



EUROPEAN COMMISSION

Brussels, 19.06.2013

C (2013) 3546 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject:**      **State aid SA.36197 (N/2013) – Portugal**  
**Privatisation of ANA - Aeroportos de Portugal**

Sir,

**1.      PROCEDURE**

- (1)      On 8 February 2013 the Portuguese authorities notified to the Commission in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup>, for reasons of legal certainty, the measures undertaken in the context of the privatisation of ANA - Aeroportos de Portugal, S.A. (hereinafter "ANA"), the operator of the large majority of Portuguese airports. The notification has been registered under case number SA.36197.
- (2)      On 22 March 2013, the Commission sent Portugal a request for further information, and replies were received on 16 April and 24 April 2013.

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<sup>1</sup>      OJ L 138 of 30.4.2004.

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## **2. DESCRIPTION OF THE MEASURE**

### **2.1. ANA – Operator of Portuguese Airports**

- (3) ANA manages eight airports across Portugal (Lisbon, Porto, Faro, Beja, and 4 airports in the Azores) that account for the large majority of all commercial air traffic in the country.
- (4) ANA also owns 70% of ANAM, the company running the Madeira and Porto Santo airports in the Madeira archipelago. In addition, ANA owns 100% of Portway, its handling subsidiary.

### **2.2. Objective of the measure**

- (5) The sale of ANA was part of the privatisation plan prepared by the Portuguese as one of commitments made in the Memorandum of Understanding for the Economic Adjustment Programme for Portugal agreed with the European Commission, the European Central Bank and the International Monetary Fund<sup>2</sup>.

### **2.3. National legal basis**

- (6) In addition to the aforementioned Memorandum of Understanding, the privatisation of ANA was based on the following legal instruments:
  - i. Law n. ° 71/88 of 24 May 1988, which sets out the legal framework for the disposal of equity shares of the public sector,
  - ii. Decree-Law n. ° 328/88 of 27 September 1988, which lays down the implementing provisions for Law n. ° 71/88 of 24 May 1988,
  - iii. Decree-Law n. ° 232/2012 of 29 October 2012, which approved the privatisation of ANA and set out the procedure,
  - iv. Resolution of the Council of Ministers n. ° 94-A / 2012, of 14 November 2012, which approved the terms of reference for the sale of ANA,
  - v. Resolution of the Council of Ministers n. ° 96-A/2012, of 16 November 2012, which approved the shortlist of bidders,
  - vi. Ministry of Finance, Office of the Minister: Order n. ° 14800-D/2012 of 19 November 2012, which fixed the deadline for submission of binding bids,
  - vii. Decree-Law n. ° 254/2012, of 28 November, which established the general legal framework related to the public service concession for the support of civil aviation in Portugal, to be granted to ANA,

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<sup>2</sup> On 7 April 2011 Portugal requested financial assistance from the European Union, the Euro area Member States and the International Monetary Fund (IMF). The Economic Adjustment Programme for Portugal was negotiated in May 2011 between the Portuguese authorities and officials from the European Commission, the European Central Bank and the International Monetary Fund. The programme includes a joint financing package of €78 billion and covers the period 2011 to mid-2014. See: [http://ec.europa.eu/economy\\_finance/eu\\_borrower/mou/2011-05-18-mou-portugal\\_en.pdf](http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf)

- viii. Resolution of the Council of Ministers n. ° 111-F/2012, of 28 December 2012, which announced the winning bidder.

#### **2.4. The privatisation procedure**

- (7) The procedure followed for the privatisation of ANA was set out in Decree-Law n. ° 232/2012 of 29 October 2012. This privatisation was via the sale of shares representing 100% of ANA's equity capital.
- (8) The model selected for the disposal of 95% of the equity capital was a sale to one or more investors, individually or in a grouping. This part of the privatisation has been concluded with Vinci – Concessions S.A.S. (hereinafter "Vinci"), who agreed to purchase this 95% portion of the equity capital.
- (9) The model selected for 0-5% of the equity capital is an initial public offering reserved for ANA workers, with the eventual percentage sold depending on demand, and with any unsold shares being sold to Vinci at the same price already paid for 95% of the shares. This part of the privatisation has yet to take place. The scope and system to be used for this part will be defined by a resolution of the Council of Ministers of the government of Portugal. The overall price to be paid by Vinci for 95-100% of the share capital is €3.08 billion, based on an assumption of the purchase of 100% of the share capital.
- (10) The "privatisation process" hereinafter, refers to the aforementioned part of the procedure relating to the disposal of up to 100%, but not less than 95% of the equity capital, in the sale through private negotiation.

##### **2.4.1. Terms of Reference**

- (11) The Portuguese authorities stated that they required a purchaser with the perspective of a stable and long-term investment, and therefore designed the process accordingly.
- (12) The terms of reference for the sale of ANA, as approved by Resolution of the Council of Ministers n. ° 94-A / 2012, of 14 November 2012, set out two cumulative conditions to be met by applicants:
- i. be the operator, or major shareholder and controller of at least one airport with traffic exceeding 10 million passengers per year, or alternatively, be the operator or major shareholder of a network of critical transport infrastructure with revenues in excess of €400 million per year;
  - ii. hold equity or assets under management, in the case of the tenderer being a fund or similar investment structure, in excess of €2.000.000.000 by reference to the latest documents to provide audited accounts.
- (13) The terms of reference also contained a lock-up rule which prevented the disposal of shares during first five years after the sale.

##### **2.4.1.1. Concession Agreement**

- (14) ANA in various forms has been responsible for operating Portugal's airport system since the 1970's. However, for the purpose of preparation of the company for privatisation, on 14 December 2012, ANA and the Portuguese state signed a new

concession agreement for the eight airports in question. The concession runs for 50 years from the date of signature.

#### **2.4.2. Negotiation process**

(15) Overall, the negotiation process was organised in two discrete phases:

##### **2.4.2.1. Phase I**

- (16) The privatisation process began with an extensive market consultation by ANA, by Parpública Participações Públicas, SGPS, S.A. (hereinafter the “Parpública”), a company wholly owned by the Portuguese state, and by the four investment banks (Barclays Bank plc, Banco Espírito Santo Investment, SA, Citigroup Inc. and Credit Suisse) that advised the State on privatisation process. Based on their combined experience and knowledge, a wide range of potential strategic investors were identified.
- (17) On 7 September 2012 letters of invitation to participate in the privatisation process were sent to these potential investors.
- (18) The letters enclosed a "Teaser" with a brief overview of ANA and its key investment highlights, and a confidentiality agreement, upon signature of which, interested parties received a Process Letter describing the process for submission of indicative offers and an information package containing confidential information on ANA.
- (19) The Portuguese authorities stated that due to the broad media coverage of the privatisation, Parpública also received a number of non-solicited expressions of interest. Given that the privatisation process was open to all eligible bidders, all these interested parties that complied with the eligibility criteria were also accepted to participate.
- (20) In total, the initial consultation process identified 54 parties potentially interested in the privatisation, and 33 entities received the documentation relevant to the preparation of a non-binding offer after signing the confidentiality agreement.
- (21) On 9 October 2012 a draft of the concession agreement that was to be signed by ANA prior to the conclusion of the privatisation process was distributed to all interested parties.
- (22) The interested parties then had to submit their non-binding offers by 24 October 2012. Eight non-binding offers were received, coming from three single entities and five consortia: Vinci, Blink, Mr. Wyss/Zurich, EAMA, Fraport/IFM, Ferrovial, GIP, and CCR/Odebrecht.

##### **2.4.2.2. Phase II**

- (23) By Resolution of the Council of Ministers n. ° 96-A/2012, on 16 November 2012, Portugal selected the following five interested parties who submitted the highest bids: Vinci, Blink, Mr Wyss/Zurich, EAMA and Fraport/IFM. These bidders were invited to the second phase of the privatisation process, in which they were requested to submit binding offers. The choice was based on the selection criteria set out in Decree-Law n. ° 232/2012 of 29 October 2012, a report by Parpública on the proposals and on the

opinion of ANA on the appropriateness of proposals for the strategic interests of the company.

- (24) The Portuguese authorities confirmed that the five interested parties invited to the second phase met the eligibility conditions of the privatisation process. .
- (25) In the second phase the interested parties had access to more detailed information than in the first phase, and were able to have individual meetings with Parpública, and make site visits to ANA infrastructure.
- (26) On 14 December 2012, four binding offers were received, one from a single entity, and three from consortia. The fifth interested party participating in this stage of the process, the Blink Consortium, withdrew its offer in writing on 29 November 2012.
- (27) ANA assessed the four binding bids on their suitability particularly in relation to their technical and strategic components, with a view to achieving compatibility with the company's interests and future development.
- (28) Parpública drew up a reasoned report assessing each of the four tenderers, taking into account the aforementioned assessment from ANA.
- (29) On 21 December 2012, the Parpública's report together with ANA's assessment, were sent to the special monitoring committee set up to oversee the privatisation process.
- (30) On 26 December 2012, the special monitoring committee issued a reasoned opinion on the regularity, impartiality and transparency of the process.
- (31) After analysing the report presented by Parpública and the reasoned opinion issued by the special committee, the Portuguese government chose Vinci to purchase up to 100% of the equity capital of ANA, as a result of the clear merit of their proposal. Vinci's bid of €3.08 billion was also the highest bid made. The second highest bid was that of the Fraport/IFM consortium for €2.44 billion.
- (32) Vinci was announced as the winning bidder by the Resolution of the Council of Ministers n. ° 111-F/2012, of 28 December 2012.

#### **2.4.3. Share Purchase Agreement**

- (33) On 21 February 2013, a Share Purchase Agreement was executed between Parpública and Vinci. Clause 4.1 of the agreement sets out various conditions which must be met before the 95% of the share capital and voting rights in ANA are transferred to Vinci, including clearance of the European Commission on both state aid and concentration issues.
- (34) The public offer of shares to employees will take place immediately after the transfer of 95% of the shares to Vinci, and shall be concluded within 37 days of that transfer.

#### **2.4.4. Choice of a negotiation process**

- (35) Portugal explained the choice of this process on the following grounds:
- (36) Firstly, the Portuguese authorities stated that the main goals to be attained with the privatisation process in the context of the Economic Adjustment Programme for

Portugal that is being applied by the Portuguese State, are set out in Decree-Law n. ° 232/2012 of 29 October 2012:

- i. Maximisation of the revenue arising from the privatisation;
  - ii. Reinforcement of the growth and efficiency of ANA, thus increasing its competitive position and the long term value of the airports.
  - iii. Minimisation of the Portuguese State's exposure to the risks related to the implementation of the privatisation procedure, notably by ensuring that its framework fully protects the national interest and maximise revenues.
- (37) The intention of these goals was that the State would obtain the maximum sale price, but have certain safeguards as to the future of ANA as the holder of the concession for the provision of services to support civil aviation in Portugal.
- (38) Portugal stated that the chosen process provided conditions which fully ensured the participation of the greatest number of appropriate entities with strategic ownership interests, and thus ensured a competitive and transparent process, as well as preserved the value of the assets and their economic importance.
- (39) The Portuguese authorities stated that the method was justified as it not only allowed income from the disposal of shares in ANA to be optimised but also strengthened the development of the company, guaranteeing a coherent, suitable and stable shareholder structure.
- (40) Secondly, the chosen procedure was already established by Portuguese law and had already been used successfully in previous privatisations with very positive results in terms of competitiveness and swiftness.
- (41) Thirdly, Portugal also stated that the chosen process was most suited to meeting the deadlines agreed in the aforementioned Economic Adjustment Programme for Portugal.
- (42) Fourthly, Portugal stated that it commissioned Banco de Investimento Global, SA to carry out a valuation of ANA, and that the competitiveness of the privatisation process chosen is demonstrated by the fact that the price agreed by Vinci of €3.08 billion [...] exceeded the upper estimate of the given valuation range of €[...].

### **3. ASSESSMENT OF THE MEASURE**

#### **3.1. Existence of aid within the meaning of Article 107(1) TFEU**

- (43) According to Article 107(1) TFEU "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".
- (44) The criteria laid down in Article 107(1) are cumulative. Therefore, in order to determine whether the notified measure constitutes State aid within the meaning of Article 107(1) TFEU, all the above mentioned conditions need to be fulfilled.

- (45) The privatisation of a firm – a transfer from the public to the private sector – is an economic policy choice which, in itself, falls within the exclusive competence of Member States.
- (46) Indeed, according to Article 345 TFEU, "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".
- (47) In accordance with constant jurisprudence of the European Courts<sup>3</sup> and Commission rules and practice on State aid in the context of privatisations<sup>4</sup>, when a Member State sells shares of undertakings, the purchaser does not receive an advantage if the Member State's behaviour is consistent with that of a private market economy investor.
- (48) In particular, when the sale of shares takes place on the stock exchange, it is generally assumed to be on market conditions and not to involve any advantage. However, when the disposal is carried out through a trade sale, it can be assumed that no advantage is involved if the following conditions are fulfilled<sup>5</sup>:
- i. the shareholding is sold by a competitive tender that is open to all comers, is transparent and is non-discriminatory;
  - ii. no conditions are attached which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price;
  - iii. the shareholding is sold to the highest bidder; and
  - iv. the bidders must be given enough time and information to carry out a proper valuation of the assets upon which their bid is based.
- (49) In other words, when the privatisation is carried out by trade sale, the benchmark for assessing whether a transaction concerning State assets involves an advantage is whether a market economy operator placed in a similar situation would have behaved in the same way, i.e. would have sold the company at the same price. Non-economic considerations, such as for example industrial policy reasons, employment considerations or regional development objectives, which would not be acceptable to a market economy operator, cannot be taken into account as reasons for accepting a lower price and, on the contrary, point at the existence of an advantage. This principle has been repeatedly explained by the Commission and constantly confirmed by the Court.

### **3.1.1. The privatisation process of ANA**

- (50) The Commission considers that the privatisation process in question is a trade sale, and therefore will assess whether the sale involves an advantage on the basis of the criteria in paragraph (48):

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<sup>3</sup> See for example: Case T-296/97 *Alitalia*, Cases T-228/99 and T-233/99, *WestLB v Commission*; Case T-366/00, *Scott SA*, Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission*; Case T-358/94, *Air France v Commission*.

<sup>4</sup> XXIIIrd Report on Competition Policy, 1993, p. 255.

<sup>5</sup> See: Point 403 of the European Commission's XXIIIrd Report on competition policy, 1993.

**3.1.1.1. The shareholding is sold by a competitive tender that is open to all comers, is transparent and is non-discriminatory**

- (51) The terms of reference specified certain eligibility conditions for potential bidders which were justified by Portugal in terms of safeguarding Portuguese national interests and ensuring continuous and stable operation of Portuguese airports.
- (52) These conditions related in particular to either having experience of operation of a major airport or a major transport infrastructure network, or to the size of the bidder in terms of the value of their equity or assets.
- (53) The Commission notes that 33 entities received the documentation relevant to the preparation of a non-binding offer, and thus were deemed eligible to compete in the privatisation process.
- (54) The Commission considers that the sale was open to all comers and that none of the eligibility conditions were discriminatory.
- (55) The Commission has seen no evidence that any part of the privatisation process was non-transparent, and notes that the key decisions that formed part of the process were made in the form of administrative acts of the Portuguese state, which entailed publication in *Diário da República*, the official gazette of Portugal.
- (56) The Commission considers that while the Portuguese authorities did not choose a standard public tender process, the chosen negotiation process respected the criteria of openness, transparency and non-discrimination.

**3.1.1.2. No conditions are attached which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price**

- (57) The terms of reference for the privatisation mentioned a lock-up rule preventing the disposal of shares during first five years after the sale.
- (58) The Portuguese authorities however have clarified that a lock-up period is usually required in contracts for the award of service concessions, and in the present case, the need for a lock-up period was already set out in the concession agreement prior to the privatisation sale agreement.
- (59) The Commission notes that on 14 December 2012, ANA and the Portuguese state signed a new 50 year concession agreement. In the concession agreement there is a specific requirement during the first five years after privatisation for authorisation of the government of any change in ownership of the concession. Since this change of ownership clause was already present in the concession, the Commission considers that it was a condition that any seller, including a private party, would have been bound to respect in a sale of the same assets, and it would have therefore been imposed on any purchaser of the shares of the company holding the concession.
- (60) Moreover, the Portuguese authorities state that this type of lock-up period is customary in privatisation processes in Portugal to ensure a medium-term stability of the privatised company, and that it is not perceived by bidders, when competing for the acquisition of a company such as ANA, as a condition that would significantly



influence the price offered.

- (61) In the light of the foregoing, the Commission concludes that in the present transaction no conditions are attached which are not customary in comparable transactions between private parties. Moreover, it notes that since the final bid was considerably higher than the estimated value of the privatised company, the lock-up rule did not negatively influence the price level to any significant extent. Moreover, after five years the purchaser will enjoy full ownership rights with no continuation of the restrictions on selling the assets, therefore this condition is not such as to permanently affect the economic freedom of the purchaser to dispose of the company as it sees fit.
- (62) The Commission's analysis found no other evidence of non-commercial conditions attached to the privatisation process.
- (63) In addition, as Portugal will retain no stake in ANA, there are no conditions resulting from privileges attached to their position as a shareholder in the privatised undertaking.

#### **3.1.1.3. The shareholding was sold to the highest bidder**

- (64) The Banco de Investimento Global SA, which was commissioned by Portugal as an independent expert to make a valuation of ANA, put the value of the company in the range of €[...].
- (65) The sale price of €3.08 billion achieved at the end of the second and final phase of the privatisation process exceeded by [...] % the upper estimate of this valuation range. The sale price was also 26% higher than the second highest binding bid which was that of the Fraport/IFM consortium for €2.44 billion.
- (66) The Commission notes that the Portuguese authorities chose the highest bids in both phases of the privatisation process. In the first phase the parties that made the five highest non-binding bids were chosen to advance to the second phase. In the second phase, the Portuguese authorities chose the highest of the four binding bids.

#### **3.1.1.4. Bidders must be given enough time and information to carry out a proper valuation of the assets upon which their bid is based**

- (67) The Commission notes that the privatisation process was organised in two discrete phases, both of which had an inherent timetable that interested parties had to adhere to in order to acquire the assets in question.
- (68) The time period from the beginning of the first phase of the process in terms of the first official information being sent to potential bidders on 7 September 2012 to the deadline for the submission of a non-binding offer on 24 October 2012 was over six weeks. The interested parties were sent a draft of the concession agreement on 9 October 2012, i.e. over two weeks before the deadline for the submission for a non-binding offer.
- (69) The identity of five bidders chosen to progress to the second phase was made known on 16 November 2012, and the eventual deadline for a binding offer was 14 December 2012. Therefore the bidders in this phase had four weeks to submit their binding bids.
- (70) The Commission considers these time periods reasonable, and indeed has seen no

evidence that any interested party had insufficient time or information to carry out a proper valuation of the assets at the basis of their bid.

### **3.1.2. Absence of any complaints**

- (71) There have been no state aid complaints made to the European Commission with regard to this privatisation process, nor has the European Commission received any other kind of complaint about the process.
- (72) The European Commission obtained confirmation from Portugal that as of 24 April 2013 - nearly four months after the winning bidder was announced - there had been no complaints made to the Portuguese authorities with regard to the privatisation process.
- (73) The Commission notes that the decisions taken by the Portuguese government in the context of this privatisation process are administrative acts and that under Portuguese law any of these acts can be challenged in the national courts within three months. This period has now expired and no party has challenged the act naming Vinci as the winning bidder, or any other of the administrative acts that were part of the process.

### **3.2. Conclusion**

In the light of the above the Commission has accordingly decided that the privatisation process of ANA - Aeroportos de Portugal, S.A. does not involve State aid in the meaning of Article 107 (1) of the Treaty on the Functioning of the European Union.

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/competition/elojade/isef/index.cfm>.

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

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Yours faithfully,  
For the Commission

*Joaquín Almunia*

Vice-President