Corte costituzionale

JUDGMENT NO. 270 OF 2010

Francesco AMIRANTE, President

Giuseppe TESAURO, Author of the Judgment

JUDGMENT NO. 270 YEAR 2010

In this case the Court considered considered a challenge to a Decree-Law referred by the Regional Administrative Court for Lazio by which an exception was created to the ordinary competition law arrangements and the legislation against the abuse of a dominant position. Upholding the legislation, the Court held that the contested provision amounted to legislation with the status of a measure, confirming that such non-general and non-abstract legislation was legitimate, but is subject to strict scrutiny as to its constitutionality. The Court held (also following a comparative analysis) that the constitutional right of freedom of economic initiative could be limited also to protect interests not directly related to the competitive structure of the market. In striking the balance, the Court considered the merits of the factual questions underlying Parliament's choice, as well as the proportionality of the measure.

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 4(4d) of Decree-Law no. 347 of 23 December 2003 (Urgent measures concerning the industrial restructuring of large companies in a state of insolvency), converted, with amendments, into Law no. 39 of 18 February 2004, introduced by Article 1(10) of Decree-Law no. 134 of 28 August 2008 (Urgent measures concerning the restructuring of large companies in crisis), converted, with amendments, into Law no. 166 of 27 October 2008, initiated by the Regional Administrative Court for Lazio by three referral orders of 27 May 2009,

respectively registered as nos. 223, 224 and 225 in the Register of Orders 2009 and published in the *Official Journal of the Italian Republic* no 37, first special series 2009.

Considering the entries of appearance by Eurofly S.p.A. and another, the Extraordinary Administrator of Alitalia-Linee Aeree Italiane S.p.A., under extraordinary administration, and Alitalia Compagnia Aerea Italiana S.p.A. as well as the interventions by the President of the Council of Ministers;

having heard the Judge Rapporteur Giuseppe Tesauro in the public hearing of 22 June 2010;

having heard Counsel Aldo Travi, Romolo Persiani and Cristoforo Osti for Eurofly S.p.A. and another, Massimo Luciani, Gian Michele Roberti and Filippo Lattanzi for Alitalia Compagnia Aerea Italiana S.p.A., Mario Sanino for the Extraordinary Administrator of Alitalia-Linee Aeree Italiane S.p.A., under extraordinary administration, and the *Avvocato dello Stato* Paolo Gentili for the President of the Council of Ministers.

The facts of the case

1.– By three referral orders of 27 May 2009 issued during the course of three proceedings, the Regional Administrative Court for Lazio raised, with reference to Articles 3 and 41 of the Constitution, a question concerning the constitutionality of Article 1(10) of Decree-Law no. 134 of 28 August 2008 (Urgent measures concerning the restructuring of large companies in crisis) converted, with amendments, into Law no. 166 of 27 October 2008, insofar as it introduced paragraph 4d into Article 4 of Decree-Law no. 347 of 23 December 2003 (Urgent measures concerning the industrial restructuring of large companies in a state of insolvency) converted, with amendments, into Law no. 39 of 18 February 2004 (or more correctly: raised a question concerning the constitutionality of Article 4(4d) of Decree-Law no. 347 of 2003, converted, with amendments, into Law no. 39 of 2004, introduced by Article 1(10) of Decree-Law no. 134 of 2008 converted, with amendments, into Law no. 166 of 2008).

2.– The first referral order (no. 223 of 2009) states that Eurofly S.p.A., represented by its legal representative, averred that it operates a scheduled air transport services businesses in competition, *inter alia*, with Alitalia-Linee Aeree Italiane S.p.A.

(hereafter, Alitalia) and AirOne S.p.A., seeking the annulment of the measure of the Italian Antitrust Authority (*Autorità garante della concorrenza and del mercato*, hereafter the "Authority"), adopted in its session of 3 December 2008, concluding procedure no. C/9812, stipulating six grounds for challenge.

This order – which was issued in relation to the communication by the company Alitalia-Compagnia Aerea Italiana S.p.A. (below: CAI) made pursuant to Article 4(4d) concerning the prior notification of the merger operation relating to the acquisition of certain business divisions of the company Alitalia-Linee Aeree Italiane S.p.A., under extraordinary administration, Alitalia Servizi S.p.A., under extraordinary administration, Alitalia Airport S.p.A., under extraordinary administration, Alitalia Express S.p.A., in extraordinary administration, Volare S.p.A., under extraordinary administration (AZ Group), and the companies AirOne S.p.A., AirOne City Liner S.p.A., European Avia Service S.p.A., Air One Technic S.p.A. and Challey Ltd (AP Group) – specified the course of action to be followed in order to prevent the risk of unjustifiably onerous prices or other contractual conditions being imposed on consumers as a result of the merger, specifying that prior to 3 December 2011 a time limit was to be set prior to which any monopoly positions brought about as a result of the operation would be required to cease, subject to the initiation of an appropriate investigation procedure.

2.1.– The Regional Administrative Court states that in its first ground for challenge, Eurofly S.p.A. averred that the contested measure was unlawful on the grounds that it applied Article 4(4d), which was claimed to violate Articles 3 and 41 of the Constitution.

In its second ground of challenge, the applicant averred that the contested measure violated Decree-Law no. 347 of 2003, converted into Law no. 39 of 2004, and Decree-Law no. 134 of 2008, converted into Law no. 166 of 2008, since the exemption from the requirement of authorisation for the merger operation relates only to "companies providing essential public services" and, pursuant to Article 1 of Law no. 146 of 12 June 1990 (Provisions governing the right to strike in essential public services and the safeguarding of the individual rights guaranteed under the Constitution. Establishment of the guarantee Commission for the implementation of the Law), these would have only included the air services providing connections with the islands and, at the time of

the operation, CAI did not hold a licence to operate air transport activity, and therefore Article 4(4d) was not applicable.

In the third and fourth grounds of challenge, Eurofly S.p.A. respectively averred that the provisions underling the contested measure violated Article 86 of the Treaty of 15 March 1957 (Treaty establishing the European Community), as in force between 1 February 2003 and 30 November 2009 (hereafter, the EC Treaty), as well as Articles 3(g), 10 and 82 of the Treaty, and should be set aside, arguing that a preliminary reference should be made to the Court of Justice of the European Communities in order to ascertain the precise interpretation of these provisions.

The fifth ground of challenge averred that the contested measure was unlawful since the assessment of the merger operation should have been for the European Commission. In the alternative, the applicant requested that a preliminary reference be made to the Court of Justice of the European Union in order to ascertain whether "a situation involving *de facto* joint control can subsist if the existence of a strong communion of interests is proven; in the event that joint control is acquired through a "shell company", the companies involved must be deemed to be the parent companies and not the special purpose vehicle; the acquisition of control by CAI and the entry of the foreign shareholder should be deemed to be the only merger operation".

In the sixth ground of challenge, Eurofly S.p.A. requested the annulment of the measure, averring that it was unlawful with respect to the "obligations imposed" in that they were incompatible with the goal of averting the risk of contractual conditions that were unjustifiably onerous for consumers.

2.2.– The referral order states that CAI filed a conditional cross-application based on three grounds, requesting the annulment of the measure contested by Eurofly S.p.A. in the event that the main claim were accepted, even partially.

2.3.– In view of the above, the Regional Administrative Court sets out the reasons for dismissing the objection filed by the *Avvocatura dello Stato* that the claim was inadmissible on the grounds of lack of standing to sue, observing that the applicant, as a competitor company of those involved in the merger, occupies a "different" position compared "to the position of all other members of society" that is also "qualified" because it does not object to the requirements laid down in the contested measure to

protect consumers, but questions the lawfulness of the merger operation on which the measure is premised, insofar as permitted by the contested provision.

2.4.– According to the referral order, the contested provision stipulated that merger operations involving companies providing essential public services concluded prior to 30 June 2009 related to, parallel with or otherwise provided for under the programme duly authorised pursuant to Article 2(2) of Decree-Law no. 347 of 2003 – namely in the under the authorisation measure pursuant to Article 5(1) of Decree-Law no. 347 – meet compelling requirements of general interest and are not subject to the requirement for authorisation pursuant to Law no. 287 of 10 October 1990 (Provisions to protect competition and the market), without prejudice to the provisions of Articles 2 and 3 of the same Law. Moreover, the provision further stipulates that, without prejudice to the provisions of Community law, the parties must notify the Authority in advance of the mergers that fall within its remit, along with a proposal specifying action to be followed in order to prevent the risk of unjustifiably onerous prices or other contractual conditions being imposed on consumers.

The Authority is then to adopt a resolution within thirty days of the communication stipulating the above measures, along with the amendments and supplements considered necessary and setting a time limit, which may not be shorter than three years, before which the monopoly conditions created, if any, must end; if the resolution is not complied with, the penalties provided for under Article 19 of Law no. 287 of 1990 are applicable.

By measure of 3 December 2008, the Authority: gave mandatory effect to the course of action whereby CAI undertook to guarantee full and broad coverage for its own customer loyalty programme for all routes, except in relation to specific promotional initiatives relating to the one-off marketing of special discounted rates on particular routes; supplemented that measures with further clarifications; and specified that CAI must apply the above measures for three years from the time the company commenced operations, setting at 3 December 2011 the date before which the next time limit is to be set, prior to which any monopoly positions brought about as a result of the operation would be required to cease, subject to the initiation of an appropriate investigation procedure.

2.5.– Having summarised the content of the contested measure, the referring court sets out the arguments in support of the rejection of the objections made by Eurofly S.p.A. in the second to sixth grounds.

First, it considers in further detail the grounds for the inadmissibility of the objections relating to the allegedly onerous conditions for consumers and the groundlessness of the argument seeking to challenge the classification of the air transport services as an essential public service. Secondly, it examines in detail the arguments in support of the groundlessness of the objection whereby the applicant submitted that the European Commission should have ruled on the operation. Thirdly, it submits arguments in order to demonstrate the lack of the alleged contrast between the national provisions applicable to this case and the Community provisions relied on by the applicant.

2.6.– Having stressed that "the grounds for challenge by which the applicant averred irregularities inherent in the decision are in part groundless and in part inadmissible", the Regional Administrative Tribunal raises a question concerning the constitutionality of Article 4(4d).

In its opinion, that provision amounts to a "provision with the status of a measure" because it relates to merger operations concluded before 30 June 2009 between companies providing essential public services related to, in parallel with or otherwise provided for under the duly authorised programme relating to the extraordinary administration procedure for large companies in a state of insolvency. Therefore, it is limited in scope and was issued with reference "to the Alitalia affair, so much so that the decree in which the provision is contained is commonly known as the 'Alitalia Decree'". Besides, the referring court observes, even the respondent administration argued that, "the CAI-Alitalia-AirOne operation … certainly saved an integrated system of public transport by air on national level from certain and imminent collapse" and the other interested party specified that "the affairs underlying the adoption of the legislative measure are well known to all [...]. The risks of the disappearance of the national carrier and the unemployment of thousands of workers led the Government to intervene with drastic measures permitting the operational continuity of the companies charged with providing essential public services that had fallen into crisis".

Therefore, the contested provision amounted to a “provision with the status of a measure” which, according to the lower court, constitutional case law had ruled admissible, provided that it respect the role of the courts and the principle of reasonableness and that it be subject to strict scrutiny by the Constitutional Court in relation to the said issues.

The requirement of reasonableness entails that provisions that result in different treatment must be assessed after a balancing of the values in play. In the opinion of the referring court, the contested provision stipulates that the merger operations under examination are necessary to protect compelling requirements of general interest and, precisely for this reason, are not subject to the provisions laid down by Articles 6 and 16 of Law no. 287 of 1990. Article 16 of that law provides that: the merger operations referred to under Article 5 must be communicated in advance to the Authority if the total turnover achieved on national level by the group of companies involved exceeds particular thresholds (paragraph 1); if the Authority considers that the merger operation may be prohibited pursuant to Article 6, it is to initiate an investigation and, should it consider this not to be necessary, must communicate its conclusions to the companies concerned and the Ministry of Industry, Commerce and SME (paragraph 4).

Article 6(1) of Law no. 287 of 1990 provides that the Authority shall assess whether the said merger operations entail the establishment or reinforcement of a dominant position on the national market liable to eliminate or reduce competition in a significant and lasting manner (paragraph 1) and, upon conclusion of the investigation provided for under Article 16(4), if it considers that the operation has those effects, it prohibits the merger, or authorises it and specifies the measures necessary in order to prevent it (paragraph 2).

The contested provision is claimed to have deprived the Authority of the power to carry out a control according to the procedure provided for under Law no. 287 of 1990, and only permitted it to specify the course of action to be followed, precluding the power to prohibit the operation and require additional measures.

According to the referring court, the impact of the merger operation on competition is clear from the contested measure itself, which first indicates that “after the operation, CAI will be the only carrier offering scheduled passenger air transport services on

numerous routes, including some of the most important in terms of volume, whilst on other routes the presence of competitor operators will be significantly reduced, with few exceptions" (paragraph 13). Secondly, it points out that "considering the competition that will be created following the operation … a carrier will be created that is able to manage a network of widespread connections throughout the country, occupying positions of absolute significance on individual connections – if not as the only provider – in terms of the frequencies currently available" (paragraph 31).

Moreover, since the contested provision specifies that the Authority shall define the time limit, which may not be shorter than three years, before which the any monopoly positions created must cease, these positions are destined to last for at least three years. Therefore, that provision is claimed to have discriminated against air carriers in providing for more favourable treatment for those involved in the merger, which increased their own position in competitive terms, to the detriment of others already operating in the sector, or which could have prospects of being able to operate.

In the opinion of the lower court, this discrimination is not reasonable, with the consequence that it violates Article 3 of the Constitution and the principle of freedom of competition, which constitutes one of the expressions of freedom of private economic initiative, since the contested provision did not even take account of the interests that it purportedly sought to guarantee which, within a balancing of all of the interests in play, could justify the exception from the principle of equality and the sacrifice of freedom of competition.

In fact, Article 4(4d) stipulates that the merger operations under examination "meet compelling requirements of general interest", without offering "a precise explanation" in this regard and without taking account either of the reasons why they should predominate over other interests of constitutional standing, or of whether it is impossible to achieve them in other ways that comply with the principles of equality and the protection of competition. To this end, the consideration contained in the preamble to Decree-Law no. 134 of 2008 relating to the "importance that the services provided by companies operating in the sector of essential public services not suffer interruptions" is claimed to be insufficient. In fact, even taking account of the importance of the continuity of these services, it would not be "easy to understand either

from the text of the legislation or from elsewhere why that result must be pursued through a provision that discriminates against other operators from the air transport industry that provide the same essential public services and which infringes the principle of the protection of freedom of competition".

Therefore, the contested provision is claimed to violate Article 41 of the Constitution, which guarantees freedom of private economic initiative, one of the fundamental manifestations of which consists in the protection of competition, whilst Article 1 of Law no. 287 of 1990 provides that the provisions contained in that Law have been enacted in order to further that constitutional principle, in order to protect the right of economic initiative.

According to the Regional Administrative Court, the question of constitutionality is relevant since the objection of inadmissibility raised by the *Avvocatura dello Stato* was rejected, the grounds of challenge concerning the irregularities in the contested measure were ruled in part inadmissible and in part groundless, and the conditional interlocutory claim was ruled inadmissible. Therefore, were the question to be accepted this would "inevitably impinge upon the legitimacy of the contested measure […] which, in stipulating the course of action to be followed by CAI, applied the [contested] provision, ... on the presumption that the merger operation had been completed".

Finally, the referring court sets out the grounds in support of its view that the conditional interlocutory claim filed by CAI is inadmissible.

3.– The second referral order (no. 224 of 2009) states that Meridiana S.p.A., represented by its legal representative, averred in the main proceedings that it carries on the business of scheduled air transport in competition, *inter alia*, with Alitalia and AirOne S.p.A., requesting with eight grounds for challenge the annulment of the measure of the Authority referred to above.

3.1.– The Regional Administrative Court states that, in its first ground for challenge, the applicant averred that the measure was unlawful on the grounds that it had been adopted in breach of Articles 7 *et seq* of Law no. 241 of 7 August 1990 (New rules governing administrative procedures and the right of access to administrative documents) and Articles 7 and 13 of Presidential Decree no. 217 of 30 April 1998 (Regulations laying down rules on investigation procedures under the jurisdiction of the

Italian Competition Authority [*Autorità garante della concorrenza e del mercato*]). In its second ground for challenge, Meridiana S.p.A. objected to the violation and incorrect application of Article 5 of the regulation on the organisation and operation of the Authority and the general principles applicable to the activities of the collegial administrative bodies, as well as on the grounds that it was *ultra vires*.

Finally, the referral order summarises the contents of the third to the eighth grounds for challenge, which substantially coincide with those filed by Eurofly S.p.A., and states that CAI filed a conditional interlocutory claim with a content identical to that in the proceedings initiated by referral order no. 223 of 2009.

3.2.– Given the above, the Regional Administrative Court sets out the arguments supporting the rejection of the objection filed by the *Avvocatura dello Stato* that the claim was inadmissible on the grounds of lack of standing to sue (identical to those made in ruling groundless the identical objection raised in the proceedings initiated by Eurofly S.p.A.), [and] summarises the legislation contained in the contested provision and the content of the contested measure.

3.3.– Thereafter, the lower court examines the first two grounds for challenge, ruling them groundless, as well as the fourth to eighth grounds, which were rejected on identical grounds to those contained in order no. 223 of 2009.

Finally, the referring court challenges Article 4(4d) with reference to the constitutional principles and issues indicated in referral order no. 223 of 2009, using arguments essentially identical to those used in the latter referral order, including in relation to the relevance of the question and the inadmissibility of the conditional interlocutory claim.

4.– The third referral order (no. 225 of 2009) states that the consumer rights association Federconsumatori-Federazione Nazionale di Consumatori e Utenti (below: Federconsumatori), represented by its legal representative, challenged the aforementioned measure of the Authority, submitting two grounds for challenge.

In its first ground of challenge, the applicant averred that the contested measure violated Article 3 of Law no. 241 of 1990, and Articles 2, 3, 41 and 117 of the Constitution and Article 81 of the EC Treaty, arguing that Article 1(10) of Decree-Law no. 134 of 2008, according to the text upon conversion into Law no. 166 of 2008,

moreover contrasted with provisions of constitutional and Community law. In the second ground of challenge, it averred that Law no. 166 of 2008 was unconstitutional with reference to Articles 2, 3, 41 and 117 of the Constitution, which were infringed by the "freezing" of the Authority's powers.

According to the Regional Administrative Court, the objection raised by the *Avvocatura dello Stato* that the application was inadmissible due to lack of standing to sue is groundless, since the applicant, as a consumer rights association, is the holder of a differentiated and qualified position. In fact, Article 4(4d) provides that the course of action that the Authority must prescribe is aimed at preventing the risk of prices or other contractual conditions being imposed that are unjustifiably onerous for consumers as a consequence of the merger operation. The applicant did not raise any objections in relation to that course of action to be followed; nonetheless, it has standing to challenge the merger upon which the contested measure is premised, insofar as it is permitted by the contested provision. Indeed, the legislation on competition law is also enacted to protect consumers, who could be harmed by reduced competition between sectoral undertakings.

4.1.– Having summarised the legislation enacted by the contested provision and the content of the contested measure, the referral order found that it did not breach Article 82 of the EC Treaty, considering therefore that the reference to Article 81 of the Treaty was not relevant.

On the other hand, the referring court questions the constitutionality of Article 4(4d) with reference to Articles 3 and 41 of the Constitution in relation to the issues and for the grounds set out in referral order no. 223 of 2009, which it substantially reproduces.

Finally, the Regional Administrative Court states that the question is relevant on the grounds that "it rejected the objection that the application was inadmissible and rejected the objections by which the applicant averred the violation of Community law", and observing that "any annulment of that law would therefore inevitably impinge upon the legitimacy of the contested measure of the Authority […] which, in stipulating the course of action to be followed for CAI, applied the law, the constitutionality of which is in doubt, in that it postulated the successful completion of the merger operation".

5.– In the proceedings initiated by referral orders no. 223 and no. 224 of 2009, Eurofly S.p.A., represented by its legal representative, and Meridiana S.p.A., represented by its legal representative, both applicants in the main proceedings, entered appearances by separate writs with substantially identical contents and requested, including in the written statements filed shortly before the public hearing, that the question be accepted. In its written statement, Eurofly S.p.A. indicated that it had changed its company name to Meridiana fly S.p.A.

The parties start with a detailed account of the stages in the privatisation of Alitalia-Linee Aeree Italiane S.p.A. (below: Alitalia), starting from the publication in 2006 of an invitation to express an interest in the purchase of the State's shareholding in that company, which concluded unsuccessfully in 2007, until the submission of an offer to buy in that year by Air France-KLM which was deemed appropriate, but not concluded and withdrawn on 21 April 2008.

The companies then go on to set out the procedures by which Intesa San Paolo S.p.A. was appointed as an advisor, with the purpose of elaborating a plan and identifying parties interested in acquisition; they examine certain issues relating to the alleged relations between the aforementioned and AirOne S.p.A. and CAI and indicate that, at the end of July 2008, the advisor had submitted an acquisition and management programme (the "Phoenix Plan"), arguing that Decree-Law no. 134 of 2008 had been issued in order to apply the arrangements governing the extraordinary administration of large companies in crisis to this case and to permit the extraordinary Administrator to sell the company by private negotiation in a very short space of time, also introducing an exception to the powers of the Authority.

The parties then present the procedures by which the companies from the Alitalia Group were subject to the extraordinary administration procedure, the articles of association and company object of CAI were amended and the latter formulated a bid; in their view, there was no doubt that it was the "Phoenix" that was to rise out of the ashes of Alitalia. Moreover, the said companies question the fulfilment by the party appointed as an expert to assess Alitalia's market of the prerequisite of independence and summarise the later events which were characterised *inter alia*: by the withdrawal by CAI of its bid; by the publication by Alitalia's extraordinary Administrator of an

invitation to note interest in the purchase of one of more business divisions of Alitalia and the companies controlled by it; by the expression of "joy" by that Administrator when CAI confirmed its bid on 25 September 2008 at a conclusion that averted the need to "leave the aircraft on the ground" (a result achieved without initiating negotiations with other potential buyers, including the applicants); by the firm offer of CAI of 31 October 2008; and by the filing of an expert's report on the value of the assets and CAI's purchase offer until conclusion of the sale.

5.1.– Both of the companies challenge the objections of inadmissibility raised by the other parties to the proceedings and the intervener, observing that CAI submitted arguments in support of the inadmissibility of the question raised in the different proceedings initiated by Federconsumatori.

According to the parties, the Regional Administrative Court ruled that all of the grounds for challenge that did not concern the unconstitutionality of Article 4(4d) were groundless, precisely in order to be able to conclude that the question raised was relevant. Moreover, they object that the contested legislation contained three provisions, with according to CAI had different normative content, arguing that they by contrast enacted one single rule concerning the granting to the Authority of the power to determine the course of action to be followed and the removal of its powers of control provided for under Law no. 287 of 1990.

5.1.1.– The objection that the question is inadmissible, based on the consideration that the referring court requested the issue of a "replacement" judgment, is claimed to be groundless since it does not take account of the solution proposed by the Regional Administrative Court, whilst the impact of the provision on the conduct of an essential public service also cannot constitute grounds for ruling the question inadmissible.

The objection that the question is inadmissible due to the fact that it is not interlocutory in nature is also claimed to be groundless, since the Regional Administrative Court correctly ruled on the other grounds of challenge, precisely for the purposes of ruling the question relevant.

Finally, Meridiana fly S.p.A. and Meridiana S.p.A. challenge the objection of a failure to give reasons relating to the non-manifest groundlessness of the question, based on the argument that the Regional Administrative Court had not clarified

"whether, if the answer is affirmative, the resolution of the Authority that is contested in the main proceeding should be annulled" and had not even indicated that the faults in the measure resulted from the contested provision. In their view, the referring court was not required to give reasons on this point and the unsuitability of the contested measure for the purpose of guaranteeing competition resulted from the fact that, in complying with Article 4(4d), is specified exclusively the course of action to be followed, which was irrelevant for competition law purposes, with the result that any assessment of this point by the referring court would have been superfluous. Moreover, the Regional Administrative Court also specified that were the question to be accepted this would impinge upon any annulment of the Authority's measure.

5.2.– On the merits, according to the parties, the merger operation under examination resulted in a *de facto* monopoly over the most important and profitable air transport routes in our country (in particular in the route Rome-Milan Linate) to the detriment of competitor companies, which were forcibly subjected to the reinforcement of the position of the dominant operator on the most economically interesting routes, given that they were not granted slots, as would have occurred had Law no. 287 of 1990 been applied.

In their view, the contested provision amounts to a "provision with the status of a measure", which is also supported by the *travaux preparatoires*, information published in the press, the fact that it was aimed at "enabling a concrete and specific transaction" and that Decree-Law no. 134 of 2008 was issued a few days after the bid by the "CAI consortium" had been finalised, as well as the temporal limitation which prevented its application to other cases.

Referring to the case law of this Court, some positions in the academic literature, and referring generically to the European Convention on Human Rights and the European Union Treaty, Meridiana fly S.p.A. and Meridiana S.p.A. submit different arguments in support of the position that whilst provisions with the status of a measure is not *per se* unlawful, they are to be subject to strict scrutiny as regards their constitutionality.

In this case, it is of significance that Law no. 287 of 1990 not only expressly refers to Article 41 of the Constitution, but also lays down essential legislation to guarantee

the freedom of private economic initiative, was enacted against a regulatory backdrop providing protection to competition as a "constitutionally protected interest" and grants the Authority control powers over mergers with the goal of averting the elimination or reduction of competition in a significant and lasting manner .

5.2.1.– With regard to the challenges brought against Article 41 of the Constitution, according to the parties, the case law of the Constitutional Court and the academic literature have asserted that the protection of competition is rooted in the Constitution, above all following the amendment of Article 117 of the Constitution. The negative impact on competition of the contested provision is claimed to be demonstrated by the facts that it: disregarded the legislation contained in Law no. 287 of 1990, implementing Article 41 of the Constitution; brought about a market situation capable of assuring additional profits to a leading company; endorsed the concept of a "useful monopoly", as an instrument of direction, aimed at achieving goals that were not clear; and violates European Union law, given that Regulation no. 139 of 20 January 2004 (Council Regulation on the control of concentrations between undertakings – "The EC Merger Regulation") recognises that mergers may have positive effects, but stipulates that there must be a specific instrument capable of guaranteeing effective control.

Both of the companies consider in greater detail the grounds for the supposed unsuitability of the course of action to be followed in order to protect competition, as specified in the measure of the Authority, averring that it is not clear how the contested provision can protect the public interest. In any case, Parliament should have provided adequate justification on this point, since it is for this Court "to identify the social goal and the applicability to it of programmes and controls" (judgments no. 196 of 1998 and no. 63 of 1991).

In their opinion, even assuming that these public interest requirements were met, this Court should ascertain whether or not the provision implemented reasonable and proportionate measures, as it is claimed not to have done. Indeed, even assuming that the derogation under examination was intended to achieve an objective in the public interest, absent any indication in the contested provision, it is not clear why it was necessary to grant a monopoly for three years to that end. Moreover, such a requirement associated with public service may subsist in relation to certain disadvantaged routes

(such as those guaranteeing connections with the islands), but not with those between the airports of Milan-Linate and Rome-Fiumicino. Finally, if the intended objective was to guarantee the promotion of a "national champion", in the name of compelling general interests, the mechanism provided for under Article 25 of Law no. 287 of 1990, or Article 8(2) of the same Law should have been used.

The objection that the legislation enacted by that Law allows for the possibility of derogations supports the view that the merger operation under examination was aimed at "creating a national champion", granting it an absolute monopoly over the market for three years, in breach of obligations undertaken under European Union law.

According to the parties, Parliament's intention to "ensure that Alitalia (and AirOne) was 'saved' through the merger proposed by CAI" is not sufficient to preclude the violation of Articles 3 and 41 of the Constitution. Law no. 287 of 1990 provides for the possibility of authorising a merger operation that is detrimental for competition in the cases and according to the procedures specified thereunder; nevertheless, it is claimed not to be possible to authorise mergers which entail "the removal of competition from the market or restrictions on competition that are not strictly justified by the general interest". Moreover, it is for the Authority to specify the measures necessary in order to re-establish the "conditions of full competition within a pre-determined time-frame", and this limit is the precondition for compatibility with Article 41 of the Constitution of the exceptional power to authorise mergers that are detrimental to competition.

In their opinion, the power provided for under Article 25 of Law no. 287 of 1990 would also not permit the merger operation under examination and, for this reason, it cannot be applied as this would run contrary to the requirements of competition and the market.

5.2.2.– The contested provision is claimed to have permitted the merger or the two largest national air carriers, increasing their dominant position to the detriment of competitor undertakings, which would not have access to the most important slots, without any consideration for the protection of competition and in breach of Article 3 of the Constitution, also because the companies sold were divested of their previous debts.

The violation of the constitutional principles invoked by the Regional Administrative Court is claimed to be due to the requirement to safeguard the

"compelling national interests" which the provision limited itself to mentioning. The significance attributed to the corporate affairs of Alitalia and AirOne are claimed not to justify the failure to account for the implications of the merger on competitor companies, and therefore there was no correct balancing of the interests of the "CAI consortium" against "the qualified positions of other operators". Furthermore, the fact that the requirement for reasons to be given does not apply to legislation does not mean that such interests need not be explained and that there is no need to balance the interests of all players, as is claimed not to have occurred.

Ultimately, the parties conclude, the future of air transport in Italy could have been safeguarded by measures that respected the protection of the market and the constitutional principles invoked by the referring court, including through the application of Article 25 of Law no. 287 of 1990.

6.– CAI, as a party to the main proceedings, entered an appearance in the three proceedings, represented by its legal representative, requesting according to arguments that were substantively identical in the different entries of appearance and in the written statements filed shortly before the public hearing that the question be ruled manifestly inadmissible, or otherwise manifestly groundless.

6.1.– The party first and foremost summarises the affairs of Alitalia until the time when it was subjected to the extraordinary administration procedure and the declaration of insolvency, the procedures specified in the offer to purchase certain assets and legal relations, the essential features of the industrial project underlying that purchase and the content of the contested measure in the main proceedings. In view of this premise, CAI avers that the Regional Administrative Court "hastily" rejected an objection that the claim was inadmissible, disputing the interest of Federconsumatori to challenge the contested act (this argument is also contained in the submissions regarding the proceedings not initiated by this party). In fact, the referring court asserted that Article 4(4d) provides that "the course of action to be followed is intended to protect consumers" and specified that in relation to the latter, Federconsumatori "has not raised any complaint", but nonetheless ruled that it had standing to sue.

According to CAI, the lower court did not acknowledge that the interest that could have vested Federconsumatori with standing was solely that of consumers, and that the

applicant did not challenge the course of action to be followed. The merger operation amounted merely to a matter of fact, and could only have had legal significance for the purposes of standing to sue if Federconsumatori had averred that no course of action could have avoided the risk of detriment to consumers, since consumers did not have any theoretical standing to object specifically to the merger operation. Therefore, the only provisions of interest to the applicant were those protecting consumers, and the question of constitutionality concerning the provision relating to the existence *per se* of the merger was irrelevant. This conclusion is also mandated by the fact that in the main proceedings, Federconsumatori challenged the merger operation, submitting a claim aimed directly against the statutory provisions authorising it.

In its written statements, CAI emphasised its submission made in all proceedings that the question was raised after all other grounds had been rejected, and therefore constituted the sole subject matter of the main proceedings, with the result that the prerequisite of interlocutory status was not met, as the case was identical to that ruled on in judgment no. 38 of 2009, of which it submits broad excerpts.

6.1.1.– According to the party, the question is also inadmissible due to the failure to give reasons for its relevance, in consideration both of the rejection of all grounds for challenge, as well as the fact that any annulment of the contested provision "would inevitably impinge upon the lawfulness" of the contested measure.

In its opinion, "the facilitation of the supplementation operation" is also justified under other legislation and the provision that the referring court should apply is not the same as that contested. Therefore, the discussion in the main proceedings relates to "a different provision" from the latter, as is claimed to be demonstrated by the fact that since the Regional Administrative Court itself "did not know how to classify the relationship between the contested provision and the proceedings before the lower court, it considers that this provision was "postulated" (and supplemented) by the [contested] measure", a relationship that is insufficient for the purposes of establishing the relevance of the question.

CAI reasserted that objection in its written statements, averring that the referring court non did not acknowledge the fact that Article 4(4d) contained a range of provisions and did not specify which of them it intended to challenge.

6.1.2.– According to the party, the question is also inadmissible since the referring court requested a replacement judgment, averring that the contested provision does not "explain" what the constitutionally significant interest pursued is, having found in this respect that the indication contained in the preamble to Decree-Law no. 134 of 2008 relating to the requirement to avoid the interruption of services provided by companies operating in the sector of essential public services is insufficient, and also stating that the reason why that result is to be achieved through a provision that discriminates against competitor undertakings is not clear.

In its opinion, the Regional Administrative Court fell foul of a blatant contradiction: on the one hand, it recognised the value of the goal pursued (the continuity of essential public services), whilst on the other ruled "that Parliament had [not] explained their essence". Irrespective of any consideration relating to the application of the obligation to give reasons in a legislative instrument, it is claimed to be clear that the referring court did not object to the actual fact of pursuing a goal that it itself considered to be worthy, but the way in which it was done, requiring to this effect an additional or replacement judgment, without indicating the content of the desired replacement and without demonstrating that the solution requested was mandated under constitutional law.

On the other hand, since the Regional Administrative Court requested the reversal of the measure, the question is also claimed to be inadmissible since any acceptance would compromise the general interest in the continuity of essential services, highlighted by the lower court itself.

6.2.– On the merits, CAI objects to the view that the contested provision is a "provision with the status of a measure", which the referring court inferred from the fact that the Decree-Law within which it is included was "commonly known" as the "Alitalia decree", without realising that terms acquired from journalist language cannot be received "a-critically by legal practitioners".

On the other hand, the provision concerned covers indiscriminately all "undertakings providing essential public services". Therefore, it lays down a general and theoretical provision, and it is on the contrary of no significance that it relates only to the said undertakings, since it is sufficient that it refer to all situations characterised

by particular objective or subjective features, and the *occasio legis* does not impinge upon the *ratio legis*. Moreover, the provision is claimed not to have authorised a merger *ex lege*, but was limited to regulating the powers of the Authority in a different manner to that provided for under Law no. 287 of 1990; the effects objected to were generated by the "interposition of the administrative measure", so much so "that Alitalia-CAI itself challenged the specific measures adopted before the administrative courts".

According to the party, during a time of serious economic and financial crisis, in exercising its own discretion and reasonably assessing the public interest, Parliament enacted legislation that in part differed from that provided for under Law no. 287 of 1990 to regulate particular merger operations involving significant industrial and employment groups, without however precluding the intermediate application of the procedure and the administrative measure.

The reference to the *travaux preparatoires* is claimed to be of no consequence and mistaken, since it highlights the general and abstract nature of the provision (reference is made to the observations of certain senators and the comments by the Minister of Economic Development during the course of the joint meeting of the VIIIth and Xth Senate Committees in the session of 23 September 2008), demonstrating that "the Alitalia affair is only one of the situations affected by the regulation under examination", up to the point that "the dangerousness of a measure of this nature which, although it had been conceived of for Alitalia, is of general nature" was criticised during the legislative procedures leading to enactment (comments by Senator Teresa Armato).

6.3.– In the opinion of CAI, according to the case law of the Constitutional Court, Parliament may by ordinary legislation enact "provisions with the status of a measure", subject to strict constitutional scrutiny; therefore, if the argument of the Regional Administrative Court were considered to be well founded, it would be necessary to identify the "particular situations of general interest" which justify the provision and which, in the opinion of the referring court, were not indicated.

This conclusion is claimed on the one hand to be mistaken, since the referral orders evoked a non-existent principle that reasons must be given for legislative acts; on the other hand, it is contradictory since the Regional Administrative Court itself recognised "the objective and subjective importance of the continuity of essential public services"

and therefore it is not clear why this reason is incapable of satisfying the general interest which is claimed to have been disregarded.

The interpretation of the contested provision provided by the applicants in the main proceedings whereby it was intended to guarantee the "continuity of the Alitalia-AirOne groups" does not consider that the requirement protected was that of ensuring the conduct of essential public services. In any case, the referring courts did not consider that Parliament's initiative through ordinary legislation was rendered necessary by the serious economic situation, supported by conclusions reached by the Bank of Italy contained in Bulletin no. 52 of 15 April 2008 relating to the world economic crisis in general, and Italy in particular, which became more alarming with the considerations made in Bulletin no. 53 of 15 July 2008. These were also backed up by the results of the General Report on the Economic Situation of the Country in 2008 by the Minister of the Economy and Finance, presented pursuant to the sole Article of Law no. 639 of 21 August 1949 (Annual Report to Parliament on the Economic Situation of the Country), as well as the annual ISTAT [Italian Statistics Institute] report for 2008.

Given the unequivocal indications of a serious economic and financial crisis, the enactment of ordinary legislation is claimed to have been justified by the requirement to permit operations intended to safeguard and guarantee the re-launch of industrial and employment groups that are strategic for the Country, including by adapting the ordinary legislation on mergers, in accordance with the principles of reasonableness and proportionality.

According to CAI, the Regional Administrative Court mistakenly held that there had been a failure to strike a reasonable balance between the interests in play, given that: in the first place, it did not indicate how that balance should have been struck, which indicates further grounds for the inadmissibility of the question; secondly, it contradicted itself in finding that the balance had not been correctly struck and that no interest of constitutional status was protected by the provision under examination.

In the opinion of the party, Article 4(4d) by contrast struck a reasonable balance since: the privately negotiated procedure did not exclude any buyer that met the statutory prerequisites; the exception was limited in time until 30 June 2009, which coincided with the period predicted to be the most acute stage of the economic and

financial crisis; the ordinary legislation remained applicable to concerted practices and abuses of a dominant position (Articles 2 and 3 of Law no. 287 of 1990) as did Community law. Moreover, the contested legislation had a limited impact in the light of the traditional suspension of structural remedies only for three years, and the Authority's power to determine the course of action that would be appropriate in order to guarantee protection for consumers' interests. Therefore, it did not amount to a genuine "exception" from antitrust legislation, but a mere transitional suspension of structural measures, in order to permit industrial consolidations operations concerning the safeguarding and re-launch of strategic assets.

According to the party, this assessment is supported by the content of the measure contested in the main proceedings, which supplemented the course of action proposed by the notifying party, made provision for a substantially structural measure (the conspicuous repositioning of 50 slots from the Linate-Fiumicino route, with the possible opening up of spaces to third parties) and laid down suitable measures to protect consumers. Moreover, the course of action to be followed did not impinge upon the Authority's power to punish abuses of a dominant position and anticompetitive concerted practices; in any case, after three years have passed, the Authority has reserved the right to intervene with structural initiatives on any monopoly positions still in existence.

Finally, the Regional Administrative Court ruled groundless the challenged aimed at establishing a contrast between the contested provision and Community law, which was also excluded by the European Commission, which confirms that the legislation under examination achieved a partial and limited adaptation of the national control regime for mergers, falling within the legitimate prerogative of the national legislature. Moreover, the referral orders are claimed to have mistakenly taken Law no. 287 of 1990 as an interposed source of constitutional law, without considering that the solutions achieved by that law were not mandatory under constitutional law and that the contested provision is justified by a specific economic contingency and is transitional in nature.

6.4.– In the opinion of the party, Article 3 of the Constitution was invoked in an obscure and uncertain manner, according to procedures that are claimed to highlight the inadmissibility of the question due to insufficient motivation on the question of non-

manifest groundlessness; in any case, the Regional Administrative Court did not clarify how the difference in treatment to the detriment of the competitor undertakings substantiated itself, thereby bringing to the fore the groundless nature of the challenge relating to Article 3 of the Constitution. Finally, according to CAI, it is significant that, where significant public interests are involved, an exception from the legislation protecting competition is also provided for under other legal systems (in Germany for example), and is contemplated under Law no. 287 of 1990 itself. The reference by the applicants to the breach of the legitimate expectations of other sectoral operators is claimed to be irrelevant, both because the argument was not raised by the referring court, and also because the claim that pre-existing rules should be maintained does not by any means amount to a legitimate expectation eligible for protection. Finally, in mooting an infringement of the interests of consumers, the Regional Administrative Court is claimed to have entirely neglected the provision stipulating the action to be taken contained in Article 4(4d).

7.– The extraordinary Administrator of Alitalia-Linee Aeree Italiane S.p.A., under extraordinary administration (hereafter, the Administrator) entered an appearance in the first two proceedings and intervened in the third, asking in two distinct submissions that the question be ruled manifestly inadmissible or otherwise manifestly groundless, and presenting arguments in support of that conclusion in its written statements, the contents of which largely coincided, filed shortly before the public hearing.

7.1.– The Administrator avers that the question is inadmissible due to the failure to satisfy the requirement that it be of an interlocutory nature, observing that the Regional Administrative Court ruled groundless all of the grounds of challenge in the main claims, ruling that the conditional interlocutory claim (filed in the first two proceedings) was inadmissible, with the consequence that the sole residual remedy sought in the main proceedings was the question of constitutionality, which was therefore inadmissible as those proceedings amounted to a kind of challenge directed against the Law.

The referring court also stated that the acceptance of the question would impinge upon the lawfulness of the contested measure which “applied the statutory provision, the constitutionality of which is in doubt, postulating the successful completion of the merger operation”, according to arguments that were not appropriate to justify the

relevance of the question. In fact, it is not clear how the acceptance of the question could impinge upon the contested measure, which concerned the course of action to be followed in order to protect consumers, with the result that no reasons were given for the lack of motivation for the causal link between the main proceedings and the proceedings before the Constitutional Court.

The question is claimed to be inadmissible on further grounds since the Regional Administrative Court did not comply with the obligation to attempt to find a constitutionally compatible interpretation of the contested provision and, in any case, invoked Articles 3 and 41 of the Constitution in a confused and heterogeneous manner, without clarifying the specific nature of the difference in treatment averred and on what grounds the competitor undertakings had been discriminated against.

7.2.– On the merits, according to the Administrator, Article 4(4d) does not amount to a "provision with the status of a measure", but governs a general and abstract situation, an arrangement that is not precluded by the fact that is has only been applied in one case. The provision is stated to enact a provision "of general scope, the rationale of which is to be ascertained in Parliament's intention to resolve the crisis affecting several large industrial groups providing essential public services, in accordance with the requirements of investors and workers, and also favouring the re-launch of the corporate structures concerned through the reconciliation of all of the public interests involved".

On the basis of contradictory motivation, the Regional Administrative Court asserted that the provision acknowledges the importance of continuity in essential public services, but did not clarify what the predominant general interests were which, following the balancing of the interests in play, could "justify the exception made to the constitutional principle of equal treatment and the constitutionally significant value of freedom of competition".

In the opinion of the Administrator, the fact that the provision amended Decree-Law no. 347 of 2003 on the extraordinary administration procedures applicable to large companies with at least five hundred employees, demonstrates on its own the intention to safeguard numerous jobs. Through the ordinary legislation enacted, in accordance with the requirements of reasonableness and proportionality, Parliament established

legislation aimed at avoiding the break-up of large industrial groups (strategic for our country's economy) and safeguarding employment during the serious stage of the world financial crisis. The failure to take that action would have brought about a very serious situation from the point of view of employment and the loss of fundamental industrial assets for the country's economic system.

The exception created from that rule is claimed to have been essential in order to guarantee the continuity of public air transport service by a carrier that was capable of providing it in a comprehensive manner and free from various requirements that could have conditioned its exercise. Had the essential public air transport service been provided by a series of smaller carriers, each subject to its own specific requirements and industrial policy choices, some financially unprofitable routes could in fact have been cancelled and the cost of the relative tickets could have increased, to the detriment of consumers.

The reasonableness and proportionality of the contested legislation is claimed to be supported by the consideration that the exception does not breach Community law, is limited in time and concerns only mergers concluded before 30 June 2009 – i.e. it was provided for a limited period of time coinciding with the most acute stage of the recent economic crisis, thereby preventing substantial and lasting harm from being caused to competitors. Moreover, in order to guarantee protection for consumers, the legislation under examination provides that the Authority shall have the power to determine appropriate action to be taken, maintaining "unchanged the remedies intended to prevent a violation of the rationale of the provision from which an exception was created" and the European Commission is claimed to have concluded that it did not violate the underlying principles and essential reference values of the Community antitrust system. Finally, the Administrator concludes, the failure to provide an express indication as to the reasons for enacting the provision was irrelevant, due to the absence of any obligation to provide reasons for legislative acts.

8.– The President of the Council of Ministers intervened in all proceedings, represented by the *Avvocatura Generale dello Stato*, requesting both in the interventions as well as in the written statements filed shortly before the public hearing that the question be ruled inadmissible or manifestly groundless.

8.1.– In different submissions filed in relation to the three proceedings, though with substantively identical content, the intervener avers the that the question is inadmissible due to the failure to give reasons for its relevance, concluding that the indication contained in the referral order, according to which the acceptance of the question would have entailed the annulment of the contested measure, was insufficient. In his opinion, the Regional Administrative Court should have demonstrated that, absent the contested provision, had the merger been assessed in accordance with the arrangements provided for under Law no. 287 of 1990, it would not have passed muster thereunder and would have been prohibited.

Moreover, the referring court is claimed not to have considered the fact that the merger "changed the party entitled to use" the slots, "but did not increase their number, and therefore did not impinge upon the market equilibriums; the competitive position of the 'smaller' operators, such as the applicants Meridiana and Eurofly, remained unchanged, because the number of their flying rights over the same routes did not fall" and they did not even "aver that the overall increase in turnover" resulting from the merger was such as to permit economies of scale capable of permitting "tariff reductions that could not have been achieved by competitors". Finally, the merger was claimed not to have been rendered possible by Article 4(4d) but by the sales procedure provided for under paragraph 4c of that Article, and therefore the problem was "incorrectly framed".

8.2.– On the merits, according to the intervener, the fact that the contested provision applied to all of the "undertakings falling under second sentence of Article 2(2)" meant that it could not amount to a "provision with the status of a measure", whilst on the contrary the temporal limitation to transactions concluded before 30 June 2009 was irrelevant, having been introduced in order to "limit the legislative intervention strictly to the needs of the particular economic situation in existence at the time of its adoption, and therefore in proportion" with that purpose. Besides, the conversion law was published on 27 October 2008 and at that time it would not have been possible to identify the merger transactions to be concluded before 30 June 2009. In any case, the Regional Administrative Court is claimed to have incorrectly argued that the contested provision should have contained specific reasons in support of the legislation enacted

under it, given that the interests protected and the rationale of the provision are to be inferred from the legislation, including through its systematic interpretation.

With reference to the objection that the principle of equality has been violated, the fact that the provision under examination relates only to large companies providing essential public services which are under extraordinary administration means that it is clear that Parliament could have enacted ordinary legislation containing specific arrangements for a given sector, provided that it complied with the principle of reasonableness, which was not violated in this case.

According to the *Avvocatura Generale dello Stato*, Article 25 of Law no. 287 of 1990 permits particular merger operations and, in this case, "the law only provided, with a temporal effect limited to around 10 months, that mergers involving companies providing essential public services under extraordinary administration 'meet predominant requirements in the general interest'". Moreover, similar exceptions to those under examination was also provided for under Community legislation (Article 21(4) of Regulation (EC) no. 139 of 2004), and were therefore also permitted for the Member States of the European Union.

Article 4(4d) did not exclude control powers for the Authority and is claimed to have regulated an authorisation procedure for the course of action to be followed – which could also be far-reaching – whilst maintaining the Authority's power to impose structural measures upon expiry of a deferred time limit in order to eliminate any monopoly situations. In addition, the consideration that at the end of that period any monopoly positions created by the provision concerned would be intangible is claimed to amount to a mere supposition of the Regional Administrative Court.

In the opinion of the *Avvocatura Generale dello Stato*, the legislation under examination complied with the sectoral legislation and Community law and introduced specific regulations into a special sector during a period of world economic crisis, in order to guarantee the continuity of essential public services to protect the fundamental rights of citizens.

As regards the challenge relating to Article 41 of the Constitution, according to the intervener, there are dominant positions which mergers may reinforce in sectors providing essential public services, a fact that is presupposed by the contested

provision, which would otherwise be entirely superfluous; nevertheless, that objection could not "in itself constitute grounds for unconstitutionality".

Moreover, Regional Administrative Court is claimed not to have explained the reasons why the course of action to be followed as prescribed by the Authority was inadequate, nor did it clarify "whether, and if yes why, it considers that the Authority's resolution contested in the main proceedings should be annulled", and also failed to indicate the hypothetical faults in the measure, with the result that the question was irrelevant. The error that is claimed to affect the referring court's arguments is said to lie in the configuration of the provisions of Articles 5, 6 and 16 of Law no. 287 of 1990 as the only provisions capable of implementing and protecting competition. On the contrary, the intervener concludes, Community legislation demonstrates the requirement to balance the different interests in play, and there is no prohibition on the reinforcement of dominant positions through mergers, since it is only prohibited for parties in a dominant position to operate "in such a way as to eliminate or reduce competition in a substantial and lasting manner" (Article 6(1) of Law no. 287 of 1990; Article 2(3) of Regulation (EC) no. 139/2004).

9.– During the public hearing the parties and the intervener again requested the Court to accept the claims contained in their written submissions.

Conclusions on points of law

1.– By three referral orders issued during the course of three proceedings, the Regional Administrative Court for Lazio raised, with reference to Articles 3 and 41 of the Constitution, a question concerning the constitutionality of Article 1(10) of Decree-Law no. 134 of 28 August 2008 (Urgent measures concerning the restructuring of large companies in crisis) converted, with amendments, into Law no. 166 of 27 October 2008, insofar as it introduced paragraph 4d into Article 4 of Decree-Law no. 347 of 23 December 2003 (Urgent measures concerning the industrial restructuring of large companies in a state of insolvency) converted, with amendments, into Law no. 39 of 18 February 2004 (or more correctly: raised a question concerning the constitutionality of Article 4(4d) of Decree-Law no. 347 of 2003 converted, with amendments, into Law no.

39 of 2004, introduced by Article 1(10) of Decree-Law no. 134 of 2008 converted, with amendments, into Law no. 166 of 2008).

1.1.– Article 4(4d) provides that mergers concluded by companies under extraordinary administration providing essential public services related to, in parallel with or otherwise provided for under the programme duly authorised pursuant to Article 4(2) of Decree-Law no. 347 of 2003 converted into Law no. 39 of 2004, or under the authorisation measure pursuant to Article 5(1) of Decree-Law no. 347, meet compelling requirements of general interest and shall not be subject to the requirement for authorisation pursuant to Law no. 287 of 10 October 1990 (Provisions to protect competition and the market), without prejudice to the provisions of Articles 2 and 3 of the same Law.

The provision further stipulates that, without prejudice to the provisions of Community law, should those mergers fall under the competence of the Italian Antitrust Authority (*Autorità garante della concorrenza and del mercato*, hereafter the "Authority"), the parties shall in any case be required to notify the latter in advance, along with a proposal setting out action in order to prevent the risk of unjustifiably onerous prices or other contractual conditions being imposed on consumers as a result of the operation. The Authority is then to stipulate these measures by resolution to be adopted within thirty days of notification of the operation, making the amendments and supplements considered necessary, and set the time limit, which may not be less than three years, before which the monopoly conditions created, if any, must end.

The provision finally stipulates that, if this resolution is not complied with, the penalties specified under Article 19 of Law no. 287 of 1990 shall apply and that the arrangements shall apply to mergers concluded before 30 June 2009.

1.2.– According to arguments that largely coincide, the referral orders state that Article 4(4d) amounts to a "provision with the status of a measure", which as such is subject to strict scrutiny as to its constitutionality with reference to the principles of reasonableness and non-arbitrariness.

According to the referring court, the provision violates these principles, thereby breaching Articles 3 and 41 of the Constitution on the grounds that, in relation to the merger at issue in the main proceedings, it introduced an exemption from the control

procedure provided for under Law no. 287 of 1990 which was unreasonable in that it did not comply with the competition law principles laid down by Article 41 of the Constitution and breached the principles of freedom of competition and the equal treatment of competitor undertakings. In fact, the provisions made possible a situation in which a "single carrier" could offer "scheduled passenger air transport services on numerous routes", permitting a significant reduction on other routes of the "presence of competitor operators, with very few exceptions" and permitting one single carrier to "operate a network of diffuse connections throughout the country, retaining a position of absolute dominance on individual connections".

These principles were stated to have been violated also on the grounds that the monopoly situation, if any, created by the merger was destined to last for at least three years, to the detriment of competitor companies, without any explanation of the interests that the provision sought to further. Indeed, it was argued that the statement that the mergers covered by the provision "met compelling requirements of general interest" and the consideration, contained in the preamble to Decree-Law no. 134 of 2008, relating to the "importance that the services provided by companies providing essential public services not be interrupted" were inadequate to this end in the absence of clarifications relating to the reasons why it was impossible to protect those interests in different ways that complied with the principles of equality and the protection of competition.

The Regional Administrative Court accordingly refers to the provisions enacted by Law no. 287 of 1990 as a parameter for reviewing the reasonableness of the contested provision given that, although the former classifies itself as a provision implementing Article 41 of the Constitution, it is still a piece of ordinary legislation and does not enact the only possible arrangements to implement that principle, with the result that any exceptions to it cannot in themselves amount to a violation of Articles 3 and 41 of the Constitution.

2.– Since the proceedings relate to the same provision, which is challenged with reference to the same constitutional principles on the same grounds and on the basis of essentially identical arguments, they raise an identical question of constitutionality and therefore should be joined and decided on in a single judgment.

3.– Alitalia-Linee Aeree Italiane S.p.A., under extraordinary administration (hereafter, the Administrator), is not a party to the main proceedings in which the referral order registered as no. 225 in the Register of Orders 2009 was issued, since it was not a respondent in those proceedings, and did not intervene. Accordingly, the intervention by that company, represented by the Extraordinary Administrator, in the constitutionality proceedings initiated by that referral order is inadmissible given that, according to the settled case law of this Court, only the parties to the main proceedings (in addition to the President of the Council of Ministers and, for cases involving regional legislation, the President of the Regional Council) may generally speaking participate in such proceedings (judgments no. 47 of 2008 and no. 314 of 2007).

The entry of appearance by that company in the proceedings initiated by referral orders no. 223 and no. 224 of 2009 is on the other hand admissible since, notwithstanding the fact that it did not enter an appearance in the main proceedings, it was a co-interested party in these since the application to the referring Administrative Court was also filed against it. According to the case law of the Constitutional Court, the "parties to proceedings" on which the referral order is to be served include in fact "all parties involved in the main proceedings", and "it is immaterial whether or not the party has entered an appearance" (see orders no. 377 and no. 13 of 2006). Therefore, since the referral order must be served on these "parties to the proceedings" in order to permit them to join the proceedings, the entry of an appearance by the Administrator in the said proceedings is therefore admissible.

4.– As a preliminary matter, it is necessary to examine the objections raised by Alitalia-Compagnia Aerea Italiana S.p.A. (below: CAI), the Administrator and the intervener that the questions are inadmissible.

4.1.– According to CAI, the questions are first and foremost inadmissible due to a failure to provide reasons for their relevance, since Article 4(4d) contains a variety of provisions and the referring court has not specified which of them it seeks to challenge, nor has it provided arguments seeking to demonstrate that the constitutional principles were violated by the provision authorising the merger, rather than by that concerning the course of action to be followed.

Moreover, the Regional Administrative Court is stated to have considered the provision concerned to have been "postulated" by the Authority when adopting the contested measure, invoking a logical inference that is insufficient in order to establish the relevance of the question, without even considering that the merger under examination could be grounded on other provisions. In particular, according to the *Avvocatura Generale dello Stato*, the said operation would have been possible under the sale procedure governed by Article 4(4c) of Decree-Law no. 347 of 2003, converted into Law no. 39 of 2004, and therefore the question was "incorrectly framed". In the opinion of the Administrator, the referring court did not clarify how any declaration that the contested provision was unconstitutional could have any impact on the contested measure.

According to the CAI, referral order no. 225 of 2009 considered the course of action specified in the contested measure to be conducive to protecting the interest of consumers and, whilst asserting that the consumer protection association Federconsumatori "did not make any objection" to it, it contradictorily asserted the applicant's interest "in calling into question the lawfulness of the merger itself". Moreover, the lower court did not consider that Federconsumatori could take action to protect the interests of consumers, yet nonetheless did not censure the course of action followed; the merger amounted to a mere factual occurrence and could have had legal significance only had the applicant averred that no course of action could guarantee that interest, since there was no abstract body of consumers that could directly object to that operation, with the result that the question concerning the constitutionality of the rule establishing the actual fact of the merger was irrelevant.

On the other hand, the *Avvocatura Generale dello Stato* averred that insufficient grounds in order to establish its relevance were given, also arguing that the merger "changed the parties with rights" over the slots, "but did not increase their number, and therefore did not impinge upon market equilibriums". Moreover, in his opinion, the referring court should have demonstrated that, absent the contested provision, the merger would not have passed muster under Law no. 287 of 1990.

According to CAI and the Administrator, the question is finally inadmissible also due to its failure to meet the prerequisites for interlocutory review, since the rejection of

the objections relating to the faults in the contested measure and the inadmissibility of the applications for conditional interlocutory orders would have meant that the only residual remedy sought in the main proceedings would have been the question of constitutionality; on this issue, the case would have been similar to that ruled on by this Court in judgment no. 38 of 2009.

4.2.– The objections are groundless.

On substantially similar grounds, referral orders no. 223 and no. 224 of 2009 set out in detail the reasons why the applicants held "a position of legitimate interest, that is a qualified and differentiated position", observing that each is "a competitor of the undertakings that concluded the merger". In particular, they clarified why that position does not obtain in relation to the relevant course of action, whilst it on the other hand obtains with regard to the objections relating to "the lawfulness of the merger" "presupposed by the measure", emphasising that the legislation on mergers has been enacted "also and above all in order to protect freedom of competition between undertakings". Finally, the referring court observed that any different solution would lead to the "paradoxical and unacceptable conclusion that, confronted with a merger ordered by law as an 'exception' to the ordinary legislation governing such matters, the competitor undertakings would lack any form of judicial protection".

According to referral order no. 225 of 2009, the fact that Federconsumatori called into question "the lawfulness of the merger itself" "presupposed by the measure" constitutes sufficient grounds to conclude that there is an interest to sue, since competition law "has been enacted also in order to protect consumers", whilst by contrast the failure to formulate specific objections to the course of action covered by the contested measure is immaterial.

Finally, all of the judges on the lower court took care to specify that the acceptance of the question" would inevitably have an impact on the lawfulness of the contested measure".

The broad reasons provided in the referral order relating to the said issues and the relevance of the question mean that the principle applies whereby any finding that there is an interest to sue and "the review of the standing of the parties are a matter for the referring court, since both relate to the relevance of the referral proceedings before the

Constitutional Court and are not amenable to review where justified by reasons, provided that these are not implausible" (judgments no. 50 of 2007, no. 173 of 1994, no. 124 of 1968 and no. 17 of 1960). Indeed, the powers of this Court do not include "the power to review the validity of the prerequisites for the existence of the proceedings before the lower court when considering the admissibility of proceedings, unless they are manifestly and uncontrovertibly lacking" (judgment no. 62 of 1992) and it is sufficient that, as occurred in this case, the referral order contain arguments establishing the relevance of the question of constitutionality, provided that these are not implausible (see, most recently, judgment no. 34 of 2010).

4.2.1.– As regards the specific averrals made by the parties, it must first and foremost be argued that the Regional Administrative Court has objected specifically to the fact that the contested provision exempts the merger from the regulations enacted by Law no. 287 of 1990, and by no means calls into question the arrangements governing the extraordinary administration and the sale procedure. Article 4(4d) (which governs the aforementioned exception, the control procedures and the measures applicable to the mergers specified thereunder) is therefore the only provision that is of significance whilst, for the purposes of establishing the relevance of the question, it is sufficient that the contested provision have an impact on the decision in the main proceedings, and the specific possibility of the parties to benefit from the effects of the decision is an immaterial question of fact (judgment no. 241 of 2008).

The intervener's further argument concerning the capacity of the change to the parties with rights over the slots to have an impact on competition, irrespective of any consideration as to whether it is well founded, relates to the merits and not the relevance of the question.

4.2.2.– Moreover, the prerequisites for interlocutory review are met when the question relates to a provision with the force of law which the referring court must apply as a mandatory step in resolving the dispute at issue in the main proceedings (see *ex multis*, judgments no. 151 of 2009 and no. 303 of 2007) and are not met on the other hand when the subject matter of the proceedings is a provision itself and there has been no act applying that provision (judgment no. 84 of 2006; orders no. 17 of 1999 and no. 291 of 1986).

Therefore, this prerequisite is met when the annulment of the contested provision is an unavoidable step in the procedure to revoke the measure that implemented it, which is in turn necessary in order to vindicate the legal right invoked in the main proceedings, as occurs in cases involving "laws or provisions with the status of a measure" (such as the provision under examination, as will be specified below). Indeed, if this were not the case, "every guarantee" and "all control" would be denied (the Court's position since judgment no. 59 of 1957) given that, with regard to provisions of that nature, the protection of individuals is established "according to the regime typical of the legislative act adopted, which is transferred from administrative law to constitutional law" (see *ex plurimis*, judgments no. 241 of 2008 and no. 62 of 1993).

Ultimately, when the relationship between the measure contested in the main proceedings and the provision is one by which the former "merely implements" the latter, and notwithstanding this the adoption of the former is indispensable in order to bring about the effects provided for under the latter, the question is deemed to be interlocutory in nature, in accordance with a principle expressed to this effect also in judgment no. 38 of 2009, which was not relevantly invoked in support of the objection of inadmissibility.

5.– According to CAI, the questions are inadmissible on the further grounds that the referring court requested a judgment with substitutive effect, and failed to indicate the constitutionally required solution. Moreover, the Regional Administrative Court contradicted itself in recognising the relevance of the interest protected under Article 4(4d) (specified as that of guaranteeing the continuity of an essential public service), whilst finding that "Parliament had [not] specified the essence of that service". Besides, in its view, should it be concluded that the referring court has requested a ruling merely annulling the provision, the questions would also be inadmissible since their acceptance, if at all, would compromise that interest, which was considered by the Regional Administrative Court to deserve protection.

The objection is groundless.

The judges on the lower court argue that the contested provision "deprived" the Authority "of the task of conducting the procedure pursuant to Law no. 287 of 1990" and, essentially, argue that the acceptance of the question would render the legislation

enacted by that law inapplicable. Therefore, they have not requested any additional measure and the remedy sought consists in the annulment of the provision, whist the ruling regarding the predominance of the interest protected by it over the other interests in play relates to the merits and not the admissibility of the question.

6.– The Administrator has finally averred the inadmissibility of the question of constitutionality (an objection which may be examined with reference to the proceedings initiated by referral orders no. 223 and no. 224 of 2009), due to the failure to attempt to interpret the provision in accordance with the Constitution and the failure to give reasons on the issue of non-manifest groundlessness. In his opinion, and according to CAI, the Regional Administrative Court moreover relied on Articles 3 and 41 of the Constitution in a confused and inconsistent manner, without clarifying what the alleged unequal treatment consisted in, referring at times to reasonableness, at other times to freedom of competition, and at other times to equal treatment.

This objection is also groundless.

With regard to the first issue, it is sufficient to observe that the literal wording of the provision does not permit an interpretation different from that provided by the referring court (which found it to breach Articles 3 and 41 of the Constitution). With regard to the second issue, it must be stressed that the referral orders contained broad arguments in support of the challenges and the objection does not call into question their well-foundedness and consistency, submitting observations relating to the merits and not the admissibility of the question.

7.– On the merits, the question is groundless.

7.1.– The contested provision is contained in a legislative instrument which, as far as is of interest here, amended the extraordinary administration procedure intended to guarantee the management of crises in very large undertakings introduced by Decree-Law no. 347 of 2003 converted into Law no. 39 of 2004. Specifically, Decree-Law no. 347 of 2003 provides that the procedure may be initiated when, *inter alia*, the intention is to restructure the company, including through a plan involving the sale of business units included in a programme intended to ensure the continuation of the business of the undertaking in crisis, as well as in the event that the rebalancing operation is pursued through the sale of simple groups of assets and contracts, regulating the procedures

governing such sales. The merger governed by the measure contested in the main proceedings relates to the acquisition of some business operations of companies under extraordinary administration and of other companies; specifically, it consists "in the acquisition […] of certain assets and legal relations" belonging to a group of companies under extraordinary administration and "of exclusive control over the companies" forming part of another group (see the preamble and paragraph 4 of the measure).

However, the amendments to the legislation governing extraordinary administration and the procedures regulating the sale of assets are not of significance, since they were not taken into account by the referring court, which objected exclusively to the control arrangements for the merger with reference to the antitrust law laid down by Article 4(4d), questioning the constitutionality only of that provision.

7.2.– The first issue relevant for the purposes of the decision concerns the classification of the contested provision as a "provision with the status of a measure" which, according to the case law of this Court, must be made when it "impinges upon a specific and very limited number of addressees and has specific and concrete content" (judgments no. 267 of 2007 and no. 2 of 1997), also insofar as it is inspired by particular requirements (judgment no. 429 of 2002).

In this case, various elements speak in favour of the classification of Article 4(4d) as a measure. In the first place, the provision was enacted by a decree-law comprised of five provisions (the last limiting itself to providing for the immediate applicability of the legislation), one of which lays down the other provision concerning, significantly, only Alitalia-Linee Aeree Italiane S.p.A., Alitalia Servizi S.p.A. and the companies controlled by these (Article 3(1)). Secondly, the temporal limitation on the contested provision's application, along with the conditions for its applicability, meant that it was essentially applicable only to the merger at issue in the main proceedings. Thirdly, the significance of that provision in resolving the issue, and the fact that approval, entry into force and the conclusion of the merger occurred at the same time, are symptomatic of the fact that the provision relates to that matter alone. On the other hand, the constant reference throughout the *travaux préparatoires* to the merger at issue in the main proceedings, irrespective of the different assessments made of the appropriateness of the

choice taken in the light of the temporal limitation on the contested provision's application and the prerequisites for the exemption, confirms its status as a measure.

However, the fact that Article 4(4d) is a "provision with the status of a measure" does not on its own impinge upon the lawfulness of the provision. According to the settled case law of this Court, ordinary legislation may in fact attract within its legislative reach objects or matters normally reserved to the administrative authorities (see most recently, judgments no. 137 of 2009, no. 288 of 2008 and no. 267 of 2007) and this feature entails only that in such a situation, insofar as is of interest here, the law must abide by general limits, in short the principle of reasonableness and non-arbitrariness, and its constitutionality is subject to strict scrutiny (in addition to those referred to above, see also judgments no. 429 of 2002, no. 185 of 1998, no. 153 and no. 2 of 1997).

The lawfulness of this type of law is to be assessed in particular "in relation to their specific content" (judgments no. 137 of 2009, no. 267 of 2007 and no. 492 of 1995) and the criteria underlying the choices that inspired them must be fulfilled, as well as the relative procedures for implementation (judgment no. 137 of 2009). However, since the requirement to give reasons does not apply to legislation (judgment no. 12 of 2006), it is sufficient that these criteria, the interests subject to protection and the rationale underlying the provision may be inferred from the provision itself, including through interpretation on the basis of ordinary canons of interpretation, notwithstanding that the review by this Court of the unreasonableness, if at all, of the choice made by Parliament "cannot go so far as to consider the accuracy of the factual considerations underlying the choice" (judgments no. 347 of 1995 and no. 66 of 1992).

8.– The provision is challenged on the grounds that, in authorising the merger at issue in the main proceedings by way of an exception to the procedure required under Law no. 287 of 1990, it causes a restriction on freedom of competition notwithstanding the lack of reasonable justifications, and for this reason violates Articles 3 and 41 of the Constitution.

Due to the principles invoked by the Regional Administrative Court, it must be recalled how this Court, in its most long-standing judgments concerning Article 41 of the Constitution, has stressed that "freedom of competition" amounts to an expression

of the freedom of private economic initiative, the limitation of which, under paragraphs two and three of that Article, may be justified on grounds of "social utility" and for "social ends" (judgments no. 46 of 1963 and no. 97 of 1969). Subsequently, a broader notion of the guarantee of freedom of competition has been provided and it has been observed, in the first place, that it has "a dual goal: on the one hand, it complements the freedom of economic initiative that is vested to the same extent in all entrepreneurs, whilst on the other it is intended to protect society as a whole, since the existence of a broad range of entrepreneurs in competition with one another is intended to improve the quality of products and to contain their prices" (judgment no. 223 of 1982); it has secondly been observed that competition amounts to a "foundational value for the freedom of economic initiative […] that is necessary in order to protect the interests of consumer" (judgment no. 241 of 1990). It emerges from this reading of Article 41 of the Constitution, and in particular of the first paragraph, that there is a close logical and systematic relationship with Article 3 of the Constitution.

The most recent decisions of this Court following the amendment to Article 117 of the Constitution by Constitutional Law no. 3 of 18 October 2001 (Amendments to Title V of Part Two of the Constitution) and the provision classifying the "protection of competition" as an area of law under the exclusive jurisdiction of the State, have highlighted the fact that the concept of competition under national law reflects "that adopted under Community law" (judgments no. 45 of 2010, no. 430 of 2007 and no. 12 of 2004). In particular, it has been concluded that this term "includes, *inter alia*, regulatory arrangements that impinge principally on competition, such as: legislative protection measures *stricto sensu* applicable to the decisions and actions of undertakings that have a negative impact on the competitive structure of the markets, and which regulate control procedures including, if applicable, penalties; legislative measures to promote competition which seek to open up a market or to consolidate their opening by eliminating entry barriers, reducing or eliminating restrictions on the free expression of entrepreneurship and competition between companies, and in general the restrictions on the procedures for carrying on economic activity. In this way, such legislation pursues the goals of expanding the area of freedom of choice of both consumers and undertakings, the latter also in turn as users of goods and services" (judgments no. 430

and no. 401 of 2007). "In other words, it concerns more specifically the issue of the promotion of competition, which is one of the levers of the country's economic policy" (judgments no. 80 of 2006, no. 242 of 2005, no. 175 of 2005 and no. 272 of 2004). Accordingly, this area of law has for example been held to include measures intended to prevent an operator from expanding its own dominant position into other markets (judgment no. 326 of 2008), or to avert "abusive practices to the detriment of consumers" (judgment no. 51 of 2008), or to guarantee the full opening of the market (judgment no. 320 of 2008), and not those which "reduce or eliminate it" (judgment no. 430 of 2007; see by analogy judgments no. 63 of 2008 and no. 431 of 2007).

8.1.– In interpreting the general clauses referring to "social utility" and "social ends" contained in Article 41(2) and (3) of the Constitution, this Court has asserted ever since its most long-standing judgments that the grounds relating to these "need not necessary be stated in express declarations by Parliament" (judgment no. 46 of 1963, referring to judgments no. 5 and no. 54 of 1962). It has thereafter been taken to be a "repeatedly asserted principle" that the judgment relating "to the social utility which the Constitution posits as a prerequisite for impinging upon the rights of private economic initiative entails only a theoretical finding of a legislative intention to pursue that goal and the generic suitability of the means put in place in order to achieve it" (judgments no. 63 of 1991, no. 388 of 1992 and no. 446 of 1988). Subsequent case law has confirmed that the requirements of "social utility" must be balanced against competition (judgment no. 386 of 1996; by analogy judgment no. 241 of 1990) and it must be reasserted that the identification of these requirements must "not appear arbitrary" and that they must not be pursued by Parliament by patently inappropriate measures (judgment no. 548 of 1990; to the same effect, judgments no. 152 of 2010 and no. 167 of 2009), and in making this assessment the "temporally limited nature of the arrangements" establishing the restrictions is also of significance (judgment no. 94 of 2009). The requirement that these measures be reasonable and that they not result in an unjustified inequality of treatment makes clear once again the correlation between Articles 3 and 41 of the Constitution.

The general clauses under examination have also been associated with interests which are qualified in various ways and associated with the economic sphere such as, in

particular, those relating to the requirement to protect a given manufacturing product (judgment no. 20 of 1980), or that "of safeguarding the market equilibrium between supply and demand" within a specific sector (judgment no. 63 of 1991), or which are conducive to guaranteeing the values of competition and the competitiveness of undertakings (judgment no. 439 of 1991), or also "the requirement of general interest in the recognition and valorisation of the role" of undertakings of a particular size (judgment no. 64 of 2007). Ultimately, it has essentially been found that the sphere of private autonomy and competition do not receive "absolute protection from the legal order" and may therefore be subject to the restrictions and coordination necessary "in order to permit the parallel satisfaction of a range of interests of constitutional significance" (judgment no. 279 of 2006, order no. 162 of 2009).

8.2.– However, in spite of the importance noted above placed on certain occasions on the balancing operation between social utility and competition, the case law of this Court has only indirectly considered first the relationship between competition and general regulation and the issue of the balance between the requirement to open up the market and the guarantee of its competitive structure vis-à-vis the conduct of market operators themselves, that is undertakings and consumers, and secondly the protection of the different interests with constitutional status identified under Article 41(2) and (3) of the Constitution which may be of significance and the protection of which requires that they be balanced against competition. Nonetheless, in providing that private economic initiative cannot be pursued in contrast with "social utility" and in such a manner as to cause harm to security, safety and human dignity, and in providing moreover that public and private economic activity may be directed at and coordinated around "social ends", it is clear that the constitutional principle under examination permits a regulation that is conducive to guaranteeing the protection also of interests different from those related to the competitive structure of the guaranteed market.

Moreover, the requirement that the arrangements respect Community law, and in particular the principle that "the internal market as set out in Article 3 [sic., should read Article 2] of the Treaty on European Union include a system ensuring that competition is not distorted" (Protocol no. 27 on the internal market and competition, annexed to the Treaty of Lisbon which entered into force on 1 December 2009, and which confirms

Article 3(g) of the EC Treaty) establish the status of this regulation as an exemption, and, by extension, its exceptional nature. In other words, it is necessary that this initiative by Parliament have been the only measure capable of providing a fair guarantee that those interests would be protected.

The criteria normally used in the antitrust law assessment of a transaction are in fact directly or indirectly related to the goal of guaranteeing the market a competitive structure: the consideration of the quotas used as a starting point or those arrived at, the creation or reinforcement of a dominant position, a significant barrier to competition, the potential harm for consumers, through to the efficiency test, including on an internal level, of the outcome of the transaction and the particular and specific significance of the acquisition of an undertaking in a state of insolvency. This in summary is the assessment that must be carried out by an independent authority when considering whether to authorise a merger, a task which Italian law assigns to the Antitrust Authority under Law no. 287 of 1990 and which the latter has performed for the last twenty years. This is an assessment which goes further than the *ex post* control of the conduct of undertakings that is typical of the guarantee function and, precisely due to the fact that it is exercised *ex ante* – i.e. on a proposed merger – it ends up coming close to and touching the boundary between the protection of competition and market regulation. In spite of this, it is still a predominantly economic assessment, which remains consistent with the technical and independent nature of the Authority since it is limited to the control over the pursuit of so-called economic market objectives, and in particular its competitive structure.

8.3.– The evaluation required for mergers on a national level, such as that at issue in the main proceedings (and as argued not implausibly by the judges on the referring court) is inspired by the criteria underpinning the evaluation carried out for mergers on Community level by the European Commission's Directorate-General for Competition. The applicable legislation is contained in Regulation no. 139 of 20 January 2004 (Council Regulation (EC) no. 139/2004 on the control of concentrations between undertakings – "The EC Merger Regulation") supplemented, above all insofar is of interest in this case, by Commission Communication no. 2004/C31/03 of 5 February 2004 laying down "Guidelines on the assessment of horizontal mergers under the

Council Regulation on the control of concentrations between undertakings" (hereafter, the "Guidelines"). The legislation governing the control over mergers on Community level also sets out assessment criteria necessary in order to tailor it to the economic objectives of the single market.

Regulation no. 139 of 2004 in particular permits the efficiencies, if any, generated by the mergers to be taken into account. The assessment of the mergers takes account both of their impact on competitor undertakings as well as the fact that, for the purposes of the declaration or incompatibility, their likelihood to cause harm to consumers is also of significance. The relevant benchmark based on the efficiency test "is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur" (Guidelines, paragraph 79).

A problematic merger may nevertheless be deemed to be "compatible with the common market if one of the merging parties is a failing firm", on the basis of an assessment carried out in accordance with the predefined criteria (Guidelines, paragraphs 89-90). Moreover, even prior to Regulation no. 139 of 2004, the fact that the undertaking to be saved might otherwise risk being forced out of the market had been deemed to be a factor in support of a positive assessment. Nor within Commission practice has there been any lack of cases in which it has been found that "an authorisation of the merger subject to appropriate conditions" could, in appropriate circumstances, be "more beneficial to consumers than a disruption caused by a potential closure" of the business by a certain undertaking, especially when considerable interests are in play that cannot be associated solely and/or directly with the competitive structure of the market, such as for example pluralism in information (European Commission Decision of 2 April 2003 in Case COMP/M.2876, Newscorp/Telepiù).

The regulation cited above also presupposes the existence of national antitrust legislation, but not necessarily of legislation requiring the prior authorisation of mergers.

Article 21(4) of Regulation no. 139 of 2004 provides finally that "Member States may take appropriate measures to protect legitimate interests other than those taken into

consideration" by the Regulation subject to the limits specified thereunder and compatible with the general principles of Community law. Moreover, the fact that the respect for that limit is controlled by the Commission, and ultimately by the Community courts, does not preclude its liability to impinge upon the outcome of the merger, since the control operates only to distinguish between Member State initiatives with protectionist goals and those due to legitimate public interests different from competition (European Commission, 2009 Report on Competition Policy of 3 June 2010).

8.4.– The significance in the evaluation of the merger of the various interests involved is also clear in the legislation enacted in the other Member States of the European Union. In France for example, provision is made for the possibility of depriving the Antitrust Authority of the power to authorise a particular merger when "reasons of general interest other than the protection of competition" enter into consideration which must be balanced against it (Article L 430-7-1 II of the Commercial Code, as amended by Law no. 776 of 4 August 2008, establishes the power of the Minister of the Economy to decide on cases involving "reasons of general interest" not specified in greater detail in the legislation). German law grants the power to the Minister of the Economy, upon conclusion of a specific procedure, to establish restrictions and conditions for undertakings, and to authorise mergers previously prohibited by the Competition Authority for reasons of general interest when the restriction on competition is "offset by the advantages accruing for the economy in general or if the merger is justified by a predominant interest of society as a whole" (Article 42 *GWB*, the German Law on Competition). In the United Kingdom, section 42 of the Enterprise Act 2002 establishes the power of the Secretary of State for Trade and Industry to intervene when he considers that "public interests considerations" may be relevant, especially in matters relating to national security and the media. Moreover, the Secretary of State may add further requirements of public interest with respect to a specific merger, which must be approved by Parliament within 28 days (for example the requirement of the stability of the national banking system, which was considered to prevail over the transaction's risks for competition in the case involving the acquisition of Halifax Bank of Scotland by Lloyds TSB in 2008).

8.5.– This possibility is also provided for under Italian law by Article 25 of Law no. 287 of 1990. This provision specifies that "The Council of Ministers, acting on a proposal by the Minister of Industry, Trade and SME, shall determine in general terms and in advance the criteria according to which the Authority may, by way of exception, authorise mergers prohibited under Article 6 on the grounds of the significant general interests of the national economy within the context of European integration, provided that these do not entail the elimination of competition from the market or restrictions on competition that are not strictly justified by the aforementioned general interests" and which lay down "the measures necessary to re-establish conditions of full competition within a pre-determined time limit".

Out of the operations defined under antitrust law, mergers ultimately benefit from overall more flexible legislation, both because they are subject to control that is ordinarily though not necessarily *ex ante*, and also because in certain exceptional cases they may permit an assessment that can take adequate account of the need to protect compelling requirements of general interest different from those related to the objective of guaranteeing a competitive structure of the market. The attention for these different interests may translate into a power of assessment – essentially a general regulatory power, and in any case non-technical – normally reserved to the political authorities which may, as appropriate, complement or replace that of the independent authority vested with antitrust control powers. Nevertheless, it should be made clear that in this case the guarantee function reserved to that authority remains unchanged also as regards the *ex post* control of the result of the merger, and in particular with regard to the prohibition on the abuse of a dominant position.

9.– Within the context of these principles, in the light of the general legislative reference framework, Article 4(4d) is immune from the challenges made by the referring court.

The legislation governing the control of mergers provided for under Law no. 287 of 1990, which expressly applies Article 41 of the Constitution, is characterised by the general conferral on the Authority of the task of evaluating whether they entail the creation or reinforcement of a dominant position on the national market that is capable of eliminating or substantially and lastingly reducing competition, specifying the

measures necessary in order to remedy such situations. Moreover, Article 25 of Law no. 287 of 1990 contemplates a specific mechanism to protect interests other than competition. However, this legislation is not binding under constitutional law. Ordinary legislation may in fact provide for the possibility to authorise mergers in order to comply with other constitutionally significant interests than those relating to the competitive structure of the market.

However, in the case under examination Parliament intervened with a provision with the status of a measure, which means that the review of reasonableness to which it should be subject requires that it be ascertained according to stringent criteria whether any interests capable of justifying it can be identified, including through interpretation, and whether a proportionate and adequate choice has been made, notwithstanding that this review of constitutionality cannot go so far as to amount to a self-standing evaluation of the facts underlying that choice.

The result of this control is positive in this case. Article 4(4d) indicates that the mergers contemplated under it meet "compelling requirements of general interest", according to a formula that can be fleshed out in the light of the context in which the provision is located and the *travaux preparatoires*. The fact that the provision is contained in a Decree-Law is first and foremost symptomatic of the need to take action on an urgent basis; the reference in the preamble to the Decree to the need to amend the extraordinary administration procedure for very large undertakings, "identifying specific legislation for large undertakings providing essential public services with the intention of guaranteeing continuity in the provision of those services", and the inclusion of those arrangements in the law regulating the provision of those services also point to the reasons for the choice.

In this case it was necessary to confront a very serious crisis situation (as is shown by the fact that it was under extraordinary administration) of an undertaking providing an essential public service, the continuity of which needed to be guaranteed (this last fact being expressly accepted by the referring court), moreover in a special sector known to be of strategic importance for the national economy which deserves to be considered separately, and which required the avoidance of distortions and interruptions liable to have systemic implications in other sectors. The ordinary legislation thus

sought to achieve an intervention intended to guarantee its continuity and to enable the significant value of the company (comprised of a broad range of assets and contractual relationships) to be preserved in order thereby to avoid also a serious employment crisis.

The *travaux préparatoires* provide a broad account of these objectives. It is in fact clear from the speeches made in the Senate and the Chamber of Deputies, in both the Committees and in plenary session, that there was an ongoing reference to the "need for important and broad-sweeping action in order to save Alitalia" and the conviction that the provision under examination was deemed to be conducive to this objective is clear throughout. There is an unequivocal intention to guarantee the continuity of air transport on all national routes, including those not economically convenient, and to avoid the winding up of a very large undertaking and the dispersal of its corporate value in order to protect jobs and the strategic requirements of the national economy. Whilst these interests predominantly relate to the economic sphere, for the reasons set out above and in consideration of the seriousness of the recession and the special nature of the reference sector, they are associated with requirements of "social utility" and "social ends" (Article 41 of the Constitution) which justify a specific, exceptional regulatory intervention that falls outwith the remit of the independent Authority.

From the viewpoint of the general objective pursued and the instrument used, the consideration that this choice is not even inconceivable within the reference legislative framework provides further support that the action is not unreasonable. The solution privileged by the provision under examination may in fact be considered as a new way of approaching corporate crises that characterises Italian law, which also served as inspiration for the reform of bankruptcy law, characterised by the abandonment of the winding-up approach in favour of that aimed at the conservation of corporate value for the purposes of social utility (including the protection of jobs), which may also be achieved through sales and mergers.

If ultimately the balancing of a variety of interests imposes a choice that is not typical of antitrust control, but is essentially characterised by a conception of economic policy and market regulation imposed by an exceptional situation, this choice cannot be regarded as unreasonable solely due to the fact that it has been made through legislation.

10.– Once the general interests of significance under constitutional law that can be brought under the general clauses of "social utility" and "social ends" pursuant to Article 41(2) and (3) of the Constitution (also in the light of the special nature of the economic cycle and the public service provided by the companies involved in the merger) have been identified, the solution implemented in order to guarantee that protection will pass the necessary proportionality test to which it is subject.

The examination of the general reference context highlighted first and foremost the fact that the relevant competition law made it possible to take account of these interests and to exploit them also with a view to achieving a particular structure to merger controls.

It is also of particular significance that although Article 4(4d) introduced an exemption from generally applicable legislation vis-à-vis the Authority's power to prescribe structural measures and the exercise of the powers provided for under Article 6(2) of Law no. 287 of 1990, it did not amend Articles 2 and 3 of that Law, and hence the possibility of sanctioning *ex post* any abuse of a dominant position flowing from the merger. To this end, it must be remembered that Article 102 of the Treaty on the Functioning of the European Union may be applied by the national antitrust authorities also to a dominant position resulting from a merger on a national level, which reinforces the Authority's power to intervene in any case with measures aimed at avoiding the abuse of a dominant position.

Ordinary legislation has also displayed attention to consumers' interests (which in this case is a significant objective, in view of the intention to guarantee the maintenance on all routes of a transport service that is fundamental for our country) which, as pointed out above, receive specific attention under the legislation on mergers on all fronts. Indeed, the legislation under examination has maintained the Authority's power to specify appropriate measures in order to guarantee consumers' needs, and did not even impinge upon the ability to exercise an ongoing control and to adopt such measures at different times, shaping and formulating them to a varying degree, including on a temporary basis, and taking account to this end of the development of the market and the impact of that development on consumers' interests.

This is an issue of certain significance in assessing the proportionality of the measure; in order to appreciate its importance, it is sufficient to recall that although the European Commission found that "[c]ommitments which are structural in nature […] are, as a rule, preferable from the point of view of the objective of [the Merger] Regulation […]", it nonetheless specified that "the possibility cannot automatically be ruled out that other types of commitments may themselves also be capable of preventing significant impediment to effective competition" (paragraph 15 of Communication no. 2008/C267/01 of 22 October 2008 laying down " Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004").

As noted above, Regulation no. 139 of 2004 also stipulates as a mandatory prerequisite for a favourable assessment of mergers the fact that they must not result in "lasting damage to competition". With regard to this issue, Article 4(4d) grants the Authority the power to define "the time limit, which may not be shorter than three years, before which the monopoly conditions, if any, created must end". The transitional nature of the exception to the Authority's power to order specific measures therefore supports the conclusion that the provision is not unreasonable and does not violate Articles 3 and 41 of the Constitution.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

rules that the intervention in the proceedings initiated by referral order no. 225 of 2009 by Alitalia-Linee Aeree Italiane S.p.A., under extraordinary administration, represented by the Extraordinary Administrator, is inadmissible;

rules that the question concerning the constitutionality of Article 4(4d) del Decree-Law no. 347 of 23 December 2003 (Urgent measures concerning the industrial restructuring of large companies in a state of insolvency) converted, with amendments, into Law no.

39 of 18 February 2004, introduced by Article 1(10) del Decree-Law no. 134 of 28 August 2008 (Urgent measures concerning the restructuring of large companies in crisis) converted, with amendments, into Law no. 166 of 27 October 2008, raised with reference to Articles 3 and 41 of the Constitution by the Regional Administrative Court for Lazio by the referral orders mentioned in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 23 June 2010.

Signed:

Francesco AMIRANTE, President

Giuseppe TESAURO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 22 July 2010.

The Director of the Registry

Signed: DI PAOLA