



EUROPEAN COMMISSION

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Subject: State Aid N 83/2009 – Greece

Modifications to the process for the sale of certain assets of Olympic Airlines/Olympic Airways Services as approved by the Commission decision of 17 September 2008 (N 321/08, N 322/08 and N 323/08)

Madam,

1. PROCEDURE

- (1) On 27 June 2008 the Hellenic Republic ("HR") notified the Commission, for reasons of legal certainty, of its plans to sell certain assets of the State-owned Olympic Airlines and Olympic Airways Services. The notifications were given the following numbers: N 321/2008, N 322/2008 and N 323/2008.
- (2) On 17 September 2008 the Commission decided to consider that the notified measures did not constitute State aid in the sense of Article 87(1) of the EC Treaty provided in particular that they were carried out on the basis of a transparent, open and non-discriminatory public tender accepting the highest bid, and thus did not raise objections to the sale notified by the HR ("the Decision").
- (3) By letter dated 6 February 2009 the HR informed the Commission about certain changes that it intended to introduce in the sales processes and asked for the Commission approval of these changes.
- (4) By e-mail of 26 February 2009 the HR accepted for reasons of urgency that the present Decision be adopted and notified to the HR in English.
- (5) By letter dated 5 March 2009 the HR informed the Commission about developments in the sales process which had taken place and about its intention to conclude a direct sale of the assets in question in the following days.

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2. DESCRIPTION

2.1. The Decision

- (6) Olympic Airways Services¹ and Olympic Airlines² are facing severe financial and regulatory problems. Both companies are heavily loss making and both have been the subject of repeated Commission State aid decisions in 2002, 2005, 2006 and 2008 requiring one or both companies to repay significant amounts of State aid to the Greek State.
- (7) The Greek authorities approached the Commission in accordance with Article 10 of the EC Treaty in order to establish how to best implement the Commission decisions requiring recovery, with regard to certain problems related to loss of value and continuity of essential services that have been or could be encountered.
- (8) The Greek authorities were of the opinion that the immediate liquidation of both companies would neither be value maximising for their creditors, nor would it offer the best solution for Greek consumers. Such a liquidation also risks creating a variety of serious problems for the State. The HR therefore notified to the Commission a procedure for the sale of certain assets of Olympic Airways Services and of Olympic Airlines prior to the liquidation of both companies.
- (9) The assets in question were to be sold in three bundles: “Pantheon” (N321/2008), involving certain flight-related tangible and intangible assets; “Ground Handling Newco” (N322/2008), involving the sale of ground handling assets; and “MRO³ Newco” (N323/2008), involving the sale of certain assets related to maintenance, repair and engineering facilities.
- (10) The notified process for selling the three asset bundles involved five phases/periods:
 - (a) A preparation period (pre-investor), when certain structural issues would be solved and when three new companies to become owners of the assets would be created;
 - (b) A private purchaser selection process, consisting of three unconditional, non-discriminatory and open tenders conducted by a reputable

¹ Olympic Airways - Services SA was previously named Olympic Airways SA. An amendment of the Articles of Association of Olympic Airways SA was published in the Greek Govt. Gazette no. 1485/19.2.2004, SA issue, on 19 February 2004. The amendment concerned the provision of article 1 on the basis of which the company was renamed "Olympic Airways – Services SA" and its duration was set for 46 years, namely up to 31/12/2049 inclusive. The amendment also concerned the provision of article 2, the main purpose of the company is ground handling servicing, engine and aircraft overhaul workshop operations, representation and agency of airline operators, etc.

² Olympic Airlines SA began operation in December 2003 and was established from the flight divisions of Olympic Airways. It operates scheduled air services within Greece on intra-EU and inter-continental routes. It is 100% state-owned.

³ MRO – maintenance, repair and operations.

investment bank on behalf of the State. The market price of the assets to be transferred to the new companies would be established by independent valuation experts and would be supervised by the investment bank and by a Monitoring Trustee ("MT")⁴, to be approved by the Commission. The purchasers, i.e. the highest bidders, would acquire 49% of the new companies to become owners of the assets along with immediately exercisable significant veto rights and call options on the remaining 51% to be exercised by 30 April 2009;

- (c) A joint acquisition phase, when the private purchasers would contribute cash to the new companies according to their winning bids. Olympic Airlines⁵ or Olympic Airways Services⁶ would at this stage acquire 51% of the new companies with a put option to be exercised by 30 April 2009. This stake would be purchased by a contribution in kind of the assets included in the sales processes. The shareholders' proportionality between the private purchaser's initial cash contribution and the Olympic Airlines' or Olympic Airways Services' contribution in kind would be verified by an independent valuator;
- (d) A transitional period, allowing the new companies to deal with certain regulatory issues, recruit staff, negotiate support contracts with suppliers and acquire some assets needed to become operational;
- (e) The exercise of a call/put option, followed by the liquidation of Olympic Airlines and Olympic Airways Services. Once all necessary actions of the transitional period would be completed, and in any way no later than 30 April 2009, the private purchasers would exercise their call options on the remaining 51% of the new companies and buy out Olympic Airlines⁷ or Olympic Airways Services⁸. Alternatively, Olympic Airlines or Olympic Airways Services would exercise their respective put options. Either way, at this point the private buyers would become the sole shareholders of the respective companies. The liquidation of Olympic Airlines and Olympic Airways Services would follow. The remaining assets of these companies would be sold by the bankruptcy trustee through the liquidation procedure. The HR would register its liabilities relating to the repayment of the aid previously found illegal and incompatible by the Commission in the schedule of liabilities. The

⁴ The MT would also be responsible for monitoring compliance by the HR with all stages of the notified process.

⁵ In the case of Pantheon.

⁶ In the case of Ground Handling Newco and of MRO Newco.

⁷ In the case of Pantheon.

⁸ In the case of Ground Handling Newco and of MRO Newco.

liquidation of the two companies would have to take place by 31 December 2009.

- (11) The Commission undertook its assessment of the notified measures in the light of Article 10 of the EC Treaty and the "Recovery Notice"⁹, according to which *"If a Member State encounters unforeseen or unforeseeable difficulties in executing the recovery decision within the required time-limit or perceives consequences overlooked by the Commission, it should submit those problems for consideration to the Commission, together with proposals for suitable amendments. In such a case, the Commission and the Member State concerned must work together in good faith to overcome the difficulties whilst fully observing the EC Treaty provisions. Likewise the principle of loyal cooperation requires that the Member States provide the Commission with all the information enabling it to establish that the means chosen constitutes an adapted implementation of the decision."*¹⁰
- (12) According to the jurisprudence of the Court, where a company that has previously benefited from aid sells, at the market price, some or all of its activities (asset deal), the purchase price will reflect the consequences of that earlier State aid, and the seller keeps the benefit of the aid. In such cases, the previous competitive situation is to be restored through recovery of the aid from the seller¹¹.
- (13) In the Decision the Commission considered that: the notified process providing for the creation of the new entities was not carried out so as to circumvent the recovery obligation; the transfer of assets to the new entities constituted an appropriate "transfer of assets"; and the sales of these bundled assets would take place at market price.
- (14) Therefore, the Commission concluded that the sales processes described in the notifications would not involve the granting of State aid to the private purchasers of Pantheon, Ground Handling Newco or MRO Newco if they were open, unconditional and non-discriminatory. This conclusion was subject to compliance with all conditions set out in the Decision.
- (15) Similarly, it was considered that the notified sales processes would not involve the granting of State aid to Pantheon, Ground Handling Newco or MRO Newco as the contribution of assets to each of these companies by either Olympic Airlines or Olympic Airways Services would be conducted on market terms. This conclusion was also subject to compliance with all conditions set out in the Decision.

⁹ Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4.

¹⁰ Par. 28 thereof.

¹¹ Case C-305/89, *Italy v. Commission ('Alfa Romeo')* [1991] ECR I-1603, par. 40.

- (16) Consequently, the Commission concluded that Pantheon, Ground Handling Newco, MRO Newco and their private purchasers would not inherit through the proposed sales processes any illegal and incompatible State aid that the HR would have to recover from Olympic Airways Services or Olympic Airlines, by virtue of the 2002, 2005, 2006 and 2008 Commission decisions, provided that all conditions set out in the Decision were respected.

2.2. Implementation of the tender processes

- (17) Following the Decision, the HR publicised three open tender processes conducted by several investment banks on 30 September 2008¹². The tender processes were designed to include a number of stages which proceeded as follows.
- (18) In the first phase, following the announcements of the tender processes and at the end of the "expression of interest" stage on 31 October 2008, 25 parties had manifested their interest in one or more of the three sales processes (18 parties in Pantheon; 19 parties in Ground Handling Newco; and 14 parties in MRO Newco). The financial advisors reviewed the expressions of interest and considered that it would be reasonable for the HR to invite the interested parties to participate in the next "indicative offers" stage of the sales processes, with the exclusion of five parties that, for specific reasons, did not meet the conditions for proceeding to the next round.
- (19) A process letter was sent to interested parties to invite them to participate in the "indicative offers" stage. This letter set out the conditions that parties should meet in their indicative offers to be submitted on or by 19 December 2008. During this period, bidders were given full and equal access to a virtual data room in order to conduct due diligence. The data room also contained explanatory documents that described, for example, the transaction structure and indicative business plans to assist the bidders in the preparation of their own projections. Finally, bidders were offered meetings with representatives of the HR and the management of Olympic Airlines / Olympic Airways Services, as well as with the financial and legal advisors appointed to advise the HR on the sales processes. Interested parties submitted indicative offers by 19 December 2008. The HR considered it to be reasonable to invite all parties that submitted an indicative offer to proceed to the "final offers" stage of the privatisation process.
- (20) A new process letter was sent to interested parties to invite them to participate in the "final offers" stage and setting out the conditions that parties had to satisfy in their final offers, which had to be submitted by 30 January 2009. Bidders were again given full and equal access to the virtual data room to conclude their due

¹² The financial advisors appointed by the HR were Lazard & Co. Limited, NBG International Limited, Emporiki Bank S.A. and Alpha Bank S.A. ("the financial advisors"). Announcements for the three sale processes were published in the London and International editions of the Financial Times and in leading Greek newspapers. Various newswires also picked up the announcement (e.g. Bloomberg and Reuters).

diligence, while the advisors held meetings or had telephone conversations with all bidders in order to clarify certain information in their indicative offers.

- (21) In accordance with the Decision, the MT appointed to oversee the sales processes submitted a report to the Commission on 16 January 2009, concluding that:
- a) The sales processes, in particular the selection of candidates for the non-binding offer phase and of the bidders for the binding offer phase, was unconditional, non-discriminatory and met the principle of openness. The selections were made on reasonable grounds and were made transparent to the MT;
 - b) As far as applicable at this stage of the sales processes, the HR has carried out all necessary steps to fulfil the conditions and obligations set by the Commission by designing the sales processes accordingly and implementing these conditions and obligations in the documents required for the execution of the sales;
 - c) All bidders were provided with adequate information at the same level by accessing a virtual data room and attending management presentations with the HR, its advisors and executives of the Newcos. Information provided to one bidder was also made available to all other bidders by publication in the virtual data room;
 - d) The response of the HR to issues raised by the MT was appropriate and substantial. Questions raised by the MT were answered comprehensively and in a reasonable period.

2.3. Outcome of the tender processes

2.3.1. Overall results

- (22) After the expiry of the deadline for final offers on 30 January 2009, the financial and legal advisors opened and reviewed all bids submitted in the three tender processes. The results of the tender processes were unsatisfactory for the Greek authorities. There were few bids presented, these had values far below those ascertained in the independent valuations and most of them did not comply with the terms of the tender processes and with the Decision.

2.3.2. Pantheon

- (23) Only two final offers were submitted for Pantheon:
- a) Athens Airways and SkyOne submitted a joint bid of EUR [...] * million which did not comply with the process letter sent to the parties for the "final offers" phase. In particular, this consortium was not able to provide evidence

* Confidential information

of cash at hand or a letter from a reputable bank demonstrating a committed funding source. In the absence of cash guarantees and taking into account that the bidders' plan was to enter the transitional period with only EUR2 million of initial capitalisation in Pantheon, the HR considered that this bidder did not demonstrate capacity to build an airline during the transitional period that would be in a position to run the routes subject to public service obligations immediately after the conclusion of the sales processes;

- b) Chrysler Aviation submitted a lower bid which was also considered by the financial and legal advisors to be noncompliant with the requirements of the tender process, in particular since the bidder: did not make an offer for the minimum asset bundle up for sale ("Minimum Assets") as explicitly required by the process letter; failed to provide evidence of its ability to secure financing to complete the transaction; and made the bid subject to conditions which went beyond the terms of the process letter.

2.3.3. *Ground Handling Newco*

(24) Four final offers were submitted for Ground Handling Newco:

- a) Swissport Aviareps Hellas ("Swissport") submitted a bid of EUR[...]* million;
- b) Hellenic Cargo Group ("Hellenic") submitted a bid of EUR [...]* million. However, this bid was not valid since the legal and financial advisors could not confirm Hellenic's compliance with the financing requirements set out in the process letter;
- c) Goldair: A number of elements contained in Goldair's final offer would have required further clarification in order to confirm its compliance with the requirements of the final offers stage (and therefore with the process approved by the Decision). Given that Goldair's cash offer for the Minimum Assets was significantly lower than those of Swissport and Hellenic, the advisors did not seek to clarify such uncertainties at this stage;
- d) Mr. Joseph In-Albon: This offer was received after the expiry of the deadline for the submission of final offers. For this reason, the legal and financial advisors considered that the offer was not compliant with the terms of the final offers stage.

2.3.4. *MRO Newco*

(25) No final offers were received for MRO Newco within the framework of the formal tender organised by the financial advisors. Only one non-compliant bid of EUR[...]* million was made by Swissport. However, Swissport had not previously participated in the tender process for MRO Newco. Therefore, its offer was not compliant with the conditions of the tender process.

2.3.5. *Independent valuations*

- (26) Greek legislation provides that a sale of State-owned assets may take place only after the Inter-Ministerial Committee of Privatisations (“the IPC”) has reviewed independent valuations undertaken for the purposes of the privatisation. This requirement for an independent valuation¹³ was introduced with a view to avoiding the sale of public property at a price below its market value. This independent valuation is therefore intended to provide legal security and to enhance transparency by ensuring that the assets in question are sold at their market price. While not formally prohibiting the HR from accepting an offer below the independent valuation, this requirement virtually obliges it to reject a bid which is substantially lower than the independent valuation, even if the latter results from an open tender process.
- (27) During the meeting of the IPC on 4 February 2009, the independent valuator informed the HR about the results of the valuations for the assets that were for sale in the tender processes. The minimum prices were:
- a) Flight operations assets: EUR [...] million;
 - b) Ground handling assets: EUR [...] million; and
 - c) MRO assets: EUR [...] million.
- (28) The independent valuation for each tender process was higher than the highest offer received for the relevant tender process (still assuming that all the offers would be compliant, which was not the case). The difference between the final offers received and the independent valuations led the IPC to reject all offers received.

2.3.6. *The impact of economic and financial developments on the outcome of the tender processes*

- (29) According to the Greek authorities, the financial turmoil and the resulting global economic slowdown prevailing throughout the period of the tender processes have had an immense impact on the outcome of the sales plan. The financial and economic crisis contributed to an already difficult environment in the aviation sector. Although the HR has carried out all necessary steps to date to fulfil its obligations related to the sales processes under the Decision, the current slump in investment worldwide has led to the tender processes’ sub-standard results.
- (30) As noted above, the expression of interest phase was launched on 30 September 2008, only two weeks after the bankruptcy of Lehman Brothers which had triggered a general and widespread erosion of investor confidence in the financial sector. By the time the indicative offers stage of the tender started on 19 November 2008, the global financial crisis had already entered into an acute phase marked by failures of prominent US and European banks, and efforts by

¹³ Article 6(5) of Law 3049/2002.

national governments and international institutions to rescue them. By that time, it had become clear that the financial crisis had also hit the Greek economy and banking system. The comments and concerns expressed by various bidders during the tender reflected the impact that the “credit crunch” and the increased financial uncertainty was having on their offers.

- (31) By October 2008, there was strong evidence that the global economic slowdown and soaring fuel prices had wiped out airline industry profits. The share prices of some of the strongest European airlines declined abruptly during the fourth quarter of 2008¹⁴.
- (32) By the beginning of the final offers stage on 23 December 2008, the full impact of the financial downturn on the economy had started to show. According to the Greek authorities, the conclusion of the tender processes at a time when the recession started affecting the wider economy had adverse effects on the number, seriousness and credibility of the offers finally made.
- (33) The economic and financial situation in Greece continued to worsen in 2009 due to several factors. On 15 January 2009 Standard & Poor's downgraded Greek sovereign debt. With the highest public debt of the Euro zone, standing above 90%, and with a current account deficit in the region of 14%, access to finance by the Greek economy in general is likely to worsen significantly in 2009. Greece faced one of its worst waves of civil unrest for decades as a consequence of youth dissatisfaction, unemployment and of the deteriorating conditions in the agricultural sector. The shipping sector, responsible for around 7% of Greek GDP, is in a deep crisis.

2.4. Changes to the process

- (34) The low prices offered in conjunction with the failure of a significant number of the bidders to comply with the requirements of the tender processes led the IPC to conclude that the tender processes should be called off altogether.
- (35) However, given the need to conclude the sales processes as soon as possible in order to comply with the Decision, the HR considered a number of possible alternative courses of action. The HR considers that embarking on new tender processes in the current economic climate would not realistically have a chance of success.
- (36) The HR considers that, at this stage and given the exceptional circumstances described above, a direct sale is the only realistic and viable solution which would allow it to remedy the failure of the tender processes, while ensuring that it meets its obligations under the Decision and does not excessively delay the conclusion of the sales.

¹⁴ For example, in October 2008, Lufthansa's share price reached a low of €9.43 per share as compared with a value per share of €20.02 one year earlier. The shares of British Airways lost approximately 69% of their 2007 value by October 2008.

- (37) The HR therefore proposed to negotiate and enter into direct sales of the three asset bundles with private investor(s) at market prices, i.e. prices equal to or higher than the independent valuations (see section 2.3.5. above). The sales would still be subject to the same legal structure and mechanisms as approved by the Decision, and would seek to achieve the same objectives. The sole difference would be the type of sale process (direct sale).
- (38) In terms of the timing of the sales processes, the Decision set out the deadlines for transferring the assets to the new companies, i.e. 30 April 2009, and for the final liquidation of Olympic Airlines and Olympic Airways Services, i.e. 31 December 2009. On the one hand, the HR estimated that the direct sales would delay the transfer of the assets to the new companies by approximately five months. On the other hand, the deadline for the liquidation of the two companies, i.e. 31 December 2009, would be maintained.
- (39) In line with HR's obligations under the Decision, the complete sales processes would continue to be monitored by the MT, who would ensure that the sales are carried out at market price.
- (40) The proposed deviation from the initial sales plan would also not affect the HR's original obligation to register its claims for recovery in the liquidation of Olympic Airlines and Olympic Airways Services.
- (41) According to the Greek authorities, a direct sale process for the flight-related and ground handling-related assets is better suited to ensure that there is uninterrupted continuity of the public service obligation ("PSO") routes than a re-tendering process. The organisation of a new public tender for the sale of the assets of Olympic Airlines / Olympic Airways Services would probably not allow Pantheon and Ground Handling Newco to participate in the forthcoming 2009 PSO tenders. Thus, the Greek authorities consider that the proposed solution provides for additional comfort with regard to their objective of not disrupting PSO services for flights and ground handling.
- (42) The Greek authorities contend that the changes do not substantially change the asset sales and liquidation processes and that, consequently, these processes will continue to contain no State aid elements. For reasons of legal certainty on 6 February 2009 they have asked the Commission to confirm this assessment.
- (43) On 4 February 2009, following the meeting of the IPC, the Minister of Development on behalf of the IPC issued an open public invitation to any and all interested parties to express interest in the purchase of the assets in question. The IPC also instructed its legal and financial advisors to enter into direct negotiations with interested parties for the sale of the three asset bundles. The lower range of the independent valuation of the asset bundles was available to any party expressing interest and they were invited to act promptly. The termination of the tender processes and the invitation for direct offers was immediately made public and reported widely in the national and international press.

- (44) The financial advisors received various expressions of interest and formal offers from interested parties in the following period.
- (45) Following consideration of the offers initially received, the HR (10 days after the open public invitation and considering the urgency to resolve the matter) entered into an exclusive three-week negotiating period (expiring 6pm GMT on 6 March 2009) with Marfin Investment Group Holding SA ("MIG"), for flight and MRO assets and with Swissport Aviareps Hellas ("Swissport"), for the ground handling assets. These two parties were chosen as they were the first to make serious, formal, direct offers for the three asset bundles which exceeded the lower range of the independent valuation of the asset bundles¹⁵.
- (46) The prices that MIG has offered are:
- a) Pantheon minimum assets (EUR [...] million); and
 - b) MRO minimum assets (EUR [...] million).
- (47) The price that Swissport has now offered for the ground handling assets is EUR [...] million, Swissport's offer was made subject to the conclusion of a satisfactory agreement for it being concluded between the HR and a purchaser of the flight and MRO assets. Accordingly the exclusivity period for negotiations between the HR and Swissport for the sale of ground-handling assets has been extended by a week to allow Swissport to consider the impact of the sale of flight and MRO assets. However, in the event that Swissport do not complete the deal to purchase the ground handling assets MIG has undertaken to purchase these assets at the price offered by Swissport.
- (48) The HR has informed the Commission that it intends to proceed with and finalise the agreement with MIG in respect of the flight and MRO assets on the basis of the offer that it had received. The sale of ground handling assets will take place on the basis of what has been previously described in the coming weeks.

3. ASSESSMENT

- (49) It must first be recalled that the Commission is being asked to pronounce on a change to the sales procedures foreseen in its Decision. That Decision had been taken after the Commission had been approached by the Greek authorities in accordance with Article 10 of the EC Treaty in order to find the best way of implementing several previous Commission decisions ordering the recovery of illegal and incompatible State aid from Olympic Airlines and Olympic Airways Services.

¹⁵ Other bids for some or all of the assets bundles were received but these were either not credible or given the exclusivity period offered to MIG and Swissport have been put into abeyance. As such, in the event that the negotiations with MIG and Swissport were not to be completed before the end of the exclusivity periods, these bids would be re-examined.

- (50) As mentioned above, the Decision was adopted in the context of the duty of collaboration established by Article 10 of the EC Treaty. In such context, the Recovery Notice explicitly requires the Commission and the Member States to work together in good faith to overcome unforeseen or unforeseeable difficulties encountered in executing recovery decisions. The present case must likewise be assessed in the context of the cooperation provided for by Article 10 of the EC Treaty, taking into account the provisions of the Recovery Notice.
- (51) The Commission notes that in the tender process the HR has so far taken all the necessary steps to correctly implement its Decision. The initial stages of the public tender procedures were carried out in compliance with the terms of the Decision. The report of the MT chosen by the Commission clearly states that the sales processes have so far been unconditional, non-discriminatory and open. That report also recognizes that the HR has in correctly implementing the tender process done everything in its power to meet its obligations under the Decision.
- (52) Despite its efforts, the results of the public tender fell short of the expectations of the HR. With regard to the sales of the flight-related assets (Pantheon) and of the maintenance, repair and engineering assets (MRO Newco), no valid offers were submitted. As far as the sale of the ground-handling assets is concerned, one valid offer¹⁶ was received but this was significantly below the independent valuation¹⁷. In accordance with Greek privatisation law, this led to a blockage of the sales processes.
- (53) In principle, the fact that the bids put forward in the context of a transparent, open and non-discriminatory public tender are lower than the value established by an independent valuation is not sufficient to conclude that the tender process required by the Decision was unsuccessful and should be discontinued. In fact, the bids submitted in the context of a public tender determine the market price of the assets. The value estimated by means of an independent valuation must be considered as a second-best indicator of the market price of the assets.
- (54) Moreover, the Commission is not bound to draw the same conclusions under EC law as the Greek authorities under national law, as regards the blockage of the sales processes.
- (55) Thus, in principle, the normal consequence of the failure of the public tender would be the liquidation of Olympic Airlines and Olympic Airways Services.
- (56) Nevertheless the difficulties encountered are largely attributable to the financial and economic crisis, which coincided with the initial stages of the tendering procedure. Several offers failed because of the inability of the bidders to secure appropriate financing for the deal. This is very likely a reflection of the lack of liquidity in the financial markets at that point in time.

¹⁶ Besides from the offer from Goldair which, as indicated above, might also be compliant subject to further clarifications.

¹⁷ The best offer, €33 million, was 26% lower than the valuation (€44.8 million).

- (57) Following the blockage of the sales processes, the Greek authorities considered the available solutions for the liquidation of Olympic Airlines and Olympic Airways Services. Such solution would have to comply with the Decision and should maximise the amount to be recovered by the State.
- (58) One possibility would have been to liquidate Olympic Airlines and Olympic Airways Services immediately. However, as explained in recitals 194-195, 215-216 and 235-236 of the Decision, this solution would not maximise the value of the two companies and consequently the State aid to be recovered for the reasons below.
- (59) With regard to Olympic Airlines, the value of two categories of intangible assets would be lost or greatly undervalued if they were included in the bankruptcy estate, rather than disposed of prior to liquidation. These assets are the historic slots and the Olympic brand. If Olympic Airlines' operating licence was to be revoked as a result of a liquidation process, the historic slots at several airports would be returned to the slot coordinators without any economic benefit to the Olympic Airlines bankruptcy estate and thereby to its creditors, including the Greek Government. Instead, by transferring these slots to Pantheon at fair market price, the return on their sale will revert to the bankruptcy estate. Likewise, the sale of the Olympic brand, which is linked to the use of the slots, in the context of liquidation would not be value maximising. The transfer to Pantheon of the brand usage rights prior to liquidation at fair value together with the slots allows the extraction of their value to the benefit of Olympic Airlines and of its creditors.
- (60) As far as Olympic Airways Services is concerned, its liquidation would imply the revocation of its ground handling licences at the five liberalised airports in Greece and the consequent loss of value. By contrast, the transfer of its contractual rights to Ground Handling Newco prior to filing its bankruptcy liquidation petition will ensure that the value of these rights will accrue to the bankruptcy estate. Also, Olympic Airways Services enjoys Build-Operate-Transfer¹⁸ rights at the Athens International Airport for cargo and ground support facilities for the term of the Airport Development Agreement. By virtue of Greek bankruptcy legislation and of the Airport Development Agreement, these contractual rights would be entirely lost in case of liquidation. Therefore, the transfer of these rights to a new company prior to liquidation is value-maximising for Olympic Airways Services and its creditors.
- (61) Another alternative considered would have been to carry out new public tender processes. However, this solution is also not likely to maximise the value of the two companies and consequently the State aid to be recovered for the reasons below.

¹⁸ Build-Operate-Transfer is a form of project financing, wherein a private entity received a concession from the private or public sector to finance, design, construct and operate a facility for a specified period. After the concession period ends, ownership is transferred back to the granting entity.

- (62) It is likely that new public tender procedures in the present economic and financial context would not achieve better results than the previous tenders. On the contrary, the economic situation of the sector has considerably deteriorated and it is increasingly difficult to find financially sound buyers that would be willing to take over the assets. It is therefore essential that the sales take place as soon as possible and the significant delays involved in organising and launching new tender procedures would most likely lead to worse results.
- (63) A new public tender would also seriously compromise the calendar agreed with the Commission. According to the Decision, the two companies have to be liquidated by 31 December 2009. The organisation and implementation of three new tender processes would probably not allow the liquidation processes to be concluded by that date.
- (64) It was also an important consideration that the sales of the three asset bundles are connected¹⁹. Moreover, the asset bundles relating to MRO Newco and Ground Handling Newco currently form part of the same company, Olympic Airways Services. The Decision²⁰ provides that following the completion of the sales process Olympic Airways Services will be liquidated. The liquidation is however contingent on the timing of the sale of both asset bundles being coordinated, so as to allow for the liquidation of Olympic Airways Services by 31 December 2009. A sale of Ground Handling Newco without the sale of MRO Newco or vice-versa before 31 December 2009 would therefore not respect the Decision.
- (65) Having weighed up these factors and discussed the possibilities with the Commission, the Greek authorities have opted for direct sale.
- (66) A direct sale process, monitored by the MT, has allowed the Greek authorities to immediately start negotiations with potential interested parties and to continue negotiations with the valid bidders in the public tender procedure. In the present economic and financial context, time is of the essence and this solution has allowed the fastest conclusion of the privatisation process. It is also the solution that is most likely to maximise the sales value and consequently the State aid to be recovered.
- (67) Unlike the option of re-tendering the assets, a direct sale process is not expected to delay the transfer of the assets to the new companies by more than five months (from 30 April 2009 to 30 September 2009) this solution should also allow the Greek authorities to meet the Decision's requirement to liquidate Olympic Airlines and Olympic Airways Services by the end of 2009.

¹⁹ In this regard see paragraph 47 above; where Swissport's offer is conditional on the sale of the other asset bundles.

²⁰ Points 109 and 140 thereof.

- (68) Therefore, the Commission considers that the HR has seriously examined the possibilities and has chosen the solution that is most likely to meet the requirements of its Decision and to maximise the recovery amount.
- (69) It is worth noting that EC public procurement law allows the award of public contracts through a negotiated procedure “when no tenders or no suitable tenders or no applications have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of contract are not substantially altered and on condition that a report is sent to the Commission if it so requests”²¹.
- (70) It is also worth noting the approach taken by the Commission when assessing the presence of State aid elements in sales of land and buildings by public authorities²². The Commission considers that there are no State aid elements if the sale is either carried out following a sufficiently well-publicized, open and unconditional bidding procedure, accepting the best or only bid, or when the sale price is at least equal to the value established by one or more independent asset valuers prior to the sale negotiations and on the basis of generally accepted market indicators and valuation standards.
- (71) It is appropriate to apply similar principles in the present case. The Commission's concern is to ensure that the assets are sold at market value and this can be ensured either if the sales take place at the prices which resulted from the public tenders or at prices that are at least equal to the values established through a new independent valuation.
- (72) In conclusion, the Commission considers that the only changes introduced in the sales process in relation to the Commission Decision, namely undertaking a direct sale instead of a public tender and extending the deadline for the sale and the asset transfer by five months, can be accepted as they do not give rise to State aid elements in the sense of Article 87(1) of the EC Treaty, provided that the Greek authorities fulfil the following conditions to which they have committed:
- a) The assets are sold at a price which is at least equal to the highest bids received in the public tenders. In the event that the Greek authorities do not succeed in selling the assets at such a price, they must ensure that the assets are sold at their market price as established by an independent valuation to be supervised by the investment bank and by the MT ;

²¹ Article 31(1)(a) of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; OJ L 134, 30.04.2004, p.114.

²² Section 2(a) of the Commission Communication on State aid elements in sales of land and buildings by public authorities; OJ C 209, 10.07.1997, p. 3.

- b) The assets in question must be sold and transferred to the new companies, namely Pantheon, Ground Handling Newco and MRO Newco no later than 30 September 2009;
 - c) All the remaining conditions set out in the Decision concerning the sales processes are respected.
- (73) In this regard the Commission notes that the sale of the flight and MRO assets was finalised on 6 March 2009 and that the price achieved for each of these asset bundles exceeded the highest bids received in the public tenders. The Commission also notes that the price that Swissport has offered for the ground handling assets exceeds the highest bid received in the public tender.²³
- (74) The Commission warns the Greek authorities that if any of these conditions are not fulfilled, it may be obliged to start infringement proceedings by referring the matter directly to the European Court of Justice pursuant to Article 88(2) of the Treaty.

4. DECISION

The Commission has accordingly decided:

- To consider that taking into account that the price achieved for each of the asset bundles exceeds the highest bid received in the public tender the modifications to the sales processes notified do not alter the conclusion that the measures assessed in its decision on cases N 321/2008, N 322/2008 and N 323/2008 (Sale of certain assets of Olympic Airlines/Olympic Airways Services) do not constitute State aid within the meaning of Article 87(1) of the EC Treaty and thus not to raise any objections.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

http://ec.europa.eu/community_law/state_aids/index.htm

²³ This decision is without prejudice to the application, where appropriate, of merger control rules to the relevant arrangements.

Your request should be sent by registered letter or fax to:

European Commission,
Directorate-General for Energy & Transport,
Directorate A,
B-1049 Brussels
Fax No: 0032 (0) 2 2964104

Yours faithfully,

For the Commission

Antonio Tajani
Vice-President of the Commission