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**Subject: State Aid SA.44259 (2016/N) - Greece  
Concession Agreements for the upgrade, maintenance, management  
and operation of regional airports.**

Sir,

## 1. PROCEDURE

- (1) On 3 October 2016 the Greek 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, two service concession contracts granting the concession for the upgrade, maintenance, management and operation of two clusters, each comprising seven regional airports located in Greece (hereinafter "the Concession Agreements"), namely (i) Cluster A encompassing the Cretan, Continental Greece and Ionian Sea regional airports<sup>2</sup> and (ii) Cluster B encompassing the Aegean regional airports<sup>3</sup> to *Fraport Regional Airports of Greece A Societe Anonyme* (hereinafter "Fraport AG-Slntel Ltd consortium" or

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

<sup>2</sup> Cluster A Regional Airports: Thessaloniki, Kerkira, Chania, Zakynthos, Kefallinia, Aktion and Kavala airports.

<sup>3</sup> Cluster B Regional Airports: Rodos, Kos, Santorini, Mikonos, Mitilini, Samos and Skiathos airports.

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the "Concessionaire")<sup>4</sup>. The notification was registered under case number SA.44259.

- (2) Greece submitted additional information on 9 November 2016, 22 December 2016, 9 January 2017, 7 February 2017 and 13 February 2017.
- (3) Greece exceptionally agreed to waive its rights deriving from Article 342 TFEU in conjunction with Article 3 of EC Regulation 1/1958 and to have the present Decision adopted and notified pursuant to Article 297 of the Treaty in the English language.

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

### **2.1. The notified measures**

- (4) In the context of the Greek privatisation programme, pursuant to the financial assistance Greece received from euro area Member States and the International Monetary Fund (IMF), the Hellenic Republic Asset Development Fund (HRADF) launched on 3 April 2013 a tender process for the award of concessions for the upgrade, maintenance, management and operation of 14 regional airports grouped in two clusters.<sup>5</sup>
- (5) On 25 November 2014, HRADF announced the award of the Concession Agreements for the two clusters to Fraport AG-Slntel Ltd consortium. The Concession Agreements and relevant contractual documentation were executed by the parties on 14 December 2015. The concession is awarded for a period of 40 years and can be extended once for a period of up to 10 years upon the mutual agreement of the Parties.
- (6) The commencement of the Concession Agreements is conditional inter alia on the parties receiving clearance from the European Commission that the Concession arrangements for each of the two airport clusters do not give rise to any issues under the State aid rules. The Greek authorities notified those Concession Agreements for that purpose.

### **2.2. National Legal Basis**

- (7) The aforementioned Concession Agreements are based on the following legal instruments:
  - i. Various legal acts<sup>6</sup> setting out the Greek Privatisation Programme

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<sup>4</sup> The shareholders of the Concessionaire are: a) Fraport AG Frankfurt Airport Services Worldwide, a company incorporated under the laws of Germany; b) Slntel Limited, a company incorporated under the laws of Cyprus.

<sup>5</sup> See footnotes 2 and 3.

<sup>6</sup> Law 3985/2011 – Table II of Chapter B “Medium-Term Fiscal Strategy Framework 2012-2015” (Government Gazette 151/A/01.07.2011); Appendix IV of the Memorandum of Economic and Financial Policies, which was ratified by Article 1 paragraph 2 of Law 4046/2012: “Approval of the Draft Financial Assistance Facility Agreement between the European Financial Stability Facility (EFSF), the Hellenic Republic and the Bank of Greece, of the Draft Memorandum of Understanding between the Hellenic Republic, the European Commission and the Bank of Greece and of other urgent provisions in order to reduce the public deficit and secure the national economy” (Government Gazette 28A/14.02.2012); Table II of chapter “Privatizations” of Appendix I of Law 4093/2012 “Medium-

- ii. Law 3986/2011 (Government Gazette 152A/01.07.2011) establishing the role, competences and obligations of the HRDAF in the context of the Privatisation Programme
- iii. Law 3913/2011 (Government Gazette 18/A/17.2.2011) providing the right to grant a concession for the rights to use, administration, development, expansion, maintenance and exploitation of one or more of the 37 regional airports in Greece operated at that time by the Hellenic Civil Aviation Authority, including the 14 regional airports concerned by this Decision
- iv. Decision No. 195/27-10-2011 (Government Gazette 2501/B/4.11.2011) which transferred HRADF the right to grant concessions for 37 regional airports in Greece, including the 14 airports concerned by this Decision
- v. Act No. 17/2015 and 301/2015 of the 7<sup>th</sup> Department of the Court of Auditors approving the final drafts of the Concession Agreements and allowing their execution
- vi. Decision of the Governing Council for the Economic Policy No. 240B/13.8.2015 (Government Gazette 98B/17.8.2015) approving the execution of the Concession Agreements
- vii. Act of the Council of Ministers No 39/2.11.2015 (Government Gazette 138A/3.11.2015) approving the execution of the Concession Agreements as well as the execution of any other agreements that are amending or are ancillary of executory to the Concession Agreements and
- viii. Law 4389/2016 of 27 May 2016 – Chapter XIV Articles 215 and 216 (Government Gazette 94/A/27.5.2016) ratifying the Concession Agreements

### **2.3. The tender process**

- (8) The Concession Agreements were awarded following a tender process. According to the Greek authorities, the tender process was not subject to the EU public procurement directives, including Directive 2004/18/EC<sup>7</sup> as implemented in Greece by Law 4281/2014 (and for a transitional period by presidential decree 60/2007), as that regime was not (at the time) applicable in respect of the award of service concession contracts. However, the Greek authorities explained that, as the concessions were considered likely to generate cross-border interest, the HRADF has throughout the process complied with the general principles of the

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Term Fiscal Strategy Framework 2013-2016" (Government Gazette 222A/12.11.2012); Point 4.4 "Privatisation" of subparagraph 4 "Structural policies for the enhancement of competitiveness and development" of paragraph C "Agreement on fiscal targets and structural reforms" of Law 4336/2015 (Government Gazette 94/A/14.8.2015) on "Social security provisions – Ratification of the Draft Agreement on the Financial Assistance by the European Stability Mechanism and provisions for the implementation of the Financing Agreement".

<sup>7</sup> Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134/114, 30.4.2004.

TFEU, including those of transparency, non-discrimination/equal treatment, mutual recognition and proportionality.<sup>8</sup>

### 2.3.1. Phase 1: Invitation to submit an Expression of interest

- (9) The Invitations to Submit an Expression of Interest (hereinafter "the Invitations") for the provision of services in relation to the operation and maintenance of each airport cluster were advertised on 3 April 2013 in both the Financial Times and Naftemporiki, a Greek daily financial newspaper. The initial deadline for submitting the responses to the Invitations was set at 17 May 2013 and extended subsequently to 31 May 2013 at the request of some of the interested parties.
- (10) The Invitations set out objective eligibility criteria for the selection of prospective bidders (referred to as "Eligible Investors"). Those criteria aimed at ensuring that potential bidders have the technical capacity as well as the financial and legal standing necessary to provide the services requested in the Concession Agreements. The conditions related in particular to having experience with operating airports, proving the availability of the material and human resources needed to implement the Concession Agreements and demonstrating the funding capacity<sup>9</sup>. The criteria also included requirements in terms of the "personal situation" of the interested parties (e.g. lack of criminal convictions, proof of compliance with the tax and social security obligations or not being declared bankrupt). The interested parties also needed to fulfil ownership-related requirements, in particular the lack of actual or potential conflict of interest which would affect their ability to provide non-discriminatory access to the concerned airports (such a potential conflict of interest would be, for example, a material stake in an airline, or an airline owning a material stake<sup>10</sup> in the interested party).
- (11) In response to the Invitations, a total of 11 Expressions of Interest were received. Following an assessment of the responses, seven Eligible Investors were found compliant with the criteria set out in the Invitations. Those seven Eligible Investors were invited to participate in Phase 2 "Request for proposal" (hereinafter "RfP").

### 2.3.2. Phase 2: RfP

- (12) On 4 February 2014, the seven Eligible Investors selected to participate in the second phase of the Tender Process were provided with a RfP in respect of each cluster of airports. The RfP set out the requirements, timescales and evaluation criteria for the tender process in relation to each of the two regional airports clusters. The RfP was accompanied by the draft Concession Agreements. The deadline for the submission of bids was initially 6 June 2014 and prolonged to 10 October 2014, following a number of extensions which were granted in response to requests by the Eligible Investors.

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<sup>8</sup> In accordance with the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives – OJ [2006] C179/2.

<sup>9</sup> In order to fulfil this condition, potential bidders had to have a minimum size in terms of the value of their average consolidated net assets (book value).

<sup>10</sup> According to the Invitations to submit an Expression of Interest, any shareholding or partnership share of above 15% was deemed to be a material stake.

- (13) The scoring methodology outlined in the RfP envisaged a two-stage evaluation.
- (14) Stage One consisted of an evaluation of the non-financial aspects of the tender. This examination was conducted on a “pass/fail” basis. The assessment considered whether the offers included various requested documents and where appropriate, in accordance with certain templates (such as Participation Letter of Guarantee, constitutional documents, approvals by the competent corporate body to participate in the tender). The evaluation also assessed the proposed business strategy for each of the clusters as well for each individual airport in each cluster (e.g. regarding the upgrade and/or expansion of existing airport infrastructure, operations enhancement, plans regarding future works). The evaluation aimed at assessing how the proposed business strategy by each bidder met the needs of the HRADF as set out in the draft Concession Agreements and were realistic and feasible.
- (15) Stage Two involved an evaluation of the financial offers submitted by those Eligible Investors who had passed Stage One. According to the Greek authorities, to ensure the objectivity of the assessment, a formula was used to determine the Total Score of the Eligible Investors in respect of Stage Two. That formula, which was set out in the RfP, was derived from the sum of a proposed upfront payment and six times a proposed annual payment to HRADF. The RfP stated that, in addition to the upfront and annual consideration, the Preferred Investor would be required to pay HRADF an annual variable concession fee calculated as a percentage<sup>11</sup> of earnings before interest, taxes, depreciation and amortisation (EBITDA).
- (16) The RfPs enabled Eligible Investors to submit an independent offer for each cluster of airports in question and, in addition, it allowed tenderers to submit a combined (“bundled”) offer for both clusters of airports.
- (17) According to the Greek authorities, in the months following the issue of the RfPs, the Eligible Investors were given an extensive opportunity to carry out due diligence (including based on access to a virtual data room containing all relevant information); to conduct site visits; to meet with HRADF and its financial, technical and legal advisers; to contribute to the drafting of the Concession Agreements; and to raise clarification questions.
- (18) Subsequent to the issue of the RfPs, one Eligible Investor voluntarily withdrew from the Tender Process. Final bids were received from three of the remaining six Eligible Investors by the deadline of 10 October 2014.
- (19) On 25 November 2014, HRADF, having obtained an independent valuation as requested by Greek law<sup>12</sup>, selected the Preferred Investor for both clusters of airports on the basis of its bundled financial offer. In accordance with the RfP rules, two Reserve Candidates were also identified, namely the two other Eligible Investors that had submitted final bids by 10 October 2014.
- (20) The financial consideration offered by the Preferred Investor under its bundled offer for both clusters of regional airports proposed in its tender was [...] higher

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<sup>11</sup> The percentage is calculated by reference to a formula provided for in the draft Concession Agreements, which was derived from the upfront and the annual amounts.

<sup>12</sup> Greek Law 3986/2011.

than both (i) an independent valuation obtained by the HRADF in accordance with Greek Law 3986/2011, and (ii) the financial offers submitted by the other two Eligible Investors which were made in respect of only one cluster (i.e. not bundled for the two clusters of airports together), who were nominated as Reserve Candidates respectively for the Cluster A and Cluster B airports.

- (21) The financial offer contained in the Preferred Investor's tender submission amounted to the following:

**Table 1 Financial offered by the Preferred Investor (Fraport AG-Slntel ltd consortium)**

	<b>Cluster A</b>	<b>Cluster B</b>	<b>Bundled offer</b>
<b>Upfront total lump sum cash consideration</b>	[...]	[...]	[...]
<b>Annual lump sum cash consideration (indexed)</b>	[...]	[...]	[...]
<i>Annual variable concession fee percentage sum</i>	[...]	[...]	[...]

- (22) The financial offers submitted by the other two Eligible Investors (i.e. the Reserve Candidates) were the following:

**Table 2 Financial offer by the other two Eligible Investors (i.e. the Reserve Candidates)**

	<b>Cluster A</b>	<b>Cluster B</b>	<b>Total</b> <i>(For illustrative purposes only since those were not bundled offers)</i>
	[...]	[...]	
<b>Upfront total lump sum cash consideration</b>	[...]	[...]	[...]
<b>Annual lump sum cash consideration (indexed)</b>	[...]	[...]	[...]
<i>Annual variable concession fee percentage sum</i>	[...]	[...]	[...]

- (23) The Tender Process as well as the selection of the Preferred Investor and Reserve Candidates was subject to a preventative audit by the Greek Court of Auditors as required by Greek law 3986/2011<sup>13</sup>. On 27 January 2015, the HRADF received the approval of the Court of Auditors to proceed with the execution of the Concession Agreements.

#### **2.4. The Concession Agreements**

- (24) The Concession Agreements were provided to all Eligible Investors in draft form together with the RfPs. The Greek authorities explained that the executed Concession Agreements were in substance the same as the drafts which accompanied the RfP. The only amendments which were made, were designed to take account of (i) the delays to the execution of the Concession Agreements resulting from the political and financial environment then prevailing in the Hellenic Republic; (ii) certain amendments requested by the Greek Court of Auditors and (iii) changes agreed between the parties during the Contractual Documents Finalisation Period (e.g. to reflect the Preferred Investor's offer details, to correct manifest errors and for additional clarity where required). According to the Greek authorities, the amendments were found by the Greek Court of Auditors to be non-substantial and as not raising any legal concerns.
- (25) In addition to the financial conditions offered by the Preferred Investor and the latter's obligations as future operator of the airports concerned, the Concession Agreements contain provisions on airport charges and public policy remit services, which are summarised below.

##### *2.4.1. Airport Charges*

- (26) As far as the Airport Charges are concerned, the Concession Agreements impose two caps on the aeronautical part of each regional airport's revenues. The two caps are cumulative.
- i. The first cap sets the maximum level of the sum of the airport charges that the Concessionaire may collect per departing passenger for providing basic airport services. This cap applies to the sum of various airport charges: (i) landing charges; (ii) lighting charges; (iii) parking charges; and (iv) passenger charges.
  - ii. The second cap imposes a maximum level of return that the Concessionaire may earn on the capital it invests into the provision of aeronautical services which should not exceed a compounded cumulative return of 15% per annum, any excess above such level accruing to HRADF.
- (27) The proceeds from the so-called Airport Development Fee (ADF) - a fixed charge levied on each passenger departing from airports in Greece - will partly accrue to the State and partly to the Concessionaire. The part of the ADF retained by the Concessionaire is included in the the airport charges subject to the first cap mentioned in paragraph (26)i above. Greece explained that, according to the draft Concession Agreements made available to all tenderers before the submission of

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<sup>13</sup> Article 9 paragraph 4 thereof.

bids, the total ADF to be retained at the 14 airports is to be fixed as a €12 fee per departing passenger irrespective of the destination and will apply for the period from the commencement date of the Concession Agreements up to 1 November 2024. Thereafter, the fee will decrease to €3 per departing passenger. The ADF to be charged to the airlines will be collected by the Greek authorities and will be deposited in each individual airport's special account with the Bank of Greece. The Concessionaire will subsequently pay part of the ADF to the State (8.5% until 2024 and 35% thereafter).

- (28) The cap on the airports' aeronautical charges will be set at such a level that the Concessionaire will be able to cover all operational expenditure, overheads, depreciation of assets, any interest paid on debts, income taxes allocated to the provision of aeronautical services, the Concession Fee for the relevant financial period as well as a capped return on the capital allocated to the provision of aeronautical services (not to exceed 15% per annum) (see paragraph (26)ii above). The level of the cap will be set at EUR 13 per departing passenger for a transitional period (during which works are undertaken to upgrade the airports) and EUR 18.50 afterwards<sup>14</sup>.
- (29) According to Greek authorities, the cap formula for the airport charges is based on objective and transparent factors, and aims to secure the airports' competitiveness as well as compliance with the applicable regulatory framework. The cap on aeronautical charges, which is specified in euros per departing passenger, was determined following a study of the average level of airport charges at a set of airports of similar dynamics, size and service quality around the Mediterranean Sea<sup>15</sup>. However, the Concession Agreements foresee a mechanism to deactivate the cap on aeronautical charges if the charges do not cover operational expenditure and a reasonable profit margin of at least 7.5 %<sup>16</sup>. The Concession Agreements also foresee the right for the Concessionaire and the HCAA to enter into discussions if it is considered that the level of the cap would result in the regional airports being on average less competitive than comparable airports of similar dynamics, size and service quality around the Mediterranean Sea.

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<sup>14</sup> The Concession Agreements defines two periods which are relevant for the cap on the airports' aeronautical charges: i) the period from the commencement date of the concession until the completion of those refurbishment, new or expansion works which are necessary to ensure that each airport is operating at the required service levels (referred to as "Imminent Works" under the Concession Agreements). This period will vary by airport depending on the magnitude and duration of Imminent Works which the Concessionaire is to perform but, in any event, it will extend to not later than 48 months from the commencement date of the Concession Agreements. The maximum average yield per departing passenger should not exceed €13; ii) the period from completion of Imminent Works (which will vary by airport) until the end of the concession term. Once the Imminent Works have been completed, the Concessionaire is entitled to increase the aeronautical charges at the respective airport to a maximum average yield per departing passenger not exceeding €18.50.

<sup>15</sup> Antalya and Izmir in Turkey; Djerba in Tunisia; Faro in Portugal; Hurghada in Egypt; Larnaca in Cyprus; Malaga and Palma de Mallorca in Spain; Malta; and Naples in Italy.

<sup>16</sup> The Concessionaire can submit its calculations to the HCAA. The HCAA can approve within 20 days the calculations (or tacit approval in case of absence of decision within 20 days). If HCAA does not approve the calculations, the Concessionaire may amend and resubmit the calculations. HCAA has another 20 days to approve the revised calculations (or tacit approval in case of absence of a decision within 20 days). If the revised calculations are not approved, the Concessionaire has to implement the HCAA proposal, but has the right to refer the matter for resolution in accordance with the Dispute Resolution Procedure foreseen in the Concession Agreements.



- (30) The non-aeronautical part of the airports' revenues is not regulated and consequently not subject to any cap.

#### 2.4.2. *Public Policy Remit Services*

- (31) According to the Concession Agreements, the following public remit services (named "Government Services" in the Concession Agreements) will be provided or procured by the State at the 14 airports: *“regulatory and supervisory authorities, customs control and excise, immigration control, police and national guard, Hellenic Fire Brigade, public health, quarantine (human and animal), veterinary and phytosanitary services, meteorological and air navigation services, public ambulance or other emergency response services and such other services as may be designated as Government Services by the State from time to time.”* No charges are made to the Concessionaire for the provision of such Government Services, since according to the Greek authorities they constitute tasks which normally fall under the responsibility of the State and are therefore either provided or directly procured by the Hellenic Republic. The Greek authorities stated that although the activities of the Hellenic Fire Brigade, in principle in charge of fire-fighting services, are listed among the public policy remit services to be provided or procured by the State at the 14 airports, in reality the Hellenic Fire Brigade will not undertake any activities at the 14 airports in the framework of the public policy remit services as the Concessionaire will be in charge of providing or procuring the fire-fighting services (see paragraph (32) below).
- (32) The Concession Agreements provide that there are two types of public policy remit service, which will be provided or procured by the Concessionaire:
- i) the rescue services and
  - ii) fire-fighting services and the aviation security services
- (33) Regarding rescue and fire-fighting services, the Concessionaire is free to decide whether to provide those services itself or to procure such services from a third party in exchange of remuneration. The Concession Agreements provide that any fees for the provision of such rescue and fire-fighting services form part of the capped regulated aeronautical charges levied by the Concessionaire and paid by the airport users. The Concessionaire is not entitled to levy any separate charges for such services, except for services on request such as fire-fighting during refuelling events with passengers on board or during engine test runs.
- (34) As regards aviation security services, the Concession Agreements provide that the Concessionaire is required to provide all security services in accordance with the applicable laws, standards and specifications in relation to aviation security. The Concessionaire is free to decide whether to provide those services itself or to procure specific security services from a third party, provided that such a third party has been approved by the HCAA and that this is in accordance with the Greek National Civil Aviation Security Plan. In return for providing the security services, the Concessionaire will receive the proceeds from the Security Charge levied by it at the regional airports, and paid by airport users in addition to the other regulated aeronautical charges levied by the Concessionaire. According to the Concession Agreements, the Concessionaire may only recover its costs in providing such security services and may not generate any profit margin.

### 3. ASSESSMENT OF THE MEASURE

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

- (35) 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"*.
- (36) The qualification of a measure as State aid within the meaning of this provision requires the following cumulative conditions to be met:
- a) the measure must be financed through State resources and be imputable to the State;
  - b) it must confer an economic advantage on its recipient;
  - c) the advantage must be selective; and
  - d) the measure must distort or threaten to distort competition and affect trade between Member States.
- (37) The Commission will assess whether the Concession Agreements confer an economic advantage to the Concessionaire.
- (38) An advantage within the meaning of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, that is to say in the absence of State intervention. Only the effect of the measure on the undertaking is relevant, not the cause nor the objective of the State intervention. Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.
- (39) However, public resources placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid,<sup>17</sup> according to the market economy operator (MEO) principle.
- (40) The MEO principle applies only if the State acted as a private market operator which is in comparable circumstances. Regional or policy considerations cannot be taken into account for the purposes of the MEO principle. Any positive repercussions on the economy or accessibility of the region in which the undertaking is located should be left aside.<sup>18</sup>
- (41) The Commission considers that, if the sale and purchase of assets, goods and services are carried out following a competitive, transparent, non-discriminatory and unconditional tender procedure, it can be presumed that those transactions are in line with market conditions, provided that the appropriate criteria for selecting the buyer or seller as set out below in in paragraph (43) have been used.<sup>19</sup> This also applies to other comparable transactions, such as the award of concessions

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<sup>17</sup> Judgment of 16 May 2002, France / Commission (C-482/99, ECR 2002 p. I-4397) ECLI:EU:C:2002:294, paragraph 69.

<sup>18</sup> Judgment of 10 July 1986, Belgium / Commission (40/85, ECR 1986 p. 2321) ECLI:EU:C:1986:305. See also point 49 of the 2014 Aviation Guidelines.

<sup>19</sup> OJ C262/1 from 19.7.2016, paragraphs 89 to 96.

for the operation of commercial assets, and therefore applies to the award of the concessions subject to the present decision.

- (42) The tender procedure is considered competitive, transparent, non-discriminatory and unconditional if the following conditions are fulfilled<sup>20</sup>:
- i. all interested and qualified bidders are allowed to participate in the process.
  - ii. the procedure is transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. Information is accessible and sufficient time is given for interested tenderers, the selection and award criteria are clear and the tender is sufficiently well-publicised, so that all potential bidders can take note of it.
  - iii. non-discriminatory treatment of all bidders at all stages of the procedure and the selection and award criteria are objective and specified in advance of the process.
  - iv. the tender is unconditional, for example a potential buyer should not be required to assume special obligations for the benefit of the public authorities or in the general public interest, which a private seller would not have demanded - other than those arising from general domestic law or a decision of the planning authorities.

- (43) The criteria for selecting the buyer or seller should fulfil the following conditions<sup>21</sup>:
- i. the only relevant criterion for selecting the buyer is the highest price also taking into account the requested contractual arrangements (for example the vendor's sales guarantee or other post-sale commitments). Only credible and binding offers are considered.
  - ii. any specific conditions attached to the tender are non-discriminatory and closely and objectively related to the subject matter and to the specific economic objective of the contract. They should allow for the most economically advantageous offer to match the value of the market.

### *3.1.1. Assessment of the tender process*

- (44) The Commission will assess whether the tender process involves an advantage on the basis of the criteria in paragraph (42) and (43):

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<sup>20</sup> Commission Notice on the notion of State aid as referred in Article 107(1) of the TFEU, OJ C262/1 from 19.7.2016, paragraphs 90 to 94.

<sup>21</sup> Commission Notice on the notion of State aid as referred in Article 107(1) of the TFEU, OJ C262/1 from 19.7.2016, paragraphs 95 to 96.

**3.1.1.1. The concessions are awarded following a competitive, transparent, non-discriminatory and unconditional process**

- (45) Phase I of the tender (invitations to submit an Expression of Interest for the provision of services in relation to the operation and maintenance of each airport cluster) was transparent since it was advertised in both the *Financial Times* and *Naftemporiki*, a well-known Greek daily financial newspaper. All interested parties could submit a response to the invitations.
- (46) Phase I specifies certain eligibility conditions aimed at ensuring that potential bidders have the necessary technical capacity as well as the financial and legal standing to provide the requested services. Those criteria are justified by the fact that Greece had an interest to select a Concessionaire who is capable of providing the requested services and maintain the assets operational. Indeed, the assets will return to the Greek State at the expiry of the Concession. This is in line with MEOP as any market economy operator would have pursued this objective. Therefore, those criteria do not unduly restrict the scope of the eligible bidders and are not discriminatory. They are clear, objective and specified in advance.
- (47) Following the publication of Phase I of the tender, eleven bidders expressed their interest. Seven of them were found to fulfil the eligibility criteria. Four bidders were disqualified: one candidate was excluded on the basis that it had failed to submit a complete application in accordance with the rules of the Tender Process; three candidates were excluded for national security reasons as they were found not to comply with the "personal situation criteria" included in the Invitations. The "personal situation criteria" included lack of criminal convictions, proof of compliance with the tax and social security obligations or not being declared bankrupt, and the exclusion from the tender of certain types of companies, such as offshore companies.
- (48) During Phase II, the seven bidders found to fulfil the eligibility criteria were provided with the RfP. Offers were received from three of the seven Eligible investors by the set deadline. The scoring methodology during Phase II envisaged a two-stage evaluation: Stage One included criteria related to the strategy of the bidders and their ability to run the airports efficiently and consisted of an evaluation of the non-financial aspects of the tender (see paragraph (14) above). Those criteria are justified as the public authority had an interest to select a Concessionaire who is capable of generating high EBITDA, since it will receive a proportion of it (see Table 1 above). Stage Two involved an evaluation of the financial offers submitted by those Eligible Investors who had passed stage one and the selection of the highest financial offer (see paragraph (15) above). This criterion is justified as the public authority has an interest to maximise the financial return on its asset awarded through concession by selecting the highest financial offer. Therefore, those criteria do not unduly restrict the scope of the eligible bidders and are not discriminatory. They are clear, objective and specified in advance.
- (49) The Commission notes that the tender process was organised in two phases, both of which had an inherent timetable that interested parties had to adhere to in order to be awarded the Concession Agreements.

- (50) During the first phase, potential bidders were given almost two months to reply to the Invitations of Expression of Interest. This is sufficient since the prospective bidders were merely required to provide documentation relating to their technical ability and the economic and financial standing. There was no requirement for the potential bidders to carry out any form of due diligence and to prepare extensive new documentation. The Expression of Interest phase also included a description of each airport and provided information regarding the tender process.
- (51) The second phased (RfP) was launched on 4 February 2014 with an initial deadline of 6 June 2014, extended subsequently to 10 October 2014. The Eligible Investors had therefore ample time to understand the Tender Process and the Concession Agreements, and to prepare fully-considered submissions.
- (52) The Commission notes that the RfP set out the requirements, timescales and the evaluation criteria for the award process as well as the Concession Agreements in draft form. As explained by the Greek authorities, in the months following the issue of the RfPs, the Eligible Investors were given an extensive opportunity to carry out due diligence (including access to a virtual data room containing all relevant information); to conduct site visits; to meet with HRADF and its financial, technical and legal advisers; to contribute to the drafting of the Concession Agreements; and to request clarification.
- (53) The Commission therefore concludes that the bidders were given enough time and information was accessible.
- (54) The Commission notes that the tender was not conditional of certain special obligations for the benefit of public authorities or in the general public interest.
- (55) On the basis of the above, the Commission considers that the tender to award the concessions was competitive, transparent, non-discriminatory and unconditional.

#### **3.1.1.2. The concession was awarded to the highest bidder**

- (56) The Commission will assess whether the concession was awarded based on the highest price also taking into account the requested contractual arrangements (for example the vendor's sales guarantee or other post-sale commitments) and whether the offers were credible and binding (see paragraph (43) above).
- (57) Based on the criteria for evaluating the financial offers set out in the RfP (see paragraph (15) above) which take into account the upfront total lump sum cash consideration and the fixed annual lump sum cash consideration, the financial offer by Fraport AG-Slntel Ltd consortium is higher than the financial offers submitted by the other two Eligible Investors (which were not bundled) both by individual cluster and for the two clusters together (see tables Table 1 and Table 2 above). Therefore, based on the selection criteria announced in the RfP, the concession was awarded to the highest bidder. Although the third parameter (i.e. the annual variable concession fee as a share of the EBIDTA) was not part of the criteria for evaluating the financial offers, the Commission found that even when taking into account the revenues from this third parameter (calculated based on the bidders' EBITDA forecasts as communicated to the Greek authorities), the same conclusion remains valid, i.e. the concession was awarded to the highest bidder.

- (58) Furthermore, the Commission notes that when adding to the final offers described in Table 1 and Table 2 above the part of the ADF accruing to the State<sup>22</sup>, the ranking of the financial offers does not change.
- (59) The Commission therefore finds that, when taking into consideration the total expected revenues from the concession (see Table 3 below), it was more beneficial for the State to award the concessions to the Preferred Investor rather than to any other bidder.

**Table 3: Total expected revenues from the concession (estimated based on bidders' financial models)**

€	Cluster A		Cluster B		Total (Cluster A + B)	
	<b>Fraport – Slentel (1)</b>	<b>[...] (2)</b>	<b>Fraport – Slentel (3)</b>	<b>[...] (4)</b>	<b>Fraport – Slentel Bundled (1) + (3)</b>	<b>[...] (2)+(4)</b>
Upfront total lump sum cash consideration (A)	[...]	[...]	[...]	[...]	[...]	[...]
Annual lump sum cash consideration (indexed) (B)	[...]	[...]	[...]	[...]	[...]	[...]
Annual variable fee (C) <i>(in euro, calculated based on EBITDA for the financial model of the bidder)</i>	[...]	[...]	[...]	[...]	[...]	[...]
Total ADF expected to be received by the State (D) <i>(in euros based on the passenger forecasts by the bidder)</i>	[...]	[...]	[...]	[...]	[...]	[...]
<b>Total (A+B+C+D) (discounted at present value)</b>	[...]	[...]	[...]	[...]	[...]	[...]

<sup>22</sup> The Greek authorities estimated the revenues from the ADF to be retained by the State based on the passenger forecasts made by the three bidders over the concession period.

Notes:

1. [...]
2. [...]
3. [...]

(60) The Commission concludes that the Greek authorities awarded the concession of the 14 regional airports to the highest bidder.

**3.1.1.3. Specific conditions attached to the tender were non-discriminatory and were closely and objectively related to the subject matter and the specific economic objective of the contract.**

(61) The Concession Agreements foresee a cap on the level of aeronautical charges which would allow the Concessionaire to cover its costs and a maximum return on the capital allocated to the provision of the aeronautical services (see paragraph (28)). However, the cap can be de-activated if the revenues from airport charges will not be sufficient to cover such costs and such return.

(62) The de-activation mechanism of the capping of charges implies that the Concessionaire will not be forced to charge airlines at a price below its marginal costs. This would therefore be in line with the Guidelines on State Aid to Airports and Airlines<sup>23</sup> (the "2014 Aviation Guidelines") which require that airports cover costs stemming from arrangements with airlines plus a reasonable profit (see section 3.5.2 of the 2014 Aviation Guidelines).

(63) Moreover, in the context of concession arrangements involving a profit-sharing mechanism between the owner of an infrastructure and its operator, which in this case takes the form of a percentage of the airports' EBITDA due to the owner, it is rational to impose a capping mechanism on fees charged for the access to the infrastructure (in this case airport charges). Indeed, such mechanisms are justified in that they aim to ensure that the infrastructure remains attractive to users and that its use is maximised, to the benefit of the owner in the short, medium and long term. In this case, the flexibility built in the capping mechanism allows the operator to set its airport charges so as to cover its costs and a reasonable profit margin. In addition, these requirements were set in the draft Concession Agreements available to all bidders in the RfP and would have applied irrespective of selected bidder. Therefore, the requirements set out in the Concession arrangements as regards the setting of airport charges are rational from a market economy operator perspective in the context of the present assessment of the existence of State aid.

(64) The Commission therefore concludes that in the present transaction specific conditions attached to the tender were non-discriminatory and were closely and objectively related to the subject matter and the specific economic objective of the contract.

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<sup>23</sup> OJ C 99, 04.04.2014, p. 3.

#### 3.1.1.4. Conclusion on the terms of the Concession Agreements resulting from the tendering process

- (65) Based on the paragraphs (42) to (64) above, the Commission finds that the terms of the notified Concession Agreements result from a competitive, transparent, non-discriminatory and unconditional tender, the award was given to the highest bidder and that the specific conditions attached to the tender were non-discriminatory and were closely and objectively related to the subject matter and the specific economic objective of the contract.
- (66) Therefore, the Commission concludes that the terms of the Concession Agreements reflecting the Preferred Investor's financial offer, as accepted by the Greek State, are in line with what a profit-driven market economy operator offering a concession for a series of airports would have accepted in similar circumstances and therefore no aid is involved.
- (67) One aspect of the Concession Agreements remains to be analysed below, namely the fact that the "Government Services" (see paragraph (31) above) will be provided or procured by the State at the 14 airports free of charge.

#### 3.1.2. Public policy remit

- (68) According to settled case law, the Commission must first establish whether the airport managers are undertakings within the meaning of Article 107(1) of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.<sup>24</sup> Any activity consisting in offering goods or services on a given market is an economic activity.
- (69) In *Leipzig / Halle Airport*<sup>25</sup>, the General Court held that from the date of the judgment in *Aéroports de Paris* (12 December 2000)<sup>26</sup>, the application of State aid rules to the financing of airport infrastructure could no longer be excluded.
- (70) While airport managers must be considered to constitute undertakings in the sense of Article 107(1) of the Treaty at least as of 12 December 2000, it must be recalled that not all activities of an airport manager are necessarily of an economic nature (see also point 34 of the 2014 Aviation Guidelines).<sup>27</sup>

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<sup>24</sup> Judgment of 23 April 1991, *Höfner and Elser / Macrotron* C-41/90 EU:C:1991:161, paragraph 21; Judgment of 17 February 1993, *Poucet and Pistre / AGF and Cancava* C-160/91 EU:C:1993:63, paragraph 17; Judgment of 18 June 1998, *Commission / Italy* C-35/96, EU:C:1998:303, paragraph 36.

<sup>25</sup> Judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission*, joined cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, in particular paragraph 93 and 94; confirmed by Judgment of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v European Commission*, C-288/11 P, ECLI:EU:C:2012:821.

<sup>26</sup> Judgment of 12 December 2000, *Aéroports de Paris v Commission of the European Communities*, T-128/98, ECLI:EU:T:2000:290.

<sup>27</sup> Judgment of 19 January 1994, *SAT Fluggesellschaft / Eurocontrol* C-364/92, EU:C:1994:7.



- (71) The Court of Justice has held that activities that normally fall under the State's responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid<sup>28</sup>.
- (72) Therefore, the financing of activities falling within the public policy remit or of infrastructure directly related to those activities in general does not constitute State aid.<sup>29</sup> At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform those activities are generally considered to be of a non-economic nature (see also point 35 of the 2014 Aviation Guidelines).<sup>30</sup>
- (73) However, public financing of non-economic activities must not lead to undue discrimination between airlines and airport managers. Indeed, it is established case-law that an advantage is present when public authorities relieve undertakings of the costs inherent to their economic activities.<sup>31</sup> Therefore, if in a given legal system it is normal that airlines or airport managers bear the costs of certain services, whereas some airlines or airport managers providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may enjoy an advantage, even if those services are considered in themselves non-economic (see also point 37 of the 2014 Aviation Guidelines).
- (74) According to the Concession Agreements, certain public remit services will be provided or procured by the State at the 14 airports (see paragraph (31) above). According to the Greek authorities, those services concern genuine public remit services as follows: i) regulation and supervision of air transport, aviation, airport safety, civil aviation security; ii) customs control and excise, iii) immigration control, iv) police and national guard, v) activities by the Hellenic Fire Brigade, vi) public health, (including human and animal quarantine), vii) veterinary and phytosanitary services for the protection of public health linked to imported plants and the import/export of animals and products of animal origin, viii) meteorological and air navigation services for air traffic control, ix) public ambulance or other emergency response services. The Commission notes that those are activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority as they relate to activities such as air traffic control, police, customs, activities necessary to safeguard civil aviation against acts of unlawful interference and typical regulatory activity forming part of a State's mission to protect public health. Consequently, those provisions are in line with point 35 of the 2014 Aviation Guidelines.
- (75) As explained in paragraph (31) above, according to Greece, although the activities by the Hellenic Fire Brigade are listed in the Concession Agreements among the Government services to be provided or procured by the State at the 14

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<sup>28</sup> Judgment of 16 June 1987, *Commission / Italy*, Case 118/85, EU:C:1987:283, paragraphs 7 and 8 and Judgment of 4 May 1988, *Bodson / Pompes funèbres des régions libérées* (30/87, ECR 1988 p. 2479) ECLI:EU:C:1988:225, paragraph 18.

<sup>29</sup> Commission Decision N 309/2002 of 19 March 2003, *Aviation security — compensation for costs incurred following the attacks of 11 September 2001* (OJ C 148, 25.6.2003, p.7)

<sup>30</sup> See, in particular, Judgment of 19 January 1994, *SAT Fluggesellschaft / Eurocontrol* C-364/92, EU:C:1994:7, paragraph 30 and Judgment of 26 March 2009, *Selex Sistemi Integrati / Commission* C-113/07 P, EU:C:2009:191, paragraph 71.

<sup>31</sup> See Judgment of 3 March 2005, *Heiser* C-172/03, EU:C:2005:130, paragraph 36, and case-law cited.

airports, in reality the Hellenic Fire Brigade will not undertake any activities to be financed by the State under the public remit services. According to the Concession Agreements, the Concessionaire will provide or procure firefighting services, rescue services and aviation security services.

- (76) Greece provided information proving that public policy remit services (as described in paragraph (31) above) provided at the 14 airports subject to the Concession Agreements are also provided and financed by the State at all the Greek airports. The Commission therefore finds that the provision of public policy remit services under the Concession Agreements is in line with point 37 of the 2014 Aviation Guidelines.
- (77) The Commission therefore concludes that the financing of those services at the airports concerned by the Greek State does not confer an economic advantage on the Concessionaire, and therefore does not constitute State aid to the latter. The fact that the Concessionaire will have to provide or procure (and thus fund from its own revenues) rescue services and firefighting services does not alter the above conclusion, since it cannot result in an advantage to the Concessionaire.
- (78) With respect to the aviation security services that the Concessionaire has to provide or supply, the Commission notes that those will be funded by the proceeds from the Security Charge levied by the Concessionaire at the 14 regional airports, namely by the Concessionaire's own resources generated by its activity. The Concessionaire can only recover its costs in providing those aviation security services and may not generate any profit margin.
- (79) The assessment set out in paragraphs (74) to (78) above only applies to the list of Government services as they appear in the Concession Agreements and does not extend to *"other services as may be designated as Government Services by the State from time to time"* (see paragraph (31) above) if those are not "public policy remit" in nature.
- (80) In view of the above, the Commission considers that the notified measure does not constitute State aid within the meaning of Article 107(1) TFEU. The present State aid decision is without prejudice to compliance with other provisions of EU law.

#### 4. CONCLUSION

The Commission has accordingly decided that the measure does not constitute aid.

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Yours faithfully  
For the Commission

Margrethe VESTAGER  
Member of the Commission