Courts, economic transactions carried out by public bodies do not confer an advantage on their counterpart, and therefore do not constitute State aid within the meaning of Article 107(1) TFEU, if they are carried out in line with normal market conditions ⁽⁷³⁾. In order to determine whether a transaction has been carried out under those conditions, the Commission applies the MEO test. That test has been developed with regard to different economic transactions.

⁽⁶⁹⁾ Judgment of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283, paragraph 7.

⁽⁷⁰⁾ Judgment of 16 May 2002, *France v Commission (Stardust Marine)*, C-482/99, ECLI:EU:C:2002:294.

⁽⁷¹⁾ Judgment of 14 October 1987, *Germany v Commission*, 248/84, ECLI:EU:C:1987:437, paragraph 17.

⁽⁷²⁾ Judgment of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; judgment of 29 April 1999, *Spain v Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.

⁽⁷³⁾ Judgment of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 60 and 61.

- (121) However, it follows from the *BP Chemicals* judgement ⁽⁷⁴⁾ that the mere fact that a public undertaking has already made capital injections into a subsidiary which are classed as aid does not automatically mean that a further capital injection cannot be classed as an investment which satisfies the private market economy investor test. Nevertheless, in a case such as the present one, which concerns three capital injections made by the same investor over a period of two years, the first two of which brought no return, the Commission must determine whether the third injection could reasonably be severed from the first two and classed, for the purposes of the private investor test, as an independent investment.
- (122) In other words, where a new State measure is inseparable from previous State aid to the undertaking concerned the MEO test should not be applied separately to the new State aid measure but instead both measures should be considered together for the purpose of the application of the MEO test. It follows that, if the MEO test was held to be inapplicable to the previous State aid, it must be inapplicable to the new measure as well in as much as it is inseparable from the previous State aid.
- (123) Therefore, the Commission will first examine the preliminary question whether the 2019 loan is separable from the 2017 loans in order to determine whether, in respect of the 2019 loan, the assessment on the existence of aid on a stand-alone basis should be conducted, including the assessment of the applicability of the MEO test. If the 2019 loan is separable and the MEO test is applicable, the Commission will apply the MEO test to the 2019 loan.

5.1.4.1. Separability of the 2019 loan from the 2017 loans and applicability of the MEO test

- (124) In the Opening Decision, the Commission provisionally concluded that the 2019 loan was separable from the 2017 loans (see recital 90). In case that the Commission confirms its provisional finding in the Opening Decision that the 2019 loan is separable from the 2017 loans, the 2019 loan will have to be assessed separately, including as regards the applicability and the application of the MEO test.
- (125) In line with the Commission's decisional practice, a series of State interventions which take place in relation to the same undertaking in a relatively short period of time are linked to each other or, were all planned or foreseeable at the time of the first intervention, may be assessed as one intervention. On the other hand, when the later intervention was a result of unforeseen events at the time of the earlier intervention, the two measures should normally be assessed separately ⁽⁷⁵⁾.
- (126) When assessing whether the 2017 loans and the 2019 loan constitute a single intervention, the Commission takes account of: (i) the chronology of the two sets of State loans in question; (ii) their purpose; (iii) the undertaking's (financial and risk) situation at the time when the decision(s) to grant the 2017 loans and the subsequent 2019 loan were made ⁽⁷⁶⁾.
- (127) Following the in-depth investigation, the Commission confirms the provisional finding in the Opening Decision that the 2019 loan, which is the object of the assessment in the present case, and the 2017 loans, which the Commission found to constitute state aid in its decision in Case SA.48171, should be considered, for the purpose of assessing applicability of the MEO test, to be a separable measure from the 2017 loans, as further explained in Section 6.2.

⁽⁷⁴⁾ Judgment of 15 September 1998, *BP Chemicals Limited v Commission* (BP Chemicals), T-11/95, ECLI:EU:T:1998:199, points 170 and 170.

⁽⁷⁵⁾ Commission Decision of 19 December 2012 in Case SA.35378 Financing of Berlin Brandenburg Airport, Germany (OJ C 36, 8.2.2013, p. 10), recitals 14 to 33.

⁽⁷⁶⁾ Judgment of 19 March 2013, *Bouygues and Bouygues Télécom v Commission and Others*, Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraph 104; judgment of 13 September 2010, *Greece and Others v Commission*, Joined Cases T-415/05, T-416/05 and T-423/05, ECLI:EU:T:2010:386, paragraph 177; judgment of 15 September 1998, *BP Chemicals v Commission*, T-11/95, ECLI:EU:T:1998:199, paragraphs 170 and 171.

- (128) In their submission to the Commission before the Opening Decision, the Italian authorities claimed that the 2019 loan was an additional instalment (see recital 104) and therefore an extension of the 2017 loans. The Italian authorities reiterated that position in their submissions after the Opening Decision (see recital 106), adding that the aim of the 2019 loan was the same as the aim of the 2017 loans, i.e. to avoid interruption of the service provided by Alitalia and disruption in the Italian air transport. Thus, the Italian authorities argued that the 2019 loan should be examined in the ambit of the investigation in Case SA.48171, in which the Commission found that the 2017 loans were incompatible with the internal market.
- (129) Moreover, the Commission notes that paragraph 81 of the Commission Notice on the notion of State aid indicates also that '[...] On the other hand, when the later intervention was a result of unforeseen events at the time of the earlier intervention the two measures should normally be assessed separately' (emphasis added).
- (130) As the Commission stated in the Opening Decision, in Decree-law 148/2017, by which Italy granted an additional EUR 300 million loan (the second of the 2017 loans), it is explicitly stated this is an increase of the EUR 600 million (the first of the 2017 loans) State financing already granted in May 2017 up to EUR 900 million²⁴. By contrast, Decree-law 124/2019, Decree-law 137/2019 or Law 2/2020 make no reference to any such link to the 2017 loans.
- (131) As regards chronology, the Commission observes that, while the 2017 loans were granted six months apart, the 2019 loan was granted two years after the previous loan (⁷⁷). The 2019 loan is thus separable from the 2017 loans since it became necessary only a considerable time after the 2017 loans and relates to the financing of costs that could not have reasonably been foreseen when Alitalia was placed initially under extraordinary administration²⁵.
- (132) Moreover, despite Italy's claim that the 2019 loan was a third tranche of a single loan and, thus, part of the 2017 loans (⁷⁸), Italy provided no evidence in that regard (see recitals 106 to 110). The Commission finds that there is no evidence in the file that the 2019 loan was foreseeable in May or October 2017, when respectively the first of the 2017 loans (equal to EUR 600 million) and the second of the 2017 loans (equal to EUR 300 million) were granted, nor that such loan was intended to support Alitalia as part of a single plan of either rescue or restructuring the air carrier started in 2017. Rather, the facts indicate that after the granting of the 2017 loans, Italy planned to streamline and sell Alitalia's business and, only after that plan failed, did Italy decide to provide further liquidity to Alitalia (see recitals 76 to 79 and 101).
- (133) Accordingly, the Commission considers that the 2019 loan is separable from the State support granted with the 2017 loans and that thus the 2019 loan and the 2017 loans constitute a separate measure for the purposes of this decision.

5.1.4.2. Applicability of the market economy operator test

- (134) The Commission will examine applicability of the MEO test on two grounds, assessing (i) whether the State acted as a public authority rather than as economic operator when granting the two State loans; and (ii) whether Italy submitted sufficient *ex ante* evidence showing that it acted as an economic operator.

5.1.4.2.1. Italy acted as public authority and not as a market economy operator

- (135) The Commission considers that the MEO test is not applicable in the present case. On the basis of all available evidence, Italy has acted in its capacity as public authority to keep Alitalia operating beyond December 2019 and until the sale of its assets. Alitalia was in extraordinary administration since May 2017 and was kept operational only due to the state financing through the 2017 loans and the 2019 loan.

(⁷⁷) The 2017 loans were granted on 2 May 2017 and 16 October 2017 respectively, while the 2019 loan was granted on 26 October 2019.

(⁷⁸) Italy's submissions of 6 January 2020 and 27 March 2021.

- (136) As a preliminary remark, the Commission recalls that the Court has considered that the applicability of the MEO test ultimately depends on a State having conferred, in its capacity as shareholder and not in its capacity as a public authority, an economic advantage to an undertaking ⁽⁷⁹⁾. Interventions by the State which are intended to honour its obligations as a public authority cannot be compared to those of a private investor in a market economy ⁽⁸⁰⁾.
- (137) In order to determine whether the 2019 loan granted by the State represents the exercise of State authority or whether it is the consequence of obligations that the State assumed as a shareholder, the Commission must examine not only the form of that loan but also (i) its nature and subject matter; (ii) the context in which it was taken; (iii) the objective pursued; and (iv) the rules to which the 2019 loan is subject.
- (138) If the State's intervention, having regard to its nature and object and taking into account the objective pursued, is not an investment that may be made by a private investor, it would constitute intervention by the State as a public authority, thus precluding application of the MEO test ⁽⁸¹⁾.

5.1.4.2.1.1. The nature and subject matter of the measure

- (139) As described in Section 2.1, the measure in question consisted of a loan granted by Italy on 26 October 2019 (see recital 2).

5.1.4.2.1.2. The context of the measure

- (140) The overall context in which the 2019 loan was granted is described in Section 2.2. Specifically, from the outset, the State acted consistently and clearly in its capacity as public authority to save Alitalia from being liquidated, a fact also acknowledged in public statements by various government ministers (see Section 2.6 of this decision as well as Section 2.5 of Decision C(2021) 6659), and not as a shareholder investing in a company or as a creditor.
- (141) Alitalia has been continuously and heavily loss-making since being acquired by CAI in 2008. Alitalia's shareholders' attempts to put Alitalia back on track through the Turnaround Plan failed because of workers' rejection of that plan on 26 April 2017, which led to it being placed under extraordinary administration (see recital 29). Alitalia has continued to lose money while in extraordinary administration.
- (142) After the rejection of the Turnaround Plan but prior to being placed under extraordinary administration, there is no evidence that any investor was willing to step in and acquire Alitalia as a going concern, even for a nominal price. Nor is there any evidence that financial institutions were ready to provide significant loan facilities to allow sufficient liquidity for it to keep operating (see recitals 227 et seq. of Decision C(2021) 6659).
- (143) When the 2017 loans were granted, Alitalia SAI was an undertaking in difficulty within the meaning of the Rescue and Restructuring Guidelines and had little prospect of becoming profitable in the near to medium term (see recitals 41, 66 and 218 to 229 of Decision C(2021) 6659). This argument fully applies to Cityliner which was placed under extraordinary administration at the same time as Alitalia SAI (see recitals 1 and 29). There is no evidence in the case file that that situation would have changed.
- (144) Furthermore, in October 2019, when the 2019 loan was granted, Alitalia's found itself in a financial position was similar to the one in May and October 2017, when the 2017 loans were granted, i.e. Alitalia was again in need of a liquidity injection in order to keep in operation (see recitals 60 to 63).

⁽⁷⁹⁾ Judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79 to 82 and 87.

⁽⁸⁰⁾ Judgment of 15 December 2009, *EDF v Commission*, T-156/04, ECLI:EU:T:2009:505, paragraph 228.

⁽⁸¹⁾ See, to that effect, judgment in *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 30, 86 and 87.

5.1.4.2.1.3. The objective pursued

- (145) The express purpose of putting Alitalia under extraordinary administration was to ensure the continuity of transport services provided by Alitalia.
- (146) As an insolvent company, Alitalia was, in essence, frozen out of the credit markets and, due to its immediate and longer-term liquidity problems, was dependent on the Italian State, which provided the 2017 loans. As described in detail in Section 2 of Decision C(2021) 6659, the first loan was granted with the principal aim of avoiding interruption of the service provided by Alitalia SAI and its subsidiaries, including Citilyner, allowing it to maintain domestic and international flight connections, thus preventing both social hardships and serious inconvenience for users. Italy also claimed that such an interruption would entail infringing, *inter alia*, the right to territorial continuity within Italy guaranteed by the Italian Constitution.
- (147) Moreover, at the end of 2019 Alitalia continued to be in a difficult financial situation (see Section 2.4.2).
- (148) Thus the additional 2019 loan was granted for the same reason as the 2017 loans, *i.e.* to ensure uninterrupted service, as well as to facilitate a restructuring and divestiture of Alitalia's assets (see recitals 2 and 7 and Section 2.1). The objective pursued by the 2019 loan was accordingly in line with the objective pursued by the placing of Alitalia under extraordinary administration.
- (149) That conclusion is further supported by the public declarations of government ministers before the initial loan was granted (see Section 2.6), namely that the government's main concern was to prevent the sudden interruption of air transport services. Furthermore, the relevant legislation granting the 2019 loan stated that the extraordinary administration was to take into account the employment levels and the operational unity of the business activities of Alitalia.
- (150) Having examined the above elements (recitals 145 to 149), the Commission considers that the main purpose of the 2019 loan was to ensure that Alitalia kept operating for reasons of public policy rather than the financial interests of the State as a market economy operator. As such, any prospect that the State would make profit from the 2019 loan, even in the long term, if that could be demonstrated, was merely incidental to the decision to grant the 2019 loan.
- (151) Furthermore, the Court has held that ensuring the continuity of transport services provided by an undertaking is a consideration which a private investor would not take into account ⁽⁸²⁾.
- (152) In addition, given that there is no evidence in the case file that the 2019 loan was repaid, it can be inferred that the maturity date of the 2019 loan was postponed or the debt was, *de jure* or *de facto*, cancelled. Given Alitalia's persistent financial difficulties after October 2017 and absent any proof to the contrary, it appears that the State as a lender never received remuneration for either its liquidity cost or the credit risk related to Alitalia. Moreover, Italy did not submit any *ex ante* study showing that the State had a financial interest to grant the 2019 loan or to prolong the repayment. That behaviour, namely granting the 2019 loan without a specific *ex ante* study of profitability of the loan and absent any evidence that Italy tried to recover the loan, is not in line with that of a MEO but demonstrates the interest of a public authority to maintain the continuity of transport service provided by Alitalia, as plainly reiterated by the Italian authorities ⁽⁸³⁾.

5.1.4.2.1.4. The rules to which the measure is subject

- (153) The 2019 loan at issue is *sui generis* and *ad hoc*. Specific Decree-laws were adopted to provide for the grant of the loan (see recitals 2 and 3). It was financed from the State budget (see recital 22). Furthermore, specific Ministerial Decrees provided for the disbursement of those loan.

⁽⁸²⁾ Judgment of 19 December 2019, *Arriva Italia and others*, C-385/18, ECLI:EU:C:2019:1121, paragraph 73.

⁽⁸³⁾ See, *inter alia*, the Parliament's debate regarding the conversion of the Government's Decree n. 137/2019 into Law, <https://www.camera.it/leg18/126?tab=6&leg=18&idDocumento=2284&sede=&tipo=>.

- (154) The money for the loan accordingly came from the general State budget and not from a separate reserve, e.g. a State-owned investment fund operating on a commercial basis.
- (155) In conclusion, it must be noted that the measure presents, in view of its nature and subject matter, the context in which it was taken, its objective and the rules to which it is subject, the characteristics of an act taken by Italy in its capacity as a public authority. Consequently, the private investor test cannot be applied to the 2019 loan.

5.1.4.2.2. Lack of a MEO reasoning by Italy

- (156) The Court has held that ‘the applicability of the private investor test ultimately depends [...] on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it’ ⁽⁸⁴⁾.
- (157) Where a Member State relies on the MEO test during the administrative procedure, that Member State ‘[m]ust establish unequivocally and on the basis of objective, verifiable and contemporaneous evidence that the measure implemented falls to be ascribed to the State acting as shareholder and is based on the requisite prior economic evaluations’ ⁽⁸⁵⁾. That evidence must show clearly that the Member State concerned took the decision to make an investment before or at the same time as conferring the economic advantage based on a reasoned assessment demonstrating a market rate of return as a result of the measure actually implemented in the public undertaking.
- (158) Furthermore, only the benefits and obligations linked to the situation of the State as a shareholder, to the exclusion of those linked to its situation as a public authority, can be taken into account to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as similar as possible to that of the State ⁽⁸⁶⁾. As a consequence, the roles of the State as a shareholder of an undertaking and as a public authority must be distinguished.
- (159) In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have carried out, before making the investment, in order to determine its future profitability.
- (160) As recalled by the General Court ⁽⁸⁷⁾, ‘whilst it is for the Commission to apply the private investor test and to request the Member State concerned to provide it with all relevant information to that end, it is the responsibility of that Member State or [...] the public undertaking concerned to provide evidence showing that it conducted a prior economic evaluation of the profitability of the measure in question, comparable to that which a private investor would have had carried out in a similar situation’.
- (161) In order to show that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen ⁽⁸⁸⁾.
- (162) Italy has failed to meet the minimal evidentiary standard for demonstrating that the MEO test is applicable in the present case.

⁽⁸⁴⁾ Judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 81.

⁽⁸⁵⁾ Judgments of 16 January 2018, *EDF v Commission*, T-747/15, ECLI:EU:T:2018, paragraph 142 and of 19 December 2019, *Arriva Italia and others*, C-385/18, ECLI:EU:C:2019:1121, paragraph 48.

⁽⁸⁶⁾ Judgments of 19 December 2019, *Arriva Italia and others*, C-385/18, ECLI:EU:C:2019:1121, paragraph 47 and of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 79 and the case-law cited.

⁽⁸⁷⁾ Judgment of 25 June 2015, *SACE and Sace BT v Commission*, T-305/13, ECLI:EU:T:2015:435, paragraph 184.

⁽⁸⁸⁾ Judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 85.

- (163) As noted in recital 91, despite the Commission's requests for information and comments on the Opening Decision, Italy failed to submit any documentary evidence that it had carried out an assessment prior to granting the 2019 loan of the potential return on investment of that loan. Nor did it submit its assessment of the likelihood of the repayment of the principal together with the associated interest from Alitalia's own resources or from the sales proceeds of Alitalia itself, and of the risk of non-repayment.
- (164) Furthermore, the Italian authorities were not able to prove the existence of a document, drawn up before or contemporaneously to the decision to grant the 2019 loan, which would constitute a business plan, a profitability assessment consisting notably of an economic assessment covering likelihood of repayment and appropriateness of pricing of the two State loans. There is no indication that the Italian administration, government, or members of parliament examined and discussed a business plan or the profitability of the 2019 loan before adopting the administrative and legislative provisions granting the 2019 loan (Section 4.2).
- (165) To that effect, when the Commission asked specifically whether Italy had carried out any assessment of the profitability and risks related to the repayment of the 2019 loan before granting it, the Italian authorities replied that the 2019 loan had been granted in order to ensure the business continuity of the company, as well as taking into consideration the public service obligations, in order to avoid the interruption of both national and international flights (see recital 109). That answer not only confirms that Italy had not carried out an assessment of the profitability and risks related to the repayment of the 2019 loan, but it can also be seen as a direct admission that in providing the 2019 loan Italy was not acting as a private lender but rather was pursuing public policy goals.
- (166) Moreover, the lack of assessment of the profitability and risks associated with the 2019 loan is corroborated by the Italian authorities' statements concerning an *ex post* assessment of the profitability and risks of the 2017 loans and whether that assessment was used in making the decision to grant the 2019 loan. The explanation provided by the Italian authorities in that regard is that Alitalia is in extraordinary administration and that repayment of such loans are ruled by law (see recital 110). That explanation and the lack of provision of documents demonstrating that an assessment of profitability was made suggest that the Italian authorities did not consider likely that the loan would be repaid and that they did not deem it necessary to assess its profitability and risks.
- (167) It follows that Italy has failed to meet the standard of proof requiring the Member State to show, unequivocally and on the basis of objective and verifiable evidence established before or at the same time as the decision to confer the economic advantage, that the measure falls to be ascribed to the State acting as a market operator and, thus, to discharge the evidentiary burden on it for the MEO test to be applicable.

5.1.4.3. Application of the market economy operator test

- (168) Without prejudice to the assessment in Section 5.1.4.2, in which the Commission concludes that the MEO test is not applicable, the Commission considers, by way of a subsidiary line of reasoning, that even if the MEO test were applicable, *quod non*, the 2019 loan conferred an economic advantage to Alitalia. Therefore, in this section, the Commission will apply the MEO test to the 2019 loan.
- (169) In applying the MEO test, the Commission acknowledges that the following facts would be known to a MEO on 26 October 2019, i.e. at the time of granting of the 2019 loan:
- (a) the extraordinary commissioners had already decided to sell Alitalia (see recitals 30 to 32) instead of restructuring it into a viable in the long term undertaking ⁽⁸⁹⁾;
 - (b) the extraordinary commissioners had received offers for the parts of Alitalia on sale (Section 4.2.2.3), which did not result in the actual sale of the company;

⁽⁸⁹⁾ The extraordinary administration took certain measures to improve the efficiency of Alitalia, however those did not amount to a restructuring plan.

- (c) the deadline for the conclusion of the sale procedure, which was initially 5 November 2017, the same as the maturity date of the initial loan, was extended and subsequently accrual of interest was stopped (recital 31);
- (d) Alitalia did not repay the 2017 loans, nor the accrued interest (see recitals 26 and 30);
- (e) Alitalia had only EUR 310 million of cash on 30 September 2019 (see Table 2).

- (170) In line with the Court's case-law ⁽⁹⁰⁾, the assessment of the Commission disregards the benefits and obligations originating from the 2017 loans. Since the 2017 loans constitute aid, the corresponding benefits and obligations refer to the State as a public authority rather than as a MEO.
- (171) Therefore, the Commission takes into consideration what the financial situation of Alitalia would have been in the lack of the 2017 loans of a total of EUR 900 million. In that scenario, Alitalia would have had a negative cash position of EUR 590 million on 30 September 2019 ⁽⁹¹⁾. Presumably, Alitalia's cash position would have been even worse on 26 October 2019, as the company was loss-making ⁽⁹²⁾. Since a company can operate only if cash inflows are greater than the outflows so that it has a positive and sufficient cash balance, the Commission considers that the bankruptcy of Alitalia is a reasonable scenario without the initial loan.
- (172) Since Alitalia would have been bankrupt without the 2017 loans, it would no longer have been a going concern at the time of granting the 2019 loan and, therefore, no market economy lender would have contemplated granting the 2019 loan at that time. Therefore, the Commission concludes that the MEO test cannot be applied to the 2019 loan.

Conclusion on the existence of an advantage

- (173) In conclusion, the Commission finds that the MEO test is not applicable to the 2019 loan granted to Alitalia. For completeness, the Commission notes that even if applied, such test would not be met at any rate, given that without the 2017 loans Alitalia would have been bankrupt in any event, as explained above (recitals 171 and 172). Consequently, the Commission concludes that the Italian State granted an advantage to Alitalia equal to the nominal amount of the 2019 loan, i.e. EUR 400 million.

Distortion of competition and impact on trade between Member States

- (174) According to Article 107(1) TFEU, to constitute State aid a measure must distort or threaten to distort competition and have an effect on intra-Union trade ⁽⁹³⁾.
- (175) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. It is therefore sufficient that the aid allows the recipient to maintain a stronger competitive position than it would have had if the aid had not been provided.
- (176) According to the extraordinary administration Commissioners, at the time of the measure Alitalia was the main Italian airline. In particular, in 2017 Alitalia had a market share of 12,6 % of the total passenger traffic from and to Italy and during the first 10 months of 2017 carried about 18,5 million passengers (16,3 million by Alitalia SAI and 2,2 million by Cityliner), of which 55 % on domestic routes, 32 % on international routes and 13 % on intercontinental routes. The extraordinary administration commissioner's trimestral report for the period January–March 2021, published on 22 March 2022 ⁽⁹⁴⁾, described the Italian air passenger transport market as highly competitive and characterised by, inter alia, a high penetration of low-cost carriers on the domestic market (the

⁽⁹⁰⁾ See, for instance, judgment of 24 October 2013, *Land Burgenland and others v Commission*, C-214/12 P, C-15/12 P and C-223/12 P, ECLI:EU:C:2013:682.

⁽⁹¹⁾ The negative EUR 590 million cash position is the result of subtracting the EUR 900 million of the 2017 loans from the total available cash on 30 September 2019, i.e. EUR 310 million.

⁽⁹²⁾ Alitalia made a net negative EUR 49 million EBITA for the period 1Q 2018 till 3Q 2019.

⁽⁹³⁾ Judgment of 30 April 1998, *Het Vlaamse Gewest v Commission*, T-214/95, ECLI:EU:T:1998:77.

⁽⁹⁴⁾ Relazione Trimestrale ex art. 61, 2° comma, D. Lgs. N. 270/1999 della procedura di amministrazione straordinaria relativa alle società Alitalia SAI S.p.A. in Amministrazione Straordinaria Alitalia CityLiner S.p.A. in Amministrazione Straordinaria, published on 22.3.2022, p. 16, https://cdn.fallcoweb.it/sito_procedura/pdf/alitalia/rel_31032021.pdf.

highest in Europe) and on the intra-European market. In 2019, Alitalia's market shares decreased to 37 % of total passengers on domestic flights, where low-cost carriers held an aggregated market share of 57 % (Ryanair 35 %, Easyjet 11 % and Volotea 8 %), and accounted for approximately 7 % of the total passenger traffic in medium-long haul flights ⁽⁹⁵⁾. In 2020, Alitalia's market share on domestic flights again decreased (around 35 % of the total passengers, equal to Ryanair's market share), while, in terms of traffic from and to Italy, Alitalia represented around 7,7 % of the total passengers ⁽⁹⁶⁾ and Ryanair was the first carrier, with a 28 % market share; other eight carriers flanked Ryanair and Alitalia, with market shares between 1 % and 2 %, for a total of 10,2 %; finally, another 228 operators, with a share of less than 1 % each, represented the remaining 21,9 % of the traffic from and to Italy ⁽⁹⁷⁾.

- (177) The Commission considers that the 2019 loan affects trade between Member States, as it concerns Alitalia, a company whose transport activity, by its very nature, directly concerns trade and covers several Member States as shown in recital 176. It also distorts or threatens to distort competition within the internal market, as it only concerns one undertaking, which is in competition with other airlines on its European network.

Conclusion on the existence of aid

- (178) Therefore, the Commission concludes that the 2019 loan involves aid under Article 107(1) TFEU, and the Commission will therefore assess its lawfulness and compatibility with the internal market. The direct beneficiaries of the aid is Alitalia SAI and Cityliner.

5.2. Lawfulness of the aid

- (179) The Commission notes that the 2019 loan was granted to Alitalia (Alitalia SAI and Cityliner) before notification to the Commission. Thus, the 2019 loan was granted in breach of Article 108(3) TFEU and the standstill obligations laid down therein.
- (180) Therefore, since the 2019 loan has been found to constitute aid within the meaning of Article 107(1) TFEU, the Commission concludes that it constitutes unlawful State aid.

6. COMPATIBILITY OF THE AID

6.1. Existence of aid within the meaning of Article 107(1) TFEU

- (181) Insofar as the 2019 loan constitutes State aid within the meaning of Article 107(1) TFEU, the Commission must assess whether that aid can be declared compatible with the internal market.
- (182) State aid is deemed to be compatible with the internal market if it falls within any of the grounds listed in Article 107(2) TFEU or Article 107(3) TFEU.
- (183) According to the Court's settled case-law, a Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission.
- (184) In pursuance of that duty, it must in particular provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled ⁽⁹⁸⁾.
- (185) To the extent that Italy claims that the 2019 loan was an instalment of the 2017 loans (recital 106), the Commission's assessment in Section 6 of Decision C(2021) 6659 applies *mutatis mutandis* to the 2019 loan, as illustrated in Section 6.2 below.

⁽⁹⁵⁾ ENAC and Eurocontrol data, <https://www.enac.gov.it/pubblicazioni/dati-di-traffico-2019>.

⁽⁹⁶⁾ ENAC data, <https://www.enac.gov.it/news/dati-di-traffico-2020>. The EA Commissioners reported that Alitalia nevertheless increased its passenger market share in the flights to/from Italy from 15,9 % of Q1 2020 to 28,5 % of Q1 2021, due also to the increase in the number of seats offered (+ 3,1 %), https://cdn.fallcoweb.it/sito_procedura/pdf/alitalia/rel_31032021.pdf.

⁽⁹⁷⁾ ENAC data, https://temi.camera.it/leg18/post/OCD15_14420/enac-i-dati-traffico-aereo-2020.html.

⁽⁹⁸⁾ Judgment of 28 April 1993, *Italy v Commission*, C-364/90, ECLI:EU:C:1993:157, paragraph 20.

6.2. Assessment under Article 107(3), point (c), TFEU and in particular under the Rescue and Restructuring Guidelines

- (186) Italy considers the 2019 loan as a continuation of the 2017 loans (recitals 104 to 112) and therefore the Commission considers it necessary to assess whether it would be a form of rescue aid in the meaning of the Rescue and Restructuring Guidelines.
- (187) On the basis of Article 107(3), point (c), TFEU, the Commission may consider compatible with the internal market State aid to facilitate the development of certain economic activities or of certain economic area within the European Union, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (188) Similarly to Decision C(2021) 6659 ⁽⁹⁹⁾, the Commission finds that Alitalia qualifies as undertaking in difficulty pursuant to point 20(c) of the Rescue and Restructuring Guidelines, as it was declared insolvent at the material time (see recitals 64 and 143). Consequently, the only ground for assessing the compatibility of the aid is rescue and restructuring aid based on the Rescue and Restructuring Guidelines. Two types of aid defined by those Guidelines are relevant here, namely rescue aid and restructuring aid.
- (189) In order to be compatible with the internal market under those Guidelines, an aid should comply with the rules and conditions set forth in those Guidelines for the purposes of the compatibility assessment of rescue and restructuring aid pursuant to Article 107(3), point (c), TFEU.
- (190) To that effect, Italy has not provided any elements demonstrating that the 2019 loan satisfies any of the conditions for either a rescue or a restructuring aid to be compatible with the internal market pursuant to the criteria set out in the Rescue and Restructuring Guidelines (recitals 107 to 114 of the Opening Decision). Accordingly, as stated in point 39 of the Rescue and Restructuring Guidelines, the failure to meet any of the criteria signifies that the aid cannot be deemed compatible.
- (191) Furthermore, given that Alitalia benefitted from previous aid through the 2017 loans, even if incompatible, as ascertained by the Commission in Section 6 of Decision C(2021) 6659, pursuant to points 72 and 73 of the Rescue and Restructuring Guidelines, according to which rescue aid should be granted only once (one time, last time condition), any subsequent loan would be incompatible unless it is provided after 10 years have elapsed since the rescue aid was granted (recitals 117 and 118 of the Opening Decision).
- (192) The 2019 loan is, therefore, incompatible, as Italy not only had already granted two loans to Alitalia in 2017, but also never submitted a restructuring plan for the 2019 loan to Alitalia. As illustrated in recitals 376 and 377 of Decision C(2021) 6659 with regard to the 2017 loans, where also no restructuring plan was submitted by Italy, the EA programme cannot be considered as a feasible, coherent and far-reaching restructuring plan to restore Alitalia's long-term viability within the meaning of Section 3.1.2 of the Rescue and Restructuring Guidelines. In fact, such programme aimed at keeping the company afloat while the sale of its assets was ongoing (recitals 76 to 83), whilst no financial or economic measures were envisaged by the extraordinary commissioners in 2019 to reorganise or rationalise Alitalia's business, nor an industrial project developed to make it competitive and viable again (recitals 60 to 62 and 67 to 68).
- (193) Therefore, and also given the fact that Italy never presented any other argument or elements as a possible legal ground of compatibility for the 2019 loan granted to Alitalia in 2019, the Commission concludes that the said State loan is incompatible with the internal market.

7. CONCLUSION

- (194) The Commission finds that Italy has unlawfully implemented an aid measure in the form of a EUR 400 million loan (the 2019 loan), granted in favour of Alitalia (Alitalia SAI and Cityliner), in breach of Article 108(3) TFEU.

⁽⁹⁹⁾ See recital 363 of Decision C(2021) 6659.

- (195) Since no grounds can be identified for finding the measure to be compatible with the internal market, it must be held to be incompatible with the internal market.

8. RECOVERY

- (196) According to the TFEU and the established case-law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that that aid is incompatible with the internal market ⁽¹⁰⁰⁾. The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽¹⁰¹⁾.
- (197) In that context, the Union Courts have established that the said objective is attained once the recipient has repaid the amounts granted by way of unlawful and incompatible aid, thus forfeiting the advantage which it had enjoyed over its competitors on the internal market, and the situation prior to the payment of the aid is restored ⁽¹⁰²⁾.
- (198) In line with the case-law, Article 16(1) of Council Regulation (EU) No 2015/1589 ⁽¹⁰³⁾ states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.
- (199) Thus, since the 2019 loan in question was implemented in breach of Article 108(3) TFEU, and is to be considered as unlawful and incompatible aid, it should be recovered in order to re-establish the situation that existed in the internal market prior to its granting. Recovery should cover the time period from the date when the aid was put at the disposal of the beneficiaries until effective recovery. The amount to be recovered should bear interest until effective recovery.
- (200) The amount of the 2019 loan that qualifies as an advantage granted can be quantified at this stage at EUR 400 000 000. Italy will have to calculate the recovery interest accruing from the dates at which the aid was disbursed to Alitalia and until full repayment of the aid principal. The interest should be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽¹⁰⁴⁾.
- (201) The obligation to repay the aid and the applicable recovery interest, calculated according to the methodology described in recital 200, arises irrespective of any additional interest that Italy may have to claim from Alitalia based on national law or on contracts between Alitalia and Italy. However, Italy may not raise any clause or provision contained in the national law or in contracts with the beneficiaries to delay the recovery beyond four months from the notification of this Decision or to reduce the amount to be recovered, which has to include the aid principal of EUR 400 000 000 plus the applicable recovery interest.
- (202) Finally, the Commission notes that Alitalia (Alitalia SAI and Cityliner, the direct beneficiaries of the aid principal as established) may form an economic unit with the other companies in the Alitalia Group due to control exercised by Alitalia SAI over the subsidiaries, including Cityliner (recitals 51 to 52, as well as Chart 1), for the purpose of the application of State aid rules. The Commission considers that Italy should, in the first place, recover the unlawful and incompatible aid granted to the Alitalia Group from Alitalia. Should it not be possible to recover the full amount of the aid from Alitalia, Italy should recover any outstanding amount from any other separate legal entity that forms part of the Alitalia Group and constitutes a single economic unit with Alitalia, so as to ensure that the advantage granted is eliminated and the situation previously existing on the market is restored through the recovery,

⁽¹⁰⁰⁾ Judgment of 12 July 1973, *Commission v Germany*, 70/72, ECLI:EU:C:1973:87, paragraph 13.

⁽¹⁰¹⁾ Judgment of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraph 66.

⁽¹⁰²⁾ Judgment of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

⁽¹⁰³⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽¹⁰⁴⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

HAS ADOPTED THIS DECISION:

Article 1

1. The measure consisting of a EUR 400 million loan granted by Italy on 26 October 2019 in favour of Alitalia – Società Aerea Italiana S.p.A. and Alitalia Cityliner S.p.A., both in extraordinary administration, constitutes State aid within the meaning of Article 107(1) TFEU.
2. The aid referred to in paragraph 1 has been unlawfully put into effect by Italy in breach of Article 108(3) TFEU.
3. The aid referred to in paragraph 1 is incompatible with the internal market.

Article 2

1. Italy shall recover the aid referred to in Article 1 from the beneficiaries.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest referred to in paragraph 2 shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

Article 3

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

Article 4

1. Within two months following notification of this Decision, Italy shall submit the following information:
 - (a) the total amount (principal and recovery interest) to be recovered from the beneficiaries;
 - (b) a detailed description of the measures already taken or planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken or planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 5

This Decision is addressed to the Italian Republic.

Done at Brussels, 27 March 2023.

For the Commission
Margrethe VESTAGER
Member of the Commission