EUROPEAN COMMISSION

Bruxelles, 9.7.2014
C(2014) 4537 final

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| 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 […]. | | PUBLIC VERSION<br><br>This document is made available for information purposes only. |

**Subject:** **SA.21420 (2014/C) (ex 2014/NN) (ex 2013/PN) – Italy**
**Setting up of Airport Handling**

Madam,

## 1. PROCEDURE

(1) In its decision C(2013)1668 of 19 December 2012, the Commission found that the aid granted by the publicly owned Milan airport manager, SEA, in favour of its fully owned ground-handling subsidiary, SEA Handling (hereinafter 'SEAH'), during the period 2002-2010, was incompatible with the internal market and should be recovered.

(2) On 28 November 2013, Italy pre-notified to the Commission, in accordance with Article 108(3) TFEU, its plan to liquidate SEAH and the setting up by the parent company SEA of a new subsidiary providing ground handling services at Milan airports, Airport Handling. Italy asked the Commission to confirm that:

(a) the sale of SEAH's assets and its liquidation does not involve elements of economic continuity with Airport Handling, capable of resulting in the transfer of the former's liabilities to the latter, and in particular the requirement to recover unlawful and incompatible State aid granted to SEAH;

(b) SEA's participation in Airport Handling capital does not qualify as State aid.

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(3) According to the pre-notification, Italy intended to implement the measure on 1 July 2014. On 4 June 2014, the Italian authorities informed the Commission that Airport Handling was already operational. They also informed the Commission that SEAH would be put into liquidation on 6 June 2014. Consequently, the case was transferred to the NN register.

## 2. COMMISSION DECISION C(2013)1668

(4) Following a complaint, on 23 June 2010 the Commission notified the Italian authorities of its decision to initiate a formal investigation procedure pursuant to Article 108(2) TFEU in connection with the capital injections carried out between 2002 and 2010 by SEA, the state-owned operator of the Milan Malpensa and Milan Linate airports, in its subsidiary SEAH, ground handling provider at the airports.

(5) During this period, the company was almost entirely owned by public bodies, namely the Municipality of Milan (84.56 %) and the Province of Milan (14.56 %), alongside with other small 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 present, SEA is owned 54.81% by the Municipality of Milan, 44.31% by F2i and 0.88% by other shareholders.

(6) 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 SEAH during 2002 - 2010. The Commission concluded that the entirety of the injections carried out by SEA into its subsidiary's capital constituted State aid. The Commission concluded that, although SEAH could be classified as an undertaking in difficulty, the measures could not be declared compatible with the internal market under the Community guidelines on State aid for rescuing and restructuring firms in difficulty.[1]

(7) Consequently, Italy was obliged without delay 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 interests. The operative part of the recovery decision reads as follows:

*Articolo 1*

*Gli aumenti di capitale effettuati da SEA a favore della sua controllata SEA Handling per ciascuno degli esercizi del periodo 2002-2010 (per un importo cumulato stimato pari a 359,644 milioni di EUR, esclusi gli interessi di recupero) costituiscono aiuti di Stato ai sensi dell'articolo 107 del TFUE.*

*Articolo 2*

*Detti aiuti di Stato, concessi in violazione dell'articolo 108, paragrafo 3, del TFUE, sono incompatibili con il mercato interno.*

*Articolo 3*

[1] OJ 2004 C 244, p. 2.

*1. L'Italia procede al recupero degli aiuti di cui all'articolo 1 presso il beneficiario.*

*2. Le somme da recuperare comprendono gli interessi che decorrono dalla data in cui sono state poste a disposizione del beneficiario fino a quella del loro effettivo recupero.*

*3. Gli interessi sono calcolati secondo il regime dell'interesse composto a norma del capo V del regolamento (CE) n. 794/2004.*

*Articolo 4*

*1. Il recupero dell'aiuto di cui all'articolo 1 è immediato ed effettivo.*

*2. L'Italia garantisce l'attuazione della presente decisione entro quattro mesi dalla data della sua notifica.*

*Articolo 5*

*1. Entro due mesi dalla notifica della presente decisione, l'Italia trasmette le seguenti informazioni alla Commissione:*

*(a) l'importo complessivo (capitale e interessi) che deve essere recuperato presso il beneficiario;*
*(b) una descrizione dettagliata delle misure già adottate e previste per conformarsi alla presente decisione;*
*(c) i documenti attestanti che al beneficiario è stato imposto di rimborsare l'aiuto.*

*2. L'Italia informa la Commissione dei progressi delle misure nazionali adottate per l'attuazione della presente decisione fino al completo recupero dell'aiuto di cui all'articolo 1. Trasmette immediatamente, dietro semplice richiesta della Commissione, le informazioni relative alle misure già adottate e previste per conformarsi alla presente decisione. Fornisce inoltre informazioni dettagliate riguardo all'importo dell'aiuto e degli interessi già recuperati presso il beneficiario.*

(8) On 4 March 2013, 15 March 2013 and 18 March 2013 respectively, Italy, the beneficiary and the Commune of Milan lodged an appeal against the Commission decision before the General Court (Cases T-125/13, T-152/13 and T-167/13).

(9) On 18 March 2013 and 21 March 2013 the beneficiary and the Commune of Milan introduced requests for interim measures to suspend application of the Commission's recovery decision (Cases T-152/13 R and T-167/13 R). On 21 May 2013, the Administrative Court of Lombardia ('TAR Lombardia') ordered the suspension of the implementation of the Commission's recovery decision. On 25 September 2013 the Council of State ('CdS') annulled the above order of TAR Lombardia. The application for interim measures launched before the General Court was withdrawn in June 2013 (see Orders of 20 June 2013 and 1 July 2013, Cases T-152/13 R and T-167/13 R).

## 3. DESCRIPTION OF THE MEASURE

### 3.1 The pre-notified measure

(10) Based on settled case law, a decision ordering a Member State to recover incompatible aid is considered to be properly implemented and the distortion of competition

eliminated either when full recovery is completed or, in case of partial recovery, when the beneficiary is liquidated in the context of national bankruptcy procedures and its assets are sold under market conditions.

(11) Since SEAH is not in a position to repay the incompatible aid, Italy announced its intention to enforce the recovery decision by liquidating SEAH and selling its assets in the context of the liquidation procedure. SEA intends to remain active in the handling business via its newly set up subsidiary, Airport Handling.

(12) Italy is of the opinion that the sale of SEAH's assets and the liquidation of the company does not give rise to issues of State aid concern based on the following reasons:

(a) the sale process will fully observe the transparency, non-discrimination and openness and the resulting sale price for the assets in question will be the market price;

(b) there will be no circumvention of any State aid recovery obligation of the Italian Republic.

(13) Nor would the creation of Airport Handling and the subsequent EUR 25 million capital injection raise any State aid concerns since SEA's decision to set up the company was justified by reasonable prospects of profitability.

(14) Based on the initial plan pre-notified by Italy, Airport Handling was to acquire the assets necessary to enter the ground-handling business on the open market. […]*. The new provider will negotiate new contracts with the airlines operating at Milan airports, in competition with other handling providers, which would enter into force as soon as SEAH has exited the market. Airport Handling will employ part of SEAH's employees under new work contracts to enter into effect the day following the termination of their contracts with SEAH. According to Italy only those employees that are necessary to ensure operation of the business would be re-employed by Airport Handling. The new work contracts would be substantially different from the existing ones.

(15) In the opinion of the Italian authorities, the plan described above would ensure that the aid granted to SEAH remains with the company and there are no grounds to consider that the aid was transferred to Airport Handling. The fact that SEAH's assets would not be transferred to Airport Handling, that there would be no automatic transfer of employees between SEAH and Airport Handling and that the contracts with the airlines would not be transferred to Airport Handling, would prove the absence of economic continuity between the beneficiary of incompatible aid and the new provider. In addition, Airport Handling would enter the ground-handling market based on a new business strategy and would operate in competition with other service providers.

(16) By letter of 9 April 2014, Italy undertook to entrust the management of Airport Handling to an independent trustee for a period of […]. Italy is of the opinion that this would alleviate potential concerns the Commission might have on the potential economic continuity between SEAH and Airport Handling. By the same letter, Italy

* Covered by the obligation of professional secrecy.

informed that the capital of Airport Handling would be opened to private investors in two phases. A first phase would consist in the search for a private investor willing to acquire […] % of the capital within […]. In a second phase, a private majority ownership 'could' be sought.

(17) Italy also modified its previous proposal that Airport Handling would acquire the required assets to provide the activity on the open market and proposed that the new provider leases at market price the assets required for the ground handling activity from SEAH. The market value of the assets would be set by an expert appointed by SEA. Should SEAH accept a bid for the acquisition of the relevant assets in the open tender, Airport Handling would be compelled to return all assets to SEAH by year end.

(18) By the same letter Italy informed the Commission of the start of Airport Handling's operations on 1 July 2014, while SEAH would cease operations on 30 June 2014. However, on 4 June 2014 Italy informed the Commission that Airport Handling was already operational.

### 3.2 The business plan 2014 – 2017

(19) Italy is of the opinion that SEA's investment in the capital of Airport Handling is MEIP-compliant. To evidence this, Italy submitted to the Commission the business plan of Airport Handling for 2014 – 2017.

(20) Airport Handling will provide 'ramp' (i.e. air-side provided services, including the boarding/disembarking of passengers, luggage and cargo, aircraft balancing, and luggage distribution) and 'passenger' (i.e. services provided land-side) handling services. The entrant is expected to gain a [55 - 75%]* and [55 - 75%] market share respectively in the second semester of 2014. Its share of the market is expected to increase to [60 - 80%] and [60 - 80%] respectively in 2017.

(21) The projections developed in the plan depict […] Airport Handling on account of the forecasted increase in market share. Total revenue was budgeted […].

(22) Average staff numbers are projected to increase from […] to […] due to an increase in contracts with fixed duration. Based on the plan, SEA's primary focus in order to reverse previous declines in handling activity is to drive work productivity. The projections show […], due to three main drivers:

(a) efficiencies by the start-up of Airport Handling ([…]);

(b) economies of scale resulting from the increase in traffic;

(c) structural adjustments in the business processes ([…]).

(23) Initial start-up costs are expected to rise to EUR […]. The capital expenditure required for Airport Handling to become operational was estimated at EUR […]. However, for the purpose of the business plan it is assumed that Airport Handling would acquire used ground handling equipment valued at EUR […].

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* Covered by the obligation of professional secrecy.

(24) In light of the funding required for the acquisition of the ground handling equipment and the start-up costs of Airport Handling, the plan lays down a EUR 25 million capital injection in 2014.

## 4. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

(25) As mentioned above, Italy asked the Commission to confirm, for reasons of legal certainty, that:

(d) the procedure described above for the sale of SEAH's assets and the setting up of Airport Handling do not involve any elements of economic continuity capable of resulting in the transfer of SEAH's liabilities to Airport Handling and, in particular, the requirement to recover unlawful and incompatible State aid granted to the former;

(e) SEA's capital injection in Airport Handling does not amount to State aid.

(26) The Commission will examine in turn these two aspects.

### 4.1 Economic continuity and transfer of the recovery obligation

(27) Based on settled case law, the unlawful and incompatible aid must be recovered from the undertakings that actually benefited from it.[2] If, at the stage of the implementation, it appears that the aid was transferred to other entities, the Member State may have to extend recovery to encompass all effective beneficiaries to ensure that the recovery obligation is not circumvented.

(28) Indeed, '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 inter alia 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 (see, to that effect, *Germany* v *Commission*, paragraph 86)'.[3]

(29) According to the case law, in case of insolvent beneficiaries, 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.[4] The Court

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[2] 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.

[3] C-610/10 *Commission v. Spain*, ECLI:EU:C:2012:781, paragraph 106.

[4] Case C‑454/09, *Commission v. Italy ('Aid in favour of New Interline SpA')*, ECLI:EU:C:2011:650, paragraph 36.

has also held that 'it is certainly possible that, in the event that hive-off companies are created in order to continue some of the activities of the undertaking that received the aid, where that undertaking has gone bankrupt, those companies may also, if necessary, be required to repay the aid in question, where it is established that they actually continue to benefit from the competitive advantage linked with the receipt of the aid. This could be the case, inter alia, where those hive-off companies acquire the assets of the company in liquidation without paying the market price in return or where it is established that the creation of such companies evades the obligation to repay that aid'.[5]

(30) According to the Court, the following criteria can notably be taken into account to establish if a company other than the initial aid beneficiary can be held responsible to pay back the aid.[6] These criteria include: 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; 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 the economic logic of the transaction.

*4.1.1. Scope of the transfer*

(31) According to Italy there would be no continuity of contracts and workforce between SEAH and Airport Handling. Work contracts with current staff will be terminated by SEAH and staff will be employed by Airport Handling under new contracts, rather than automatically transferred to the new provider. Likewise, contracts with airlines operating at Milan airports would be re-negotiated by Airport Handling.

(32) However, the Commission considers that even if the staff would be re-employed by Airport Handling, the fact that the shareholding of the employer is the same and that the latter appears to have guaranteed the same rights to staff after the transfer from SEAH to Airport Handling indicates a *de facto* continuity of the work contracts. Indeed, according to the Agreement with the trade unions, signed by SEA, SEAH and the trade unions on 4 November 2013, former employees of SEAH are being guaranteed the rights acquired under the previous contracts with SEAH.[7]

(33) The Commission also has doubts as concerns Italy's argument that contracts with the airlines would be re-negotiated. According to information submitted by Italy in the context of the recovery procedure, the majority of the most profitable contracts with airlines […] would have had to be renewed in any event. Based on the information available to the Commission at this stage it would appear that even before the expiry of such contracts, SEA and Airport Handling had engaged in joint marketing efforts aiming to reassure airlines operating at the airport that SEA would continue the ground handling business.

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[5] 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.

[6] 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.

[7] Available at: http://www.flaits.it/1/upload/va_4_nov_2013_progetto.pdf.

(34) Furthermore, the Commission notes that the fact that SEA expects that Airport Handling gains in the first six months from its entry in the market a market share […] can only be seen as realistic due to the insourcing of business previously undertaken by SEAH.

*4.1.2. Transfer price*

(35) According to Italy there will be no direct transfer of equipment/contracts between the aid beneficiary and the new ground handling provider.

(36) 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.

(37) At this stage the Commission takes the view that the use by the new provider of the assets owned by SEAH suggests that Airport Handling is, in fact, continuing the activity of SEAH. According to Italy the most likely buyer of the assets in question would be Airport Handling. Since […], at this stage there is no certainty that the assets in question would only be operated by Airport Handling for a limited period. Moreover, Italy's argument that such assets would be leased by Airport Handling at market price cannot be accepted to the extent the value of the assets in question is to be set by an expert appointed by the parent company SEA.

*4.1.3. Identity of the shareholders*

(38) The Commission notes that the ground handling business will have the same owner, SEA. Italy's proposal to tender out […] % of the capital of the new ground handling provider is 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.

*4.1.4. Timing and economic logic of the operation*

(39) The timing – after adoption of the recovery decision - and logic of the creation of the new ground handling provider seem to suggest the plan pre-notified by Italy constitutes a mechanism to circumvent recovery.

*4.1.5. Conclusion*

(40) Taking into consideration the above, at this stage the Commission finds that the object and effect of the creation of the new company appears to be the circumvention of the obligation to repay the aid and that Airport Handling is the successor of SEAH. It follows therefore that Airport Handling could be held liable to pay back the incompatible aid granted to SEAH in the past.

**4.2 The capital investment**

*4.2.1. State resources and imputability to the State*

(41) According to an established jurisprudence, the resources of public undertakings (i.e. undertakings on which the public authorities can exercise, be it directly or indirectly, a dominant influence), also qualify as State resources because these resources 'constantly remain under public control, and therefore [are] available to the competent

national authorities'.[8] In line with this jurisprudence, as SEA is a public undertaking, (see below recital 46), its resources have to be considered as State resources for the purposes of Article 107 (1) TFUE.

(42) A separate issue to be explored is whether the transfer of State resources is also attributable to the State.

(43) As the Court established in Stardust Marine, the imputability of a measure to the State can be established either by 'organic' or 'structural' indicators or by indications that the State has been involved, or was unlikely to be absent, from the decision that lead to the concrete measure. In the same judgment the Court established a non-exhaustive set of possible indicators of state imputability, such as:

(a) the fact that the undertaking through the intermediary of which the aid has been granted had to take into account directives issued by governmental bodies;

(b) the integration of the public undertaking into the structures of the public administration;

(c) the nature of the undertaking's activities and the exercise of the latter on the market in normal conditions of competition with private operators;

(d) the legal status of the undertaking (public law or ordinary company law);

(e) the intensity of the supervision exercised by the public authorities over the management of the undertaking; and

(f) any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content, or the conditions which it contains.

(44) The Commission considers that there are clear indications that the creation of Airport Handing is imputable to the State, and that SEA did not engage in the creation of Airport Handling only for profit-maximising considerations.

(45) First, the Commission notes that the Italian State holds a majority stake of 54.81% at SEA. According to Article 2 of the Transparency Directive, a dominant influence by the public authorities shall be presumed when public authorities hold a major part in the company's subscribed capital, control the majority of the votes attaching to shares issued by the company, or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory board. In the case of SEA it seems that all three of these noncumulative criteria for presuming dominant influence by the State are met.

(46) Indeed, the majority ownership of SEA, which translates into majority of votes in the Management Board and Supervisory Board, implies that the State must be regarded as having influence on SEA's decision-making processes and being involved in the decisions taken by the company. The State, given its participation in the company, has

[8] See for example case C-278/00 *Greece v. Commission* [2004] ECLI:EU:C:2004:239, C-482/99 *France v. Commission* ECLI:EU:C:2002:294 and joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v. Commission* [2003], cited, paragraph 33.

a majority of votes in the General Assembly. According to the Constitutive Statute of the company, each nominal share entitles to one vote in the General Assembly of the shareholders. The members of the Administration Board are appointed to represent proportionally the majority shareholders and the minority shareholders' participations.

(47) Second, the Commission considers at this stage that the measure was decided and orchestrated by the State. In this sense, the Commission notes that the Minister for Infrastructure and transports stated: 'On SEA Handling (…) we are in tune with the Commune of Milan and SEA, to address the procedure opened by the UE, with two objectives: to protect employment and to liberalize the market'. On a different occasion the Minister stated: 'We are working towards the creation of Airport Handling. The protection of employment is the main objective. We are evaluating possible options to balance the objectives of protection of employees and maintaining the company on the market in keeping with the indications of the EU'.[9] Giuliano Pisapia, Mayor of Milan, has stated: 'for us the priority has been the protection of the company and the employees (…) this is why the government's commitment can only be regarded as a positive step towards finding a solution'.[10] At this stage the Commission considers that these statements constitute evidence of imputability to the State in the sense of the *Stardust Marine* case-law.[11]

(48) In view of the above, the Commission is at this stage of the view that the Italian State had a clear and direct influence on SEA and SEA's decision to invest in Airport Handling.

*4.2.2. Selective economic advantage*

(49) Italy is of the opinion that SEA's injection in Airport Handling's capital respected the Market Economy Investor Principle (MEIP), thus no advantage was granted, 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 return, 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.

(50) For the purpose of MEIP assessment, it is necessary to determine whether, in similar circumstances, a private investor would have behaved in a similar way. The Court of Justice has held that although the conduct of a private investor with which the intervention of a public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy - whether general or sectoral — and guided by prospects of profitability in the

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[9] Available at: http://www.milanofinanza.it/news/dettaglio_news.asp?id=201403311538001632&chkAgenzie=PMFNW&titolo=Sea%20H.:%20Lupi,%20obiettivo%20e'%20tutela%20occupazione.

[10] Available at: http://www.euractiv.it/it/news/trasporti-turismo/8827-lavoro-sea-handling-venerdi-incontro-lupi-almunia.html.

[11] Case C-482/99 *France v. Commission*, cited.

longer term.[12] 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.[13]

(51) A market investor would duly take into account the risks associated with the investment - so as to require higher profitability from more risky investments. In Alfa Romeo[14] and ENI-Lanerossi[15] the Court of Justice had held that just as a private shareholder might reasonably subscribe the capital necessary to secure the survival of a company which was experiencing temporary difficulties but was capable of becoming profitable again, possibly after a reorganisation, so might a parent company decide to bear the losses of one of its subsidiaries for reasons other than the pursuit of a short-term return on investment. In ENI-Lanerossi, the Court indicated that in the eyes of a private investor pursuing an objective of long-term profitability (not merely financial), a transfer of capital to a loss-making subsidiary might be justified by considerations such as the likelihood of an indirect material profit from the investment, the prospect of disposing of the subsidiary on better terms, or the desire to protect the group's image or to redirect its activities. However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 107 of the TFEU.[16]

(52) The Commission has doubts that SEA acted as a market economy investor when performing the injection in Airport Handling's capital for the reasons detailed below.

(53) First, the Commission has doubts that a private investor would have actually provided capital to Airport Handling at the time SEA did. At the time the measure was undertaken, the fact that the Commission and the Italian authorities were in contact as concerns enforcement of the Commission's recovery decision concerning incompatible aid granted to SEA had been made public. The Commission services had already informed the Italian authorities that the setting up of a new ground handling provider as envisaged, would likely lead to economic continuity and consequently, the new company could be required to reimburse the incompatible aid granted to SEA.

(54) According to the case-law, a private investor contemplating a recapitalisation of an undertaking with significant debts would have required a restructuring plan capable of making the company viable, taking into account the necessity to reimburse EUR 359,6 million plus interests.[17]

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[12] Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v. Commission* ECLI:EU:C:1994:325, paragraphs 20–22.

[13] Case C-482/99 *France v. Commission*, cited, paragraph 71.

[14] Case C-305/89 *Italy v. Commission* ECLI:EU:C:1991:142, paragraph 20.

[15] Case C-303/88 *Italy v. Commission* ECLI:EU:C:1991:136, paragraph 21.

[16] Case C-303/88 *Italy v. Commission*, cited, paragraphs 21 and 22.

[17] Joined cases T-126/96 and C-127/96, *BFM and EFIM v. Commission*, ECLI:EU:T:1998:207, paragraphs 82-86.

(55) In the case at hand, Italy claims that SEA's decision to recapitalise Airport Handling was taken based on the business plan dated 14 November 2013. This plan does not however contain an analysis of the risk of a transfer of the recovery liability from SEAH to Airport Handling, which a diligent private investor would have expected in a similar situation. In similar circumstances a private investor would not have injected fresh capital into the company giving the significant liabilities stemming from the recovery obligation without considering the risk of a possible recovery order by the Commission on the profitability of its investment.

(56) Second, even if the recapitalisation of a company could be considered an essential element of a business plan, this would not be sufficient to satisfy the private investor criteria where it is established that the plan was based on insufficient or unreliable information. In this case some the Commission has doubts whether the business plan underpinning SEA's decision to invest in Airport Handling relies on sufficiently robust assumptions. In addition to the risk of reimbursement of the incompatible aid granted to SEAH, the Commission has doubts on the following elements:

(a) The business plan appears to assume market share of [55 - 75%] and [55 - 75%] respectively in the ramp ad passengers handling markets at Milan airports in 2014. The market shares are expected to further increase to [60 - 80%] and [60 - 80%] in 2017. At this stage the Commission takes the view that this assumption is overly optimistic notably in view of 'le condizioni di estrema concorrenzialità in cui operano gli handler aeroportuali comportano anche rischi di significativa variabilità delle quote di mercato da essi servite'.[18]

(b) Based on the plan, productivity would […]. It is not at this stage clear how this increase was estimated. Nor are the assumptions on which this increase was projected.

(57) On this basis, 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.

*4.2.3. Distortion of competition and affectation of trade*

(58) The measures affect trade between Member States and distort or threaten to distort competition in the internal market in that they favour a single undertaking, which is in competition with other ground handling service providers at Malpensa and Linate airports, and with all other providers authorised to operate there, many of which operate in more than one Member State, in particular since the liberalisation of the sector took effect in 2002.

*4.2.4. Conclusion*

(59) In view of the grounds above, the Commission takes the preliminary view that the setting up by SEA of Airport Handling and the subsequent EUR 25 million capital injection amounts to State aid.

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[18] SEA – Relazione finanziaria annuale al 31 dicembre 2013.

## 5. LAWFULNESS OF THE AID MEASURE

(60) The setting up of Airport Handling and the EUR 25 million capital injection was not formally notified to the Commission according to Article 108(3) TFEU. Airport Handling was incorporated on 9 September 2013 and started operation in June 2014.

(61) Since the measure has therefore been put into effect before formal approval by the Commission, to the extent that the measure qualifies as State aid, the Italian authorities have not fulfilled their stand-still obligation under Article 108(3) TFEU.

## 6. COMPATIBILITY OF THE AID TO AIRPORT HANDLING

(62) If the measure constituted aid under Article 107(1) TFEU, its compatibility with the internal market would need to be assessed.

(63) According to the case-law of the Court, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met.

(64) The Commission notes that, since the Italian authorities do not consider the measure to amount to State aid, no specific and detailed argumentation has been brought forward as to its compatibility with the internal market.

(65) At this stage the Commission takes the preliminary view that none of the derogations provided in Articles 107(2) TFEU and Article 107(3)(a)(b)(c) and (d) of the TFEU apply for the purpose of assessing compatibility of the measure with the internal market. The measure is therefore likely to constitute State aid incompatible with the internal market.[19]

## 7. DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Italy to submit its comments and to provide all such information as may help to assess the question of the transfer of the recovery obligation from SEA Handling to Airport Handling as well as the possible aid inherent in SEA's capital injection in Airport Handling, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Italy that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will

[19] Case C-301/87 *France v. Commission* ECLI:EU:C:1990:67, paragraph 41.

inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, 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 publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
Directorate F
B-1049 Brussels
Fax No: (32-2) 296 12 42

Yours faithfully,

For the Commission

Joaquin Almunia
Vice-President