

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2017/2111

of 5 July 2016

**on the setting-up and capitalisation of Airport Handling SpA SA.21420 (2014/C) (ex 2014/NN)
implemented by Italy**

(notified under document C(2016) 4103)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 23 June 2010, following a complaint, the Commission notified the Italian authorities of its decision to initiate the formal investigation procedure pursuant to Article 108(2) of the Treaty on the Functioning of the European Union ('the Treaty'), in connection with the capital injections carried out between 2002 and 2010 by SEA SpA (hereinafter 'SEA'), the state-owned operator of the Milan Malpensa and Milan Linate airports, in its subsidiary SEA Handling SpA (hereinafter 'SEAH'), ground handling provider at those airports.
- (2) During that period, SEA had been almost entirely owned by public bodies, namely the Municipality of Milan (84,56 %) and the Province of Milan (14,56 %), alongside with smaller shareholders (0,88 %). In December 2011, 29,75 % of SEA's capital was sold to the private fund F2i (*Fondi italiani per le infrastrutture*). End 2012, F2i increased its shareholding in SEA to 44,31 %. At the closure of the formal investigation procedure by this Decision, SEA is owned 54,81 % by the Municipality of Milan, 44,31 % by F2i and 0,88 % by other shareholders.
- (3) On 19 December 2012 the Commission adopted decision C(2012) 9448, corrected by decision C(2013)1668 of 22 March 2013 (hereafter 'the recovery decision') concerning aid granted by SEA to its subsidiary SEAH during the years 2002-2010. The Commission concluded that the entirety of the injections carried out by SEA into its subsidiary's capital constituted unlawful State aid. The Commission also concluded that, although SEAH could be classified as an undertaking in difficulty, those capital injections could not be declared compatible with the internal market under the EU guidelines on State aid for rescuing and restructuring firms in difficulty ⁽²⁾.

⁽¹⁾ OJ C 44, 6.2.2015, p. 30.

⁽²⁾ OJ C 249, 31.7.2014, p. 1.

- (4) Consequently, Italy was ordered to take all necessary steps, in accordance with the applicable national laws, to recover from SEAH the incompatible State aid of approximately EUR 359,644 million plus recovery interest.
- (5) On 4 March 2013, 15 March 2013 and 18 March 2013 respectively, Italy, SEAH and the Municipality of Milan lodged actions for annulment against the recovery decision before the General Court (Cases T-125/13, T-152/13 and T-167/13). Cases T-125/13, T-152/13 and T-167/13 are pending.
- (6) On 18 March 2013 and 21 March 2013, SEAH and the Municipality of Milan introduced applications to suspend the operation of the recovery decision (Cases T-152/13 R and T-167/13 R). On 21 May 2013, the Administrative Court of Lombardy ('TAR Lombardia') ordered the suspension of the implementation of the recovery decision. On 25 September 2013, the Council of State ('Cds') annulled the order of TAR Lombardia. The application for suspension brought before the General Court was withdrawn in June 2013⁽³⁾.
- (7) On 27 November 2013, by way of an informal pre-notification process, Italy consulted the Commission on the following projects: First, on SEA's plan to liquidate SEAH; second on SEA's intention to establish a new subsidiary providing ground handling services at Milan airports, named 'Airport Handling SpA' (hereinafter 'Airport Handling') and to inject initial equity into it. In that pre-notification process, Italy asked the Commission to confirm that:
 - (a) the sale of SEAH's assets in the liquidation procedure does not involve elements of economic continuity with Airport Handling, and thus does not transfer the former's liabilities to the latter, and in particular the requirement to recover the unlawful and incompatible State aid granted to SEAH;
 - (b) SEA's equity injection into Airport Handling's capital does not qualify as State aid.
- (8) By letter dated 9 July 2014, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the setting-up by SEA of Airport Handling ('the 2014 opening decision'). With that procedure, the Commission invited Italy to provide all such information as may help to assess the question of the transfer of the recovery obligation from SEAH to Airport Handling as well as the possible aid inherent in SEA's capital injection in Airport Handling, within 1 month of the date of receipt of this letter.
- (9) On 19 September 2014, Italy, SEA and Airport Handling lodged actions for annulment against the 2014 opening decision before the General Court (Cases T-673/14, T-674/14 and T-688/14). The General Court (Fourth Chamber) rejected the action in Case T-673/14 by Order of 8 December 2015; the actions in Cases T-674/14 and T-688/14 were withdrawn on 14 and 15 July 2015 respectively.
- (10) On 23 September 2014 and 25 September 2014, SEA and Airport Handling introduced applications for *interim* measures to suspend the operation of the Commission's 2014 opening decision (Cases T-674/14 R and T-688/14 R). On 29 September 2014, the President of the General Court ordered the suspension of the publication of the 2014 opening decision in the *Official Journal of the European Union*. On 28 November 2014, the President of the General Court rejected SEA's and Airport Handling's requests for *interim* measures and revoked the preliminary *interim* measure whereby it ordered the Commission not to publish the 2014 opening decision⁽⁴⁾.
- (11) On 6 February 2015, the 2014 opening decision was published in the *Official Journal of the European Union*⁽⁵⁾ and the Commission thereby invited interested parties to submit their comments on the measures under investigation.
- (12) Italy submitted its comments on the 2014 opening decision by letter dated 9 September 2014.

⁽³⁾ See Order of 20 June 2013, case T-152/13 R, ECLI:EU:T:2013:337, and Order of 1 July 2013, case T-167/13 R, ECLI:EU:T:2013:331.

⁽⁴⁾ See Order of 28 November 2014, case T-688/14 R, ECLI:EU:T:2014:1010. The President of the General Court dismissed the application in case T-674/14 R by Order of 27 November 2014, ECLI:EU:T:2014:1009.

⁽⁵⁾ OJ C 44, 6.2.2015, p. 30.

- (13) The Commission received comments from four interested parties. It forwarded those comments to Italy and gave it the opportunity to react. Italy informed the Commission of its observations on said comments by letter of 26 May 2015.
- (14) The Commission asked Italy to provide additional information by letter of 20 May 2015. Italy replied by letters of 19 and 22 June 2015 and 2 July 2015.
- (15) Meetings between the Commission's services and the representatives of the Italian authorities and the Milan Airport Handling Trust took place on 30 January 2015, 7 May 2015, and 15 September 2015. Those meetings were followed by several submissions to the Commission by the Trust on 6 February 2015, 8 June 2015, 13 August 2015 and 23 September 2015, essentially aiming to inform the Commission on the state of the procedure for the sale of a minority shareholding in Airport Handling. The nature and task of the Trust will be explained in Section 2.3 below.
- (16) By letter dated 23 October 2015, the Commission asked Italy to provide supplementary information. Italy responded by letter dated 10 November 2015.
- (17) On 25 November 2015, a meeting was held between the Commission services and the Italian authorities, the Milan Airport Handling Trust and the company D'Nata that was preparing to acquire a participation in Airport Handling's share capital.
- (18) By letter of 16 December 2015, Italy informed the Commission on plans to partially alter the scope of Airport Handling's economic activities.
- (19) Italy presented a summary of the main elements it had supplied in the course of the proceedings, by letter of 18 December 2015. The Commission responded by letter of 19 January 2016.
- (20) By letters dated 29 January and 15 February 2016, Italy updated the Commission on the process of the privatisation of Airport Handling.

2. DESCRIPTION OF THE MEASURE

- (21) There are two measures under investigation: First, the creation of Airport Handling combined with the liquidation of SEAH. The Commission assessed whether this measure gave rise to economic continuity between the two companies, leading to a transfer of the recovery obligation from SEAH to Airport Handling. Second, the provision of equity capital to Airport Handling, by its public mother company SEA. The Commission assessed whether this measure was implemented on market terms. In the following, a description of the circumstances surrounding these transactions is given.

2.1. Agreements with the trade unions and new work contracts

- (22) In the period during which the measures under investigation were implemented, SEA Group (SEA and SEAH), SEAH and Airport Handling respectively concluded agreements with the trade unions that represented the employees of SEAH, against the backdrop of SEAH's voluntary liquidation, initiated by SEA. The overall objective of these agreements was to safeguard the jobs of all SEAH personnel and to ensure continued and sustainable handling operations in the SEA-Group. The following agreements were concluded:
- (23) After SEA had decided that SEAH should be wound up in order to comply with the recovery decision, SEA Group concluded an agreement with trade union organisations, on 4 November 2013, to solve the issue of SEAH workers becoming redundant. The agreement provided for a voluntary termination incentive plan for all SEAH employees, to be implemented through collective dismissals and the incorporation of a new whollyowned subsidiary of SEA which would hire part of SEAH's workforce.
- (24) That agreement specified a 'draft settlement' and stipulated that an 'Implementing Agreement' was necessary to set out rules for new contractual conditions and a new working structure for Airport Handling employees, because the requirement for discontinuity stated by the Commission would dictate the creation *ex novo* of employment relationships. Further according to the agreement, conclusion of such Implementing Agreement would only be possible following the completion of 'commercial negotiations between Airport Handling and the carriers operating at Linate and Malpensa Airports, in a context of free competition' ⁽⁶⁾. In summary, the Implementing Agreement had to be based on the following principles:

— continuation of the objective to safeguard the jobs of all SEAH personnel,

⁽⁶⁾ Point 5 of the agreement of 4 November 2013.

- identification of clear criteria for the possible relocation of personnel within the SEA group,
 - economic viability of the handling business,
 - definition of an appropriate, inclusive system of industrial relations,
 - continued application of the SEA Group company welfare system.
- (25) On 22 April 2014, SEAH initiated the laid-off workers' mobility scheme (*Collocamento in mobilità*), a social security scheme put in place by the Italian State mainly aiming to support employees of companies in difficulties during unemployment periods⁽⁷⁾. At that time, SEAH had 2 214 employees, being the equivalent of 1 980 full time employees.
- (26) On 31 May 2015, Airport Handling had [...] (*) employees ([...] (*) full-time equivalents, hereinafter 'FTE'), of which [...] (*) employees ([...] (*) FTE) were previous SEAH-employees.
- (27) On 4 June 2014, SEAH and the trade unions signed the Implementing Agreement aiming to implement the provisions of the draft settlement described under recital 24 above.
- (28) The agreement laid down that SEA had consented, firstly, that Airport Handling employs SEAH personnel, to the extent and subject to the job profiles required by Airport Handling and secondly, that negotiations with the trade union organisations commence with regard to staff selection criteria. The agreement also points out that any new employment contract with Airport Handling would be necessarily characterised by a break with the formal and substantive content of the employment contract with SEAH.
- (29) According to that agreement, SEAH showed its availability to provide for a financial incentive scheme for workers who by 30 June 2014 agree not to oppose the layoff measures.
- (30) Also on 4 June 2014, Airport Handling concluded an agreement with the trade union organisations. That agreement specifies the number of employees with contracts of an indefinite duration required by Airport Handling on 1 July 2014. It further specified that Airport Handling agreed to re-employ with priority former employees of SEAH.
- (31) That agreement indicates Airport Handling's presumed labour demand expressed in FTE. In that context, the agreement emphasises that those indications may be subject to change in terms of the total number and/or variables stated in the agreement. The staff estimates were as follows: [...] (*) FTE permanent staff for operations; [...] (*) FTE administrative staff; [...] (*) FTE fixed-term personnel for seasonal activities. The agreement stipulates that, in order to satisfy that demand, Airport Handling's priority strategy will be to approach individuals currently employed by SEAH. The agreement also provides for the recruitment procedure, the legal and financial content of employment contracts, welfare policy and work organisation. The agreement's provisions imply that former SEAH staff will be hired under new contracts with materially different economic conditions.
- (32) Working arrangements set out in that agreement differ from those which SEAH applied to its employees. In particular:
- under the national collective labour agreement for aviation staff, Airport Handling would apply the Handlers section, while the Airport operators section applied to labour contracts of workers previously employed by SEAH. According to Italy, the Handlers section provides for different conditions concerning leave (20 instead of 22 days per year), duration of work (7h30 minutes a day instead of 7h15 minutes a day) and remuneration and allowances (elimination of 6 days' remuneration),
 - different organisation of salary rights, e.g. the non-application by Airport Handling of certain headings of the corporate contract supplementing the national collective labour agreement, which SEAH used to apply to its employees,
 - different organisation of employees (e.g. [...] (*)).

⁽⁷⁾ Law No 223 of 23 July 1991 on the rules relating to the lay-off fund, laid-off workers' mobility, unemployment benefits, the implementation of EU directives, job placement and other provisions relating to the labour market (GURI No 175 of 27 July 1991).

(*) Business secret.

- (33) According to Italy, as a result:
- Airport Handling's total labour cost decreased by 30 % compared to SEAH's total labour cost,
 - the weight of the costs of Airport Handling's supplementary corporate contract decreased by [...] (*) % when compared to SEAH's, with average salary cuts on an annual basis being [...] (*) times the monthly salary.
- (34) On 9 June 2014 SEAH's Extraordinary Shareholders Assembly approved the winding up of the company and its placement into voluntary liquidation, establishing the effective winding-up date as being 1 July 2014 ⁽⁸⁾.
- (35) A liquidator was appointed and tasked to sell the company's assets, pay off creditors and prepare the final liquidation balance sheet and report.
- (36) The trade union organisations had conditioned the entry into force of the agreements of 4 June 2014 on the positive result of a referendum amongst SEAH employees. That referendum was held between 11 and 13 June 2014. In that referendum, the agreement of 4 June 2014 was rejected.
- (37) Therefore, on 1 July 2014, SEAH's Shareholders Assembly decided the prolongation to 31 August 2014 of the deadline for SEAH's cessation of activities, empowering the liquidator (who had assumed his role on 1 July 2014) to provisionally manage the company until that date, and, on expiry of that term, to proceed to the disposal of SEAH's assets and the cessation of its activity.
- (38) In order to overcome the negative vote of the referendum of 14 June 2014, the trade union organisations on 4 July 2014 proposed certain clarifications on points stipulated under the June 4, 2014 agreement, such as that additional days of work had to be spread evenly throughout the year, that reference to the 'effectiveness of the working hours' meant that at least 7,5 hours per day, per 5-day working weeks, had to be worked, and that workers had the possibility to select, between two options, how to work during certain festivities which were no longer paid under the new agreement. On 7 July 2014 Airport Handling endorsed those proposals. On 15 July 2014, Airport Handling signed a supplementary agreement which confirmed the validity of the agreement of 4 June 2014 and included the clarifications requested by the trade union organisations. That new agreement however did not introduce any material alterations as compared to the previously rejected agreement of 4 June 2014.
- (39) In August 2014, SEAH proceeded to the dismissal of its entire workforce. At the same time, Airport Handling started to recruit, amongst former workers of SEAH, those workers which it considered essential to its activities. Airport Handling also contacted Adecco, a service provider in the field of temporary work, for the procurement of temporary workers.
- (40) SEAH ceased operations as of 1 September 2014. On that day, Airport Handling started operations at Milan airports. As of 1 September 2014, Airport Handling had [...] (*) employees ([...] (*) FTE), thus employing [...] (*) % of the workers employed by SEAH as of 22 April 2014, date on which SEAH initiated official proceedings for the collective dismissal of its employees. In addition, Airport Handling used [...] (*) interim-workers ([...] (*) FTE) [...] (*).

2.2. Contract with the air carriers

- (41) By letter of 22 April 2014, SEAH informed air carriers, suppliers and other interested parties, that it would cease operations as of 1 July 2014 and that therefore, on that date, it would cease providing ground handling services at Milan Airports.

(*) Business secret.

⁽⁸⁾ Voluntary liquidation is essentially similar to winding up by the Court, save for the fact that it falls to the shareholders in general meeting, and not to the Court, to take the decision to wind up the company, appoint the liquidators and determine their powers. Only where a majority of the shareholders cannot be assembled must the company apply to the court for a declaration putting it into liquidation. The Court then designates the liquidators in accordance with the company's articles of association or pursuant to the decision of the shareholders in general meeting, unless it is clear that disagreement between the shareholders will prevent them from taking a decision in a general meeting, in which case the court itself appoints a liquidator.

- (42) Following the above communication, ten airlines decided to entrust ground handling services at Milan airports to providers other than SEAH and Airport Handling.
- (43) At the same time, Airport Handling was selected as ground handler service provider by 19 airlines operating at Milan airports based on open tenders. Other airlines selected Airport Handling based on competitive dialogue procedures. According to Italy, the selection of the service provider is normally based on the assessment of certain factors such as price, financial soundness of the provider, availability of efficient equipment, existence of a network, track record, experience and competences of the operator.

2.3. Creation of Airport Handling and transfer of SEA's participation to the Milan Airport Handling Trust; capitalisation of Airport Handling

- (44) Airport Handling was incorporated on 9 September 2013 as a limited liability company with a share capital of EUR 10 000.
- (45) On 10 March 2014, SEA's Board of Directors decided to increase the capital of Airport Handling by up to EUR 2,5 million, in order for Airport Handling to meet the requirements for certification as ground handler by the National Civil Aviation Authority (ENAC). Pursuant to the national rules in force, ENAC grants licences to ground handling services providers that meet the following requirements⁽⁹⁾:
- capital of at least one fourth of the likely turnover,
 - operating resources and organisational capacity adequate to carry out the services,
 - certificate proving that all obligations arising from labour and safety laws are complied with.
- (46) On 30 June 2014, SEA's Board of Directors decided the setting-up of the Milan Airport Handling Trust ('the Trust') and the increase in Airport Handling's capital by up to EUR 25 million.
- (47) The Trust was incorporated on 30 June 2014 and the Trust Deed was signed on the same day. According to its deed of incorporation, the Trust: (i) acts as sole shareholder of Airport Handling pending the sale of a minority shareholding in the company; and (ii) ensures that Airport Handling operates in economic discontinuity with SEA Handling.
- (48) According to the Trust Deed, the Trust was set up for the specific purposes to:
- confirm and verify the absence of economic continuity of Airport Handling with SEA and SEAH, ensured notably by managing Airport Handling independently of SEA,
 - allow the entry of independent third-party investors in the share capital of Airport Handling for a percentage shareholding of not less than 30 %.
- (49) The Trust Deed states that in order to implement this mission, the Trust exercises its power to:
- appoint directors, statutory auditors and other corporate bodies, choosing among eligible candidates that have no operational responsibility or employment relationship with SEA or SEAH,
 - ask for a report from the directors on the events of economic discontinuity which occurred prior to the incorporation of the Trust, and
 - ensure that appropriate procedures are in place to avoid that the commercial information of SEA unduly benefits Airport Handling in acquiring or maintaining contracts with airlines, compared to competitors, with the observance of the limitations contained in Annex A of the Trust Deed.

⁽⁹⁾ Airport Handling filed the request for the licence for the provision of ground handling services at Linate and Malpensa on 21 January 2014. ENAC awarded the licence to Airport Handling on 17 April 2014.

- (50) In particular, according to the Trust Deed, the trustee shall verify that, since the incorporation of Airport Handling, no legal acts have been put in place which result in the transfer by SEAH to Airport Handling of any assets, moveable and immovable property, contracts with airlines and/or with handling services suppliers, intellectual property rights or unilateral undertakings with economic effects (i.e. real or personal guarantees) other than those provided under the Trust Deed.
- (51) In this sense, the Trust Deed excludes from the scope of the controlling power of the trustee:
- the fact that Airport Handling was incorporated and capitalised by SEA,
 - the fact that Airport Handling had taken over personnel from SEAH,
 - the fact that Airport Handling leases its assets and handling equipment from SEAH under a lease contract due to expire on 28 February 2015.
- (52) In addition, the Trust Deed also provides that the trustee is required to verify that:
- with the exception of the powers granted to SEA under the Trust Deed, Airport Handling's operational management is separate from SEA's management, under the control and oversight of the Board of Directors, whose members are appointed autonomously by the trustee,
 - before or after the creation of the Trust, SEA and Airport Handling do not put in place legal deeds resulting in the transfer by SEA of assets, moveable or immovable property, contracts, unilateral undertakings with economic effect (i.e. real or personal guarantees) or intellectual property rights, other than those provided in the Trust Deed or requested by SEA in its capacity as concession holder of the Milan airports, and
 - Airport Handling puts in place procedures and controls to avoid that it can benefit from SEA's proprietary commercial information which could unduly benefit Airport Handling in acquiring or maintaining contracts with airlines, such as information on the contracts entered into in the past by SEAH or requirements of the airlines communicated to SEA in its capacity as airport operator.
- (53) According to the Trust Deed, it is however not the task of the trustee to verify or assess the circumstances that:
- representatives of SEA participated to the negotiations with the employees to be assumed by Airport Handling,
 - Airport Handling benefits from outsourced SEA-employees, including its general manager, which was to be maintained for the duration of the Trust,
 - certain centralised services would continue to be provided by SEA,
 - SEA may verify quality service levels in order to comply with its duties as airport operator of the Milan airports infrastructure,
 - decisions on the future funding of Airport Handling are entirely left to SEA, without prejudice to the rights of the Board of Directors of Airport Handling to take decisions in order to implement the business plan.
- (54) As far as the entry of a third party investor in Airport Handling is concerned, the Trust Deed provides that the initial phase of the procedure for the opening of Airport Handling's capital to 'eligible shareholders' (namely physical or legal persons or entities which, if resident in Italy, do not qualify as public entities or companies controlled by the Italian state, with the exception of listed companies) was to be managed by SEA and was supposed to be completed by 28 February 2015.
- (55) The Trust Deed stipulates that if by 1 March 2015 SEA is still a shareholder of Airport Handling for more than [...] (*) %, the trustee shall start searching for investors which must comply with conditions previously communicated to it by SEA through a deed which must be notified to the lawyer acting as Trust Guardian, and subject to revision by SEA in due time. In any other case, the trustee may not alienate the shareholding in Airport Handling without SEA's consent.

(*) Business secret.

- (56) The Trust Deed further stipulates that after the sale of [...] (*) % of SEA's shareholding in Airport Handling, SEA shall search for private investors willing to take on further participations in Airport Handling's capital, taking into account social considerations and the obligation on SEA to continue ensuring the provision of ground handling services at Milan airports.
- (57) On 26 August 2014 Airport Handling's Board of Directors approved an Addendum to the Trust Deed. The Addendum laid down that Airport Handling would issue 20 000 participating equity instruments — SFPs (*strumenti finanziari partecipativi*) pursuant to Article 2346 paragraph 6 of the Italian Civil Code ⁽¹⁰⁾, with a nominal value of EUR 1 000 each, to be proposed to SEA. The Addendum was signed on the following day.
- (58) On 27 August 2014, Airport Handling's Shareholders Assembly ⁽¹¹⁾ decided to increase Airport Handling's capital from EUR 1,3 million to EUR 5 million, subscribed and paid-in by SEA.
- (59) On the same day SEA transferred the entire holding of Airport Handling to the Trust and appointed a trustee, namely Crowe Horwath Trustee Services ('the Trustee') to manage Airport Handling.
- (60) On 27 August 2014 the Trustee appointed a new Board of Directors of Airport Handling. SEA [...] (*) senior managers [...] (*), out of five, [...] (*). According to Italy, both perform their activities in the exclusive interest of Airport Handling on the basis of a secondment contract from parent company SEA.
- (61) Still on 27 August 2014, after the conferral of SEA's participation in the Trust, Airport Handling's Shareholders Assembly ⁽¹²⁾ decided the conversion of Airport Handling from a limited liability company (SRL) to a joint stock company (SpA) and the issuance of the 20 000 SFPs, offered for subscription to SEA at a price of EUR 1 000 each. The SFPs were subscribed and paid in by SEA the following day, thereby increasing Airport Handling's capital to EUR 25 million in total (EUR 5 million share capital and EUR 20 million in the form of SFPs).

2.4. The attempted sale of SEAH's assets; the lease contract with Airport Handling

- (62) On 12 November 2014, the liquidator issued a call for expression of interest in the purchase of SEAH's assets; the call was published in the Supplement to the *Official Journal of the European Union*:

'Italy — Milan: Sale of equipment comprising, for information only: Cargo loaders, transporters, lifting platforms, pallet jack, mobile/mobile/conveyor belts, towed/BAE towed stairs, electric/diesel/hybrid tractors, barrels, generators, air conditioner units, compressors, baggage/goods trolleys 2014/5 218-385934 — Call for expression of interest' ⁽¹³⁾. For the purposes of the call for expression of interest, the assets were grouped in nine lots.

- (63) SEAH commissioned *Istituto del Marchio di Qualità SpA* ('IMQ') to establish a comprehensive valuation of SEAH's assets and on that base to set the fee for the lease of SEAH's ground handling equipment as well as the price for the sale of the assets. IMQ delivered two reports: On 25 June 2014 as regards the lease fee; on 16 October 2014 as regards the division of assets in lots for sale. According to IMQ, the estimated value of the assets shall be understood as the likely market value that assets of similar technical characteristics, performance, state of repair and storage, use and age would have in monetary terms.
- (64) The closing date for the submission of bids for the nine lots for sale was set for 26 January 2015.
- (65) IMQ proposed as a fee for the lease of SEAH's ground handling equipment EUR [...] (*) per semester (EUR [...] (*) per year).

(*) Business secret.

⁽¹⁰⁾ The SFPs are equity-based instruments, therefore they are not subject to a repayment obligation of the amount contributed by SEA. They do not carry administrative rights but are similar to shares in terms of equity rights. In particular, these instruments provide profit-sharing and reserve rights and rights to other equity items, including in case of winding up of the company.

⁽¹¹⁾ On that date SEA was still the sole shareholder of Airport Handling.

⁽¹²⁾ On that date the Trust was the sole shareholder of Airport Handling.

⁽¹³⁾ Contract notice No 2014/S218-385934 of 12.11.2014 in the 'tenders electronic daily' (TED) supplement to the OJ: <http://ted.europa.eu/udl?uri=TED:NOTICE:385934-2014:TEXT:EN:HTML&src=0>

- (66) On 1 September 2014, SEAH and Airport Handling entered into a lease contract by which Airport Handling would lease SEAH's ground handling equipment at a lease fee of EUR [...] (*), i.e. the amount proposed by IMQ. The lease contract was to expire on 31 August 2015.
- (67) In order to confirm the correctness of the valuation process carried out by IMQ, Airport Handling and SEAH on 1 September 2014 contracted a second independent expert, *Ernst & Young* financial-business Advisors SpA ('E&Y'), to revalue the level of the lease fee. In this context, SEAH and Airport Handling had contractually agreed that, should the second valuation conclude that the market value deviated by at least [...] (*) % from the level set by IMQ, the contractual fee would be adjusted accordingly with retroactive effect.
- (68) On 15 October 2014, E&Y delivered its report and set the market rate for the lease of SEAH's assets at EUR [...] (*) per year. On 25 October 2014, Airport Handling and SEAH agreed to broaden the analysis carried out by E&Y and entrusted the latter with the task of analysing the actual operating conditions and physical state of the assets (E&Y had initially based its assessment on a physical check of the assets on a sample basis). This analysis revealed that a number of machinery and equipment were not suitable for use taking into account the short duration of the lease and the high costs of necessary repairs in view of the obsolete nature of many pieces of equipment. According to the Trust, at the date when it submitted its comments on the 2014 opening decision, SEAH and Airport Handling were contemplating a solution to avoid litigation. Consequently, the lease fee was retroactively adjusted to EUR [...] (*) per annum.
- (69) On November 26, 2014, Airport Handling's Board of Directors decided to start the public tender for the purchase of new equipment on the market. On 11 February 2015, as a result of that tender procedure, Airport Handling replaced roughly [...] (*) % of its equipment by assets bought on the market, costing approximately EUR [...] (*). According to the Italian authorities, Airport Handling financed that purchase exclusively through its own resources.
- (70) On 9 February 2015, the tender for the sale of SEAH's assets was declared unsuccessful, as no bidder had expressed interest in the purchase of any of the lots.
- (71) On 26 February 2015, SEAH received a first notice from Airport Handling, whereby the latter expressed its interest in the purchase of 6 of the 9 tender lots. On 3 June 2015, Airport Handling renewed its notice of interest. On 18 September, 2015, [...] (*) were sold to Airport Handling at the price indicated in the initial tender procedure, being EUR [...] (*).

2.5. The sale of a minority shareholding in Airport Handling

- (72) As laid down by the Trust Deed, the Trustee initiated the procedure for the sale of a minority share of Airport Handling's capital.
- (73) For that purpose, the Trustee on 27 January 2015 appointed the Italian branch of *BNP Paribas* as financial advisor in relation to the sale of 'at least 30 %' of the share capital of Airport Handling to third party investors. The Italian authorities pointed out that BNP Paribas in its capacity of financial advisor organised the sale process in complete independence. BNP Paribas scheduled the following sale phases: 1. Preliminary screening; 2. Organisation of the transaction; 3. Closing of the transaction.
- (74) Five interested investors submitted non-binding offers for the purchase of a [...] (*)-[...] (*) % stake in Airport Handling: [...] (*), [...] (*), [...] (*), [...] (*), and [...] (*).
- (75) According to the draft sale contract provided by Italy, in order to allow the investor to have operational control of Airport Handling, the Trustee undertakes, for the entire period until the expiry of the standstill period⁽¹⁴⁾, to grant the investor the right to appoint the majority, i.e. three out of five members, of the Board of Directors, among which the CEO of the company, whilst the Chairman of the Board of the Directors shall be appointed by the shareholder's meeting.

(*) Business secret.

⁽¹⁴⁾ 'Long-stop date' 18 calendar months from the execution and exchange of all documents and the performance and consummation of all obligations, arising from the sale contract.

- (76) On 21 September 2015, the Trustee signed a binding Framework Investment agreement with D’Nata, for the sale of [...] (*) % of Airport Handling shares. Pursuant to that agreement, the following arrangements apply:
- (77) Initial investment: After merger control authorities have cleared the acquisition, D’Nata acquires [...] (*) % of Airport Handling’s shares with the right to appoint the majority of the board of directors and the CEO. The objective of that arrangement was that D’Nata, despite being a minority shareholder, would effectively be in the position of a controlling shareholder.
- (78) Additional investment: Under a call-option arrangement, D’Nata is entitled to acquire a further [...] (*) % stake in Airport Handling. A specific ‘State Aid Put-Option’ stipulates that D’Nata will have the right to sell back its [...] (*) % stake for the adjusted initial acquisition price, if either the Commission adopts a negative decision, or if 18 months after completion of the initial investment, the State aid procedure is still pending.
- (79) On 8 February 2016, the Italian Competition Authority, *Autorità Garante della Concorrenza e del Mercato*, cleared the acquisition of the sole control of Airport Handling by D’Nata under Italian merger control law. The Trustee informed the Commission that subsequent to that clearance, it would proceed with D’Nata to closing of the investment on 8 March 2016.

2.6. The business plan 2014-2017

2.6.1. The business plan of 14 November 2013

- (80) During the preliminary investigation phase, Italy had provided the business plan of Airport Handling for the period 2014-2017, dated 14 November 2013 (‘the business plan of November 2013’), to evidence that SEA’s investment in the capital of Airport Handling complied with the market economy investor principle. The main elements of that plan are summarised below:
- (81) The business plan focuses on ramp⁽¹⁵⁾ and passenger⁽¹⁶⁾ services, which represent the main part of Airport Handling’s business. The company’s overall market share at both Malpensa and Linate airports was expected to be [50-70] (*) % and [50-70] (*) % respectively in the second semester of 2014 and to increase to [60-80] (*) % and [60-80] (*) % respectively by 2017.
- (82) The projections developed in the plan depict increasing operating revenues on account of a forecasted increasing market share. Total revenue was assumed to increase from EUR [...] (*) for the second half of 2014 to EUR [...] (*) in 2017, based on an assumption of an [...] (*)- [...] (*) % p.a. increase in passenger traffic for the period 2014-2017.
- (83) Average staff numbers were projected to increase from [...] (*) FTE in 2014 to [...] (*) FTE in 2017 due to an increase in the number of contracts with fixed duration. Labour costs were estimated to be around [...] (*) % of total operating costs. SEA would increase productivity by 12 % in the reference period, using three main drivers:
- efficiency gains in the start-up of Airport Handling (adjusting the share of fixed duration and part time contracts; better definition of the work programme²; adjusting the organisational structure to use resources effectively by restricting use of seasonal workers; maximising capacity of existing workforce),
 - economies of scale resulting from the increase in traffic,
 - structural adjustments in the business processes (better work planning and organisation; investments in technical solutions to enable partial or total automation of certain activities; linking workforce expenditure against business outputs and outcomes).

(*) Business secret.

⁽¹⁵⁾ Air-side services, including the boarding/disembarking of passengers, luggage and cargo, aircraft balancing, and luggage distribution.

⁽¹⁶⁾ Services provided land-side.

- (84) Initial start-up costs for the renegotiation of client and supplier contracts, workforce agreements, recruitment, writing of organisational/administrative/operational procedures, legal costs, bank charges, consultancy and purchase of small items and sundry supplies were expected to amount to EUR [...] (*).
- (85) Operational start-up costs, i.e. capital expenditure required for Airport Handling to become operational were estimated at EUR [...] (*) for new equipment. However, for the purpose of the business plan of November 2013, it was assumed that Airport Handling would acquire used ground handling equipment valued at EUR [...] (*).
- (86) In order to cover the outlay for all estimated start-up costs, the business plan requires a capital increase of EUR [...] (*) in [...] (*).

2.6.2. *The business plan of 6 August 2014*

- (87) Further in the course of the investigation, Italy submitted a revised business plan for the period 2014-2017, dated 6 August 2014 ('the business plan of August 2014'), as approved by Airport Handling's Board on 26 August 2014. According to information provided by Italy, that revision was already being finalised in the month of July 2014. That plan's main assumptions are summarised below:
- (88) Market share: As regards [...] (*), the business plan of August 2014 assumes slightly lower growth than the previous plan, with a market share of [70-80] (*) % in [...] (*), based on updated forecasted levels of traffic of [...] (*), and the [...] (*).
- (89) Prices: Unit prices (per aircraft movement) are higher than the prices assumed in the business plan of November 2013, and are constant in nominal terms over the entire period 2014-2017.
- (90) Personnel costs: Estimated personnel costs in the business plan of August 2014 are slightly higher than those assumed for the November-2013 Business Plan and are ranging between [...] (*) and [...] (*) % of operating costs. That increase is due to the [...] (*).
- (91) Other costs taken into account were external costs, depreciation and provisions, which together accounted for about [...] (*) % of total operating costs, and regulated costs (about [...] (*) %) of services which SEA provides to Airport Handling for the use of common shared infrastructures of the airport (notably [...] (*)). The August-2014 business plan estimated that EUR [...] (*) would have to be invested for the purchase of equipment, of which [...] (*) % for the purchase of new equipment and [...] (*) % for the purchase of second-hand vehicles on the market. These figures were based on bids by potential suppliers received by airport handling in March 2014.
- (92) Like the business plan of November 2013, the business plan of August 2014 shows a reduction in operating costs as compared to SEAH's cost structure, achieved in essence through efficiency increase and personnel reduction.

2.6.3. *Economic valuations of the business plan*

2.6.3.1. *The BCG report*

- (93) Airport Handling commissioned *Boston Consulting Group* with a preliminary independent evaluation of the Business Plan 2014-2017 ('the BCG-Report'). BCG delivered its report on 14 October 2014.
- (94) The BCG-Report is based on the business plan approved on 26 August 2014, on the business plan drawn up in November 2013, on BCG's own industrial experience and know-how as well as on public data relating to market developments and the main handling operators.
- (95) In summary, BCG evaluated the following assumptions underlying the business plan: Revenue perspectives (based on assumed traffic growth potential, assumed growth of volumes handled by Airport Handling); personnel costs (based on costs per FTE; assumed productivity gains); planned investments (total amount EUR [...] (*)).

(*) Business secret.

- (96) BCG summarised its findings as follows:
- (97) In essence, the assumptions concerning traffic volumes at the level of SEA appear to be sustainable and consistent with provisions made by major organisations, in particular IATA and Eurocontrol. BCG however noted that the intention to maintain a constant mix of carriers, consisting of low-cost carriers (LCCs) and so-called legacy carriers, would not be in line with historical development of the mix at the Malpensa terminal, where over the past 4 years the share of LCC would have increased by [...] (*) percentage points. Moreover, a new national regulation (*Decreto Linate*) could lead to the relocation of some carriers from Malpensa to Linate.
- (98) The assumption on possible development of the volumes handled by Airport Handling seems broadly achievable because firstly, the agreements signed with new carriers at the date when BCG wrote the report would ensure a market share of [60-70] (*) %; secondly, the [70-80] (*) % target market share for 2017 would be sustainable in view of current competitive dynamics in the sector as well as of SEAH's historical [70-80] (*) % market share.
- (99) According to BCG, assumptions on revenue from services to the airport manager seemed to be broadly pursued in ongoing negotiations with SEA. BCG however could not assess expected revenues in the last year of the plan (2017), due to the assumed 2-year contract duration.
- (100) Assumptions on average personnel unit cost increases of [...] (*) % per year from 2014 to 2017 would be broadly aligned with the agreement signed between the Italian Association of Airport Operators, Assaeroporti, and trade unions in October 2014.
- (101) The [...] (*) % improvement in resource productivity would appear to be broadly sustainable firstly, because [...] (*) % productivity gain had already been achieved when the report was written and secondly, because the remaining [...] (*) % seem reasonable in light of current organisational levers and technical stage of implementation.
- (102) BCG also found that the EUR [...] (*) budget for investments appears broadly consistent with the purchase of a new fleet mainly consisting of new vehicles (95 %), as shown by the detailed purchase values indicated in the tenders received by Airport Handling at the date of March 2014.
- (103) BCG found that in summary, the profit margin foreseen in the business plan to 2017 ([...] (*) %, EUR [...] (*) would appear broadly in line with, or slightly below the average profitability of a significant sample of other European companies operating in the private and public sector (based on a comparison with *Portway*, *Acciona*, *Aviapartner*, *Fraport* and *ATA-Handling*). BCG however pointed out that the actual evolution of the traffic mix as well as possible impacts of a new regulation concerning Linate (*Decreto Linate*) might lead to less traffic at Malpensa.

2.6.3.2. The Brattle Report

- (104) SEA commissioned *Brattle Group* to analyse SEA's equity injection in Airport Handling, and in particular to analyse whether that investment complied with the market economy investor principle. Brattle delivered its report on 30 March 2015.
- (105) According to the Brattle Report, the analysis is based on the information that was known to SEA at the time the decision to invest in Airport Handling was taken, as well as on public data concerning the competitive position of SEA. According to the Brattle report, the assumptions in the business plan of November 2013 are the most relevant for the market economy investor test, since they represent the basis on which SEA carried out the investment ⁽¹⁷⁾.
- (106) According to the Brattle Report, the doubt spelt out by the Commission in the 2014 opening decision, namely that Airport Handling's business plan was overly optimistic, can be dispelled, given that key assumptions of the business plan have been realised in practice. In particular, Airport Handling's market share in 2014 exceeded the forecasts of the business plan of November 2013.

(*) Business secret.

⁽¹⁷⁾ Brattle Report, p. 1, paragraph 1 and p. 7, paragraph 34.

- (107) According to the Brattle Report, unit prices (prices charged by Airport Handling for each aircraft movement) shown in the Business Plan of August 2014 are based on contracts already signed with the airlines, on average being EUR [...] (*) , which is higher than the price assumed in the Business Plan of November 2013, ranging from EUR [...] (*) in 2014 to EUR [...] (*) in 2017. This led the experts to the following conclusions: First, market prices in the Business Plan of August 2014 are closer to the actual process achieved, because they were based on signed contracts. Second, that the Business Plan of November 2013, on which SEA based its investment decision, actually underestimated the market price that Airport Handling could charge. Third, this confirms that market prices in the Business Plan of November 2013 were not only reasonable but in fact were too low.
- (108) Lastly, the experts noted that market prices that Airport Handling negotiated with the airlines were lower than the prices that SEAH was actually charging.
- (109) The experts agree that the initial market share for Airport Handling, as anticipated in the business plan of November 2013, may seem high for a new entrant. They however assume that a market economy investor would have known that the demise of SEAH would create an unusual situation, whereby a large number of the handling contracts at the SEA airports were 'up for grabs'. The experts conclude that Airport Handling would have therefore taken advantage of this situation in the same way the other operators at the Milan airports could have done. In addition, according to the report, Airport Handling's anticipated market share would be typical for large Italian airports, where the largest handler normally holds a share of around 70 % of the market. In addition, the experts had established that Airport Handling is the only handler with sufficient assets and equipment to guarantee 24-hour full service, which would be a key advantage with respect to competitors.
- (110) The experts also found that lower personnel costs was one of the key reasons why Airport Handling expected to be profitable although SEAH had been loss making. The experts considered such assumption as reasonable, since Airport Handling was negotiating new labour contracts where workers agreed to work 20 additional days per year relative to the previous SEAH contracts.
- (111) Moreover, according to the Brattle report, although the business plan of November 2013 slightly underestimated labour costs, the business plan of August 2014 showed FTE costs of EUR [...] (*)/hour, [...] (*) .
- (112) In the experts' view, when investing in Airport Handling, a market economy investor would have expected to earn a rate of return (Internal Rate of Return — IRR) equal to or greater than the Weighted Average Cost of Capital (WACC) according to standard financial theory. In this case the calculations confirmed that in all scenarios the expected IRR of the project exceeds the WACC and therefore a private investor would have expected to earn profit from its investment in Airport Handling.
- (113) The consultant also noted that when SEA made its decision to set up Airport Handling in 2013, the private equity fund F2i owned 44,31 % of the company. F2i appoints two members to SEA's Board of Directors and according to the Brattle report neither Board member had voted against the proposal for SEA to invest in Airport Handling, which would evidence that the investment was expected to be profitable and was therefore consistent with the market economy investor principle.
- (114) Further according to the Brattle report, a market economy investor would have considered the probability that the Commission finds economic continuity between SEAH and Airport Handling, and therefore requires the latter to repay the aid found incompatible in the recovery decision, to be relatively low. This is because SEA undertook measures to ring-fence Airport Handling and to prevent economic continuity, such as the setting up of the Trust. According to Brattle's financial estimations on the November 2013 business plan, as long as the chance of a finding of economic continuity was less than [...] (*) % (assuming the cost of capital estimate proposed by SEA) or less than [...] (*) % (assuming the cost of capital estimate proposed by Brattle), then SEA's investment with AH was consistent with the market economy investor principle. Brattle found it reasonable to assume that given the context and in particular the notification to the Commission, a market economy investor would judge such probability to be less than [...] (*) % , and would therefore invest in Airport Handling on purely economic terms.

(*) Business secret.

2.7. Announced reduction of the scope of Airport Handling's economic activities

- (115) Italy proposed to further reduce the scope of the activities currently carried out by Airport Handling in comparison with those carried out in the past by SEAH. In particular relating to [...] (*).
- (116) SEA currently provides [...] (*), pursuant to a new and different agreement expiring on 31 December 2018.
- (117) SEA declared that it was willing to terminate, by 31 December 2016 at the very latest, the agreement relating to [...] (*), thereby taking it away from Airport Handling, and also to hire around [...] (*) Airport Handling employees currently [...] (*). As a result of this change, the turnover of Airport Handling, being in the order of EUR [...] (*) in its first year of activity, would be reduced by around EUR [...] (*).

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

3.1. On economic continuity and transfer of the recovery obligation

- (118) In the 2014 opening decision, the Commission took the preliminary view that in this case, the criteria identified by the Court of Justice to establish if a company other than the initial aid beneficiary can be held responsible to pay back the aid were largely fulfilled. In particular:
- even if the staff would be re-employed by Airport Handling, according to the agreement signed by SEA, SEAH and the trade unions on 4 November 2013, it appeared that former employees of SEAH were being guaranteed the rights acquired under the previous contracts with SEAH,
 - according to information available to the Commission at that stage, SEA and Airport Handling, even before the expiry of the main contracts with the airlines, had engaged in joint marketing efforts aiming to reassure airlines operating at the airport that SEA would continue the ground handling business through its new subsidiary Airport Handling after SEAH's liquidation has been completed,
 - the equipment required to provide ground handling services would be leased by Airport Handling from SEAH, pending the (possible) sale of such assets to third parties in the open tender. The Commission considered that Italy's argument that such assets would be leased by Airport Handling at the market price could be accepted, to the extent the value of the assets in question was assessed by an expert appointed by the parent company SEA and the eventual sale of those assets was not certain,
 - the new ground handling business would have the same owner as SEAH, namely SEA. The Commission considered Italy's proposal to tender out 20 % of the capital of the new ground handling provider insufficient to guarantee discontinuity from SEAH since first, the proposal was only limited to a minority shareholding and second, no guarantees were provided that that would actually happen. Moreover, this opening of the capital would only occur after the entry of Airport Handling on the market,
 - the timing — after adoption of the recovery decision — and economic logic of the creation of the new ground handling provider suggested that the plan pre-notified by Italy constitutes a mechanism to circumvent recovery.
- (119) The Commission therefore preliminarily concluded that the object and effect of the creation of the new company appeared to be the circumvention of the obligation to repay the aid and that Airport Handling was the successor of SEAH. On this basis the Commission took the preliminary view that Airport Handling could be held liable to pay back the aid granted to SEAH in the past and found incompatible in the 2012 recovery decision.

3.2. On the capital injection

- (120) The Commission took the preliminary view that SEA's decisions to set up Airport Handling and to inject equity into it was imputable to the State: Firstly, the Commission noted that the Municipality of Milan held a majority stake of 54,81 % in SEA and that therefore the State should be regarded as having an influence on SEA's decision-making processes and being involved in the decisions taken by the company. Secondly, the Commission referred to certain statements made by representatives of Italian authorities in relation to the issue, which seemed to indicate that the creation of Airport Handling was orchestrated by the Italian authorities, notably in order to protect employment at Milan airports.

(*) Business secret.

- (121) In addition, since SEA appeared to be controlled by the Italian authorities, the Commission reached the preliminary conclusion that the capital injection, which was financed by SEA, involved State resources.
- (122) The Commission also took the preliminary view that SEA did not act as a market economy investor when performing the injection in Airport Handling's capital.
- (123) Firstly, the Commission expressed doubts that a private investor would have provided capital to Airport Handling at the time when SEA did, since the Commission's services had already informed the Italian authorities that the intended setting-up of a new ground handling provider would likely lead to economic continuity and thus liability of the new company to reimburse the aid found incompatible in the 2012 recovery decision. The business plan of November 2013 however did not take the risk of a transfer of the recovery liability from SEAH to Airport Handling into account.
- (124) Secondly, the Commission expressed doubts as to whether the business plan underpinning SEA's decision to invest in Airport Handling relied on sufficiently robust assumptions.
- (125) The Commission therefore considered that SEA's investment of EUR 25 million into Airport Handling does not appear to be based on economic evaluations comparable to those which, in the relevant circumstances, a rational private investor in a similar situation would have had carried out, before making such investments, in order to determine its future profitability. On that basis, the Commission took the preliminary view that the EUR 25 million capital injection amounted to State aid in favour of Airport Handling.

4. COMMENTS FROM ITALY

4.1. On economic continuity

- (126) Italy recalled that according to settled case-law, the recovery of illegal and incompatible State aid aims to eliminate the distortion of competition caused by the competitive advantage conferred by the unlawful aid. Consequently, the unlawful and incompatible aid must be recovered from the undertaking that actually benefited from it. The recovery obligation may only be extended to companies other than the original beneficiary of the aid if the following cumulative conditions are fulfilled:
- that the company was found to continue the activity of the recipient undertaking, and
 - that the company retains the actual benefit of the competitive advantage connected with the receipt of the aid.
- (127) In Italy's view, in this case the transfer of the competitive advantage linked to the aid granted to SEAH can be excluded from the outset.
- (128) In particular, Italy notes that the alleged advantage granted to SEAH was defined by the Commission in recitals 219 *et seq.* of its recovery decision as corresponding to the compensation of SEAH's losses during the period 2002-2010. As indicated by the Commission, those losses had been generated by high personnel costs, which represent a significant share of the cost structure of a ground handling provider. Since the capital injections classified as State aid by the Commission served primarily to cover losses resulting from excessive personnel costs of SEAH, in Italy's view the competitive advantage which SEAH benefitted from would *ipso facto* be removed with its liquidation and exit from the market.
- (129) Italy also noted that even if a part — albeit small — of the competitive advantage linked to the aid granted to SEAH could be associated with the assets of the company, i.e. the assets used by SEAH to carry out its ground handling activity at Milan airports, those assets would however not be subject to transfer from SEAH to Airport Handling. Rather, they would be leased temporarily by the latter under market conditions pending their sale on the open market.
- (130) Italy further noted that, even if a transfer of competitive advantage from SEAH to Airport Handling effectively took place, it cannot be established in this case that Airport Handling *de facto* continues the economic activity of SEAH.
- (131) First, no transfer, *de facto* or *de jure*, of work contracts would have taken place between SEAH and Airport Handling. According to Italy, Airport Handling had only employed, under substantially new conditions, the staff strictly necessary for the performance of the ground handling activity. In addition, the new employment contracts were governed by a different regime (the *Handler* Section rather than the *Airport operators* Section of the national collective labour contract (*Contratto Collettivo Nazionale di Lavoro* (CCNL)) and association of employees (*Assohandlers* instead of *Assoaeroporti*). On that basis, Italy pointed out that Airport Handling would achieve a reduction of personnel costs, with a significant increase in productivity.

- (132) Italy also added that the Commission's assertion in the 2014 opening decision that former employees of SEAH were guaranteed the rights acquired in respect of previous contracts with SEAH would not be supported by factual evidence. According to Italy the agreement of 4 November 2013 did not provide for any guarantee to the benefit of former employees of SEAH on acquired rights, and clearly laid down the need for new employment contracts to be based on new conditions.
- (133) Nor would there be any transfer of the contracts between SEAH and the air carriers operating at Milan airports to Airport Handling. According to Italy, upon the termination of contracts between SEAH and air carriers, Airport Handling negotiated *ex novo* the contracts with the air carriers operating at Milan airports. In addition, according to Italy, SEA and Airport Handling did not engage in common marketing efforts to this end, contrary to the Commission's allegations in the 2014 opening decision which according to Italy is supported by no factual evidence. This circumstance would in any event be irrelevant to the assessment of economic continuity between SEAH and Airport Handling. In that respect, Italy recalled that the current portfolio of clients of Airport Handling is different from that of SEAH. Rather, Airport Handling would have concluded certain contracts with air carriers that were not already customers of SEAH, whilst at the same time failed to retain some of the former customers of SEAH.
- (134) Italy stated that the fact that the business plan of Airport Handling provides for a market share [...] (*) cannot, as such, be considered proof of economic continuity. Such market share should be assessed in the light of the objective pursued by Airport Handling of reaching viability in the medium term.
- (135) Italy also submitted that Airport Handling is not involved in the procedure for the sale of SEAH's assets and, therefore, there would be no transfer of assets between the two companies. Furthermore, in Italy's view the mere fact that the assets of the beneficiary of the aid are leased to a third undertaking cannot constitute sufficient evidence that the latter enjoyed the competitive advantage linked to the aid. In Italy's view, for this to constitute an indication of continuity, the lease of those assets must take place at a price below the market price. In this case, however, the lease price would have been determined by an independent company (IMQ).
- (136) Italy also recalled that SEA's shareholding differs significantly from the period when the alleged aid was granted to SEAH. While SEA was entirely State-owned in the period 2002-2010, a private investor, F2i, currently owns 44,31 % of its capital.
- (137) Furthermore, in Italy's view the setting-up of the Trust constitutes an additional guarantee of the absence of continuity between SEAH and Airport Handling. Indeed, as laid down by the Trust Deed, the activities of the Trustee should be instrumental in achieving the following objectives:
- ensure the independent management of SEA's participation in Airport Handling, assuming sole control over the company and thus ensuring the absence of any interest and/or information flow between Airport Handling and the SEA group, with particular reference to SEAH and handling activities previously carried out by the latter at Milan airports,
 - allow the entry into the capital of Airport Handling of new private investors not connected to the SEA group, as a first step not less than [...] (*) %.
- (138) As a result of the transfer of 100 % of SEA's shareholding in Airport Handling to the Trust, the Trustee was entered in the business register as sole shareholder of the company. In this capacity, the Trustee has full and substantial control over SEA's participation in Airport Handling.
- (139) As sole shareholder of Airport Handling the Trustee must, inter alia:
- Exercise voting rights on the appointment of the managing bodies of Airport Handling independently and without any interference by SEA, and in such a way as to ensure that the members of those bodies do not have or have not had operational roles or dependence on SEA or SEAH. At the moment of the transfer of SEA's participation to the Trust, all members of the managing bodies of Airport Handling appointed by SEA handed in their resignation and were replaced by those appointed by the Trustee.

(*) Business secret.

- Monitor the economic discontinuity between SEAH and Airport Handling, requesting regular reports on the management of the company, the correct implementation of the business plan, the market share and development prospects.
- Ensure that procedures are in place to prevent that Airport Handling unduly benefits from information held by SEA in the acquisition or maintenance of contracts with air carriers or suppliers of goods or services.
- Verify that no sale transaction has taken place between SEAH and Airport Handling.

4.2. On the capital injection

4.2.1. On States resources and imputability

- (140) In Italy's view, SEA's status as a public undertaking is not sufficient to conclude that its resources qualify as State resources within the meaning of Article 107(1) of the Treaty. In that respect, Italy recalled that Airport Handling's financial resources are not in the possession or under the control of SEA, as its participation in Airport Handling is being managed by an independent body, the Trust, in total independence from SEA.
- (141) SEA would therefore not have the possibility to exercise typical majority-shareholder powers, namely, inter alia, the power to appoint the members of the managing bodies of the subsidiary and, therefore, to participate in a decisive manner to the management of the company.
- (142) According to Italy, the Commission cannot infer the imputability of the contested measures to the State by the mere fact that it is highly unlikely that those measures have been taken without any intervention by the State. According to Italy, the Commission is required to meet a high standard of proof. The measures at hand may be deemed imputable to the State only to the extent that the public shareholder of SEA played a key role in the adoption of the capital injection in favour of Airport Handling. In this sense, Italy considers it is important to note that Article 15 of SEA's by-laws provides that the deliberations relating, inter alia, to the increase in capital of subsidiaries must be taken with the favourable vote of at least six members out of seven, which requires the consent of administrators appointed by the private shareholder F2i. Consequently, irrespective of their ownership of the majority of the shares of SEA, the public shareholder cannot validly deliberate a capital increase without recourse to consent (or rather, the decisive vote) of directors appointed by the private shareholder.
- (143) Furthermore, Italy submitted that statements such as those made by the Minister for Infrastructure and Transport to reassure workers, quoted by the Commission in the opening decision, are fully in line with European and Italian practice and, therefore cannot be used as proof of the imputability to the State of the measure. The statements in question must be regarded as political declarations intended to mitigate adverse effects of unemployment.
- (144) On this basis, Italy considers that SEA's investment in Airport Handling is not imputable to the State and does not involve State resources and thus does not constitute State aid within the meaning of Article 107(1) of the Treaty.

4.2.2. On the existence of an economic advantage

- (145) Italy recalled that the private shareholder contributes to capital injections in proportion to the share of the capital held at SEA, 44,31 %. According to Italy, the participation of the private investor F2i has a real economic impact and is significant. In this respect, Italy considers it important to note that according to the Commission's practice, private investment of around one third of the total investment was considered significant. In Italy's view this is in itself sufficient to exclude the State aid qualification within the meaning of Article 107(1) of the Treaty of the capital injection.
- (146) Second, Italy submits that the business plan of Airport Handling was evaluated by an independent expert who concluded that SEA's investment is justified from a purely economic point of view and therefore complies with the market economy investor principle.
- (147) On this basis Italy considers that the SEA's investment in Airport Handling was made in circumstances that would be acceptable to a private investor operating under normal market conditions and that, therefore, the measure does not constitute State aid within the meaning of Article 107(1) of the Treaty.

5. COMMENTS FROM INTERESTED PARTIES

- (148) The Commission received comments from SEAH (in liquidation), the Milan Airport Handling Trust and Airport Handling, SEA and an interested party which asked for anonymity.

5.1. Comments from the Milan Airport Handling Trust and Airport Handling (hereinafter referred to as 'the Trust')

5.1.1. On the transfer of workforce

- (149) According to the Trust, Airport Handling has from the beginning of its activity structured its business model based on an economic logic different from that of SEAH, having as objective to operate on the market on a standalone basis and to reach viability without capital interventions from its shareholder.
- (150) In particular, Airport Handling always had considered that its business model should follow a modulation of the labour force organised according to criteria of efficiency and relevance. According to the Trust the handling activity is characterised by labour peaks at certain times of the year (e.g. summer). To address those rapid changes in demand, the service provider must respond flexibly, by means of recruiting temporary staff for those periods when the recruitment is justified in relation to the volume of work required.
- (151) While SEAH mostly used [...] (*) ([...] (*)), Airport Handling has adopted an approach based on [...] (*) (e.g. [...] (*)). Although this would require more complex training, management and coordination activities, it would in turn lead to higher flexibility and, consequently, a drop in operating costs. According to the Trust, this allowed for [...] (*) (On 31 December 2014, Airport Handling had [...] (*)).
- (152) The Trust submitted that there was no transfer of employment contracts between SEAH and Airport Handling, as demonstrated by the following circumstances:
- Airport Handling recruited its staff according to a plan defined in complete autonomy, according to expected traffic volumes and the specific organisation of work, thereby achieving a significant reduction of the workforce compared with SEAH,
 - former employees of SEAH were recruited by Airport Handling based on conditions that are formally and substantially different, according to a business model different from that of SEAH.
- (153) In addition, the Trust recalled the climate of strong opposition and the very difficult relations with the trade union organisations in June 2014. It is in the Trust's view evident that if indeed Airport Handling would have re-employed former SEAH employees based on the same conditions, those employees would have had no reason to complain. On the contrary, the strong resistance of trade unions to the agreement of June 2014 would evidence the fact that the workers were fully aware that their employment conditions had deteriorated.

5.1.2. On the contracts with the air carriers

- (154) First, the Trust submitted that the contracts with the air carriers are by nature not transferable to third parties. Article 3.2 of the Standard Ground Handling Agreement expressly provides that, save in exceptional cases to be agreed with the ground handling companies, the carrier cannot assign tasks to third parties under the contract:
- 'The carrier shall not appoint any other person, company or organisation to provide the services which the handling company has agreed to provide by virtue of this Agreement, except in such special cases as shall be mutually agreed between the parties'.
- (155) The Trust provided several statements by airlines which had not carried out a tender procedure within the meaning of the public procurement procedures, in order to select Airport Handling as ground handler. Those airlines indicated that Airport Handling had however been selected on the basis of a competitive procedure based on benchmarking with other ground handling providers.
- (156) In addition, the Trust recalled that the duration of the handling agreement is set by the air carrier and often provides for the possibility for the latter to withdraw by notice. For instance the IATA standard contract provides that each party may terminate the contract with a 60 days' notice. Therefore, the contract with the air carrier is not necessarily a long lasting contract based on which the handler may be sheltered from competition. In fact, carriers may withdraw from the contract if they obtain better conditions from other service providers.

(*) Business secret.

- (157) According to the Trust, when SEAH exited the market and Airport Handling negotiated new contracts with the air carriers, the latter proposed to Airport Handling, as well as to the other service providers contacted, different — more favourable — conditions than those obtained from SEAH. It is, according to the Trust, quite common that an air carrier decides to terminate the contract when it receives more favourable conditions from other competing handlers; or threatens the continuation of the contract if the current handler is not willing improve its offer as compared to that of other providers.
- (158) Airport Handling started its activity at Milan airports on 1 September 2014, after SEA's shareholding was transferred to the Trust. Although Airport Handling initially notified to ENAC and to the air carriers the start of its activity on 1 July 2014, the delays arising from the transfer of the shares to the Trust and the difficulties with the trade unions have further delayed this launch of operations to 1 September 2014.
- (159) On 28 February 2015, Airport Handling had concluded ground handling contracts with [...] (*) air carriers, [...] (*) operating at Linate and [...] (*) operating at Malpensa. The Trust further submitted that Airport Handling did not conclude contracts with all carriers previously in a contractual relation with SEAH. More specifically, [...] (*).
- (160) According to the Trust, the contracts signed by Airport Handling with the air carriers are different from those with SEAH:
- *From a legal perspective:* Airport Handling has entered into a new contractual relationship and did not become the successor of a former contract. Therefore Airport Handling is not responsible for previous liabilities, claims or debts of carriers in respect of SEAH.
 - *From the point of view of the content:*
 - Airport Handling has almost systematically received from carriers (directly or through tender notices) requests for [...] (*),
 - some carriers have [...] (*),
 - some carriers requested [...] (*).
- (161) In particular, according to the Trust, [...] (*) carriers have obtained from Airport Handling, within the framework of the negotiation of the new ground handling contract, [...] (*). At the same time, [...] (*) carriers have contracted [...] (*) with SEAH.
- (162) The Trust also submitted that some of the most important contracts with carriers ([...] (*)) would expire as follows:
- the contract with [...] (*) on [...] (*),
 - the contract with [...] (*) on [...] (*),
 - the contract with [...] (*) on [...] (*).

5.1.3. *On the presumed joint marketing efforts*

- (163) Like Italy, the Trust considers that any joint marketing efforts undertaken by SEA/SEAH and Airport Handling, if such effort could be proven, would be irrelevant to the assessment of economic continuity.
- (164) In addition, the Trust considers that the fact that SEA may have stated publicly and/or communicated to carriers that the group intended to continue ground handling operations is irrelevant for the purposes of the investigation to the extent the creation and capitalisation of Airport Handling had been known to the Commission since 2013.

5.1.4. *On the expected market share of Airport Handling*

- (165) According to the Trust, the fact that Airport Handling may acquire a significant presence on the market for ground handling services at Milan airports results not from the transfer of any assets from SEAH to Airport Handling, but from the particular context of Milan airports and the business models pursued by the different handlers.

(*) Business secret.

- (166) In the Trust's view the fact that a company exiting the market and another operator (be it a new entrant or an already existing operator) gains similar market shares is a phenomenon that markets observe on a regular basis, and is the result of cross elasticity between competing undertakings. In a hypothetical market with only two undertakings A and B, it is likely that, if company A fails, its customers and market share transfer to undertaking B, without any legal or factual link between the two undertakings. In the case of the Milan airports, it is true that more than two handlers operate, however according to the Trust to date only two of those operators focused their business model on the Milan airports. The similar market shares could in the Trust's opinion be justified by reference to the fact that Airport Handling is the only service provider that has organised its activity at Milan airports as hub-provider, in order to largely satisfy the demand of the carriers and provide high quality services.
- (167) According to the Trust the reasoning of the Commission is circular: Either the market share that Airport Handling was expected to reach at Milan airports, as estimated by the business plan is unrealistic, and therefore the capital injection in Airport Handling would amount to State aid, or the market share is in fact realistic, however in that case the fact that Airport Handling could reach that market share is relevant to the issue of economic continuity.

5.1.5. *On the use of SEAH's assets by Airport Handling*

- (168) The Trust emphasises that the tender for the sale of SEAH's assets was declared unsuccessful since no bidder had expressed an interest in the purchase of the lots put up for sale.
- (169) According to Airport Handling, the main reason for that is that SEAH's assets are obsolete and, therefore, do not appear attractive to the market. Indeed, the Trust submits that out of the [...] (*) most valuable components (i.e. the [...] (*)), only around [...] (*) assets were purchased by SEAH after 31 December 2006. Most assets would be more than 15 years old, which causes significant difficulties in obtaining spare parts and consequently in ensuring the required performance levels.
- (170) The Trust also recalled that Airport Handling did not bid in the tender for the sale of SEAH's assets. However, it considers that its acquisition of the assets would not constitute proof of economic continuity with SEAH.
- (171) The Trust also submitted that Airport Handling is currently using SEAH's assets under a bilateral contract signed on 1 September 2014. According to the Trust, the contract was negotiated at arm's length by SEAH and the Trustee in the period between the date of setting-up of the Trust (30 June 2014) and the date of the actual transfer of SEAH's participation in Airport Handling to the Trust (27 August 2014).
- (172) Significant changes would have been brought to the contract by the Trustee, such as:
- the verification of the market value of the lease fee by an independent expert appointed jointly by Airport Handling and SEAH, to ensure that Airport Handling paid a market oriented fee for the use of SEAH's assets,
 - the adjustment of that lease fee in case of a deviation of more than 10 % from the lease fee indicated by the independent expert,
 - the prolongation of the contract up to 31 August 2015, to bring it in line with the normal commercial practice,
 - the possibility to sublet the equipment to third parties,
 - a condition that routine and damage maintenance is borne by Airport Handling, while extraordinary maintenance remains in the responsibility of SEAH.
- (173) The Trust recalled that the lease fee had been set based on independent valuations by different experts and therefore reflected the market price.
- (174) The Trust also submitted that Airport Handling had already put in place procedures for the purchase from third parties of a significant portion of assets ([...] (*) %) required to run the business, to replace the assets leased from SEAH at the expiry of the lease contract. In this sense:
- On 26 November 2014, the Board of Directors of Airport Handling resolved to initiate a tender procedure for the renewal of the assets leased from SEAH, for a total estimated value of approximately EUR [...] (*).

(*) Business secret.

- Those tenders (all but one which at the time the Trust's comments on the 2014 opening decision were submitted was still in its start-up phase) were concluded at the beginning of January 2015 and Airport Handling had already approved a first order for the purchase of around [...] (*) % of the assets (including [...] (*) on 11 February 2015. According to the Trust a second order could be placed shortly, subject to the finding of alternative forms of funding or supply since the results of the selection procedure showed a significant increase in the costs of new equipment.

5.1.6. *On the timing and logic of the operation*

- (175) According to the Trust, concluding that the creation of a new ground handling subsidiary by SEA has the aim of circumventing the recovery order is the same as stating that a negative State aid decision prevents the beneficiary of the alleged aid from resuming its business under new conditions.

5.1.7. *On the actions taken by the Trustee to ensure economic discontinuity*

- (176) The Trust points out that on 1 August 2014, the Trustee and SEA concluded a Protocol to allow the Trustee to start performing certain functions leading and monitoring the operation of Airport Handling during the months of July and August 2014.

- (177) At that stage, in addition to measures taken in consultation with SEAH concerning the lease of SEAH assets and the expert report, the Trustee requested and obtained from SEA the financial resources required to carry out its work in complete independence from the latter. In addition, the Trustee urged SEA to redefine its service contracts with Airport Handling, identified a new general counsel for Airport Handling and required changes to Airport Handling's by-laws to ensure full autonomy of the company.

- (178) Following the transfer of SEA's participation to the Trust, on 27 August 2014 the Trustee appointed a new Board of Directors.

- (179) The Trustee also saw to it that the new Board:

- asked the members of the Board of Directors of Airport Handling to prepare and deliver a complete assessment of the business to ensure that no acts have been adopted which are incompatible with the requirement of economic discontinuity,

- required the putting into place of procedures in order to:

- ascertain, inter alia, that no legal acts were in place between SEAH and Airport Handling concerning the supply of goods, movable and/or immovable property, contracts with airlines and/or suppliers of goods and services relating to the handling activities,

- verify that Airport Handling would put in place necessary procedures and controls so as to avoid that the company benefits from undue commercial information held by SEA which could benefit Airport Handling vis-à-vis competitors in the acquisition or maintenance contracts with carriers or is relevant for the positioning of Airport Handling on the ground handling market,

- took note of existing posts, by integrating senior functions where deemed insufficient (primarily Legal and Resources Directorate),

- modified the governance of Airport Handling delegating to CEO, who is a member of the Trustee, Trustee) extensive decision-making powers,

- assessed and provisionally confirmed the Director-General,

- decided that Airport Handling should have its own website,

- undertook intense negotiations with SEA for a thorough revision of service contracts existing between Airport Handling and SEA with the aim to ensure that all services are available at the best possible conditions and obtained the possibility of discontinuing the service without penalty if and when Airport Handling decides to make use of internal structures or approach different and more convenient suppliers,

(*) Business secret.

- communicated to customers, suppliers and the competent authority (ENAC) the change in control of the company.
- (180) Furthermore, the Trustee took measures in order to ensure economic discontinuity. In summary, those procedures encompass:
- the listing of operations deemed relevant to ensure economic discontinuity,
 - the appraisal and approval of those operations,
 - the information flow to the Board,
 - the procedures concerning management, separation and storage of information which may be relevant for economic discontinuity.
- (181) According to the Trust, those internal procedures were explained in two training sessions for Airport Handling senior and middle management respectively.

5.1.8. *On the imputability to the State of the measures*

- (182) According to the Trust, in the period June — August 2014 the Italian authorities have not exercised direct influence on SEA and its decision to invest in Airport Handling. There would never have been any indication, direct or indirect, which could have given rise to even the remote doubt that the decision of setting up and/or capitalise Airport Handling depended upon the Italian authorities.

5.1.9. *On Airport Handling's business plan and compliance with the market economy investor principle*

- (183) According to the Trust there is no continuity between SEAH and Airport Handling, therefore any private investor would have considered the fragility of the Commission's assessment in the 2014 opening decision and would not have been influenced by that assessment in its decision to invest in Airport Handling.
- (184) The Trust clarified that the business plan of November 2013 initially presented to the Commission had been refined in the meantime. Therefore the business plan at the basis of the decision to capitalise Airport Handling was the business plan of August 2014 adopted by the Board of Directors of Airport Handling on 26 August 2014.
- (185) Following the transfer of SEA's participation to the Trust, the Trustee proceeded to verify that Airport Handling's business plan was credible. According to the Trust, the newly appointed Board of Airport Handling first examined whether the business plan of 6 August 2014 was reliable, entrusting the task to Boston Consulting Group (BCG).
- (186) BCG reported its findings to Airport Handling on 14 October 2014. BCG came to the conclusion that the aim of the business plan, i.e. EBIT in 2017 of EUR [...] (*), with a margin of [...] (*) %, was reasonable and that the level of deviation was broadly in line or slightly below the average profitability of a significant sample of other public and private European companies operating in the ground handling sector. BCG also confirmed the validity of the business plan of November 2013.

5.1.9.1. *On the intended workforce reduction and efficiency gains*

- (187) According to the Trust, Airport Handling is determined to deliver maximum efficiency and flexibility by means of [...] (*). According to the business plan of 6 August 2014, Airport Handling is expected to employ [...] (*). This will be achieved by streamlining coordination structures and the introduction of new performant equipment and computer systems for personnel management, which will allow Airport Handling not to replace outgoing staff.

(*) Business secret.

5.1.9.2. On efficiency gains linked to factors specific to the organisation of work

(188) According to the Trust, an even greater degree of efficiency will result from the following series of measures:

- *Optimisation of the share of fixed-term contracts and part-time contracts*: efficiency is estimated to increase by around [...] (*) % already in 2015; and together with the [...] (*) would increase by an additional [...] (*) % by 2017.
- *Better definition of the work programme*: the work contract applied by Airport Handling foresees [...] (*) than the contract SEAH applied to its employees. This allows savings of [...] (*) % in respect of the number of working employees. In addition, the daily working time of full time staff has been [...] (*), with an impact on staffing needs of [...] (*) %. With the renewal of the collective agreement, expected during 2015, a further [...] (*). Furthermore, Airport Handling intends to optimise the use of resources by introducing instruments such as working in shifts and contracts with modulation of the daily and weekly schedule according to the actual requirements in line with the new possibilities offered by collective agreements at national level. These mechanisms will enable Airport Handling to increase efficiency for at least a further [...] (*) %.
- *Adapting the organisational structure in order to use resources effectively* by [...] (*): already from 2015, there will be an increase in efficiency resulting from the seasonal upgrading of the matrices in function of traffic growth and by the redistribution of leave on nine periods which entails a [...] (*). The estimated savings will be [...] (*) %.
- *Optimisation of the capacity of existing staff*: the progressive use of [...] (*) will lead to a positive increase in productive efficiency of 0,5 %. The reduction of posts for [...] (*), in part already carried out ([...] (*)) and partly under implementation during 2015 ([...] (*)), will further contribute to increasing efficiency.
- *Economies of scale arising from the higher traffic*: traffic increase of existing customers and contracting with new carriers, even those operating in non-peak times, will allow the improvement of staff saturation factors with an effect in terms of productive efficiency of + [...] (*) % in 2017.
- *Structural adjustments in the industrial processes*: the Trust mentioned the following routes envisaged to foster efficiency: better work planning and organisation, investments in technical solutions to enable partial or total automation of certain activities, linking workforce expenditure to business outputs and outcomes. As concerns work planning, the Trust indicated that Airport Handling had foreseen investments in new IT systems for the management of personnel and allocation to shifts leading to a more rational use of resources with an efficiency of [...] (*) %. In addition, Airport Handling has begun a process of acquisition of new equipment endowed with modern geo-location systems. Efficiencies in respect of staff use are estimated to [...] (*) %.

(189) According to the Trust, the results achieved by Airport Handling in its first months of operation allow the Commission to verify *ex-post* that the assumptions in the business plan were sound. The Trust pointed to the results of the first 4 months of activity, showing [...] (*) EBIT of EUR [...] (*) and [...] (*) of EUR [...] (*) as compared to the forecasts of the business plan of 6 August 2014. This positive trend was the result of [...] (*) revenues (EUR [...] (*)) and [...] (*) costs (EUR [...] (*)).

5.2. Comments from SEAH (in liquidation)

5.2.1. On SEAH's assets

(190) According to SEAH the ground handling equipment had a book value of EUR [...] (*) prior to SEAH's entry into liquidation. The average age of these assets was [...] (*). Of the approx. [...] (*) items of higher value [...] (*) equipment except [...] (*)), only [...] (*) had been acquired after 31 December 2006.

(*) Business secret.

- (191) When SEAH was put into liquidation, the only other assets of the company consisted of working capital linked to the business ceased at 1 September 2014. In addition, certain [...] (*) were present. Those positions had been liquidated in the meantime. Therefore, according to SEAH, the liquidator can only count on the sale of the ground handling equipment to fund liquidation costs and any other residual debit.

5.2.2. *On the tender for the sale of SEAH's assets*

- (192) One of the main tasks of the liquidator was to complete the open, public and non-discriminatory tender procedure for the sale of SEAH's assets already launched before the entry of the company into liquidation proceedings.
- (193) According to SEAH, the assets were grouped in nine bundles that included complementary assets of different values, and with functional autonomy. The objective was to guarantee a wide participation in the tender. The distribution of the assets in bundles was aimed at addressing market requirements, as identified based on the activity of major handlers at Italian airports. Available information shows that the sales procedure was restricted to handlers, airport operators, air carriers, manufacturers of the types of equipment sold, resellers and leasing companies. Moreover, certain minimum solvency requirements were set out, concerning in particular (i) a turnover of at least EUR 1 million per bundle of assets for which they intend to submit a bid; (ii) net assets of at least EUR 1 million or EUR 2 million in case potential buyers bid for more than one bundle; (iii) debt to total assets ratio not higher than 3. The call for tenders did not lay down any selection criteria other than the mandatory requirements set out above.
- (194) SEAH notes that no potential bidder expressed interest in the acquisition of those assets. The only requests for information would have been submitted outside the framework of the procedure from parties interested in acquiring only certain assets, however at prices significantly lower than those set by the independent experts. SEAH also submitted that Airport Handling had expressed an interest to acquire the assets in question but had not bid. The Commission notes that the Italian authorities had already declared on 27 November 2013, when they consulted the Commission on SEA's plan to liquidate SEAH, establish Airport Handling and provide it with capital, that Airport Handling would not participate in the sales procedure and thus would not submit any offer in that procedure.
- (195) Following the unsuccessful attempt to sell out SEAH's assets, the liquidator proceeded to contact the main operators in the sector to discuss the possibility of a sale of those assets and the conditions that might apply to such sale.

5.2.3. *On the valuation of the assets*

- (196) SEAH recalled that prior to the entry into liquidation of SEAH, its Board of Directors had selected IMQ as independent expert entrusted with the valuation of the assets. The valuation was delivered on 25 June 2014 and proposed a lease fee of EUR [...] (*) per year, as a value considered in line with market conditions. On 1 September 2014, SEAH entrusted E&Y with a second valuation of the assets. Upon request from the Trustee, SEAH and the Trustee jointly tasked E&Y with providing such a second valuation. E&Y then proposed a lease fee of EUR 1,4 million per year.
- (197) SEAH added that Airport Handling currently uses SEAH's assets under a lease contract and is responsible for their maintenance (maintenance costs are estimated at EUR [...] (*) per year).

5.2.4. *On the lease contract*

- (198) According to SEAH, the lease contract prior to its conclusion was subject to intense negotiations between the parties, without any interference from SEA. SEAH submitted that the conclusion of the lease contract is a mandatory condition for the maintenance of the value of the assets in view of their dismissal. Absent the lease contract with Airport Handling, SEAH would have had to remove the equipment from the airport premises therefore incurring significant transport and maintenance costs.
- (199) SEAH also submitted that, given the expiry of the lease contract at 31 August 2015, the liquidator was considering options for the dismissal of the assets. SEAH points out that a sale of the assets to Airport Handling once the doubts of the Commission on economic continuity have been alleviated, would enable SEAH to maximise the value of those assets in the liquidation procedure.

(*) Business secret.

5.3. Comments from SEA

5.3.1. On economic continuity

- (200) In SEA's view the case law quoted in the 2014 opening decision differs quite significantly from the case at hand.
- (201) Firstly, that case-law would exclusively refer to situations characterised by the presence of a transfer of assets from the beneficiary of the aid to a newly created company. The case law would essentially concern cases where the undertaking which had benefitted from incompatible State aid and was not in the position to repay such advantage established a new undertaking to which it transferred part of its activities. Secondly, in all cases quoted by the Commission, the transfer between the beneficiary and the new undertaking concerned assets of significant value (activities, facilities, goods, property, trademarks, industrial property rights).
- (202) According to SEA, the characteristics of the present case lead to the conclusion that Airport Handling could not have continued to enjoy the competitive advantage linked to presumed aid received by SEAH, given that it had not taken over any assets from SEAH. Rather, the alleged competitive advantage granted to SEAH would have been terminated with the liquidation of the company and could not therefore be transferred.
- (203) SEA recalls that in the recovery decision of 2012, the Commission concluded that the alleged competitive advantage granted to SEAH corresponded to the financing of the losses incurred by the company, which were generated mainly by high staff costs. While recalling that staff costs have a major impact on the cost structure of ground handling providers, accounting for between 65 % and 80 % of total costs, SEA points out that, unlike those cases quoted by the Commission, the present case does not concern a transfer of shares or assets required to exercise (or rather to continue) SEAH's activity nor an operation whose aim is to protect the assets of the beneficiary and therefore circumvent the recovery order.
- (204) According to SEA, it should also be noted that since the advantage derived from the alleged State aid received by SEAH was used to cover losses resulting from excessive labour costs, such advantage was definitely terminated with the liquidation of the company and the dismissal of the workers. In SEA's view the fact that former employees of SEAH were subsequently recruited by Airport Handling at conditions formally and substantially different, cannot materially alter this conclusion.
- (205) SEA adds that, even if it were accepted that the absence of an asset transfer from SEAH to Airport Handling is not sufficient to conclude on the absence of economic continuity, the circumstances of the transaction underlying the creation of Airport Handling, viewed as a whole, cannot be regarded as having had the effect of circumventing the recovery order.
- (206) According to SEA the decision to set up a new ground handling company operating on market conditions in competition with other service providers is based on economic logic and justified by a management model that differs significantly from that of the previous operator SEAH ([...] ^(*)) in order to pursue an objective of sustainable profitability in the medium to long term.
- (207) SEA states that SEAH's announcement that the company would cease operations at Milan airports and SEAH's entry into liquidation have created a momentum of effective competition on the market, during which the air carriers operating at Milan airports could choose the provider of ground handling services based on a comparative evaluation of the offers submitted by different providers.
- (208) According to SEA it was following this competitive process that Airport Handling successfully concluded contracts with air carriers, in complete independence from SEA. Indeed, some carriers, formerly clients of SEAH, decided not to use the services of Airport Handling whilst Airport Handling concluded contracts with carriers not previously served by SEAH.
- (209) In addition, according to SEA, within the meaning of Council Directives 78/660/EEC ⁽¹⁸⁾ and 83/349/EEC ⁽¹⁹⁾ on consolidated financial statements, transposed into Italian legislation by Legislative Decree No 127 of 9 April 1991, failing any power of control and management by SEA of Airport Handling following the transfer of its participation to the Trust, Airport Handling is no longer part of the SEA group for accounting purposes and therefore its budget is not consolidated with that of SEA.

^(*) Business secret.

⁽¹⁸⁾ Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11).

⁽¹⁹⁾ Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1).

- (210) Furthermore, in order to speed up the entry of third parties in the capital of Airport Handling, SEA and the Trustee on 26 January 2015 signed an 'implementing regulation under Article 20 of the Trust Deed', with the aim of conferring to the Trustee the responsibility to look for a third-party investor. The Trustee and SEA decided to appoint BNP Paribas as independent advisor for the assignment.
- (211) BNP Paribas assisted Airport Handling in the preparation of the offer for the sale of shares, took contact with several investors potentially interested to enter the capital of Airport Handling and carried out meetings with potential investors.
- (212) SEA added that once a private investor has acquired at least 30 % of Airport Handling, SEA will consider searching for investors interested to take over the majority shareholding in the company.

5.3.2. *On State resources and imputability*

- (213) SEA is of the view that the fact that Airport Handling is a public undertaking is not sufficient to conclude that its resources are State resources within the meaning of Article 107(1) of the Treaty. In addition, following the setting up of the Trust, the financial resources of Airport Handling are not under the control of SEA, therefore it cannot be claimed that they are State resources within the meaning of Article 107(1) of the Treaty.
- (214) In this respect, SEA adds that:
- A first increase of capital, amounting to EUR 3,7 million, was approved by the general meeting of shareholders of Airport Handling on 27 August 2014. On the same date the Trust was vested with SEA's entire participation in SEAH. On that date the Trustee became, for all legal purposes, sole shareholder of Airport Handling.
 - On the same date, the Trustee, as sole shareholder of Airport Handling issued 20 000 SFPs for a total value of EUR 20 million. The SFPs were subscribed and paid in full by SEA on 28 August 2014.

- (215) SEA underlines that, since their transfer, the financial resources of Airport Handling have remained at all times under the control of the Trustee, the sole shareholder of Airport Handling.
- (216) In SEA's view the above shows that the public shareholder of SEA (Municipality of Milan), cannot exercise — directly or indirectly — any influence on the use of financial instruments in respect of Airport Handling and that throughout the duration of the Trust, such resources will remain under the control of the Trustee. In any event, as a result of the establishment of the Trust, SEA lost its power to appoint the members of the Board of Directors of Airport Handling.

5.4. **Comments from an interested party**

- (217) The Commission received comments from an interested party who demanded that neither its identity nor its comments be disclosed to any third party.

6. **COMMENTS FROM ITALY ON THE INTERESTED PARTIES COMMENTS**

- (218) Italy commented on the observations submitted in the framework of the investigation by the Trust and SEA.
- (219) Italy supported in full the observations submitted by the above mentioned interested parties and underlined that they evidenced on one side the lack of any interference from the Italian authorities on SEA's activity and the latter's decision to invest in Airport Handling, and, on the other side, that Airport Handling does not continue the economic activity of SEAH.

7. **ASSESSMENT**

- (220) In this case, the Commission had to assess two distinct matters: First, the possible transfer of the recovery obligation stemming from the recovery decision from SEA Handling to Airport Handling; second, possible aid inherent in SEA's EUR 25 million capital injection in Airport Handling.

7.1. Economic continuity and transfer of the recovery obligation

- (221) Based on settled case law, unlawful and incompatible aid must be recovered from the undertakings that actually benefited from it ⁽²⁰⁾.
- (222) In case of insolvent beneficiaries of State aid, the recovery obligation can be fulfilled by registration of the liability relating to the repayment of the aid in the schedule of liabilities, provided that the aid beneficiary exits the market ⁽²¹⁾. The Court held that ‘where the undertaking which received the unlawful aid is insolvent and a company has been created to continue some of the activities of the insolvent undertaking, the pursuit of those activities may, where the aid concerned is not recovered in its entirety, prolong the distortion of competition brought about by the competitive advantage which that company enjoyed in the market as compared with its competitors. Accordingly, such a newly created company may, if it retains that advantage, be required to repay the aid in question. That is the case where it is established that that company continues genuinely to derive a competitive advantage because of the receipt of that aid, especially where it acquires the assets of the company in liquidation without paying the market price in return or where it is established that the effect of that company’s creation is circumvention of the obligation to repay the aid’ ⁽²²⁾.
- (223) In the context of the transfer of assets from an aid beneficiary to another company that continues the former’s activities, the Court confirmed that the following factors *may be taken into consideration* for the assessment of economic continuity between the two companies ⁽²³⁾: the scope of the transfer (assets and liabilities, continuity of the workforce, bundled assets, etc.); the transfer price; the identity of the shareholders or owners of the acquiring firm and of the original firm; the moment at which the transfer is carried out (after the start of the investigation, the initiation of the procedure or the final decision); and, lastly, the economic logic of the transaction.
- (224) According to case law, the aforementioned factors may be taken into account to varying degrees, according to the specific features of the case at hand ⁽²⁴⁾. It follows that the Commission is not required to take into account the whole of those factors, as is demonstrated by use of the expression ‘may be taken into consideration’ ⁽²⁵⁾.
- (225) In order to decide whether there is economic continuity between SEAH and Airport Handling and the latter may be held liable for the reimbursement of the incompatible aid granted to the former, the Commission applied the aforementioned indicators to the specific circumstances of the case at issue.

7.1.1. Scope of the transfer

7.1.1.1. Transfer of workforce and work contracts

- (226) After SEAH was put into liquidation, many of its former employees were reemployed by Airport Handling, constituting initially the majority of the latter’s workforce. Therefore, it is relevant to analyse whether this situation is not indicative of a circumvention of the recovery decision. To that effect, it should be assessed whether the process that led to that outcome did not amount to transferring SEAH’s workforce into Airport Handling while preserving its core features. It is all the more relevant since for a ground handling company, workforce is the primary resource necessary to operate ⁽²⁶⁾.
- (227) According to Italy there is no continuity of workforce between SEAH and Airport Handling as work contracts were terminated by SEAH and staff was employed by Airport Handling under new contracts, based on substantially different conditions. This view was supported by both Airport Handling and SEA.

⁽²⁰⁾ Case C-303/88 Italy v Commission ECLI:EU:C:1991:367, paragraph 57; Case C-277/00, Germany v Commission (‘SMI’), ECLI:EU:C:2004:238, paragraph 75. By repaying the aid, the recipient must forfeit the advantage it previously enjoyed on the market, and the pre-aid situation is restored.

⁽²¹⁾ Case C-454/09, Commission v Italy (‘Aid in favour of New Interline SpA’), ECLI:EU:C:2011:650, paragraph 36.

⁽²²⁾ C-610/10 Commission v Spain, ECLI:EU:C:2012:781, paragraph 106.

⁽²³⁾ Joined Cases C-328/99 and C-399/00 Italy and SIM 2 Multimedia v Commission (‘Seleco-Multimedia’) ECLI:EU:C:2003:252, paragraphs 69, 77-78. This set of indicators was then confirmed in Case T-123/09 Ryanair v Commission, ECLI:EU:T:2012:164, paragraph 155.

⁽²⁴⁾ Joined Cases T-415/05, T-416/05 and T-423/05 Hellenic Republic et al. v Commission, ECLI:EU:T:2010:386, paragraph 135.

⁽²⁵⁾ Case T-123/09 Ryanair v Commission, ECLI:EU:T:2012:164, paragraph 156.

⁽²⁶⁾ See footnote 40.

- (228) In Italy's view the agreement signed by SEA, SEAH and the trade unions on 4 November 2013 should not be construed to have guaranteed former employees of SEAH the rights acquired under the previous contracts with SEAH. Such agreement would be an essentially programmatic document which was subsequently replaced by the agreements signed on 4 June 2014. It would be evident from the wording of those agreements that former employees of SEAH were not guaranteed previously acquired rights but were rather re-employed by Airport Handling under new conditions.
- (229) Based on information obtained in the formal investigation procedure, the Commission assessed (i) the process whereby a significant part of SEAH's workforce was reemployed by Airport Handling, (ii) and the agreements with trade unions on the reemployment of SEAH's workforce.
- (230) Firstly, as regards the process, it should be noted at the outset that there was no *de jure* transfer of work contracts from SEAH to Airport Handling. Contracts with SEAH were legally terminated and new contracts were concluded with Airport Handling. Moreover, work contracts were neither automatically nor globally transferred from SEAH to Airport Handling. In fact, no transfer whatsoever of work contracts took place. Rather, the former company terminated the work contracts prior to reemployment of part of the workers by the latter on different conditions.
- (231) Secondly, as regards the scope of the transfer, the following is to be noted: On 22 April 2014, when SEAH initiated the laid-off workers' mobility scheme, its workforce was [...] (*) strong, equivalent to [...] (*) FTEs. Available data shows that on 31 May 2015, 9 months into its operations, Airport Handling had [...] (*) employees, of which [...] (*) had been previously employed by SEAH. Hence, Airport Handling had until then taken over approx. [...] (*) % of SEAH's employees. The transfer was therefore not complete, and not even practically complete. Nevertheless, it is also to be noted that Airport Handling's workforce, at least in the early phase after starting operations, consisted almost exclusively of former SEAH staff.
- (232) Thirdly, as regards the material conditions of the re-employment, the Commission notes that contracts signed by Airport Handling with former SEAH employees differed both formally and materially from the previous contracts with SEAH in particular in that different conditions apply concerning:
- a [...] (*) applies to Airport Handling's employees,
 - Airport Handling does not apply the [...] (*) supplementing the national collective labour agreement,
 - the material changes to employment conditions are encompassing:
 - [...] (*),
 - [...] (*), which SEAH used to apply to its employees,
 - work organisation, e.g. [...] (*),
 - a measurable result of above listed changes is the reduction of labour costs of around [...] (*) %, as compared to SEAH's labour costs, both resulting from the changes in the applicable national collective labour regime and the supplementary corporate contract; the weight of the terms of the latter on labour costs was reduced by 50 %.
- (233) Lastly, also the circumstances under which the terms of employment were negotiated between the parties involved and ultimately agreed in this case indicate that employment conditions changed materially: SEA, SEAH and Airport Handling negotiated separately with trade unions and reached separate agreements with them. It took Airport Handling and trade unions more than 8 months to reach an agreement on the terms of the recruitment procedure, the legal and financial content of employment contracts, welfare policy and work organisation. According to the Trust, SEAH workers initially opposed the changes to which trade unions representing the workers had consented in the agreement of June 2014. Workers rejected these changes in a referendum. According to documentation provided by the Trust, Trade Unions then only agreed to the new employment terms after Airport Handling accepted to

(*) Business secret.

introduce certain clarifications to aforesaid agreement. The Commission notes that Airport Handling negotiated separately with the trade unions and, despite initial disagreements, it succeeded in implementing the above described changes. As was described in recital 38 above, the agreement between Airport Handling and trade unions, of 4 June 2014 has not been altered materially after trade unions rejected it in a referendum, where they demanded a number of clarifications to that agreement.

- (234) In light of the above considerations, the actual workforce transfer was neither complete nor did it imply any replication in substance of employment conditions prevailing under the SEAH contracts.
- (235) This finding is not affected by the agreements between respectively SEA, SEAH and Airport Handling with the trade union organisations concerning the workforce. Indeed, the objective of the agreements does neither indicate that the workforce would be completely transferred from SEAH to Airport Handling, nor that the conditions prevailing under SEAH's work contracts would be continued. The Commission notes in particular that according to the initial draft settlement of 4 November 2013 between SEA and trade unions, a future implementing agreement must be inspired by the objective to safeguard the jobs of all SEAH personnel⁽²⁷⁾. That agreement enumerates a number of measures to attain that objective, in essence all mechanisms made available by the relevant legislation governing employment and collective bargaining such as social safety nets and voluntary redundancies, also to be implemented within the SEA Group, and solutions involving relocation within the Group. Hence, that agreement indeed implied that jobs were to be reattributed within the SEA group as a whole⁽²⁸⁾, but not only to Airport Handling, and only as one measure among several. Moreover, those agreements were not concluded with Airport Handling, which concluded separate agreements with the personnel. Therefore, the number of jobs reallocated to Airport Handling was not pre-determined by the parties but was established following the company's staffing needs after conclusion of the contracts with the airlines.
- (236) The Commission further notes that there is no indication that Airport Handling was under any obligation, imposed either by public authorities or by its mother company SEA, to employ former SEAH staff.
- (237) In conclusion, as regards the scope of the transfer of the workforce, the Commission considers that the circumstances indicate a *prima facie* stronger element of economic continuity due to the reemployment of a significant part of SEAH's workforce by Airport Handling. However, the facts surrounding the reemployment must be taken into account, in particular the termination of all contracts and the conclusion of new contracts with new contractual conditions. The Commission therefore concludes that the workforce transfer cannot be construed as a strong indication of economic continuity between SEAH and Airport Handling.

7.1.1.2. Contracts with air carriers

- (238) In its 2014 opening decision, the Commission took the preliminary view that Airport Handling's expected market shares for the first 6 months of operations could only be seen as realistic due to the insourcing of business previously undertaken by SEAH.
- (239) In the course of the investigation, Italy, SEA and Airport Handling claimed that those expectations were based on Airport Handling's business plan of August 2014. They were made possible by laying down significant reductions in operating costs, gained through labour efficiency and personnel reduction.
- (240) Moreover, the contracts with airlines operating at Milan airports were negotiated *ex novo* by Airport Handling. According to Italy, such contracts could not be legally transferred from SEAH to Airport Handling. They had to be negotiated *ex novo* in competition with the other service providers operating at Milan airports.
- (241) Indeed, as was described above in recitals 133 and 208, Airport Handling's client portfolio differs from that of SEAH. When SEAH exited the market, a number of its clients decided to entrust ground handling services to operators other than Airport Handling. Conversely, Airport Handling managed to attract customers which were not previously served by SEAH.

⁽²⁷⁾ 'continuation of the objective to safeguard the jobs of all SEAH personnel.' See point 6, subparagraph 1 of the agreement of 4 November 2013.

⁽²⁸⁾ 'Recourse to all mechanisms made available by the relevant legislation governing employment and collective bargaining (primarily, social safety nets and voluntary redundancies, also to be implemented within the SEA Group, seamlessly with regard to the upcoming deadline of 31 December 2013) and solutions involving relocation within the Group (both in line with new business opportunities and in accordance with the insourcing processes implemented following the post de-hubbing company agreements, and with internal mobility designed to address the organisational requirements of SEA SpA); *Ibid.*

- (242) In order to further evidence the fact that the new contracts concluded by Airport Handling with the air carriers were not only subject to *ex novo* negotiation but also provide for materially different contractual conditions, Italy submitted information showing that certain airlines previously served by SEAH (such as [...] (*)) were able to obtain significantly more favourable conditions from Airport Handling than from SEAH. In particular, in the course of the negotiations with Airport Handling, [...] (*) requested that [...] (*). As a result [...] (*) obtained a [...] (*)⁽²⁹⁾.
- (243) In the course of the investigation, Italy explained that SEA had not conditioned the granting of discounts from airport charges to air carriers operating at Milan airports on conclusion by the latter of ground handling contracts with Airport Handling. Based on the comments received in the investigation, there is no documentary evidence to prove that SEA would have effectively engaged in such behaviour in order to induce airlines operating at Milan airports to conclude new ground handling contracts with Airport Handling.
- (244) In the 2014 opening decision, the Commission expressed doubts that contracts with the airlines would be renegotiated. In that context the Commission pointed to information that suggests that even before the expiry of such contracts, SEA and Airport Handling had engaged in joint marketing efforts aiming at reassuring airlines operating at the airport that SEA would continue the ground handling business. The formal investigation procedure however did not produce any factual evidence that SEA and Airport Handling had organised, through joint marketing efforts, a mere change of contractor without leaving the airlines, as principals, a margin for renegotiation of the contractual terms. In particular, the Commission did not obtain any evidence that either SEA or Airport Handling would have been in a position to effectively frustrate attempts of former SEAH-customers to obtain more favourable terms from other ground handling providers.
- (245) The Commission assessed if Airport Handling, when preparing its entry into business, *de-facto* was in the position of a new entrant or rather benefitted from SEAH's market position and customer contacts, so as to ensure the continuity of operations. Under the specific circumstances of the case in hand, if SEAH's market exit had not resulted in an opportunity for its customers to negotiate new contracts with ground handlers other than Airport Handling, this could be indicative of a circumvention of the recovery decision in that it would amount to a transfer of customers from SEAH to Airport Handling.
- (246) In that respect, the following is of particular relevance: Airport Handling's business plan did not consider alternative scenarios with lower market shares. This could indicate that Airport Handling was confident to take over SEAH's customer basis with a relatively high degree of likelihood and could thus possibly expect to benefit from SEAH's former market position and customer contacts to attract its customers and the corresponding contracts without facing competition by other ground handling companies to win those contracts.
- (247) However, certain formal and material factors show that such was not the case.
- (248) Firstly, as regards the form of the transfer, service contracts were not legally transferred from SEAH to Airport Handling. Airlines were thus free to select a provider other than Airport Handling as soon as their contracts with SEAH were terminated, as described in recital 43 of the present decision.
- (249) Secondly, available information suggests that customers were in a position to approach other service providers when SEAH informed them that it would cease activities. Indeed, the fact that a number of clients defected is proof that such opportunity existed. Most importantly, SEAH had no legal grounds to unilaterally transfer the contracts to any third party, save in exceptional situations. According to information provided by the Italian authorities, the clause on exceptional situations had however not been invoked. The Italian authorities provided an overview of Airport Handling's customer base, as of 14 February 2014, which shows that out of 68 former SEAH customers, [...] (*) had defected to other ground handling service providers, that of the [...] (*) Airport Handling clients at that time, 1 had defected from a competitor, 3 were newcomers to the airport and [...] (*) were former SEAH-clients. [...] (*) of those [...] (*) former SEAH-clients negotiated new contract terms more favourable for the clients, either stipulating lower prices (13 clients), a modified serve portfolio [...] (*) clients), or even a combination of both [...] (*) clients). Hence, only 20 clients concluded service contracts that in essence stipulate the same conditions as the previous contracts with SEAH. Price reductions are ranging from [...] (*) to [...] (*) % compared to prices previously agreed with SEAH.

(*) Business secret.

⁽²⁹⁾ [...] (*).

- (250) In view of the above, on balance, the Commission sees no indication of circumvention of the recovery decision (and thus economic continuity) in the process that led Airport Handling to enter into agreements with a number of former customers of SEAH. Indeed, Airport Handling appeared to have been exposed to genuine competition when negotiating with carriers operating at Milan airports, and there are indications that competition between service providers at Milan's airports was effectively opened when SEAH was about to exit the market.

7.1.1.3. SEAH's assets

- (251) As a third point in the analysis of the scope of the transfer, the Commission assessed the scope of the transfer of the assets.
- (252) The Commission notes that, when Airport Handling started operations, it sourced 100 % of its entire ground handling equipment from SEAH through leasing. 5 months later, it started gradually replacing that equipment with assets bought on the market and finally, in September 2015, purchased [...] (*) of [...] (*) lots of assets from SEAH.
- (253) Specifically, Airport Handling commenced providing ground handling services using SEAH's assets under a lease contract. That contract was due to expire on 31 August 2015. Before the lease contract ended, Airport Handling expressed its interest in the acquisition of [...] (*) out of [...] (*) tender lots, namely lots No [...] (*). According to Airport Handling, although realistically around one third of the ground handling equipment owned by SEAH and leased to Airport Handling was aged, Airport Handling was willing to acquire around [...] (*) % of that equipment (which would be sufficient for Airport Handling to run its business) considering that Airport Handling had in the meantime obtained on the market a significant stock of spare parts which could be used for the replacement of some parts of the most aged SEAH equipment.
- (254) Available documentation suggests that sales negotiations between Airport Handling and SEAH commenced when by letter dated 3 June 2015 Airport Handling made the following proposals:
- that a [...] (*) %-discount on the [...] (*) in view of, firstly, the fleet's age and condition and secondly the outcome of the sales procedure initiated by SEA,
 - payment [...] (*) from 31 July until 31 December 2015,
 - that the original lease contract be terminated consensually on 30 June 2015 and that SEAH grants provisional and limited free-lease (*comodato*) of approx. [...] (*) selected items [...] (*), until 31 December 2015 at the latest, all insurance and maintenance costs being at the expense of Airport Handling.
- (255) On the same day, a meeting between the parties was held. By letter of 10 June 2015, SEAH's liquidator responded to Airport Handling's proposals, in the sense summarised below:
- Although SEAH is willing to accept the offer, it is not ready to grant discounts since all prices had been determined by expert evaluations. The liquidator pointed out that Airport Handling would not even have to bear any transport costs.
 - SEAH does not accept payment in instalments except if Airport Handling provides adequate guarantees.
 - In the absence of discounts, SEAH is willing to transfer the fleet on 30 June 2015 and to agree to lend the specified items, however only until 30 November 2015 at the latest.
- (256) According to the Italian authorities, negotiations still drew on until September 2015, when SEAH agreed to the payment of the purchase price [...] (*) for the sale of the [...] (*) lots, [...] (*). The purchase price was EUR [...] (*), that is the price initially indicated in the failed tender procedure. The original lease was exceptionally extended until [...] (*), for [...] (*) items of the fleet and against payment of an overall lease of EUR [...] (*), which fee was based on the value attributed to those items by the abovementioned independent appraisals. Airport Handling returned these [...] (*) items to SEAH on [...] (*).

(*) Business secret.

- (257) According to Airport Handling, the purchase was nevertheless economically justified, in particular for the following reasons:
- Airport Handling's business model in essence consists in having its operational hub only in one location, namely Milan airports, and therefore is based on an organisational model which provides for human resources and technical means to meet the demand of services in one single location (hub-provider business model). In Airport Handling's view, this model ensures better efficiency and more secure profitability margins. Hence, age and efficiency of the equipment would be less of a concern for Airport Handling than for operators that are active on several airports and therefore must necessarily carry out a 'lean management' of their equipment.
 - Although part of the equipment was aged, a number of items were relatively recent and could be operated efficiently.
 - Items were already on the premise and therefore would not have implied any transport cost.
 - Airport Handling hoped to reduce maintenance costs, as most of the items came from the same manufacturer and were of the same model.
 - When trying to purchase second-hand equipment on the market across the EU, Airport Handling found that the market did not offer enough second-hand equipment to satisfy Airport Handling's requirements at an acceptable price.
 - A balanced mix of used and new assets should be used during the start-up phase, mainly because equipment suppliers seemed unable to provide new equipment in one go, and also because Airport Handling had reason to believe that a sudden massive increase of demand could trigger price hikes. Hence, Airport Handling rather intended to progressively decommission used items and replace them with new ones.
 - Lastly, testing a new fleet and adequately training staff to operate it during regular operations would have been difficult, in particular in the start-up phase.
- (258) Airport Handling had in the meantime launched a tender procedure, from November 2014 until January 2015, for the purchase of new equipment on the market. According to the Italian authorities, the value of the equipment purchased under this first tender procedure is approx. EUR [...] (*).
- (259) The Commission assessed whether comparing the value and number of Airport Handling's assets purchased on the market with the value and number of items leased and then purchased from SEAH is a reliable indicator for economic continuity. As regards the comparability of both types of assets, the Commission found that:
- SEAH's liquidator had formed the lots so as to bundle in each lot items which were in working conditions together with less operational assets and items.
 - In general, SEAH's equipment was aged.
 - According to the Italian authorities, roughly [...] (*) of the [...] (*) items purchased from SEAH were in good or fair working order. About 1/3 at best could have been used to obtain spare parts. 700 of the items purchased were later found to have minimal or no value/use; 270 items were then parked and decommissioned as scrap.
 - Airport handling equipment is composed of a wide array of different items such as steps, trucks, forklifts, cargo-loaders and dollies.

(*) Business secret.

— It is not excluded that even a single new state-of-the-art vehicle that is operated full time can be operated far more efficiently than multiple aged vehicles which, as a rule, require more down-time for maintenance.

- (260) On that basis, the Commission concludes that comparing the value and number of new equipment with the value of equipment leased and the purchased cannot be used as an indicator for economic continuity in this case.
- (261) Against this backdrop, the Commission assessed the importance of the assets (operating tools) as a production factor in Airport Handling in proportion to labour as a production factor, and also in proportion to the turnover of both SEAH and Airport Handling.
- (262) As regards the importance of assets in relation to labour, in SEAH's last balance sheet before liquidation, the value of operating tools amounted to around EUR [...] (*). Airport Handling, in turn, in 2015 owned capital assets worth EUR [...] (*)⁽³⁰⁾. In contrast, Airport Handling's labour cost amounted to EUR [...] (*) in the year September 2014-August 2015, according to Airport Handling's operating statement for that period⁽³¹⁾.
- (263) Asset value is also of lower importance when compared to turnover: Airport Handling's operating statement for September 2014-August 2015 shows turnover to the amount of EUR [...] (*). Therefore, the assets in question appear to be a production factor of minor importance compared to labour. Their value is also very modest compared to turnover generated with both labour and assets. Information obtained in the formal investigation procedure rather indicates that both SEAH and Airport Handling are pursuing a pronouncedly labour intensive rather than asset intensive business model.
- (264) The Commission therefore concludes that, even though Airport Handling has sourced initially all its assets from SEAH, this cannot be construed as *per se* indicating economic continuity because assets are only a production factor of minor importance in the ground handling business.

7.1.1.4. Summary of the assessment on the scope of the transfer

- (265) The assessment of the question in how far the scope of the transfer could indicate that there is economic continuity between SEAH and Airport Handling leads to the following indication:
- (266) First, there was no transfer of the client portfolio from SEAH to Airport Handling. Rather, with the liquidation of SEAH, all contracts were terminated and Airport Handling had to reacquire contracts whereby it could attract some of the previous clients of SEAH and some new clients, and where it lost some of the clients to competitors. The contractual conditions were negotiated independently of the previous conditions under the agreements with SEAH. In this respect, Airport Handling had the same standing as any other competitor or new entrant would have had. The Commission considers the fact that there was no transfer of the client portfolio as a strong indication against economic continuity.
- (267) Second, Airport Handling recruited its initial workforce entirely from SEAH, but under new contracts and new contractual conditions. There was no block transfer of employment contracts, no automatic transfer of such contracts and no replication of their employment conditions.
- (268) Third, whereas it is true that Airport Handling initially leased all of SEAH's ground handling assets, finally, after the expiry of the lease, it took over only part of SEAH's assets as it had in the meantime started purchasing equipment from third parties. Available information furthermore suggests that the assets represent only a minor share of the production assets in the ground handling business and are not decisive for Airport Handling's cost structure and efficiency.
- (269) Overall, judging from the perspective of the scope of the transfer, the Commission considers that all circumstances attached to the setting up of Airport Handling in the wake of the liquidation of SEAH viewed together are not strong enough to indicate that there was economic continuity between both companies with a view to circumvent the recovery decision.

(*) Business secret.

⁽³⁰⁾ The Commission notes that according to statements and complete inventories provided by Airport Handling, the greater part of SEAH's assets was aged, repair intensive and fully written off.

⁽³¹⁾ According to the abovementioned Brattle report on Airport Handling's business plan, the company's labour costs were [...] (*).

7.1.2. *Payment of the market price*

- (270) According to case law, transfer of the assets at a price below market price would also be an indicator of economic continuity between the liquidated company owing the State aid debt and the newly created company.

7.1.2.1. SEAH's assets — general remarks

- (271) In the context of bankruptcy proceedings, circumvention of a negative State aid Decision through a transfer of assets can occur in particular when:

- assets are sold — or leased — below the market price (for example following a sale procedure which is not sufficiently open, transparent and non-discriminatory), or
- the bankruptcy administrator performed actions which defrauded the creditors and may have reduced the assets of the insolvent company, or it breached the principle of the equal ranking of creditors to the loss of the public creditors ⁽³²⁾.

- (272) To the contrary, the Commission considers that a transfer — or lease — of assets from an insolvent company that received incompatible aid to a new company is not indicative of circumvention of a recovery decision if:

- nothing was done to reduce the value of the assets of the insolvent company to the benefit of the new company, to the detriment of the creditors (since the purpose of liquidation is to maximise the proceeds from the sales of the assets to reimburse creditors to the maximum extent possible),
- the public creditors (holding the claim linked to the incompatible aid) have not been unduly disadvantaged compared to other creditors (including possibly the new company or its founders) in the context of the insolvency proceedings.

- (273) In this case:

- The lease fee was set based on two external valuations. It was adjusted upwards corresponding to the second valuation, which was based on a comprehensive check of the leased equipment. Hence, there is no indication that the price at which SEAH's assets were leased by Airport Handling was at variance with normal market conditions.
- There is also no indication that the transactions performed on the initiative of the liquidator defrauded the creditors and may have reduced the value of the assets of SEAH. In particular, as shown in more detail below, all available information showed that proper tenders were organised for the sale of SEAH's assets, giving all potentially interested buyers opportunity to bid. The facts that the lease price was determined by external experts and revised upwards after a second valuation, and that SEAH's liquidator was not ready to grant Airport Handling a rebate on the purchase price of the equipment shows that the disposal process organised by the liquidator was geared towards revenue maximisation with respect to the assets in question, to the benefit of SEAH's creditors, and thus did not lead to a particular transfer of economic advantage to Airport Handling.
- The Commission also notes that none of the interested parties claimed that the liquidation proceedings have infringed the rights of the creditors or reduced the value of the assets owed by SEAH, or that such assets were leased to Airport Handling below market prices. SEAH's ground handling equipment consisted of around 4 000 assets. According to the plan initially announced by Italy, such assets were going to be leased by SEAH at market price pending their sale on the open market in the framework of the liquidation procedure.

7.1.2.2. Lease of SEAH's assets to Airport Handling — The setting of the lease fee

- (274) Following the failure of the bidding procedure, the ground handling equipment was leased to Airport Handling under a lease contract initially due to expire on 31 August 2015.

⁽³²⁾ Case C-277/00 *Germany v Commission* ('SMI'), ECLI:EU:C:2004:238, paragraph 93.

- (275) According to case law, the mere fact that a company has leased for a certain period some or all of the assets of an insolvent company does not necessarily mean that the new company enjoyed the competitive advantage linked to an aid previously granted to the lessor ⁽³³⁾. Leasing of the assets by the recipient of the aid to a company performing a similar activity is not indicative of economic continuity if the lease price reflects the market price. However, if the lease price, paid by the new company to the beneficiary of the aid, was below market price, this could be an indication of economic continuity in that the advantage conferred on the beneficiary by the illegal and incompatible aid could be said to have been fully or partly transferred to the new company through a price below market value.
- (276) Available information suggests that SEAH and the Trustee negotiated the lease contract at arm's length. Moreover, the lease fee was determined by two subsequent external valuations. In order to confirm the soundness of the first valuation, which had set the annual lease fee at EUR [...] (*), SEAH and Airport Handling jointly entrusted E&Y with the task of reassessing the lease fee. That second valuation initially recommended a [...] (*) lease fee, being EUR [...] (*). Then, after SEAH and Airport Handling had agreed to broaden that second valuation in order to include new information gathered in equipment delivery reports, the experts found that a number of machinery and equipment items were not suitable for use and revised their initial estimate [...] (*), to EUR [...] (*). Based on that second evaluation report, SEAH and Airport Handling agreed to reduce the lease amount to EUR [...] (*) *per annum*.
- (277) In conclusion, available information suggests that SEAH and Airport Handling negotiated at arm's length, and relied on expert reports on the value of the assets in question. The fact that the second valuation was revised upon mutual request of both parties indicates that both intended to keep the lease price as closely as possible in line with market conditions and to pre-empt any possible doubt of collusion. The Commission therefore considers the agreed lease fee to be at least the market price.

7.1.2.3. Purchase of part of SEAH's assets by Airport Handling — the purchase price

- (278) Airport Handling purchased the assets after the failure of the bidding procedure and after the expiry of the leasing agreement. The Commission assessed whether Airport Handling through that transaction received any advantage originating from previous unlawful aid granted to SEAH. That assessment starts on the premise that an advantage is excluded if the purchase price of EUR [...] (*) corresponds to at least the market price.
- (279) The call for expression of interest for SEAH assets was published on 12 November 2014 in the Supplement to the *Official Journal of the European Union*. In view of the large number of items, the liquidator, with the assistance of independent consulting company IMQ, decided to divide the items into nine lots. According to SEAH, the reason was to avoid inefficiency due to excessive fragmentation. With a view to attracting as many bidders as possible, each lot was defined as a stand-alone combination of assets, including items which are complementary and of different values. An external expert had set a minimum price for each of the lots.
- (280) The sale procedure was restricted to handlers, airport operators, air carriers, manufacturers of the types of equipment sold, resellers and leasing companies fulfilling certain minimum-solvency criteria.
- (281) According to Italy, no formal expression of interest was received in the tender. SEAH only received informal communications from third parties aiming to explore the possibility of acquiring only certain assets however at lower prices than the ones indicated in the tender. Those communications were provided to the Commission in the investigation.
- (282) Italy submitted that following the negative outcome of the tender, SEAH's liquidator tried to raise the interest of potential purchasers of SEAH's assets, by contacting certain operators active in the handling services sector, as well as those operators that had informally expressed their interest during the tender procedure, and by allowing access to the data room as well as to assets, so as to enable any interested operator to inspect the assets on site.

⁽³³⁾ Case C-277/00 Germany v Commission ('SMI'), ECLI:EU:C:2004:238, paragraph 88.

(*) Business secret.

- (283) Some notices of interest to purchase SEAH's equipment were received as a result, however still at prices lower than those indicated in the tender. In the end, the only credible purchaser interested in the purchase of SEAH's equipment was Airport Handling.
- (284) The Commission assessed whether the bidding procedure in question effectively addressed the market, so that its failure can be seen as an indication that the market was not interested in purchasing SEAH's assets. The Commission assumes a bidding procedure to be effectively open to the market and geared towards revenue maximisation if the procedure is open, transparent, non-discriminatory and non-conditional.
- (285) As to the openness of the procedure in question, the Commission notes that the sale was published in the Supplement to the Official Journal of the EU and thus was given adequately wide publicity.
- (286) The procedure was however restricted to certain types of buyers, namely handlers, airport operators, air carriers, producers, resellers and leasing companies meeting certain minimum-solvency criteria (recital 193 above).
- (287) Further, the Italian authorities have not brought forward valid reasons for *a priori* restricting the range of potential buyers. Therefore, the bidding procedure was not fully open, as eligibility criteria may have limited the bidding procedure such that the public owner could not be sure of receiving the economically most favourable offer.
- (288) In practice however, the Commission takes the view that there are no indications suggesting that, had the tender not be limited to ground handling operators or related businesses, the tender would have been successful. This is corroborated by the fact that the attempts to attract bidders informally outside the scope of the tender procedure also failed to produce bids reaching the requested prices.
- (289) SEAH's liquidator received a number of expressions of interest to purchase SEAH's equipment at prices lower than those indicated in the bidder procedure. This is sufficient indication that market operators outside the restricted field of initially eligible bidders were not ready to pay the price asked for by SEAH.
- (290) The above described outcome of both the sales procedure and the negotiations between SEAH as seller and Airport Handling as buyer indicate that the initial asking price was above the price that market operators were ready to pay. In particular, SEAH's liquidator as seller negotiated at arm's length, in order to obtain the maximum economic benefit from the sale of the assets concerned. Documentation provided by the Italian authorities shows that the offer made by Airport Handling was indeed the economically most advantageous offer SEAH had received. Airport Handling, in turn, had economic reasons to acquire the assets despite SEAH's refusal to grant a discount or more favourable payment terms. The purchase price can be considered to be at least the market price. Hence, there is no indication that Airport Handling through the purchase of part of SEAH's assets received any advantage that would stem from previous unlawful aid to SEAH.

7.1.2.4. Conclusion on the Market Price as potential indicator of economic continuity

- (291) In light of the above, the Commission concludes that the circumstances of the lease and the subsequent sale are effectively excluding any transfer of economic advantage from SEAH to Airport Handling. Hence, lease price and purchase price cannot be held as an indicator of economic continuity in this case.

7.1.3. Identity of the shareholders

- (292) In the 2014 opening decision, the Commission noted that Italy undertook to entrust the management of Airport Handling to an independent trustee for a period of 3 years⁽³⁴⁾. Moreover, Italy proposed to open 20 % of Airport Handling's share capital to investors. The Commission then found, firstly, that the ground handling business would have the same owner, SEA, and secondly, that Italy's proposal to tender out 20 % of the capital of the new ground handling provider was not sufficient to guarantee discontinuity from SEAH since first, the proposal is only limited to a minority shareholding and second, no guarantees have been provided in this respect. Moreover, this opening of the capital would only occur after the entry of Airport Handling on the market.

⁽³⁴⁾ Recital 16 of the opening decision.

- (293) In the course of the investigation, Italy alleged that the setting-up of the Trust would guarantee the absence of continuity between SEAH and Airport Handling. The Trustee would ensure the independent management of SEA's participation in Airport Handling, assuming sole control over the company and thus guaranteeing the absence of any interest and/or information flow between Airport Handling and the SEA group.
- (294) The Commission assessed the chronological and material characteristics of identity of ownership in the case in question.
- (295) First, as regards chronology, the Commission notes that SEA established Airport Handling on 9 September 2013. The Trust was incorporated on 30 June 2014; the Trust Deed was signed on the same day. The Commission notes that the Trust took over the actual management of Airport Handling only later, on 27 August 2014, when SEA transferred the entire holding of Airport Handling to the Trust and appointed a trustee. The latter, in turn, then appointed a new Board of Directors of Airport Handling. Airport Handling started operations a few days later, on 1 September 2014. The Commission however notes that according to available information, the company had already carried out economic activities by offering its services on the market before that date, and apparently as early as April 2014, as a number of service contracts had [...] (*) been concluded ⁽³⁵⁾. Then however, Airport Handling was fully owned and controlled by SEA.
- (296) Second, as regards the material characteristics of the transition of ownership and control to the Trust, the Commission assessed if the fact that Airport Handling shortly before it started operations was temporarily managed by a Trustee was sufficient to exclude that SEA could exercise rights in respect of the management of Airport Handling in that it may unilaterally take commercial decisions. In that respect, the Commission notes the following:
- (297) According to the Trust Deed, the activity of the Trustee is subject to certain material constraints, notably the Trustee is not required to investigate:
- whether representatives of SEA have participated to the negotiations with the employees to be re-employed by Airport Handling,
 - that SEA outsources personnel to Airport Handling, including its Director-General,
 - that certain central services, including investor relations and customer care, will continue to be provided by SEA,
 - that funding decisions are entirely left to the discretion of SEA.
- (298) In addition, although based on the Trust Deed the management of Airport Handling is supposed to be separate of that of SEAH, Airport Handling is being managed by the former head of Aviation Business Development of SEA.
- (299) Indeed, the Commission notes that SEA seconded two senior managers to AH. Both of them are currently holding senior management positions at Airport Handling. According to Italy there would be no hierarchical relationship between SEA and those managers and the latter would not perform any activity in favour of SEA. Their remuneration would also be independently determined by Airport Handling.
- (300) According to Italy, SEA's decision of seconding those managers to Airport Handling was taken with a view to Italy's proposals concerning the opening-up of Airport Handling's capital to third parties. For that purpose, it would have been necessary to ensure, on one hand, that Airport Handling's management was fully qualified and, on the other hand, that the conditions of employment of the managers were flexible. In fact, Italy clarified that Airport Handling signed secondment contracts with SEA for [...] (*) employees.
- (301) In conclusion, the Commission finds that both the chronology and the material provisions of the entrustment confirm that SEA throughout Airport Handling's start-up phase and entry into economic activities has enjoyed control over that company to an extent which, albeit varying, continuously ensured significant influence over its day-to-day management.
- (302) The Commission took note of the above described Framework Investment Agreement of 21 September 2015, between the Trustee and private market operator D'Nata, concerning the sale of a [...] (*) % stake in Airport Handling, in combination with the right to appoint the majority of the board of directors and also the CEO of Airport Handling, and further concerning an option to acquire a further [...] (*) % stake in Airport Handling.

(*) Business secret.

⁽³⁵⁾ Dates of signature of contract according to a list provided by Italy: e.g. [...] (*).

- (303) D'Nata will have effective control over Airport Handling when it will have appointed the majority of the board of directors and also the CEO of Airport Handling. Moreover, available information on the bidding process, which was organised independently of both SEA and the Trustee by a private bank, confirms that D'Nata acquired a stake in Airport Handling at the market price. Lastly, available information confirms that D'Nata is not identical with, or otherwise linked to, SEA.
- (304) Nevertheless, the transfer of control over Airport Handling from SEA and the Trustee to D'Nata took place more than 2 years after SEA had established Airport Handling, and more than 1 year after that company had started operations.
- (305) Therefore, the Commission cannot conclude solely on the basis of the criterion regarding the identity of the shareholders that there is no economic continuity. Nevertheless, the Commission assessed this criterion together with the other relevant criteria, in order to conclude whether the absence of economic continuity can be established.

7.1.4. *Timing of the transaction*

- (306) The liquidation of SEAH on 1 July 2014 and the establishment of Airport Handling on 9 September 2013 took place after the Commission, on 12 December 2012, had adopted the recovery decision. The company in liquidation ensured ground handling operations until Airport Handling started operations on 1 September 2014.
- (307) The timing of events thus could *prima facie* be an indication that the process which culminated in the creation of Airport Handling had the effect of circumventing the recovery decision, which had been adopted before that process was carried out. The Commission however recalls that case-law does not require the Commission to examine, in particular and over and above the other criteria, the time at which the transfer of assets took place, which is one of the factors which 'may' be taken into consideration in order to set aside the economic continuity between those two entities ⁽³⁶⁾.

7.1.5. *Economic logic of the transaction*

- (308) Available information confirms that Airport Handling in essence continues the same type of business activities of SEAH, namely offering airport handling services at Linate and Malpensa airports.
- (309) In that respect, the Commission refers to case law according to which the mere circumstance that the acquirer is in fact continuing the business of an undertaking that is obliged to reimburse aid does not necessarily mean that the former undertaking enjoyed the competitive advantage linked with the aid granted to the latter. In the specific case referred to, the former undertaking leased a plant at a market price from the undertaking that had received aid almost 3 years before the creation of the former undertaking ⁽³⁷⁾. The Commission recalls that in the case at issue, Airport Handling has leased, then purchased, SEAH's assets at a price that can be deemed at least the market price, and that the unlawful aid that is to be recovered from SEAH was granted during the years 2002-2010, i.e. 3 years before Airport Handling was incorporated and 4 years before Airport Handling started its economic activity.
- (310) More particularly as regards the economic logic of the transaction, the Commission notes the following:
- (311) As was described above in points 2.6.1 and 2.6.2, Airport Handling's business plan differs from SEAH's in a number of points, in particular:

- [...] ^(*),
- [...] ^(*),
- [...] ^(*),
- [...] ^(*),
- [...] ^(*),
- [...] ^(*).

⁽³⁶⁾ Case T-123/09 *Ryanair v Commission*, ECLI:EU:T:2012:164, paragraph 156.

⁽³⁷⁾ Case C-277/00 *Germany v Commission* ('SMI'), ECLI:EU:C:2004:238, paragraphs 86-89.

^(*) Business secret.

- (312) Hence, Airport Handling managed its activities under different operating conditions than SEAH's, under its own business plan. Moreover, the Italian authorities did not require Airport Handling to follow a specific business model nor to maintain a certain scope of activities, nor to take over any specific assets or employees.

7.1.6. Overall conclusion on economic continuity from SEAH to Airport Handling

- (313) In the Commission's view, the case at hand contains both, elements which would argue in favour of economic continuity and elements which would support the opposite finding.
- (314) On the side of the elements supporting a finding of economic continuity, the Commission identified the fact that it was the former owner of SEAH who created Airport Handling, a company active in the same business as SEAH, which recruited its initial workforce of Airport Handling almost exclusively from former SEAH employees and took over a large part of the assets, all this after the Commission's recovery decision.
- (315) However, a number of other factors rather indicate that Airport Handling was not set up as a circumvention company but rather as a genuinely new company. The strongest element in this respect is that the client portfolio had to be newly created by approaching the airlines with offers independent from previous SEAH contracts and by concluding new agreements at new conditions with them. Airport Handling therefore had to newly acquire its customers and gain market shares such as any competitor or new entrant would have had to do. Considering that the client portfolio is the basis for the ground handling business, the Commission attributes a high weight to this element.
- (316) As regards assets taken over from SEAH, Airport Handling paid at least a market price for the lease of the assets and later, when it purchased part of the assets, paid a price that was at least the price market operators were ready to pay.
- (317) Further, the workforce was not block transferred. Airport Handling concluded new contracts at new conditions. Any competitor or new entrant would have had the same possibility to recruit former SEAH employees, and the former SEAH workers just seemed the most appropriate target for new recruitments. Only a part of the assets was transferred; in addition they represent only a minor part of the overall production factor in the ground handling business.
- (318) With respect to the economic logic of the operation, Airport Handling manages its activities under different operating conditions than SEAH's and under its own business plan. Moreover, the Italian authorities did not require Airport Handling to follow a specific business model nor to maintain a certain scope of activities, nor to take over any specific assets or employees.
- (319) Against that backdrop, the Commission considers that on balance, there is no economic continuity between SEAH and Airport Handling and the creation of the latter cannot be regarded as a circumvention of the recovery decision. Consequently, Airport Handling cannot be held liable to repay the aid found incompatible in the recovery decision.

7.2. SEA's investment in Airport Handling — existence of State aid

- (320) According to Article 107(1) of the Treaty 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (321) The criteria laid down in Article 107(1) of the Treaty are cumulative. Therefore, in order to determine whether the measures constitute State aid within the meaning of Article 107(1) of the Treaty, all the above-mentioned conditions need to be fulfilled. Namely, the financial support should:
- (a) be granted by a Member State or through State resources;
 - (b) favour certain undertakings or the production of certain goods;

(c) distort or threaten to distort competition;

(d) affect trade between Member States.

7.2.1. *Selective economic advantage — the market economy investor principle*

- (322) Italy is of the opinion that SEA's injection in Airport Handling's capital complied with the market economy investor principle and thus no advantage was granted to Airport Handling, and therefore the measure did not constitute State aid. Even though SEAH had consistently recorded losses since 2000, it would be legitimate to assume that Airport Handling's activity would in turn yield a sufficient return to render the equity injection profitable, notably in view of the actions laid down in the business plan for Airport Handling for 2014-2017. When deciding to invest in the capital of Airport Handling, SEA would therefore have acted as a prudent market investor.
- (323) For the purposes of the market economy investor principle assessment, it is necessary to determine whether, in similar circumstances as those surrounding the adoption of the measure under assessment, a hypothetical market economy investor, guided by profitability prospects, and not public policy objectives, would have behaved in a similar way. In order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation⁽³⁸⁾.
- (324) Consequently, the market economy rationale of a public investment must be assessed having regard to the information available and developments foreseeable at the time when the investment was made⁽³⁹⁾.
- (325) In the course of the investigation Italy explained that the decision to invest in Airport Handling was based on the business plan of 6 August 2014. However, the Commission observes that this business plan is dated only after the final decision to increase the capital of the company up to EUR 25 million was taken on 30 June 2014. The Commission considers that the initial decision to set up Airport Handling and invest EUR 25 million must have been taken at the latest prior to establishing the company on 9 September 2013. The business plan available to the Commission which is closest to that date is the business plan of 14 November 2013. The Commission also observes that this business plan already assumes the investment of EUR 25 million. Therefore the Commission considers that the business plan of November 2013 is the relevant one for testing the market economy investor principle.
- (326) In the 2014 opening decision, the Commission expressed doubts that SEA acted as a market economy investor. First, because SEA did not consider the risk of Airport Handling being liable to repay incompatible aid previously granted to SEAH following a finding of economic continuity by the Commission. Second, the Commission doubted whether the business plan, underpinning SEA's decision to invest in Airport Handling relied on sufficiently plausible assumptions. Ultimately the Commission has to assess if the decision to invest in Airport Handling is taken on market terms. In other words, the Commission has to assess if the investor could have expected a reasonable return taking into account the foreseeable risks related to the investment.

7.2.2. *Risk mitigation measures taken by SEA*

- (327) As regards the first doubt, the Commission observes that SEA was aware of the risk of finding economic continuity and has taken risk mitigation measures:
- (328) SEA was aware of such risk, as shown by the documents submitted to the Commission in the context of the pre-notification of November 2013. The risk that liability could be transferred to Airport Handling through economic continuity from SEAH was a legal risk. Perception and weighing of the risk and adequate risk mitigation measures depend on legal assumptions made at the time of the investment.

⁽³⁸⁾ Case C-482/99 France v Commission, cited, paragraph 71.

⁽³⁹⁾ Case T-16/96 Cityflyer Express v Commission [1998] ECR II-757, paragraph 76.

- (329) Available information shows that SEA had considered the following work force related risk mitigation measures: In the agreement between SEA and the Trade Unions, of 4 November 2013, SEA declared that ‘fundamental importance was attributed to the requirement for “discontinuity”, which must form part of any alternative solution to payment in money, as a guarantee that it is not possible for the obligation to recover the aid to be extended to any third party.’ In the course of negotiations on the partial transfer of the workforce from SEAH to Airport Handling, work structure and certain employment conditions were materially altered as explained in detail in recitals 232-234 above. The applicable principles were set out in the above described Implementing Agreements with the Trade Unions, of 4 June 2014 and had already been announced in the agreement with the Trade Unions of 13 November 2013, and thus prior to implementing of the two major capital injections of 10 March and 30 June 2014 (recitals 45 and 46 above).
- (330) SEA put in place the following risk mitigating measures to ensure discontinuity from the assets transfer of SEAH: First, the Trustee excluded Airport Handling from the public bidding procedure for the sale of the assets. Second, Airport Handling leased assets from SEAH against a market lease fee which was determined by two independent expert reports.
- (331) SEA took measures to ensure discontinuity of Airport Handling from the SEAH also in view of the customer base. The customers of SEAH were informed in advance about the liquidation of the company. New service contracts with new financial conditions were signed with the airlines which chose Airport Handling as their service provider.
- (332) As a further risk mitigation measure, SEA set up a Trust. As explained in Section 2.3 above the main purpose of the Trust was to act as sole shareholder of Airport Handling and ensure that Airport Handling operated in economic discontinuity with SEAH.
- (333) The Commission notes that the risk arising from a possible future liability to repay the aid is not mentioned in Airport Handling’s business plan of November 2013. In that respect, the Commission observes that SEA made that business plan for its own purposes. Being the mother company of an established market player in ground handling and demonstrably being aware of the risks arising from various factors of continuity, SEA was in a position to take informed investment decisions without explicitly mentioning that risk in that business plan. Additionally, the final decision to raise the capital up to EUR 25 million was taken only after the risk mitigating measures were ensured. Moreover, the above described external evaluation of the November 2013 business plan (recital 114 above) confirms that a rational investor would have judged the probability of economic continuity, and thus the liability to repay the aid, to be less than [...] (*) %, and therefore would have found it economically rational to invest in AH.

7.2.3. Airport Handling’s business plan

- (334) As regards the second doubt, namely whether the business plan underpinning SEA’s decision to invest in Airport Handling relies on sufficiently plausible assumptions, the Commission makes the following observations:

7.2.3.1. Assumptions on traffic development STOP

- (335) Air traffic forecasts at Milan airports, combined with Airport Handling’s market shares, are a determining factor in that company’s business plan. As confirmed by external experts (BCG) who evaluated Airport Handling’s business plans, the company’s traffic forecasts are coherent with the forecasts issued by IATA and Eurocontrol. The Commission considers those bodies as reliable data sources to make traffic forecasts in the aviation sector. As regards the application of these forecasts to Malpensa airport, the Commission notes that according to the BCG report, Airport Handling’s intention to maintain a constant mix of carriers on that airport would not be in line with historical developments and that a new regulation could lead to the relocation of some carriers to Linate.

7.2.3.2. Assumptions on personnel costs

- (336) According to the business plan of November 2013, personnel costs on average constitute [...] (*) % of operating costs in the period 2014-2017.
- (337) The Commission assessed the plausibility of the assumptions underlying that significant cost item.

(*) Business secret.

- (338) First, the Commission notes that in light of the Brattle report, the percentage of personnel costs over total operating costs forecasted by Airport Handling is broadly in line with the cost structure of the European ground handling industry, which shows an incidence of personnel costs over total operating costs amounting to 65 %-80 %. In that respect, the report refers to the figures mentioned in the Commission's impact assessment accompanying its proposal for a new ground handling Regulation ⁽⁴⁰⁾.
- (339) Second, on the basis of information provided by Italy, the Commission notes that Airport Handling's average hourly personnel costs per FTE seems to be [...] (*). The average hourly personnel cost in the business plan of November 2013 is EUR [...] (*), and EUR [...] (*) in the business plan of August 2014, which is respectively [...] (*) than the average hourly costs paid by SEAH in 2013 of about EUR[...] (*) ⁽⁴¹⁾. The Brattle report confirms that Airport Handling achieved these labour costs in reality and therefore concludes that the business plan was not overly optimistic.
- (340) The Commission finds that the assumed decrease in labour costs does not seem unrealistic in view of the typical cost structure in the industry.

7.2.3.3. Assumptions on market share

- (341) The Commission expressed concerns about the relatively high market share assumptions of Airport Handling's business plan of November 2013. The market share for ramp-services is foreseen at [60-70] (*) % in 2014 and rises to [70-80] (*) % in 2017. The market share for passenger services is foreseen at [60-70] (*) % in 2014 and rises to [60-70] (*) % in 2017.
- (342) In 2013, SEAH's overall market share was [70-80] (*) % ⁽⁴²⁾. The Commission observes that the anticipated market share of Airport Handling is below the market share of SEAH. Consequently, it was not expected that Airport Handling received all SEAH contracts. Certain losses in the market share of the new company are in fact taken into consideration.
- (343) Airport Handling's strategy is to offer a higher level of availability compared to other handlers at Linate and Malpensa. It guarantees a 24-hour service so that ground-handling services are provided even if a plane arrives late. This is a competitive advantage which can be particularly valuable for air carriers with significant operations and high flight frequencies at Milan airports, such as Alitalia and EasyJet. These air carriers may be inclined to remain with the supplier who is able to provide these services. This can reasonably explain why Airport Handling could expect a relatively high market share from the launch of its operations.
- (344) The Commission also observes that, as noted in the Brattle report, based on 2013 data, Airport Handling's anticipated market share was lower as compared to that estimated for larger ground handling providers at other Italian airports: (i) Bergamo (78,23 %); (ii) Cagliari (75,61 %); (iii) Catania (77,18 %); (iv) Palermo (75,85 %); (v) Torino (68,8 %).
- (345) Moreover, the Commission notes that the market share Airport Handling achieved in 2014 is in fact higher than the one predicted in the November 2013 business plan. Such a high market share can mainly be explained by the fact that Airport Handling managed to sign contracts with [...] (*). Together they account for a significant share of the traffic at the two airports, namely [...] (*) % of Linate's and [...] (*) % of Malpensa's air traffic.

⁽⁴⁰⁾ Annex to the Impact Assessment, Accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council on groundhandling services at Union airports and repealing Council Directive 96/67/EC', of 16.1.2012, SEC(2011) 1439 final. On p. 95 of that document, the Commission notes that 'The liberalisation of groundhandling services and the end of monopolies or (airport/hub carrier) duopolies at airports have meant that groundhandling providers have had to adapt in order to become more competitive and have had to deal with tougher competition. The most visible consequence for groundhandling workers was the increase in work productivity and flexibility. Groundhandling providers often explain that this increase in work productivity is imperative as staff costs amount to 65-80 % of their total costs, while workers' associations usually claim that groundhandling companies focus too much on the work factor to reduce costs.'

(*) Business secret.

⁽⁴¹⁾ According to the Brattle report paragraph 48, p. 11.

⁽⁴²⁾ Brattle report paragraph 40, p. 9

- (346) In conclusion, the Commission does not doubt the plausibility of Airport Handling's market share assumptions: First, they are based on competitive advantages offered by Airport Handling. Second, these assumptions seem to be conservative, compared to the market shares of a peer group of airport handling companies at the time when the business plan was drawn up. The Commission also notes that these assumptions materialised in practice.

7.2.3.4. Assumptions on profitability

- (347) The business plan of November 2013 anticipates [...] (*) EBIT and a [...] (*) pre-tax profit as from the second year of operation. EBIT and after-tax profit [...] (*). The business plan of November 2013 does not show the usual metrics of profitability such as for example internal rate of return (IRR) or net present value (NPV). However, the Brattle report presents these calculations based on the numbers in the business plan.
- (348) In order to invest in Airport Handling a rational private investor must expect a return equal to, or greater, than its opportunity cost of capital which can be approximated by the weighted average cost of capital (WACC).
- (349) The Brattle report calculates the equity IRR of the investment in Airport Handling and checks if it is equal to or higher than its WACC. The report uses two alternative values of the WACC. The first one is [...] (*) % which is according to the report the unlevered post-tax WACC used in the business plan⁽⁴³⁾. The second one is [...] (*) % and is calculated in the report as the lower bound of the opportunity cost of capital. Depending on the terminal value of the investment, the Brattle report estimates that the expected equity return of the investment in Airport Handling ranges from [...] (*) % to [...] (*) %. The calculations show that in all scenarios the expected IRR exceeds the opportunity cost of capital and therefore the investment is profitable.
- (350) The Commission observes that the time horizon of the business plan (2014-2017) is relatively short. For that reason the business plan can be sensitive to variations of the underlying assumptions. However, that time line is to be seen in the light of the following facts. First, the business plan was drawn up for the airport operator SEA, which has owned an airport handling subsidiary for many years. Second, restructuring was already in progress and significant productivity gains had already been achieved in SEAH. Therefore it appears not unreasonable to limit the scope of the business plan, to the minimum necessary for an experienced investor such as SEA.
- (351) The Commission notes that some of the key assumptions of the business plan of November 2013 broadly materialised, in particular in terms of profitability and market shares. Airport Handling was already profitable in its first year of operations: According to the profit-and-loss account for September 2014 until August 2015, the company generated EBIT of EUR [...] (*).
- (352) In conclusion the Commission considers that using assumptions as to evolution of labour costs and the market share which do not appear unreasonable, the business plan shows a sufficiently high return on equity to SEA for the capital injection of EUR 25 million.

7.2.4. Conclusion on selective economic advantage

- (353) The Commission concludes that SEA has taken sufficient measures to limit the risks of finding of economic continuity. The business plan was based on assumptions which a rational private investor, who has significant experience in the airport handling industry and who aims to restructure the company, would have deemed plausible and sufficient to establish Airport Handling's future profitability. SEA's investment in Airport Handling therefore does not constitute an advantage that Airport Handling could not have obtained under normal market conditions.

7.2.5. Conclusion on the presence of State aid in SEA's investment in Airport Handling

- (354) The investment does not contain any advantage that Airport handling could not have obtained under normal market conditions. Hence, one of the cumulative criteria pursuant to Article 107(1) of the TFEU is not met. Consequently, the investment does not constitute State aid within the meaning of Article 107(1) of the TFEU,

(*) Business secret.

⁽⁴³⁾ This WACC is according to the Brattle report higher, because it takes into account project specific risks through an increase in the equity beta.

HAS ADOPTED THIS DECISION:

Article 1

1. The process that led to the liquidation of SEA Handling SpA and the creation of Airport Handling SpA did not give rise to economic continuity between the former and the latter undertaking.

2. Airport Handling is not liable to repay the State aid found incompatible with the internal market in Commission Decision C(2012) 9448 of 19 December 2012, corrected by decision C(2013) 1668 of 22 March 2013 concerning aid granted by SEA to its subsidiary SEA Handling SpA during the years 2002-2010.

Article 2

The setting-up and capitalisation which Italy has implemented for Airport Handling SpA, amounting to EUR 25 million does not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 5 July 2016.

For the Commission

Margrethe VESTAGER

Member of the Commission
