



EUROPEAN COMMISSION
DG Competition

***Case M.8894 - ACS / HOCHTIEF / ATLANTIA / ABERTIS
INFRAESTRUCTURAS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 06/07/2018

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EUROPEAN COMMISSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 6.7.2018
C(2018) 4451 final

PUBLIC VERSION

To the notifying parties:

Dear Sir or Madam,

**Subject: Case M.8894 – ACS / HOCHTIEF / ATLANTIA / ABERTIS
INFRASTRUCTURAS
Commission decision pursuant to Article 6(1)(b) of Council
Regulation No 139/2004¹ and Article 57 of the Agreement on the
European Economic Area²**

¹ OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

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- (1) On 1 June 2018, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Atlantia S.p.A. ("Atlantia", Italy) and ACS Actividades de Construcción y Servicios, S.A. ("ACS", Spain), together with its controlled company HOCHTIEF AG ("Hochtief", Germany) acquire within the meaning of Articles 3(1)(b) and 3(4) of the Merger Regulation joint control over Abertis Infraestructuras, S.A. ("Abertis", Spain) by way of acquisition of shares (the "Transaction").³ Atlantia, ACS/Hochtief and Abertis are collectively designated hereinafter as "the Parties"

1. THE PARTIES

1.1. Atlantia

1.1.1. Atlantia's activities

- (2) Atlantia is a holding company mainly active in the toll motorway concessions and airport infrastructure sectors.⁴ With regard to toll motorway management in the EU, Atlantia is active in Italy, through in particular Autostrade per l'Italia S.p.A. ("ASPI"), and more marginally in Poland, through Stalexport Autostrada Malopolska. In addition, Atlantia operates electronic toll systems (ETS) through Telepass S.p.A. ("Telepass") and is active in the provision of intelligent transport systems (ITS) through Autostrade Tech. Finally, Atlantia provides construction and maintenance works, through Pavimental S.p.A. ("Pavimental"), and engineering services, through Spea Engineering S.p.A. ("Spea"). Both companies mainly operate on an intra-group basis.

1.1.2. Control over Atlantia and Autogrill

- (3) Atlantia's main shareholder is Edizione S.r.L ("Edizione"), via Sintonia S.p.A. with a participation of 30.25% of Atlantia's issued capital. Edizione is an Italian holding company that belongs to the Benetton family, which notably controls Autogrill S.p.A. ("Autogrill"), a company active in the provision of concession food services to travellers, mostly on motorways.
- (4) The Commission recently affirmed that in view of Atlantia's shareholding structure and in the absence of specific rights attached to it, Edizione has not "*de jure sole control over Atlantia*"⁵ and that "*considering the past and expected attendance rates at Atlantia's shareholders' meetings (approximately 80%), the level of Edizione's stake in Atlantia is insufficient to conclude that Edizione will have the absolute majority of the votes at Atlantia's shareholders' meetings*".⁶ However, in the light of additional factors, the Commission could not rule out that

³ Publication in the Official Journal of the European Union No C 208/06, 15.06.2018, p. 07.

⁴ With regard to airport infrastructure, Atlantia controls Aeroporti di Roma S.p.A., which manages Rome airports, and Aéroports de la Côte d'Azur S.A. in France.

⁵ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 25.

⁶ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 26.

Edizione exercises de facto sole control over Atlantia and, therefore, that Atlantia and Autogrill belong to the same group.⁷

- (5) ACS and Atlantia submit that no changes in the corporate structure and/or decision-making process have taken place since Atlantia's previous notification of case M.8536 – *Atlantia/Abertis Infraestructuras*.⁸
- (6) For the purpose of this Decision, the question of whether Edizione controls Atlantia can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market even considering that Atlantia is an active player, through Autogrill, for food services concessions.

1.2. ACS

1.2.1. ACS' activities

- (7) ACS is a group of companies active in construction and services activities. ACS' activities are divided into three business areas: (i) construction, (ii) industrial services and (iii) other services.
- (8) Hochtief carries out infrastructure development and building projects in the transport, energy and social and urban infrastructure sectors, as well as mining activities, public-private partnerships (PPP) and other services. In addition to Hochtief, ACS carries out construction projects through Dragados, S.A. ("Dragados") and is active in the concession business through Iridium Concesiones de Infraestructuras, S.A. ("Iridium").

1.2.2. Control over Hochtief

- (9) Currently, ACS holds a stake of 71.72% in Hochtief and there has not been any material change in Hochtief's corporate governance since ACS acquired sole control over Hochtief in 2011 and, most importantly, since the Commission approved Abertis' potential acquisition by Hochtief.⁹
- (10) Post-Transaction, and as explained in section 2 below, as part of the financing of the takeover of Abertis, Atlantia will ultimately acquire the new shares that Hochtief will issue through a capital increase and that will represent a minority shareholding in Hochtief of up to 24.1%, while ACS will continue to hold no less than 50% plus one share of Hochtief's entire share capital.¹⁰ ACS will therefore continue to have a majority of the voting shares represented at general shareholders' meetings, and will therefore be able to pass or reject the resolutions that require a simple majority of votes cast, including the election of

⁷ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 31.

⁸ Form CO, paragraph 7.

⁹ The Commission approved the acquisition of sole control over Hochtief by ACS in Case M.6020 – *ACS/Hochtief* in 2011. See also Form CO, paragraph 114.

¹⁰ Post-Transaction, it is expected that ACS will still hold [...]% of the shares in Hochtief, while the remaining approx. [...]% will remain in free float (Form CO, paragraphs 37 and 150).

shareholders' representatives in Hochtief's Supervisory Board. Atlantia will have customary minority protection rights.¹¹ As a consequence, there will be no veto rights allowing Atlantia to exercise joint control over Hochtief.¹²

- (11) ACS will therefore continue to exercise sole control over Hochtief post-Transaction within the meaning of the Merger Regulation.

1.3. Abertis

1.3.1. Abertis' activities

- (12) Abertis is the parent company of a group operating mostly in the toll roads and telecommunications infrastructure sectors. With regard to toll motorway management in the EU, Abertis is mainly active in the management of toll motorways in Spain (mainly through Acesa, Aumar, Avasa, Iberpistas, Aucat and Invicat among others), in France (through Sanef, including SAPN), and to a lesser extent in Italy (through the A4 Holding - Autostrada Brescia-Padova).¹³
- (13) Abertis also owns a 50% stake in Areamed 2000 S.A. ("Areamed"), a joint venture active in Spain in the food services concession on motorways; and a 35% stake in Bip & Drive S.A. ("Bip&Drive"), which distributes electronic toll payment devices known as on-board equipment (OBE) in Spain.¹⁴ Abertis also operates and issues electronic payment systems through Bip&Go SAS ("Bip&Go") and Eurotoll SAS ("Eurotoll"), and electronic tolling and smart mobility solutions through Emovis SAS ("Emovis") and A4 Mobility Srl ("A4 Mobility").

1.3.2. Control over Areamed

- (14) Areamed is a 50-50 joint venture between Abertis and Areas S.A. ("Areas", of Portugal), a subsidiary of Elixor Group.
- (15) Even though Abertis is not involved in the day-to-day management of Areamed's service areas, the Commission could not exclude in two recent decisions that Abertis jointly controls Areamed together with Areas, exercising a decisive influence over strategic decisions concerning the operation of Areamed.¹⁵ Areamed's shareholding structure and its governance and control mechanisms have not changed since.

¹¹ Form CO, paragraph 151.

¹² ACS and Atlantia's reply dated 29 June 2018 to RFI 8.

¹³ Abertis also owns a 33.33% stake in Road Management Group Limited ("RMG"), a consortium operating two toll motorway concessions in the United Kingdom. The Commission did not exclude in a recent decision that Abertis exercises a decisive influence over strategic decisions concerning the operation of RMG (see Case M.8694 – *Hochtief/Abertis*, paragraphs 11-16).

¹⁴ The Commission approved the acquisition of joint control over Bip&Drive in Case M.7075 – *Cintra/Abertis/Itinere/Bip & Drive JV* in 2014.

¹⁵ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 44; and Case M.8694 – *Hochtief/Abertis*, paragraph 19.

- (16) In any case, for the purpose of this Decision, the question of whether Abertis jointly controls Areamed's operations can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market even considering Abertis as active, through Areamed, on the market for the provision of concession food services.

2. THE OPERATION AND THE CONCENTRATION

- (17) The Transaction constitutes a revised structure of two precedent proposed concentrations notified and cleared unconditionally by the Commission, but never implemented as originally foreseen. Atlantia initially announced a takeover offer for 100% of Abertis' share capital which was approved by the Commission on 13 October 2017.¹⁶ On 6 February 2018, the Commission cleared a competing offer by Hochtief to acquire sole control over Abertis.¹⁷ Subsequently, on 23 March 2018, Atlantia, ACS and Hochtief entered into an Investment Agreement ("the Investment Agreement") by which they modified their respective acquisition projects over Abertis and decided to proceed with a joint investment in Abertis.
- (18) Pursuant to the terms of the Investment Agreement, Atlantia withdrew its offer, while Hochtief modified and completed its competing offer and therefore acquired sole control over Abertis. Subsequently, ACS and Atlantia will incorporate a special purpose vehicle (the "SPV") which will then acquire the shares of Abertis owned by Hochtief. Atlantia, ACS and Hochtief will own interests in the SPV as follows: (i) Atlantia will own 50% plus one share; (ii) ACS will own 30% and (iii) Hochtief will own 20% minus one share.
- (19) In a last step, as explained in Section 1.2 above, Hochtief will issue new shares through a capital increase, which Atlantia will ultimately acquire, representing a minority shareholding in Hochtief up to 24.1%, while ACS will continue to hold no less than 50% plus one share of Hochtief's share capital.¹⁸

2.1. Joint Control

- (20) The governance of the SPV owning Abertis' shares and the governance of Abertis will be regulated by the Shareholders' Agreement ("SHA").¹⁹ Furthermore, ACS and Atlantia entered into [information related to other agreements signed by the Parties].
- (21) According to the SHA, Atlantia will be able to appoint 5 out of 9 directors of the Boards of Directors of the SPV and Abertis. The appointment of senior management will be subject to simple majority. As a consequence, Atlantia will be able to appoint Abertis' CEO and the CFO and will in fact determine the

¹⁶ Case M.8536 – *Atlantia/Abertis Infraestructuras*.

¹⁷ Case M.8694 – *Hochtief/Abertis*.

¹⁸ Atlantia's planned acquisition of a minority shareholding in Hochtief was cleared by the German Bundeskartellamt on 11 May 2018 (ref. B5-106/18).

¹⁹ Sections 3 and 4 of the SHA.

company's daily management. It follows from the above that joint control cannot be established on the basis of equality in voting rights or appointment to decision-making bodies.²⁰

- (22) However, ACS has additional rights which allow it to veto decisions which are essential for the strategic commercial behaviour of the SPV and of Abertis and enable it to co-determine which concessions Abertis is going to acquire and thereby to co-determine the investment strategy of Abertis.
- (23) In this regard, paragraphs 65-71 of the Commission Consolidated Jurisdictional Notice ("CJN") stipulate that in case of a veto right on major investments, the importance of such a veto right for the purposes of assessing control depends on (i) the extent to which investments constitute an essential feature of the market and (ii) the level of investments subject to the approval of the parent companies.
- (24) Pursuant to the SHA,²¹ for the approval by the Shareholders' Meeting of any Reserved Matter, including equity investment, divestment²² decisions or participation in projects above EUR [...] million in aggregate per financial year, the express approval of both ACS and Atlantia is required. In practice, it means that ACS will be able to veto any investment and/or divestment²³ that would go above that threshold. If, however, over a single financial year, there were three single investments of EUR [...] million each, ACS would only be able to exercise its veto as from the third investment.
- (25) In addition, ACS and Atlantia submit that the veto right will also indirectly apply to the financing²⁴ and re-financing²⁵ of projects.
- (26) ACS and Atlantia submit that investment decisions are essential and strategic in the toll motorway sector. In particular, ACS and Atlantia submit that during the last 10 years, equity investments and/or participation in projects and concessions

²⁰ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("CJN")., OJ C95/1, Of 16 April 2008, p. 64

²¹ Sections 3.2 and 4.3 of the SHA.

²² ACS and Atlantia clarify that the veto right will also apply to the disposal of concessions within Abertis' portfolio. See Form CO, paragraph 173 and reply dated 8 May 2018 to question 8(g) of QP1.

²³ ACS and Atlantia clarify that if Abertis carried out a transaction involving a mixed investment/divestment, such as, for example, the divestment of a stake in a concession in return for an acquisition of a stake in another, to the same party, the veto right would apply since the value of the investment would be added up to the value of the divestment. See Form CO, paragraph 171.

²⁴ Paragraph 6 of the Schedule 3.2.2(b) of the SHA, in which it is clearly stated that "*Any M&A transaction (i.e. acquisitions, disposals or equity investments in assets, or participations in projects) above EUR [...] thresholds, in aggregate for one financial year, except for the disposals of [certain ABERTIS' subsidiaries]*" constitute a Reserved Matter.

²⁵ Paragraphs 2 and 7 of the Schedule 3.2.2(b) of the SHA, which respectively provide that (i) "*Any issuance of any equity linked instruments and/or synthetic instruments, excluding exceptionally, to the extent and for the amount strictly required to maintain the Minimum Rating and subject to the terms of this Agreement*" and (ii) "*Any modification to the financial policy or Dividend Policy of the Abertis Group as set forth in this Agreement*" constitute a Reserved Matter.

by Abertis have exceeded – with the only exception of [year] – the EUR [...] million in aggregate per financial year threshold. Furthermore, the large majority of the acquisitions (and disposals) by Abertis of toll motorway concessions within the period 2007 to 2017 exceeded EUR [...] million on a stand-alone basis, and would have sufficed in themselves to trigger ACS' veto right.²⁶ This shows that the threshold of EUR [...] million in aggregate per financial year is low enough to trigger the veto right in most of the projects in which Abertis will participate.

- (27) In terms of post-Transaction investments, ACS and Atlantia submit that they plan to carry out investments of the size and capital commitment as the ones that are usually carried out in the toll motorways sector and that have been carried out over the last 10 years, meaning above the EUR [...] million in aggregate per financial year threshold.²⁷
- (28) Being able to veto investment decisions about whether to acquire or not a toll motorway concession allows deciding about the market presence of Abertis. It is the only decision triggering the presence in the market for the granting of concessions, i.e. the competition *for* the market. As the management and exploitation of the concessions, i.e. competition *in* the market, is subject to ex-ante regulation by the granting authority, the decision to invest is also a decision about the subsequent management and exploitation of the concession. Therefore the acquisition of toll motorway concessions constitutes the core business of Abertis. It follows that such a veto right is of crucial relevance for determining its commercial strategy.
- (29) For the above reasons, the veto right that ACS may exercise with respect to the acquisition of toll motorway concessions and that will be triggered by the EUR [...] million in aggregate per financial year thresholds affects the adoption of strategic decisions within the meaning of paragraphs 65-71 of the CJN.
- (30) In case of deadlock,²⁸ the SHA disposes that the status quo should prevail. However, if five or more unresolved deadlocks occur within the five years following the SHA's effective date, the SHA provides for a clause pursuant to which both ACS and Atlantia have the right to initiate the process for the termination of the SHA.²⁹ [Details on how to proceed for the termination of the SHA in case of a deadlock.]
- (31) [Details on the termination of the SHA]. This mechanism is very cumbersome and long-lasting. It will not only absorb a lot of time and resources but could also lead to the entry of new shareholders which may not be in Atlantia's interest.

²⁶ Table 8, paragraph 175 of the Form CO: "*Abertis' Investments 2007-2018*".

²⁷ ACS and Atlantia's reply dated 8 May 2018 to question 9 of QP1; Form CO, paragraph 177.

²⁸ Section 5.2 of the SHA, pursuant to which, a deadlock exists where an agreement cannot be reached regarding (i) the approval of a Reserved Matter or, (ii) in case of No Majority Shareholder Event, the approval of any matter. [Details on how the parties may proceed in case of deadlock]. If the matter is not resolved, the status quo will prevail.

²⁹ Section 5.3 of the SHA.

Therefore, it is in both ACS and Atlantia's interest to jointly agree on investments/divestments that can be subject to the veto right.

- (32) [Details on the termination of the SHA.] In addition, ACS and Atlantia submit that the likelihood of five or more un-resolved deadlocks taking place during the first five years is very low due to the fact that any deadlock would deteriorate the effectiveness of the governance, of the strategy and therefore of the value of Abertis.
- (33) It follows that the veto right over investments/divestments above EUR [...] million in aggregate per year is in itself sufficient to concede the parent companies joint control over Abertis even though there is no equality between the parent companies in votes or representation in the board of directors. Consequently, ACS has also control over Abertis.

2.2. Full-Functionality

- (34) Abertis will continue to have a management dedicated to its day to day operations, including a CEO and a CFO, and access to financial resources. Abertis will also maintain its current presence in the market, and it will generate revenues through the tolls it charges to the users of the motorways.
- (35) Pursuant to Section 13.1 of the SHA, the initial duration of the SHA is [...] years. [Details of the SHA's renewal], there is a lock-up period [details of the lock-up period].³⁰
- (36) As a consequence, the JV is meant to be on a lasting basis and full functional.

3. EU DIMENSION

- (37) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Atlantia: EUR 5 782 million, ACS: EUR 34 899 million and Abertis: EUR 5 323 million).³¹ Each of them has an EU-wide turnover in excess of EUR 250 million (Atlantia: EUR [...] million, ACS: EUR [...] million and Abertis: EUR [...] million) but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.
- (38) The Transaction has therefore an EU dimension according to Article 1(2) of the Merger regulation.

³⁰ Pursuant to Section 9.2 of the SHA, ACS and/or Atlantia can transfer all or part of their shares to another shareholder or to any wholly-owned subsidiary provided that [conditions to be fulfilled for the transfer of shares].

³¹ Turnover calculated in accordance with Article 5 of the Merger Regulation.

4. MARKET DEFINITION

- (39) ACS, Atlantia and Abertis are active in the market for (i) toll motorway concessions. The Transaction also relates to services ancillary to the operation of toll motorway concessions, such as (ii) the provision of electronic toll systems (ETS)/distribution of on-board units (OBE), (iii) the provision of equipment or services for electronic toll collection (ETC)/intelligent transport systems (ITS) (iv) the construction of infrastructure, (v) food services concessions.
- (40) The definition of all the markets referred to in the above paragraph was addressed by the Commission in the course of its market investigation for Cases M.8536 – *Atlantia/Abertis Infraestructuras* and M.8694 – *Hochtief/Abertis*.

4.1. Toll Motorway Concessions

- (41) The operation of infrastructure concessions in general is an activity where private operators assume responsibility for the design, construction, finance, operation and maintenance of an infrastructure asset for a public sector customer. The contracts are usually long-term contracts and the construction costs and the subsequent maintenance/operation costs tend to be covered by fees paid either by the users of the asset (e.g. motorway tolls) or by the public sector customer throughout the contract term, rather than, as in a normal construction contract, upon completion of the construction. This transfers the responsibility for the financing of the asset from the public to the private sector and this is what drives the public sector to opt for concessions to address their infrastructure needs.
- (42) In prior decisions relating to infrastructure services provided by licensed operators³² such as motorway concessionaires, the Commission has held that competition essentially takes place (i) at the time where the license is granted by the public authorities (competition *for* the market), and (ii) whenever a licensed operator is subject to competition from substitutable alternatives (competition *in* the market).³³
- (43) Therefore, the Commission has distinguished two markets relating to toll motorway concessions: (i) the market for the grant of toll motorway concessions, where supply is represented by public authorities and demand by undertakings or consortia of undertakings with an interest in acquiring toll motorway concessions, and (ii) the market for the transport on toll motorways, consisting in the provision

³² In Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 52, the Commission refers to the its decision practice regarding other infrastructure services provided by licenced operators, such as airport services (Case M.6862 – *Vinci/Aeroportos de Portugal*, paragraphs 11-12), rail services (Case M.5855 – *DB/Arriva*, paragraph 68), water supply and sewage services (Case M.567 – *Lyonnaise des Eaux/Northumbrian Water*, paragraphs 10-12).

³³ Case M.7512 – *Ardian/Abertis/Tunels*, paragraph 19; Case M.7075 – *Cintra/Abertis/Itinere/BIP&Drive JV*, paragraph 25; Case M.5974 – *Finavias/ Abertis/ Autopista Trados M-45*, paragraph 11; Case M.4687 – *Sacyr/Eiffage*, paragraph 26; Case M.4249 – *Abertis/Autostrade*, paragraphs 15-17; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 52; and Case M.8694 – *Hochtief/Abertis*, paragraph 29.

of speedy and secure road transport infrastructures between various geographical points (routes).³⁴

- (44) In the case of motorways, concessionaires bidding for a motorway concession generally earn revenues through (i) direct tolling systems, where the granting authority delegates the construction, funding and management of a road to a managing company, which carries out the works at its expenses and collects the tolls directly from users (distance-based charge) to cover the investment and the maintenance costs (also referred to as "real tolls"); (ii) shadow tolling systems, where the granting authority delegates the construction, funding and management of a road to a managing company, which does not collect any tolls from users (tolls are paid by the road administration based on the number of vehicles using the road); or (iii) availability payment schemes, where the granting authority delegates the construction, funding and management of a road to a managing company, which carries out the work at its expenses and is remunerated by the granting authority according to pre-defined indicators based on road availability and level of maintenance. In this case, users may pay a toll to the granting authority in the form of a "vignette" (time-based charge).³⁵

4.1.1. *The grant of toll motorway concessions*

Regulatory framework

- (45) In this section, the Commission describes the rules applicable to the grant of toll motorway concessions by public authorities, as determined by EU law or the law of EEA countries in which the Parties hold toll motorway concessions.

EU level

- (46) The grant of high value concession contracts in the EU is governed by Directive 2014/23/EU (the "Concessions Directive").³⁶ Considering the investments required for the operation of a toll motorway concession, the award of toll motorway concessions in the EU is likely to fall within the scope of the Concessions Directive.³⁷
- (47) The Concessions Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, which aim at ensuring non-discrimination, fair access to markets and EU-wide competition for high-value concessions. In particular, they provide for the

³⁴ Case M.4087 – *Eiffage/Macquarie/APRR*, paragraphs 18-20. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 42.

³⁵ Case M.8694 – *Hochtief/Abertis*, paragraph 28, in conjunction with Form CO, paragraph 230.

³⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1-64.

³⁷ According to its (amended) Article 8, the Concessions Directive applies to concessions of a value equal to or greater than EUR 5 548 000. The value of a concession is defined as "*the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.*"

mandatory publication at EU level of a concession notice, including a description of the concession and the conditions of participating in the concession award procedure,³⁸ thus preventing the direct award of concession contracts without transparent competition.

- (48) The EU Member States had to transpose the Concessions Directive into their national legislation by 18 April 2016.

Italy

- (49) Pursuant to the transposition of the Concession Directive by legislative decree No. 50/2016 (the "Code"),³⁹ toll motorway concessions are to be awarded pursuant to public tender procedure, on the basis of provisions consistent with those set out in the Concessions Directive.⁴⁰

Spain

- (50) Law 9/2017, of 8 November 2017, on Public Sector Contracts, which came into force on 9 March 2018, partially transposed the Concessions Directive and regulates service concessions and other concessions in general.⁴¹ However, Concession Act 8/1972, which is still in force, is *lex specialis* with regard to motorway concessions.

4.1.1.1. Product market definition

ACS and Atlantia's view

- (51) ACS and Atlantia consider that the relevant product market should be defined as the market for the grant of toll motorway concessions, meaning that no further segmentation should be made between a) direct tolling systems where the motorist is charged based on distance, b) indirect tolling systems where the motorist is charged based on time (e.g. vignette) by the granting authority, also

³⁸ Articles 31 and 33 of the Concessions Directive.

³⁹ Legislative decree No. 50 of 18 April 2016 on the implementation of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services as well as on the revision of the current rules on public contracts for works, services and supplies (*Decreto legislativo 18 aprile 2016, n. 50 - Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonche' per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e furniture*).

⁴⁰ Articles 164 and followings of the Code. In particular, Article 178 provides for specific rules concerning toll motorway concessions and require that new motorway concessions or those expired at the date of entry into force of the Code (i.e. 19 April 2016) be granted according to public tender procedures, unless the granting administration decides to carry out on its own or along with other public authority the management of a given motorway.

⁴¹ Form CO, paragraphs 486-489.

referred to as availability payment schemes and c) shadow tolling systems where the company is remunerated by the granting authority directly.⁴²

- (52) ACS and Atlantia consider two lines of arguments, both on the demand and the supply side.
- (53) On the demand side, the mechanism chosen by the granting authority to remunerate the concessionaire would play a minor role as opposed to other factors, such as, for example, the complexity of the engineering and construction works, the duration of the construction phase, the length of the toll road and the associated operating and capital expenses.
- (54) On the supply side, the reason why a given granting authority would opt, for example, for a direct toll instead of a shadow toll or an availability scheme mechanism would reflect historical preferences rather than competition dynamics.⁴³
- (55) In addition, ACS and Atlantia consider that no segmentation should be made between (i) the primary market, i.e. concessions that are awarded by the granting authorities, and (ii) the secondary market, i.e. the sale of on-going concessions.⁴⁴
- (56) Finally, ACS and Atlantia also submit that there is no need to distinguish between (i) "greenfield" concessions, which include the initial construction and development of the road infrastructure, and (ii) "brownfield" concessions, which refer to the award of the motorway concession once the construction phase is complete and the road is fully operational, since the proposed Transaction would not raise competition concerns regardless of whether a separate market is defined or not.⁴⁵

The Commission's assessment

- (57) In its prior decision practice, the Commission has defined the market for the grant of toll motorway concessions as consisting in the economic activity where supply is represented by the public administration and demand by undertakings or consortia of undertakings with an interest in acquiring the right to operate the toll motorway concessions.⁴⁶
- (58) The results of the Commission's market investigation did not warrant a narrower segmentation within the grant of toll motorway concessions depending on the toll revenue scheme.

⁴² Form CO, paragraphs 230-236.

⁴³ Form CO, paragraph 232.

⁴⁴ Form CO, paragraph 238.

⁴⁵ Form CO, paragraphs 239-241.

⁴⁶ Cases M.7512 – *Ardian/Abertis/Tunels*, paragraph 21; Case M.4249 – *Abertis/Autostrade*, paragraph 15; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 63; Case M.8694 – *Hochtief/Abertis*, paragraph 33.

- (59) Some respondents having expressed an opinion pointed towards a different degree of risk entailed by these three different tolling mechanisms, such as the risk of managing different types of payment, the risk of payment elusion⁴⁷ and, most importantly, traffic volume risk.⁴⁸ More specifically, (i) direct tolling and (ii) shadow tolling would require the concessionaire to take traffic volume risk as opposed to (iii) indirect tolling (availability payment schemes).⁴⁹
- (60) However, the more an economic operator would be financially solvent, the more likely such an economic operator would be capable and willing to face traffic volume risk. As an example, one respondent states that "*[b]idding for a real toll or a shadow toll system normally implies to assume traffic risk. [...] The traffic risk implies higher level of economic and financial risk. This will cause lenders being more demanding on the equity commitment by the sponsors and on financial covenants*".⁵⁰ As an example, one respondent states that "*[m]ore and more the market is seeing industrial companies with large experience teaming up with entities with the financial capacity (funds) to bid for specific projects. Those consortia will be always strong competitors [...]*".⁵¹ One respondent states that "*[i]n the end, toll collection activity can be subcontracted to third parties in the case the bidder has not specific skills*".⁵²
- (61) In the end, the majority of respondents having expressed an opinion consider that the operation of toll motorway concessions through each of (i) direct toll, (ii) indirect toll and (iii) shadow toll payment scheme systems is in essence similar and can be operated by any toll motorway manager interchangeably.⁵³
- (62) More specifically, the majority of granting authorities having expressed an opinion considered that bidding for toll motorway concessions does not require the bidder to have specific resources and abilities to generate revenues through (i) direct tolling, (ii) indirect tolling (availability payment systems) or (iii) shadow tolling systems.⁵⁴
- (63) Although some granting authorities replied that they might favour bidders with a specific background in managing a given toll revenue mechanism over other economic operators when granting a motorway concession, the granting

⁴⁷ Reply to question 7.1 of Q1 – Questionnaire to competitors.

⁴⁸ Reply to questions 7.1 and 8.1 of Q1 – Questionnaire to competitors; reply to question 2.1 of Q2 – Questionnaire to granting authorities.

⁴⁹ Reply to questions 7.1 and 8.1 of Q1 – Questionnaire to competitors; reply to question 2.1 of Q2 – Questionnaire to granting authorities.

⁵⁰ Reply to question 8.1 of Q1 – Questionnaire to competitors.

⁵¹ Reply to question 15.1 of Q1 - Questionnaire to competitors.

⁵² Reply to question 8.1 of Q1 – Questionnaire to competitors.

⁵³ Reply to question 7 of Q1 – Questionnaire to competitors; reply to question 2 of Q2 – Questionnaire to granting authorities.

⁵⁴ Reply to question 3 of Q2 – Questionnaire to granting authorities.

authorities clarified that the criteria on the basis of which granting authorities select the concessionaire are more varied and focus on technical and financial solvency.⁵⁵ As an example, one granting authority states that "*[t]he main requirements are technical and financial solvency, but there are no specific requirements in order to favour bidders with specific background in managing a given toll revenue mechanism against other motorways operators not managing this type of toll revenue scheme*". As an example, one granting authority states that "*[t]he three mechanisms require similar project finance arrangements that we as an authority will not differentiate upon [...]*".⁵⁶

- (64) On the demand side, the majority of competitors having expressed an opinion considered that bidding for toll motorway concessions does not require the bidder to have specific resources and abilities to generate revenues through (i) direct tolling, (ii) indirect tolling (availability payment systems) or (iii) shadow tolling systems..⁵⁷
- (65) Moreover, some respondents also indicated that the three mechanisms at issue require different resources and technical abilities, with (i) direct toll requiring more specific resources and abilities than (ii) shadow toll and (iii) availability payment schemes. Nevertheless, the market investigation confirmed that this technology is easily accessible and that economic operators can easily outsource the relevant technology, establish partnerships or outsource collection and enforcement operations..⁵⁸
- (66) The Commission therefore concludes that the market for the grant of toll motorway concessions should not be further divided according to the remuneration system as the economic risk does not differ to a significant extent and all potential bidders have the necessary resources to operate under any of the three mechanisms either individually or by setting up a consortium.
- (67) In recent cases⁵⁹, the Commission noted that secondary transactions (i.e. the sale of concession holders by their shareholders and their acquisition by new shareholders) present key differences from primary transactions, e.g. secondary transactions are in general not launched at the initiative of the granting authority.
- (68) Nevertheless, the Commission acknowledged that there is some degree of competition for the acquisition of existing concessions, which may involve

⁵⁵ Reply to question 3.1 of Q2 – Questionnaire to granting authorities.

⁵⁶ Reply to question 2.1 of Q2 – Questionnaire to granting authorities.

⁵⁷ Reply to question 8 of Q1 – Questionnaire to competitors.

⁵⁸ Reply to question 7.1 of Q1 – Questionnaire to competitors; reply to question 2.1 of Q2 – Questionnaire to granting authorities.

⁵⁹ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 65-68; Case M.8536 – *Hochtief/Abertis*, paragraph 34.

companies also active in the market for the grant of toll motorway concessions by granting authorities.⁶⁰

- (69) In any event, the Commission considers that for the purpose of this Decision, the question of whether the market for the grant of toll motorway concessions may be further split into greenfield, brownfield or secondary sales of motorway concessions constitute another relevant product market may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.
- (70) Therefore, while it is not necessary to decide on whether secondary sales represent a market, which would be distinct from the grant of toll motorway concessions, the Commission will also take account of the level of competition between ACS, Atlantia and Abertis at the time of secondary sales to assess the effects of the Transaction on the market for the grant of motorway concessions.

4.1.1.2. Geographic market definition

ACS and Atlantia's view

- (71) ACS and Atlantia consider that the geographic market for the grant of toll motorway concessions should be considered at least EEA-wide (and potentially worldwide) in scope.⁶¹

The Commission's assessment

- (72) In the past, the Commission has left open the question of the geographic scope of the market for the grant of toll motorway concessions. While results of prior market investigations pointed out to an at least EEA-wide market,⁶² the Commission did not exclude the existence of national markets.⁶³
- (73) In the light of the market investigations in the most recent Commission's decisions, the Commission left open the question of whether the market for the grant of toll motorway concessions is national, EEA-wide or world-wide.⁶⁴

4.1.1.3. Conclusion on market definition

- (74) In view of the above, the Commission considers that (i) direct tolling systems, (ii) indirect tolling systems and (iii) availability payment schemes are all part of the same market for the grant of toll motorway concessions.

⁶⁰ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 67.

⁶¹ Form CO, paragraphs 242 to 251.

⁶² Case M.4249 – *Abertis/Autostrade*, paragraph 17; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 70; Case M.8694 – *Hochtief/Abertis*, paragraph 36.

⁶³ Case M.4687 – *Sacyr/Eiffage*, paragraph 27. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 70; Case M.8694 – *Hochtief/Abertis*, paragraph 36.

⁶⁴ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 70-78, 80; Case M.8694 – *Hochtief/Abertis*, paragraph 37 and 39-40.

- (75) For the purpose of this Decision, the question of whether brownfield and greenfield concessions constitute a separate or a single relevant product market may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either definition.
- (76) For the purpose of this Decision, the question of whether secondary sales of motorway concessionaires constitute another relevant product market may be left open as well, as the Transaction would not raise serious doubts as to its compatibility with the internal market on that plausible product market.
- (77) With regard to the geographic scope, for the purpose of this Decision, the question of whether the market for the grant of toll motorway concessions is national, EEA-wide or world-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.

4.1.2. *Transport on toll motorways*

4.1.2.1. Product market definition

ACS and Abertis' view

- (78) ACS and Abertis submit that the Commission should only take into account for the assessment of the present transaction the grant of toll motorway concessions, leaving out other means of transport.⁶⁵

The Commission's assessment

- (79) In its prior decision practice, the Commission has considered a market for the transport on toll motorways, also corresponding to the management of motorway concessions, and consisting in the provision of speedy and secure road transport infrastructure between various geographical points (routes).⁶⁶
- (80) In previous cases, the Commission has left open the question of whether alternative modes of transport (for example by rail, air or sea) are in the same market as toll motorways, indicating that the existence and extent of inter-modal competition has to be assessed on a route-by-route basis.⁶⁷

4.1.2.2. Geographic market definition

ACS and Abertis' view

- (81) ACS and Abertis agree with the Origin & Destination ("O&D") method the Commission applied in previous decisions but submit that the exact geographic

⁶⁵ Form CO, paragraphs 252-255.

⁶⁶ Case M.4249 – *Abertis/Autostrade*, paragraph 18; Case M.4087 – *Eiffage/Macquarie/APRR*, paragraph 18; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 89, Case M.8694 – *Hochtief/Abertis*, paragraph 38.

⁶⁷ Case M.5855 – *DB/Arriva*, paragraph 67; Case M.4087 – *Eiffage/Macquarie/APRR*, paragraph 19; and Case M.3770 – *Lufthansa/Swiss*, paragraph 14.

market definition may ultimately be left open, as it would not alter the competitive assessment of the case.⁶⁸

The Commission's assessment

- (82) In its prior decision practice, the Commission has defined transport on toll motorways according to the O&D method, whereby every combination of a point of origin and a point of destination is considered to be a distinct market from the demand side.⁶⁹

Conclusion on market definition

- (83) For the purpose of this decision, the question of whether the provision of transport on toll motorways should be distinguished from other transport modes may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.
- (84) In any event, considering that the Parties do not offer transport infrastructure services other than on toll motorways or toll roads,⁷⁰ the Commission will assess the effects of the Transaction on the narrowest product market, i.e. the provision of transport on toll motorways.
- (85) As to the geographic market definition, for the purpose of this decision, every combination of a point of origin and a point of destination (O&D pair) will be considered as constituting a distinct market.

4.2. Provision of electronic toll systems (ETS)/distribution of on-board units (OBE)

- (86) An OBE is a device installed in the vehicle and read remotely by an antenna installed on motorway tolls for the purposes of allowing the vehicles to pass without stopping to make the toll payment.⁷¹
- (87) In order to electronically collect road tolls, according to ACS and Atlantia, drivers and motorway concessionaires need to enter into contracts with OBE distributors or ETS providers (also referred to as toll service providers – "TSP") that interconnect road users with the road managers, manage the toll collection, and its transfer to the toll motorway managers.⁷²

⁶⁸ Form CO, paragraphs 256-257.

⁶⁹ Case M.7512 – *Ardian/Abertis/Tunels*, paragraph 25; and Case M.4249 – *Abertis/Autostrade*, paragraphs 20-21; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 91, Case M.8694 – *Hochtief/Abertis*, paragraph 48.

⁷⁰ ACS and Atlantia's reply dated 27 June 2018 to question 1 of RFI 7.

⁷¹ Case M.7075 – *Cintra/Abertis/Itinere/BIP & Drive JV*, footnote 3.

⁷² Form CO, paragraph 278.

4.2.1. Regulatory framework

- (88) On 31 May 2017, the Commission proposed⁷³ to recast the EETS directive.⁷⁴ When describing the reasons for and objectives of the proposal, the Commission emphasised that (i) even if the electronic toll collection systems have been deployed at national, regional or local level in 20 Member States and the number of systems is increasing constantly, the vast majority require road users to install special equipment, namely on-board units/on-board equipment ("OBU"/"OBE") in their vehicles. While some offer cross-border interoperability, most do not. This results in costs and burdens for users, who must equip their vehicles with multiple OBUs to be able to drive unhindered in different countries; and (ii) the objectives of the EU legislation at stake – and in particular the pan-European interoperability of electronic road toll systems that was the main objective of the directive – remain largely unattained.⁷⁵

4.2.2. Product market definition

4.2.2.1. Prior decisional practice

- (89) With regard to the distribution of OBE devices, the Commission identified the following five main categories of stakeholders in a previous decision: concessionaires, OBE manufacturers/Intelligent Transport Systems ("ITS") providers, distributors or electronic tolling service provider ("ETSP"), financial institutions, and OBE users (the drivers). The payment of the toll fee can be made either in cash, by credit/debit card or via OBE devices.⁷⁶
- (90) In a prior decision, the Commission concluded that the different methods of toll payment, i.e. in cash, by credit/debit card, or by using an OBE device, do not form part of the same product market.⁷⁷ The Commission therefore defined a market for the distribution of OBE devices.
- (91) The results of the market investigation in Case M.8536 – *Atlantia/Abertis Infraestructuras* were inconclusive with regard to the question of whether the market for the distribution of OBE devices should be considered as a distinct market. While some respondents, in line with the previous Commission's findings, confirmed that OBE devices were not substitutable to other means of toll payment (such as credit/debit card and cash), others indicated that car drivers as well as truck (heavy vehicles) drivers using a toll motorway consider the

⁷³ Proposal for a Directive of the European Parliament and of the Council on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the Union., COM(2017) 280 final, 31.5.2017.

⁷⁴ Directive 2004/52/EC of the European Parliament and of the Council of 29 April 2004 on the interoperability of electronic road toll systems in the Community, OJ L 166/124, 30.4.2004.

⁷⁵ Proposal for a Directive of the European Parliament and of the Council on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the Union (recast) – Section 1.

⁷⁶ Case M.7075 – *Cintra/Abertis/Itinere/Bip & Drive JV*, paragraphs 33-34.

⁷⁷ Case M.7075 – *Cintra/Abertis/Itinere/Bip & Drive JV*, paragraph 36.

different means of toll payment as interchangeable and that once someone has started using an OBE device they would be willing to switch to other means of toll payment if the costs of OBE devices were to increase by 5-10% on a permanent basis.⁷⁸

- (92) In addition, the majority of the respondents to the same market investigation having expressed an opinion indicated that there were no significant differences between the provision of ETS/distribution of OBE to car drivers and the provision of ETS/distribution of OBE to truck drivers, notably in terms of cost and type of devices. However, some respondents also pointed out to a distinction between the two segments notably due to technical interoperability issues.⁷⁹

4.2.2.2. ACS and Atlantia's view

- (93) ACS and Atlantia consider that the exact product market definition can be left open also in this case, as no competition concern should arise under any plausible market definition.⁸⁰

4.2.2.3. The Commission's assessment

- (94) The results of the market investigation referred to in paragraph (92) above have not provided any indication that would make the Commission deviate from the conclusions reached in its precedent cases.

4.2.3. *Geographic market*

4.2.3.1. Prior decisional practice

- (95) In its prior decisions, the Commission has considered the market for the distribution of OBE devices as likely national in scope, even though the OBE device may be interoperable on a wider basis than national basis. When analysing the progress achieved in the implementation of the EETS, the Commission reached the conclusion that there are still different national systems due to technical barriers which have not yet been removed by the Member States and the stakeholders. Therefore, a pan-European interoperability of electronic road toll systems has not been achieved yet.⁸¹

4.2.3.2. ACS and Atlantia's view

- (96) ACS and Atlantia submit the provision of ETS/distribution of OBE is national in scope, as the economic relations between OBE distributors and users are established on a national basis. Nevertheless, ACS and Atlantia ultimately consider that the exact geographic definition of the market can be left open, as

⁷⁸ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 137.

⁷⁹ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 138.

⁸⁰ Form CO, paragraph 284.

⁸¹ Case M.7075 – *Cintra/Abertis/Itinere/BIP&Drive JV*, paragraph 38, and Case M.7512 – *Ardian/Abertis/Tunels*.

there would be no possible competition concern regardless of the geographic scope considered.⁸²

4.2.3.3. The Commission's assessment

(97) The results of the market investigation in the recent Case M.8536 – *Atlantia/Abertis Infraestructuras* were inconclusive with regard to the geographic scope of the market for the distribution of OBE devices. While some of the respondents to the market investigation provided indications towards an EEA dimension, others confirmed that the implementation of the EETS took place only in some of the EEA countries but not in all. For example it is still on-going in Italy and Germany.⁸³ The conclusions reached by the Commission in its recast proposal also clearly point to national markets (see paragraph (88) above).

4.2.4. Conclusion on market definition

(98) For the purpose of this decision, the questions of whether (i) the market for the provision of ETS/distribution of OBE devices constitutes a distinct market, (ii) OBE devices are substitutable to other means of toll payment, and (iii) distribution of OBE to cars should be distinguished from the distribution of OBE to trucks, may be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.

(99) As regards the geographic scope, the question on whether the market for the distribution of OBE devices is national or EEA-wide in scope may be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.

4.3. Provision of equipment and/or services for electronic toll collection (ETC)/intelligent transport systems (ITS)

(100) ETC systems detect the presence of a vehicle passing a toll station, classify it and deduct the correct toll fee.⁸⁴

(101) In order to allow the proper functioning of ETC systems, motorway concessionaires need to install at tolling stations, in proximity of the free flow lane(s), certain roadside equipment, such as tag readers/antennas, as well as other devices such as cameras for automated license plate recognition, or other equipment aimed at automatising the toll fee calculation and collection, that communicate with the drivers' OBE units. The initial set-up of such systems, and/or its maintenance, may be provided either by the same companies already active within the market for the distribution of OBE, or by more specialised companies active in the market for the provision of ITS.⁸⁵

⁸² Form CO, paragraph 289, in conjunction with paragraphs 322 and 369.

⁸³ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 141.

⁸⁴ Case M.8694 – *Hochtief/Abertis*, paragraph 67.

⁸⁵ Form CO, paragraph 134.

(102) ITS are advanced applications which without embodying intelligence as such aim to provide innovative services relating to different modes of transport and traffic management and enable various users to be better informed and make safer, more coordinated and ‘smarter’ use of transport networks.⁸⁶

4.3.1. *Regulatory framework*

Italy

(103) In Italy, Article 177 of the Code (see paragraph (49)) introduced the obligation for the concessionaire to award 60% of the contracts for the provision of services and supplies exceeding a given threshold (EUR 150 000) through a public tender procedure. Consequently, within the abovementioned 60% threshold, intra-group companies interested in the contracts to be awarded have to take part into such public tenders, direct awarding being precluded.⁸⁷

Spain

(104) In Spain, the main regulation in force concerning tender procedures is Law 9/2017, of 8 November 2017, on Public Sector Contracts, which came into force on 9 March 2018 and replaced previous legislation. According its Article 252 the execution of the works that a concessionaire is entitled to perform pursuant to the grant of the concession may be sub-contracted to third parties or to their in-house companies but only through a tender procedure.⁸⁸ As a result, even the assignment of works to in-house companies is subject to a tender procedure.

4.3.2. *Product market definition*

4.3.2.1. *Prior decisional practice*

(105) In a prior decision, the Commission considered a distinction between the provision of ETC equipment (including the manufacture and provision of OBE) and the provision of other ITS equipment, ultimately leaving it open.⁸⁹

4.3.2.2. *ACS and Atlantia's view*

(106) ACS and Atlantia consider that the exact product market definition can be left open also in this case, as no competition concerns would arise under any of the plausible market definitions.⁹⁰

⁸⁶ Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010.

⁸⁷ ACS and Atlantia's reply dated 21 June 2018 to RFI 3, in conjunction with Form CO, paragraph 428.

⁸⁸ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 159 and ACS and Atlantia's reply dated 27 June 2018 to question 2 of RFI 7.

⁸⁹ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 149 and 152.

⁹⁰ Form CO, paragraph 293.

4.3.2.3. The Commission's assessment

- (107) The Commission's market investigation revealed some differences between ETC equipment used for tolling purposes, and other (non-tolling) ITS equipment, used mostly for traffic management and traffic law enforcement. This is because although some companies produce both tolling and non-tolling ITS equipment, in many cases some suppliers specialise in either ETC or in other ITS equipment.⁹¹
- (108) A competitor to the Parties submitted that ETC equipment includes (a) the manufacturing and provision of OBE equipment; (b) roadside equipment for capturing vehicle passages and for detecting toll violators; (c) so called back-office systems, which are centralized computer systems for processing toll transactions, supervision of technical systems and tolling associated commercial business processes like billing or fining traffic law violators; (d) professional services like roadside and back office technical and commercial operations and maintenance.⁹²
- (109) Although the provision of ETC equipment might also include the manufacturing and provision of OBE equipment, the latter activity differs from the distribution of OBE devices to end users for being basically a business-to-business model, as opposed to a business-to-customer model.
- (110) As an example, another respondent to the market investigation pointed out that the provision of certain ETC equipment or services should be included in the market for the grant of toll motorway concessions. This would be the case, for example, of those contracts in which the construction and/or maintenance of the road infrastructure would not be included. Instead, the concessionaire would be granted the rights to design, finance, build, maintain and/or operate national or regional pure tolling systems.⁹³
- (111) ACS and Atlantia argue that these contracts should not be qualified as concession contracts but rather as public procurement contracts.⁹⁴

⁹¹ Replies to question 29.1 of Q1 – Questionnaire to competitors.

⁹² Replies to question 29.1 of Q1 – Questionnaire to competitors.

⁹³ This would be the case, for example of the truck tolling systems currently in Poland, Czech Republic, Germany, Austria and Belgium (reply to question 38 of Q1 – Questionnaire to competitors).

⁹⁴ ACS and Atlantia's reply dated 2 July 2018 to RFI 8: "[...] such contracts concern the provision of systems/services on request of the contracting authority (i.e. the set-up and/or operation and maintenance of ETC system), as such remunerated through the compensation recognised to the service provider, without entailing any transfer of the entrepreneurial risk on the same provider. On the basis of our knowledge, the winner is selected on the basis of the best price/most advantageous economic offer submitted to the contracting authority; and, differently from what usually occurs in case of motorway concessionaires, the remuneration of the ETC provider is not depending on the level of traffic nor on the amount of the toll collected (even when remuneration includes a variable component, such as price per user connected or per amounts of transactions registered through the ETC system, this component is simply aimed at compensating costs borne by the provider for specific activities, such as transactions costs relating to commissions to be paid to financial institutions or costs related to equipment deployed)".

(112) The Commission considers that those contracts should not be included in the market for the grant of toll motorway concessions. Instead, given that these contracts deal with the provision to private or public customers of ETC equipment and/or services, they should be included in the market for the provision of equipment and/or services for ETC, regardless of whether the ETC provider installs the ETC system or whether the ETC provider installs and then operates the ETC system.

4.3.3. Geographic market

4.3.3.1. Prior decisional practice

(113) In prior decisions, the Commission has ultimately left open the question whether the market for the provision of equipment or services for ETC/ITS is national or EEA-wide in scope.⁹⁵

4.3.3.2. ACS and Atlantia's view

(114) ACS and Atlantia consider that the exact geographic definition of the market for the provision of ITS equipment/services can be left open, as the Transaction would not raise any serious doubts as to its compatibility with the internal market under any plausible geographic definition of the market.⁹⁶

4.3.3.3. The Commission's assessment

(115) The results of the market investigation for the Case M.8536 – *Atlantia/Abertis Infraestructuras* case were inconclusive with regard to the geographic scope of the market for ITS equipment or services. While some of the respondents to the market investigation indicated that the conditions of competition (e.g. equipment or services requested by motorways concessionaires, price levels, procedures for the award of the contract by motorways concessionaires) for providing equipment or services for ITS are homogeneous in the EEA, others also provided indications towards significant differences from one EEA country to another.⁹⁷

4.3.4. Conclusion on market definition

(116) For the purpose of this Decision, the question of whether a distinction should be made between the provision and operation of ETC equipment (including the manufacture and provision of OBE) and the provision and operation of other ITS equipment may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

(117) The Transaction would not raise serious doubts either even if a plausible narrower segment is considered for the manufacturing and provision of OBE units.

⁹⁵ Cases M.8694 – *Hochtief/Abertis*, paragraph 74; and Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 153.

⁹⁶ Form CO, paragraph 295.

⁹⁷ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 151.

- (118) As regards the geographic market definition, the question of whether the market for the provision of equipment or services for ETC/ITS is national or EEA-wide in scope may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible geographic market.
- (119) The Commission will therefore consider the same market definition for the provision of equipment or services for ETC/ITS considered for the previous Cases M.8536 – *Atlantia/Abertis Infraestructuras* and M.8694 – *Hochtief/Abertis*.

4.4. The construction of infrastructure

4.4.1. Regulatory framework

- (120) Within the market for the construction of infrastructure, the demand is represented by the State, other contracting authorities, as well as private concessionaires.
- (121) Regarding road construction, the contracts are awarded under a specific regime determined by European and national law.

At EU level

- (122) The award of works contracts related to road concessions is covered by the Concessions Directive as well as Directives 2014/24/EU and 2014/25/EU (the "Public Procurement Directives").⁹⁸

Italy

- (123) In Italy, the regulatory regime related to road construction works on motorways is provided by the legislative Decree No. 50 of 18 April 2016 (*Decreto Legislativo N° 50/2016*) as modified by Law No. 205 of 27 December 2017, implementing the Concessions and Public Procurement Directives. Article 177 of this legislative Decree provides that concessionaires (State-owned and private ones) are obliged to outsource at least 60% of their contracts concerning works, services, and supply. Pursuant to the same provision, when granting such contracts, the concessionaires have to use tendering procedures.

Spain

- (124) In Spain, the legal framework applicable to works related to motorway concessions is set in (i) the Law 9/2017, of 8 November 2017, on Public Sector Contracts, which transposes Directive 2014/24/EU and partially the Concessions Directive, (ii) the Spanish Act 8/1972 of 10 May 1972 on construction, maintenance and operation of motorways, as well as (iii) Decree 215/1973 of 25 January 1973, on the general terms governing the construction, maintenance and operation of motorways under concession. The Spanish Act 8/1972 distinguishes

⁹⁸ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 094 28.3.2014, p. 65, and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 094 28.3.2014, p. 243.

between two types of administrative motorway concessions: on the one hand, construction, maintenance and operation of motorways; on the other hand, maintenance and operation of already constructed motorway sections.

- (125) According to Article 252 of the Law 9/2017 on Public Sector Contracts, the execution of the works that a concessionaire is entitled to perform pursuant to the grant of the concession may be sub-contracted to third parties in line with the provisions of that Law or the specific tender documentation.

4.4.2. *Product market definition*

ACS and Atlantia's view

- (126) ACS and Atlantia submit that the market at stake should be defined as the market for construction of all large infrastructures, including motorways, which encompass also engineering services.⁹⁹

The Commission's assessment

- (127) In its prior decision practice, the Commission has considered the possibility of distinguishing within the market for construction services between (i) large and small infrastructure (divided according to the projects concerned), (ii) roads and other types of infrastructure, and (iii) motorways and other roads.¹⁰⁰
- (128) In a prior decision regarding transport, the Commission has also considered engineering services as a distinct market.¹⁰¹

4.4.3. *Geographic market*

ACS and Atlantia's views

- (129) ACS and Atlantia submit that the appropriate geographical scope of the market should be wider than national given that international construction firms are fully capable of bidding for construction contracts in Member States in which they have no pre-existing presence. In any case, the Parties deem that is not necessary to exactly define the geographical scope of the market, since there would be no competitive concerns regardless of the ultimate market definition chosen.¹⁰²

⁹⁹ Form CO, paragraph 264.

¹⁰⁰ Case M.4087 – *Eiffage/Macquarie/APRR*; Case M.4249 – *Abertis/Autostrade*; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 168; Case M.8694 – *Hochtief/Abertis*, paragraph 54.

¹⁰¹ Case M.6646 – *Alstom Transport SA/FSI/Translohr*; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 170; Case M.8694 – *Hochtief/Abertis*, paragraph 56.

¹⁰² Form CO, paragraph 267.

The Commission's assessment

- (130) In its prior decision practice, the Commission has left open the question on whether the market for construction of infrastructure is national or EEA-wide in scope.¹⁰³

4.4.4. Conclusion on market definition

- (131) For the purpose of this Decision, the question of whether a distinction should be made between (i) large and small infrastructure, (ii) roads and other infrastructure, and (iii) motorways and other roads may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (132) Considering that Abertis is only active in the market for concessions for motorway infrastructure, the Commission will assess the effects on the Transaction on a narrower product market for motorways.
- (133) In addition, the question of whether a distinction should be made between the market for construction of infrastructure and the market for engineering services may also be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible product market.
- (134) As to the geographic market definition, the question of whether the market for construction of infrastructure is national or EEA-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible geographic market.

4.5. Food services concessions

- (135) In its prior decision practice relating to concession food services, the Commission has mainly analysed the competitive dynamics at the time of the award of food services concessions (competition *for* the market).¹⁰⁴
- (136) Considering that Atlantia (through Autogrill) and Abertis (through Areamed) may be subject to the competitive constraint exerted by other providers of conceded services (food services or retail), the Commission has assessed whether, in relation to concession food services, competition *in* the market should also be analysed. For that purpose, and by analogy with the approach taken for toll motorway concessions (see section 4.1 above), the Commission has considered the definition of two distinct markets: (i) the grant (or award) of food services sub-concessions on motorway service areas, and (ii) the provision of food services on motorway service areas.

¹⁰³ Case M.1157 – *Skanska/Scancem*, Case M.4087 *Eiffage/Macquarie/APRR*; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 171; Case M.8694 – *Hochtief/Abertis*, paragraph 57.

¹⁰⁴ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 92.

4.5.1. Regulatory framework

(137) This section describes the rules applicable to the grant of food services sub-concessions by toll motorway concessionaires, as determined by EU law or the laws of EEA countries in which Abertis holds toll motorway concessions.

4.5.1.1. At EU level

(138) The Concessions Directive does not provide for a specific legal regime applicable to the granting of sub-concessions by concessionaires.

4.5.1.2. In Italy

(139) The procedures for the award of all services provided in motorways service areas by motorway concessionaires are subject to the specific regime set forth in Law No. 498/92 (as amended),¹⁰⁵ which notably requires that ANAS S.p.A.¹⁰⁶ approves the schemes of the invitation to tender.¹⁰⁷

(140) Furthermore, the ASPI convention of 12 October 2007 provides the concessionaire with the right of granting sub-concessions for motorway services areas on the basis of competitive, transparent and non-discriminatory procedures, which should be adequately made public.¹⁰⁸

(141) Finally, in 2000, the Italian competition authority (*Autorità Garante della Concorrenza e del Mercato*, "AGCM") scrutinised the acquisition of control of ASPI by Edizione.¹⁰⁹ In that framework, it imposed certain commitments concerning the award of food service concessions on ASPI's motorway network, in order to neutralise a possible strengthening of Autogrill's dominant position on the Italian market for the supply of food services on motorways. The decision notably requires that (i) ASPI fully tenders out the supply of food services on its network, (ii) the tendering procedure is entrusted to an independent body, and (iii) the share of outlets entrusted to Autogrill by Atlantia does not exceed 72%. Those commitments, which have no time limit, still apply to Atlantia and would still apply post-Transaction, unless they are revised following a change in the factual or legal situation on which the AGCM decision was based.¹¹⁰

¹⁰⁵ Law No 498 of 23 December 1992 on urgent intervention on public finance (*Legge 23 dicembre 1992, n. 498 - Interventi urgenti in materia di finanza pubblica*), particular its Article 11.

¹⁰⁶ ANAS S.p.A. (*Azienda Nazionale Autonoma delle Strade*) is the public body responsible for managing the national road network in Italy.

¹⁰⁷ Paragraph 5(d) of Law No. 498/92.

¹⁰⁸ ACS and Atlantia's reply dated 27 June 2018 to question 3, RFI 7.

¹⁰⁹ Case C.3818 – *Edizione Holding/Autostrade Concessioni e Costruzioni*.

¹¹⁰ ACS and Atlantia's reply dated 27 June 2018 to question 4, RFI 7.

4.5.1.3. In Spain

(142) According to Law 37/2015 on roads (the "Road Act"),¹¹¹ sub-concessions for motorway service areas shall be awarded to the most economically advantageous tender following a tender procedure, which shall be approved by the Ministry of Public Works and Transport.

4.5.2. *The grant of food services sub-concessions on motorway services areas*

4.5.2.1. Product market definition

ACS and Atlantia's view

(143) ACS and Atlantia did not contest the Commission's approach in its prior decision practice.¹¹²

The Commission's assessment

(144) In its prior decision practice, when assessing competition at the time of the award of food services concessions (competition *for* the market), the Commission has identified a market for concession food services distinct from contract food services, consisting in the outsourcing or the provision of food service requirements to the public in travel- and retail-related locations and leisure venues.¹¹³

(145) The Commission has further considered whether the market for food services concessions should be divided according to the type of activity primarily carried out in the areas where concession food services are provided (e.g. travel, retail, sports or leisure). Within food services concessions in travel-related locations, the Commission has considered a further sub-division according to the type of locations or venues (e.g. airports, railway stations, motorway service areas).¹¹⁴

(146) Conversely, the Commission has considered whether concession food services provided on motorway service areas are part of a broader market for services ancillary to the operation of toll motorway facilities, also including gas sales or hotel accommodation.¹¹⁵

¹¹¹ Law 37/2015, of 29 September, on roads (*Ley 37/2015, de 29 de septiembre, de carreteras*), in particular its Article 27.

¹¹² Form CO, paragraphs 269-271.

¹¹³ Case M.4762 – *Autogrill/Alpha Airports Group*, footnote 4; Case M.4249 – *Abertis/Autostrade*, paragraph 28; Case M.2977 – *Compass/Onama Spa*, paragraphs 12 and 18; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 102.

¹¹⁴ Case M.4762 – *Autogrill/Alpha Airports Group*, paragraph 12; Case M.3728 – *Autogrill/Altadis/Aldeasa*, paragraph 10; and Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 103.

¹¹⁵ Case M.4087 – *Eiffage/Macquarie/APRR*, paragraph 22; and Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 104.

4.5.2.2. Geographic market definition

ACS and Atlantia's view

- (147) ACS and Atlantia did not contest the Commission's approach in its prior decision practice.¹¹⁶

The Commission's assessment

- (148) In its prior decision practice regarding food services concessions, the Commission has initially considered that the market for concession food services is national in scope,¹¹⁷ before considering it as possibly wider than national.¹¹⁸ With regard to a neighbouring market, i.e. the market for the award of concessions for travel retail services at airports, the Commission has found some indications that the market could be at least EEA-wide in scope.¹¹⁹
- (149) As for toll motorway concessions, it is not possible, at this stage, to conclude firmly on the precise geographic scope of the market for the grant of food services sub-concessions.
- (150) However, the progressive implementation in the national laws of EEA countries of requirements for motorway concessionaires to grant sub-concessions following a transparent competitive procedure as well as the internationalisation of food services concessionaires point towards the definition of an EEA-wide or even worldwide geographic market.¹²⁰

4.5.2.3. Conclusion on market definition

- (151) For the purpose of this Decision, the question of whether there is an overall market for the grant of sub-concessions for commercial ancillary facilities on motorway services areas or whether it should be segmented by type of services or locations may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (152) In addition, the question of whether the market for the grant of food services sub-concessions on motorway service areas is national, EEA-wide or world-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

¹¹⁶ Form CO, paragraph 272.

¹¹⁷ Case M.2977 – *Compass/Onama Spa*, paragraph 17; and Case M.126 – *Accor/Wagons-Lits*, point Y.3.

¹¹⁸ Case M.4762 – *Autogrill/Alpha Airports Group*, paragraph 15; and Case M.3728 – *Autogrill/Altadis/Aldeasa*, paragraph 13.

¹¹⁹ Case M.7622 – *Dufry/ World Duty Free*, paragraph 24; Case M.6263 – *Aelia/Aéroports de Paris/JV*, paragraph 52; and Case M.8536 – *Atlantia/Abertis Infraestructuras* paragraph 111.

¹²⁰ Case M.8536 – *Atlantia/Abertis Infraestructuras* paragraph 114.

4.5.3. *The provision of concession food services on motorway service areas*

4.5.3.1. Product market definition

ACS and Atlantia's view

- (153) ACS and Atlantia did not contest the Commission's approach in its prior decision practice.¹²¹

The Commission's assessment

- (154) The Commission has not, in its past decision practice, defined a market for the provision of concession food services on motorway service areas, distinct from the market for the grant of food services sub-concessions on motorway service areas.
- (155) However, it has identified two neighbouring markets: (i) the provision of retail services at airports, distinct from the market for the award of concession for the operation of retail services at airports;¹²² and (ii) the retail supply of motor fuels (i.e. sales of motor fuels at service stations), possibly divided between sales at motorway and at non-motorway stations.¹²³
- (156) In addition, the Commission has found that there is a market for motorway catering distinct from the market of traditional catering, based on demand-side considerations (captive customers only made of motorway users) and supply-side considerations (wide turnover variations, importance of ancillary services, long opening hours and heavily regulated environment). Within that market, it has distinguished between (i) food services strictly speaking (restaurants), (ii) refreshment services, and (iii) sale of food products.¹²⁴
- (157) In that context, the Commission has assessed (i) whether the market for the provision of food services should be divided between food services provided on motorway service areas and at other locations, and (ii) concession food services provided on motorway services areas represent a part of a wider market also encompassing refreshments services and sale of food products on motorway services areas.

¹²¹ Form CO, paragraphs 273-275.

¹²² Case M.6723 – *Ferrovial/Qatar Holding/CDPQ/Baker Street/BAA*, paragraph 27; Case M.6263 – *Aelia/Aéroports de Paris/JV*, paragraph 18; and Case M.5123 – *Autogrill/World Duty Free*, paragraphs 8 and 16.

¹²³ Case M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraph 28; and Case M.5637 – *Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings*, paragraph 29.

¹²⁴ Case M.126 – *Accor/Wagons-Lits*, points Y.1-2.

4.5.3.2. Geographic market definition

ACS and Atlantia's view

- (158) The view of ACS and Atlantia is that the exact geographic definition of the market can be left open, as no competition concerns arise under any plausible market definition.¹²⁵

The Commission's assessment

- (159) The Commission has not, in its past decision practice, defined the geographic scope of the market for the provision of concession food services.
- (160) Due to the homogeneity in prices and in consumer preferences as well as a possible chain of substitution effect across motorway service areas, it cannot be excluded that the market for the provision of concession food services is national. In addition, supply-side considerations, notably the number of players operating on an at least national basis, would plead in favour of the relevant geographic market being defined as wider than local.¹²⁶

4.5.3.3. Conclusion on market definition

- (161) For the purpose of this decision, the question of whether (i) a distinction should be made between the grant (or award) of food services sub-concessions on motorway service areas, and the provision of food services on motorway service areas and (ii) the market for the provision of concession food services on motorway service areas is part of a wider product market (encompassing other locations or other services) may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (162) Considering that Abertis, as a concessionaire, only manages toll roads and that Autogrill is only active in the provision of food services, the Commission will assess the effects of the Transaction on the narrower product market, i.e. the provision of concession food services on motorway service areas.
- (163) As to the geographic market definition, the question of whether the market for food services concessions is local or national may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible geographic market.

5. COMPETITIVE ASSESSMENT

5.1. Horizontal effects

- (164) The Transaction leads to horizontal overlaps in the following markets: (i) the grant of toll motorway concessions (ACS, Atlantia and Abertis are active on the

¹²⁵ Form CO, paragraph 277.

¹²⁶ Case M.3728 – *Autogrill/Altadis/Aldeasa*; Case M.4249 – *Abertis/Autostrade*; and Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 127 and 128.

demand side), (ii) the provision of ETS/distribution of OBE, (iii) provision of equipment or services for ETC/ITS, (iv) the provision of concession food services and (v) the construction of infrastructure.

5.1.1. *The grant of toll motorway concessions*

- (165) The Transaction would lead to affected markets as follows: First, at EEA level, the Transaction gives rise to a horizontally affected market for the grant of toll motorway concessions in terms of revenues.
- (166) Second, if the geographic market is considered to be national in scope, the Transaction gives rise to a horizontally affected market for the grant of toll motorway concessions in Italy (in terms of km and revenues) and Spain (in terms of km and revenues).

5.1.1.1. Analytical framework

- (167) In its prior decision practice regarding infrastructure managed under concession or franchise contracts, the Commission has assessed the impact of a concentration on the market for the grant of concessions or franchises based on three elements.¹²⁷
- (168) First, the Commission has taken account of the Parties' combined position on the market of the concessions or franchises operated by the Parties, calculated notably on the basis of the number of concessions or franchises, in terms of length (km) or of revenues. Nevertheless, in bidding markets such as the grant of toll motorway concessions, the Commission has acknowledged that those shares reflect the Parties' position based on past grants, but not necessarily the actual or future bidding behaviour and success rate.¹²⁸
- (169) Second, the Commission has analysed historic bidding data, to determine whether the Parties are active bidders and compete head-to-head, as well as whether bidders are expected to enjoy significant incumbency or scale advantages as a result of previous grants of concessions or franchises.¹²⁹
- (170) Third, the Commission has considered the number of alternative bidders in the market and the competitive constraint they exert on the Parties.¹³⁰

¹²⁷ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 175-178. Case M.8694 – *Hochtief/Abertis*, paragraphs 101-104.

¹²⁸ Case M.5855 – *DB/Arriva*, paragraph 32; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 176; Case M.8694 – *Hochtief/Abertis*, paragraph 102.

¹²⁹ Case M.5855 – *DB/Arriva*, paragraphs 33-35; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 177; Case M.8694 – *Hochtief/Abertis*, paragraph 103.

¹³⁰ Case M.5855 – *DB/Arriva*, paragraph 37; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 178; Case M.8694 – *Hochtief/Abertis*, paragraph 104.

5.1.1.2. ACS and Atlantia's view

- (171) ACS and Atlantia claim that the Transaction is unlikely to create any concern relating to the grant of toll motorway concessions for the following reasons.
- (172) First, ACS and Atlantia submit that the market for the grant of toll motorway concessions is a bidding market where high value contracts are awarded following open and transparent tender procedures, which are conducted according to the Concessions Directive, as transposed by the Member States into their national legislation.¹³¹
- (173) Second, ACS and Atlantia submit that the Parties are not close competitors. Atlantia and Abertis specialise in brownfield concessions, which are projects in which the construction is completed so that the road is operational and generating revenue at the time of the investment. In contrast, ACS focuses (through Iridium and Hochtief) on greenfield concessions, which require the design, finance and construction before the road becomes operational.¹³²
- (174) Third, ACS and Atlantia submit that the Parties face strong competition from a wide range of international and local concession companies, construction firms and financial infrastructure investors which are capable to successfully bid, either alone or in consortia, for toll motorway concessions.¹³³

5.1.1.3. The Commission's assessment

Calculation of market presence for toll motorway concessions

- (175) As previously described in section 4.1.1, toll motorway concessions consist of the economic activity where supply is represented by the public administration and demand by undertakings or consortia of undertakings with an interest in acquiring the right to operate the toll motorway concessions.
- (176) Within this framework, ACS and Atlantia claimed that free motorways, i.e. motorways (i) free of charge and (ii) directly operated by a public authority without a concession contract, should be included in the calculation of the total market and the Parties' market presence. According to ACS and Atlantia, it is not exceptional that toll motorway concessions operated by a private company are reverted to the State, and public authorities may eventually put their entire motorway network (including free motorways) on the market place through competing bidding processes.¹³⁴
- (177) However, the Commission considers that the methodology proposed by ACS and Atlantia is not appropriate as it leads to a distorted picture of the competitive

¹³¹ Form CO, paragraph 396.

¹³² Form CO, paragraph 392; ACS and Atlantia's reply dated 4 July 2018 to RFI 9.

¹³³ Form CO, paragraphs 393-394.

¹³⁴ Form CO, paragraphs 342-347, in conjunction with ACS and Atlantia's reply dated 8 June 2018 to RFI 2.

landscape of the market. Indeed, the proposed methodology would not be consistent with the market definition and dilute the Parties' market presence.

- (178) Given the reasons above and in the light of the market definition, the Commission will take a conservative approach whereby the total market size should not include free motorways.¹³⁵
- (179) Moreover, following the previous practice,¹³⁶ the Commission will take a conservative approach whereby every toll motorway concession will be allocated in full to the Parties' market share whenever one of them holds control over a consortium operating a concession, regardless of whether it is joint or sole control.
- (180) Finally, due to the lack of publicly available information on the proceeds for certain concession payment mechanisms (mostly for shadow toll and availability payment schemes) ACS and Atlantia have estimated the total market size in terms of revenues by applying an average ratio "revenue/length" specific to each country.¹³⁷

Combined market presence for toll motorway concessions operated by the Parties

- (181) It follows that, with regard to direct toll motorway concessions, the proposed Transaction would give rise to affected markets for the grant of toll motorway concession at EEA level, and nationally in Italy and in Spain.
- (182) At worldwide level, the Parties operate together [10-20]% of the toll motorway concessions based on km (ACS: [0-5]%, Atlantia: [0-5]%; Abertis: [5-10]%) and [10-20]% of toll motorway concessions based on revenues (ACS: [0-5]%, Atlantia: [5-10]%; Abertis: [5-10]%).¹³⁸
- (183) At EEA level, the Parties operate together [10-20]% of the toll motorway concessions based on km (ACS: [0-5]%, Atlantia: [5-10]%; Abertis: [5-10]%) and [20-30]% of toll motorway concessions based on revenues (ACS: [0-5]%; Atlantia: [10-20]%; Abertis: [5-10]%).¹³⁹
- (184) It follows that the Transaction gives rise to an affected market for the grant of toll motorway concessions based on revenues in the EEA.

¹³⁵ For the purpose of this decision, the Parties' market presence is calculated over a total market size including (i) direct toll, (ii) shadow toll and (iii) availability payment scheme toll motorways only.

¹³⁶ Case M.8694 – *Hochtief/Abertis*, paragraphs 109-112.

¹³⁷ ACS and Abertis' reply dated 8 June 2018 to RFI 2, Note on the Calculation of the Market Shares of Atlantia, Abertis and ACS (Q26-Q27-Q28).

¹³⁸ ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4. For the sake of completeness, the Parties operate [10-20]% of the direct toll motorway concessions based on km and [10-20]% of the direct toll motorway concessions based on revenues at world-wide level.

¹³⁹ ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4. For the sake of completeness, the Parties operate [10-20]% of the direct toll motorway concessions based on km and [20-30]% of direct toll motorway concessions based on revenues at EEA-wide level

- (185) According to the data submitted by ACS and Atlantia, there are, at EEA level, four main competitors, namely Vinci ([5-10]% in km; [10-20]% in revenues), Eiffage ([0-5]% in km; [5-10]% in revenues), Asfinag ([0-5]% in km; [5-10]% in revenues) Brisa ([0-5]% in km; [0-5]% in revenues) and Gruppo Gavio ([0-5]% in km; [0-5]% in revenues).¹⁴⁰
- (186) In Italy, where there are a total of 76 toll motorway concessions, Abertis would add 2 concessions to Atlantia's 21 toll motorway concession portfolio.¹⁴¹
- (187) Altogether, Atlantia and Abertis operate [50-60]% of the toll motorway concessions in Italy based on km (Atlantia: [50-60]%; Abertis: [0-5]%) and [60-70]% of the toll motorway concessions based on revenues (Atlantia: [50-60]%; Abertis: [5-10]%).¹⁴²
- (188) According to the data submitted by ACS and Atlantia, there are, in Italy, three other main competitors, namely Gruppo Gavio ([10-20]% in km; [10-20]% in revenues), Autostrada del Brennero ([5-10]% in km and [5-10]% in revenues) and Autovie Venete ([0-5] % in km; [0-5]% in revenues).¹⁴³
- (189) In Italy, the increment brought about by the Transaction would be of 236 km to the 3 019 km operated by Atlantia and of EUR [...] million to the EUR [...] million of Atlantia.
- (190) In Spain, where there are a total of 76 toll motorway concessions, ACS would add 10 concessions to Abertis' 11 toll motorway concession portfolio.¹⁴⁴
- (191) Altogether, ACS and Abertis operate [30-40]% of toll motorways in Spain based on km (ACS: [10-20] %; Abertis: [20-30]%) and [40-50]% of toll motorways based on revenues (ACS: [0-5]%; Abertis: [30-40]%).¹⁴⁵
- (192) According to the data submitted by ACS and Atlantia, there are, in Spain, three other main competitors, namely Itinere ([10-20] % in km; [5-10]% in revenues), Sacyr ([5-10] % in km; [0-5]% in revenues), Cintra ([5-10] % in km; [0-5]% in

¹⁴⁰ ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4.

¹⁴¹ Form CO, Tables 11 and 12 and Annex 7.I.1.3 to the Form CO, as last reviewed by ACS and Atlantia in their reply dated 8 June 2018 to RFI 2

¹⁴² ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4. For the sake of completeness, Atlantia and Abertis operate [50-60]% of the toll motorways based on km and [60-70]% of the direct toll motorway concessions based on revenues in Italy.

¹⁴³ ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4.

¹⁴⁴ Form CO, Table 12 and Annex 7.I.1.3 to the Form CO, as last reviewed by ACS and Atlantia in their reply dated 8 June 2018 to RFI 2. These figures include the toll motorways reverted to the Spanish State between March and May 2018, and currently operated by SEITT S.A. (a wholly-owned state owned company).

¹⁴⁵ ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4. For the sake of completeness, ACS and Abertis together operate [50-60]% of the direct toll motorway concessions based on km and [60-70]% of the direct toll motorway concessions based on revenues in Spain.

revenues), FCC ([5-10]% in km), Globalvia ([0-5]% in km), Acciona ([0-5]% in km).¹⁴⁶

- (193) In Spain, the increment brought about by the Transaction would be of 580 km to the 1 573 km operated by Abertis and of EUR [...] million to the EUR [...] million of Abertis.
- (194) However, it is worth noting that in bidding markets such as the grant of toll motorway concessions, the Commission has acknowledged that those shares reflect the Parties' position based on past grants, but not necessarily the actual or future bidding behaviour and success rate.¹⁴⁷
- (195) ACS and Abertis' activities in the market for the grant of toll motorway concessions overlap in the UK. However, for the reasons outlined below, the UK is not an affected market. In the UK, where there are a total of 20 toll motorway concessions, Abertis would add one concession to ACS's one toll motorway concession portfolio.¹⁴⁸¹⁴⁹
- (196) Altogether, ACS and Abertis operate [5-10]% of toll motorways in the UK based on km (ACS: [0-5]%; Abertis: [5-10]%) and [5-10]% of toll motorways based on revenues (ACS: [0-5]%; Abertis: [0-5]%).¹⁵⁰
- (197) According to the data submitted by ACS and Atlantia, there are, in the UK, five other main competitors, namely IFM Investments ([0-5] in km; [5-10] in revenues), Sir Robert McAlpine ([10-20] in km), Balfour Beatty ([30-40] in km), Equitix ([10-20] in km) and Semperian PPP invest ([10-20] in km).¹⁵¹
- (198) In the UK, the increment brought about by the Transaction would be of 22 km to the 74 km operated by Abertis and of EUR [...] million to the EUR [...] million of Abertis.

Historic bidding data and closeness of competition

- (199) ACS and Hochtief provided data on the 112 tenders for the grant of toll motorway concessions launched in the EEA between 2005 and 2017 in which either ACS or Abertis have participated.¹⁵²

¹⁴⁶ ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4.

¹⁴⁷ Case M.5855 – *DB/Arriva*, paragraph 32; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 176; Case M.8694 – *Hochtief/Abertis*, paragraph 102.

¹⁴⁸ Form CO, Annex 7.I.1.3, as last reviewed by ACS and Atlantia in their reply dated 8 June 2018 to RFI 2.

¹⁴⁹ Form CO, Table 12; Annex 7.I.1.1. to the Form CO.

¹⁵⁰ ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4. For the sake of completeness, ACS and Abertis do not operate any direct toll motorway in the UK.

¹⁵¹ ACS and Atlantia's reply dated 22 June 2018 to question 1 of RFI 4.

¹⁵² Form CO, paragraphs 390 to 392; Form CO, Annex 8.1.

- (200) In the countries where Atlantia, and/or ACS, and/or Abertis are active, there have been: 26 tenders in Spain, 12 in Portugal, 11 in Germany, 9 in Ireland, 8 in France, 7 in the UK, 6 in Italy, 6 in The Netherlands, 6 in Greece, 1 in Poland;
- (201) Atlantia has not participated in any of these tenders, save for the prequalification phase of a public tender procedure launched by ANAS S.p.A. on June 13, 2012, for the award of a concession relating to the building, operation and maintenance of the A21 motorway Piacenza-Cremona-Brescia with a branch to Fiorenzuola D'Arda. On November 14, 2014, the Italian Ministry of Infrastructures and Transport (which in the meantime succeeded to ANAS S.p.A. as grantor) admitted ASPI to the subsequent phase, but ASPI never submitted a binding bid.¹⁵³
- (202) ACS has participated in 82 of the above-mentioned 110 EEA tenders and won 26 times.
- (203) ACS and Atlantia submit that Abertis has participated in only five tenders: through Sanef in four tenders in France¹⁵⁴, of which it has won one, and through Acesa in one tender in Spain, which it lost.¹⁵⁵
- (204) Moreover, ACS and Atlantia submit that neither Atlantia nor Abertis have been very active bidders since 2005. More specifically, in the EEA, Atlantia only participated in two procedures (in Italy)¹⁵⁶ and Abertis in five procedures, including four in France (through SANEF) and one in Spain (through Acesa). Abertis successfully participated in one out of those five procedures (in France).¹⁵⁷

¹⁵³ Form CO, paragraph 390: ACS and Atlantia explain that an ASPI subsidiary (i.e. Società Autostrade Meridionali – SAM S.p.A.) made a bid for the renewal of the A3 Napoli-Salerno concession, further to its expiration on December 31, 2012. Abertis did not take part to such competitive bid.

¹⁵⁴ Form CO, paragraph 390, these tenders are: the A355 Highway Strasburg, the Lyon North Ring-Road, the A150 Ecalles-Alix to Barentin (Rouen-Le Havre) and the A88 Motorway Falaise-Sees.

¹⁵⁵ Form CO, paragraph 390.

¹⁵⁶ Atlantia, through ASPI, participated in 2012 in the pre-qualification phase for the award of a concession relating to the building, operation and maintenance of the A21 motorway Piacenza-Cremona-Brescia with a branch to Fiorenzuola D'Arda. Atlantia was admitted to the subsequent phase, but it never submitted a binding bid. In addition, one of ASPI's subsidiaries (i.e. Società Autostrade Meridionali – SAM S.p.A.) made a bid for the renewal of the A3 Napoli-Salerno concession, further to its expiration in 2012. Abertis did not participate. In this respect, we specify that, on 10 August 2012, the Italian government published a call for tender on the Official Journal. A total of five companies were shortlisted, but ultimately only two of them submitted proposals: namely SAM (a subsidiary of ASPI) and [a competitor]. However, the granting authority took the final decision to disqualify both bidders from the tender process.

¹⁵⁷ As to Italy, Abertis' entry in such country was achieved through a secondary transaction, more precisely through the acquisition of a majority shareholding in A4 Holding in 2016, and not through the grant of a toll motorway concession by the competent Italian roads authority.

- (205) In addition, ACS and Atlantia submit that (i) ACS and Atlantia have never participated in the same award procedure¹⁵⁸, that (ii) Atlantia and Abertis have not competed for the same toll motorway concessions to be awarded by public authorities in the EEA over the last ten years¹⁵⁹ and that (iii) ACS and Abertis competed against each other for the award of the same motorway concession contract only once.¹⁶⁰
- (206) In addition, ACS and Abertis have not competed directly against each other, even taking into account secondary transactions (i.e. sale and acquisition of existing concessionaires) in the EEA.¹⁶¹
- (207) The granting authorities having expressed an opinion in the market investigation confirmed that ACS, Atlantia and/or Abertis never competed against each other since 2005. Furthermore, the majority of granting authorities consider that absent the Transaction, the Parties are not expected to compete against each other.¹⁶² Indeed, one granting authority stated that "*[o]nly one party [...] has ever submitted bids and there was never competition between each other*".¹⁶³ Another granting authority stated that "*[...] we have not seen any historic head-to-head competition for concessions or electronic tolling [...] between*" ACS and Abertis.¹⁶⁴
- (208) The majority of the granting authorities having expressed an opinion in the market investigation do not consider ACS, Atlantia and Abertis as being the closest or close competitors to each other overall.
- (209) In Italy, where ACS is not present, Gruppo Gavio is indicated as being the closest competitor of Atlantia.¹⁶⁵
- (210) In Spain, where Atlantia is not present, two out of the three granting authorities having expressed an opinion consider, on the one hand, Abertis as being the closest competitor of ACS and, on the other hand, Itinere and Cintra as being ACS' close competitors.¹⁶⁶ One of those two granting authorities considers Itinere

¹⁵⁸ For the sake of completeness in 2008 Atlantia (via ASPI) and Hochtief took part in competing consortia in the frame of the privatisation procedure concerning the A1 motorway (AD Buchholz to Bremer Kreuz). However, at that time Hochtief was not part of ACS Group.

¹⁵⁹ Form CO, paragraph 390. Form CO, paragraph 392; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 184.

¹⁶⁰ ACS and Abertis' subsidiary Acesa participated to the same consortium to bid for the C-25 greenfield concession in 2007 in Spain, but they didn't win.

¹⁶¹ Form CO, paragraph 391.

¹⁶² Reply to questions 4 and 4.1 of Q2 - Questionnaire to granting authorities.

¹⁶³ Reply to question 4.1.1. of Q2 - Questionnaire to granting authorities.

¹⁶⁴ Reply to question 4.1.1. of Q2 - Questionnaire to granting authorities.

¹⁶⁵ Reply to question 6 of Q2 - Questionnaire to granting authorities.

¹⁶⁶ Reply to questions 6 and 7 of Q2 - Questionnaire to granting authorities.

as being the closest competitor of Abertis. However, the same granting authority considers Cintra and ACS as being Abertis' close competitors. The other granting authority does not consider any of the Parties as being the Abertis' closest or close competitor.¹⁶⁷

- (211) However, the majority of granting authorities having expressed an opinion in the market investigation responded that there would still be, post-Transaction, a sufficient number of companies competing with the Parties to prevent the risk that granting authorities receive less advantageous offers in Italy, Spain, UK and, more generally, at EEA level.¹⁶⁸
- (212) The majority of competitors having expressed an opinion in the market investigation do not consider ACS, Atlantia and Abertis as being the closest or close competitors to each other overall.
- (213) In Italy, where ACS is not present, the majority of competitors having expressed an opinion in the market investigation do not consider ACS, Atlantia and Abertis as being the closest or close competitors to each other.¹⁶⁹ The majority of competitors having expressed an opinion in the market investigation consider that Atlantia's closest competitor in Italy is Gruppo Gavio.¹⁷⁰ Two competitors consider Abertis as being the closest competitor of Atlantia, whilst three competitors consider Atlantia as the closest competitor of Abertis.¹⁷¹
- (214) In Spain, where Atlantia is not present, the majority of competitors having expressed an opinion in the market investigation do not consider ACS, Atlantia and Abertis as being the closest or close competitors to each other. Cintra and Globalvia are indicated as being the closest competitors of ACS.¹⁷² Globalvia is indicated as being the closest competitor of Atlantia.¹⁷³ Cintra, Globalvia and Itinere are indicated as being the closest competitors of Abertis.¹⁷⁴ Two competitors, however, consider Abertis as the closest competitor of ACS.¹⁷⁵ One of those two competitors considers ACS as being a close competitor of Abertis.¹⁷⁶

¹⁶⁷ Reply to questions 6 and 7 of Q2 - Questionnaire to granting authorities.

¹⁶⁸ Reply to questions 6 and 7 of Q2 - Questionnaire to granting authorities.

¹⁶⁹ Reply to question 10 of Q1 - Questionnaire to competitors.

¹⁷⁰ Reply to question 10 of Q1 - Questionnaire to competitors.

¹⁷¹ Reply to question 10 of Q1 - Questionnaire to competitors.

¹⁷² Reply to question 11 of Q1 - Questionnaire to competitors.

¹⁷³ Reply to question 11 of Q1 - Questionnaire to competitors.

¹⁷⁴ Reply to question 11 of Q1 - Questionnaire to competitors.

¹⁷⁵ Reply to question 11 of Q1 - Questionnaire to competitors.

¹⁷⁶ Reply to question 11 of Q1 - Questionnaire to competitors.

- (215) However, the majority of competitors having expressed an opinion in the market investigation consider that there would be a sufficient number of companies competing with ACS, Atlantia and Abertis for toll motorway concessions to prevent the risk that granting authorities receive less advantageous offers.¹⁷⁷
- (216) The fact that ACS is not closest competitor to Atlantia and Abertis is also confirmed by the Parties' commercial strategy. ACS has a specific focus on greenfield concessions, whilst Atlantia and Abertis specialise in on-going concessions (brownfield concessions or secondary transactions).¹⁷⁸

Parties' bidding strategies

- (217) The Parties bidding strategy further confirms that ACS, Atlantia and Abertis are not each other's closest competitors.
- (218) First, ACS has a specific focus on greenfield concessions, whilst Atlantia and Abertis specialise in on-going concessions (brownfield concessions or secondary transactions).¹⁷⁹ This explains limited past and recent activity of Atlantia and Abertis on the market for the grant of toll motorway concessions at EEA and worldwide levels.¹⁸⁰ As a consequence, ACS and Atlantia claim that ACS is not to be seen as a close competitor of Atlantia and of Abertis.
- (219) The results of the Commission's market investigation also support the complementarity of ACS' construction activities and appetite for greenfield concessions, against Atlantia and Abertis' preference for mature assets and less risky brownfield investments.¹⁸¹
- (220) Second, ACS and Atlantia submit that the acquisition of existing concessionaires in some non-EEA countries, (e.g. Turkey, Brazil and Chile) offers more attractive risk-return profiles, hence more interesting business opportunities, than in EEA countries.¹⁸² Therefore, ACS and Atlantia submit that Atlantia intends to focus on secondary sales outside of the EEA.¹⁸³

¹⁷⁷ Reply to question 13 of Q1 - Questionnaire to competitors.

¹⁷⁸ Form CO, paragraph 392. ACS and Atlantia's reply dated 4 July 2018 to RFI 9. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 187-190.

¹⁷⁹ Form CO, paragraph 392; ACS and Atlantia's reply dated 4 July 2018 to RFI 9. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 187-190.

¹⁸⁰ Form CO, paragraph 392; ACS and Atlantia's reply dated 4 July 2018 to RFI 9. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 187-190.

¹⁸¹ Reply to questions 5 and 5.1 of Q2 - Questionnaire to granting authorities; reply to questions 9 and 9.1 of Q1 - Questionnaire to competitors.

¹⁸² Form CO, paragraph 392; ACS and Atlantia's reply dated 4 July 2018 to RFI 9. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 187-190.

¹⁸³ Form CO, paragraph 392; ACS and Atlantia's reply dated 4 July 2018 to RFI 9. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 187-190.

- (221) The Commission has found no evidence running counter to ACS and Atlantia's statements regarding their investment strategies and business plans.
- (222) As a consequence, the Commission considers that, absent the Transaction, Atlantia and Abertis would have continued to give priority to secondary sales and, as far as Atlantia is concerned, to infrastructure projects outside of the EEA.¹⁸⁴,
- (223) This finding would also apply to Italy, the only EEA country where both Atlantia and Abertis currently hold toll motorway concessions. In fact, Abertis' internal documents confirm that it has a strategic focus on [Business secret]. Although it cannot be excluded that Abertis, as an exception to this strategic focus, could bid for the renewal of the concession awarded to A4 Holding (subsequently acquired by Abertis), it should be considered that (i) it is at least uncertain whether Atlantia would have bid for that concession absent the Transaction, considering that it did not bid for the acquisition of A4 Holding and, (ii) in any case, any potential loss of competition would not materialise before 2027, when the concession awarded to A4 Holding expires.¹⁸⁵

Barriers to entry or expansion

- (224) ACS and Atlantia submit that there are no specific barriers to entry, given that economic operators that have already been granted a toll motorway concession are not better placed than potential entrants.¹⁸⁶
- (225) In addition, ACS and Atlantia submit that possible barriers to entry that stem from the bidding specifications can be easily surmounted by current or potential competitors in so far as they are strong integrated companies and that they take part to such tenders in consortia.¹⁸⁷
- (226) According to ACS and Atlantia, integrated companies would be able to bid as part of consortia in view of getting specific expertise deemed to be useful for a given project.¹⁸⁸ According to ACS and Atlantia, members of the consortia are not usually the same and consortia can also combine in different ways works/equipment/services provided by single members: even integrated companies, having in-house competences, may leave to other partners of the consortium the responsibility to provide them. In addition, financial funds, pension funds and sovereign funds can bid together with integrated companies.¹⁸⁹

¹⁸⁴ Form CO, paragraph 392; ACS and Atlantia's reply dated 4 July 2018 to RFI 9. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 187-190.

¹⁸⁵ Form CO, paragraph 392; ACS and Atlantia's reply dated 4 July 2018 to RFI 9. Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 187-190.

¹⁸⁶ Form CO, paragraph 495, in which ACS and Atlantia refer to paragraph 193 of the Commission's decision in Case M.8536 – *Atlantia/Abertis Infraestructuras*.

¹⁸⁷ Form CO, paragraph 496.

¹⁸⁸ Form CO, paragraph 497.

¹⁸⁹ Form CO, paragraph 497.

- (227) In particular, the bidding data provided by Atlantia tend to demonstrate that the submission of bids by consortia is frequent.¹⁹⁰ These consortia enable the combination of different skills and spread financial risks among several companies, thus mitigating the advantages in terms of integration or scale of largest concessionaires.
- (228) Some respondents to the market investigation identify the established position of certain companies on the market, experience or reputation, language barriers, loyalty to public authorities, high investments, know-how and access to important technology as the barriers to enter or expand in the market for toll motorway concessions.¹⁹¹ Nevertheless, the Commission considers that the Transaction is unlikely to have a major impact on these barriers to entry or expansion, as confirmed by the majority of respondents to the market investigation having expressed an opinion.¹⁹²
- (229) The Commission also considers entry not to be particularly difficult. One competitor stated that "*[e]xperience and financial capacity will continue to be the main barriers and those will not change with the Transaction. More and more the market is seeing industrial companies with large experience teaming up with entities with the financial capacity (funds) to bid for specific projects. Those consortia will be always strong competitors [...]*".¹⁹³ Another competitor confirmed that "*[t]he Transaction does not affect the investment capacity of potential competitors [...]*".¹⁹⁴
- (230) In addition, the Concessions Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, which aim at ensuring non-discrimination, fair access to markets and EU-wide competition for high-value concessions. In particular, they provide for the mandatory publication at EU level of a concession notice, including a description of the concession and the conditions of participating in the concession award procedure,¹⁹⁵ thus preventing the direct award of concession contracts without transparent competition.
- (231) The EU Member States had to transpose the Concessions Directive into their national legislation by 18 April 2016. And the implementation of the Concessions Directive is expected to promote the treatment on an equal footing of incumbent

¹⁹⁰ Out of the 112 tenders carried out in the EEA in which either ACS or Abertis have participated between 2005 and 2017 for which it has been possible for ACS and Atlantia to collect information on winners, an integrated company bidding alone was granted the concession in only six cases.

¹⁹¹ Reply to question 14 of Q1 - Questionnaire to competitors; reply to question 8 of Q2 - Questionnaire to granting authorities.

¹⁹² Reply to question 15 of Q1 - Questionnaire to competitors; reply to question 9 of Q2 - Questionnaire to granting authorities.

¹⁹³ Reply to question 15.1 of Q1 - Questionnaire to competitors.

¹⁹⁴ Reply to question 15.1 of Q1 - Questionnaire to competitors.

¹⁹⁵ Articles 31 and 33 of the Concessions Directive.

and non-incumbent concessionaires, considering that conceding authorities are required to apply harmonised selection criteria guaranteeing that the motorway concessions are awarded to the most economically advantageous tenders.¹⁹⁶

Other bidders

- (232) ACS and Atlantia submit that there are a number of large companies competing for the grant of toll motorway concessions at the EEA level, such as the groups Vinci, Eiffage, Brisa, Sacyr or Cintra. ACS and Atlantia submit that in the last ten years, Vinci participated in 23 tenders in the EEA and won nine; Sacyr participated in 14 tenders in the EEA and won four.¹⁹⁷ Considering the significant level of integration of those large companies, they are expected to continue competing for the grant of toll motorway concessions, even if the merged entity were to stop participating in bidding consortia post-Transaction".¹⁹⁸
- (233) Similarly, ACS and Atlantia submit that at national level, there are a number of companies competing for the grant of toll motorway concessions in the market, namely: (i) in Spain, the groups Sacyr, Cintra, Globalvia and Acciona are to be regarded as strong competitors as they are identified amongst the successful winners of several tender procedures for motorway concessions in the bidding data submitted by ACS and Atlantia and (ii) in Italy, Gruppo Gavio is particularly active and successful in the market.¹⁹⁹
- (234) As a consequence, ACS and Atlantia claim that, post-Transaction, there would be a sufficient number of strong and skilled competitors for the grant of toll motorway concessions to prevent the risk that granting authorities receive less advantageous offers as a consequence of the weakening of competition.²⁰⁰
- (235) A majority of both the competitors and granting authorities that expressed an opinion during the market investigation consider that, post-Transaction, there would be a sufficient number of companies competing with the Parties for toll motorway concessions to prevent the risk that conceding authorities receive less advantageous offers in Italy and Spain, as well as in other EEA countries.²⁰¹

¹⁹⁶ One granting authority stated in its reply to question 9.1 of Q2 - Questionnaire to granting authorities that "[...] entry conditions are in any case defined by criteria established in the tender that do not depend on the company size".

¹⁹⁷ Form CO, paragraph 393.

¹⁹⁸ Form CO, paragraph 393.

¹⁹⁹ Form CO, paragraph 394.

²⁰⁰ Form CO, paragraph 395.

²⁰¹ Reply to questions 13 and 13.1 of Q1 - Questionnaire to competitors; reply to questions 7 and 7.1 of Q2 - Questionnaire to granting authorities.

(236) More generally, the majority of respondents to the market investigation having expressed an opinion consider that there would be sufficient competition left, entry is not difficult and the market is regulated.²⁰²

5.1.1.4. Conclusion

(237) In view of the above considerations and of the outcome of the market investigation, meaning that (i) neither Atlantia or Abertis have been very active bidders over the last ten years in the EEA; (ii) ACS, Atlantia and/or Abertis never competed against each other since 2005 and absent the Transaction, the Parties are not expected to compete against each other; (iii) the complementarity of the Parties' business focus; (iv) the number and strength of the remaining competitors, (v) the degree of regulation of the award procedures for the grant of toll motorway concessions, and (vi) the fact that the majority of respondents to the market investigation expect sufficient competition to prevent the Parties from raising prices in tenders, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the grant of toll motorway concessions or to secondary transactions, under any plausible geographic market definition (national, EEA-wide or worldwide).

5.1.2. *Transport on toll motorways*

(238) In the EEA the Parties provide transport on toll motorways in the following Member States: Atlantia in Italy and Poland; ACS group in Spain, Germany, United Kingdom, Ireland, Portugal, Greece and the Netherlands; Abertis in Spain, France, Italy and the United Kingdom. The Transaction thus gives rise to horizontal links between the Parties in Italy, Spain, and the United Kingdom.

5.1.2.1. ACS and Atlantia's view

(239) ACS and Atlantia submit that their networks do not overlap in terms of O&D. Therefore, the Transaction has no impact whatsoever on the structure and the functioning of the market for the transport on toll motorways.²⁰³

5.1.2.2. The Commission's assessment

(240) Despite the fact that the Parties hold motorway concessions in Italy, Spain and the United Kingdom, the motorways held by the Parties connect different O&D pairs, and therefore the Transaction does not give rise to any relevant horizontal overlap in the market for transport on toll motorways.²⁰⁴

²⁰² Reply to question 16.1 of Q2 - Questionnaire to granting authorities; reply to question 36.1 of Q1 Questionnaire to competitors.

²⁰³ Form CO, paragraphs 304-307.

²⁰⁴ All possible O&D pairs for the transport infrastructure managed by the Parties in Italy, Spain and the United Kingdom are illustrated in the maps provided by ACS and Atlantia - Form CO, Annexes 7.I.1.5 and 7.I.1.6.

5.1.3. Provision of ETS/distribution of OBE

(241) Atlantia and Abertis both operate as TSP in Italy (Atlantia through Telepass), in Spain (Abertis through Bip&Drive and Bip&Go) and in France (Abertis through Bip&Drive, Bip&Go and Eurotoll).²⁰⁵ ACS has no presence in the market for the provision of ETS/distribution of OBE.²⁰⁶

5.1.3.1. ACS and Atlantia's view

(242) ACS and Atlantia consider that the Transaction will not give rise to any concerns related to unilateral effects on the provision of ETS/distribution of OBE.²⁰⁷

(243) First, at national level, the Parties' activities for the provision of ETS/distribution of OBE do not overlap. Second, at EEA level, there would remain strong enough competing companies.

5.1.3.2. The Commission's assessment

(244) The Transaction does not give rise to affected markets, if the market for the distribution of OBE was considered national.²⁰⁸

(245) At EEA level, the Transaction gives rises to an affected market, with the Parties' combined market share reaching [30-40]% for all drivers, and [30-40]% when considering the potential segment for car drivers only. The increment brought about the Transaction is less than [5-10]% (Abertis would respectively add [5-10]% and [5-10]% to Atlantia's Telepass).²⁰⁹

(246) The majority of the respondents having expressed an opinion during the Commission's market investigation submitted that the Transaction would not have an impact on the provision of ETS/OBE,²¹⁰ and that there would be sufficient competition post-Transaction to prevent the Parties from raising prices or degrading service quality for the provision of ETS/OBE.²¹¹ These results are in line with the responses to the market investigation for the recent Case M.8536 –

²⁰⁵ Some of Telepass' OBEs are interoperable and can also be used in France, Belgium, Spain, Portugal, Austria, Denmark and Poland (Form CO, paragraph 365); Bip&Drive is also present in Portugal (Form CO, paragraph 367).

²⁰⁶ Form CO, paragraph 366.

²⁰⁷ Form CO, paragraph 372.

²⁰⁸ There would be a de-minimis overlap for the distribution of OBE in France, where Atlantia's Telepass sold [...] OBE units for heavy vehicles during the year 2017, which represent [0-5] % of the total OBE units sold in France (Form CO, paragraph 366).

²⁰⁹ Form CO, Annex 7.IV.

²¹⁰ Replies to question 37 of Q1 – Questionnaire to competitors and question 18 of Q2 – Questionnaire to Granting Authorities.

²¹¹ Replies to question 36 of Q1 – Questionnaire to competitors; and question 16 of Q2 – Questionnaire to Granting Authorities.

Atlantia/Abertis Infraestructuras, for which the same horizontal overlap for the provision of ETS/distribution of OBE was also addressed, and the market investigation did not identify any concerns with respect to uncoordinated effects due to the horizontal overlap on the market for the provision of ETS/distribution of OBE, either at EEA or at national level.²¹²

- (247) Affected markets at EEA level mainly result from the monopoly currently enjoyed by Atlantia in Italy, which however pre-dates the Transaction and it is therefore not merger-specific. Moreover, Atlantia and Abertis will face competition, post-Transaction, from a number of other OBE distributors, such as ViaVerde, Vinci, APRR (owned by Eiffage) and Toll Collect with individual market share of approximately [10-20]%, [5-10]%, [5-10]% and [0-5]% respectively for all drivers, and with ViaVerde, Vinci and APRR also present in the segment for car drivers only with individual market shares of [10-20]%, [10-20]% and [5-10]% respectively.
- (248) Considering a sub-segmentation for the distribution of OBE for cars only at EEA level appears to be less relevant, because a very high proportion of OBE devices in Europe are not technically interoperable and can only be used in a single country.²¹³ If an EEA-wide market was considered for the distribution of OBE devices for heavy vehicles – for being those that travel cross-border on a regular basis, the Parties' combined market share would be as low as [5-10].²¹⁴
- (249) Finally, two major operators active at EU level in different Member States, namely DKV and Axxès (a company controlled by the Vinci group), are entering the Italian market with their own OBE. DKV has already obtained the required authorisations/certifications to operate on the Italian toll motorway network. Such process could plausibly be completed by the end of the current year 2018. Axxès is in an advanced phase to obtain the authorisation/certification. In addition, Total, another relevant player at the EU level has started contacts with the Italian authorities in charge of the granting of the authorization in order to enter the Italian market.²¹⁵

5.1.3.3. Conclusion

- (250) In view of the above, and considering notably (i) the fact that no affected markets arise at national level, (ii) the limited increment brought about by the Transaction at EEA level, and (iii) the number and strength of remaining competitors, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in respect of the market for the provision of ETS/distribution of OBE, under any plausible segmentation.

²¹² Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 166.

²¹³ In 2017, only Telepass distributed OBE devices for cars interoperable within different EEA countries (Form CO, Annex 7.IV).

²¹⁴ Form CO, Annex 7.IV.

²¹⁵ Atlantia's and ACS' reply dated 21 June 2018 to RFI 3.

5.1.4. Provision of equipment or services for ETC/ITS

(251) Atlantia and Abertis are both active as providers of ETC systems in the EEA, through Autostrade Tech (Atlantia, mainly active in Italy, but also in Austria, Spain, France and Poland), Emovis (Abertis, active in Croatia, France, Ireland and the UK) and A4 Mobility (Abertis, active in Italy).²¹⁶ ACS has no presence in the market for the provision of equipment or services for ETC/ITS.²¹⁷

5.1.4.1. ACS and Atlantia's view

(252) ACS and Atlantia submit that the Transaction would not give rise to any affected markets for the provision of equipment or services for ETC/ITS, either at EEA level or at national level, even if a plausible narrower market is considered for the manufacture and provision of OBE.²¹⁸

5.1.4.2. The Commission's assessment

(253) With regard to the overall market for the provision of ITS equipment or services, the proposed Transaction does not give rise to any affected markets both at EEA level and at national level.²¹⁹

(254) On a narrower market for the provision of ETC equipment, the Parties' combined market shares in 2017 do not give rise to any affected market either at EEA level or at national level.²²⁰

(255) If an even narrower market for the manufacture and provision of OBE is considered, the proposed Transaction would not lead to an overlap, since only Atlantia, through Autostrada Tech, is engaged in the production of OBE.²²¹

(256) The majority of the respondents having expressed an opinion during the Commission's market investigation for this case submitted that the Transaction would not have an impact on the provision of ETC systems,²²² and that there

²¹⁶ Some of Telepass' OBEs are interoperable and can also be used in France, Belgium, Spain, Portugal, Austria, Denmark and Poland (Form CO, paragraph 365); Bip&Drive is also present in Portugal (Form CO, paragraph 367); and ACS has no presence in this market (Form CO, paragraph 366).

²¹⁷ Form CO, paragraphs 324 and 376.

²¹⁸ Form CO, paragraphs 325-326.

²¹⁹ Form CO, tables 40 and 41.

²²⁰ Form CO, tables 40 and 41.

²²¹ Neither ACS nor Abertis (through A4 Mobility or Emovis) are active in the manufacture of OBE (ACS and Atlantia's reply dated 21 June 2018 to question 5 of RFI 3).

²²² Replies to question 37 of Q1 – Questionnaire to competitors and question 18 of Q2 – Questionnaire to Granting Authorities.

would be sufficient competition post-Transaction to prevent the Parties from raising prices or degrading service quality for the provision of ETC systems.²²³

- (257) The majority of the respondents having expressed an opinion during the Commission's market investigation submitted that the Transaction would not have an impact on the provision of equipment or services for ETC/ITS,²²⁴ and that there would be sufficient competition post-Transaction to prevent the Parties from raising prices or degrading service quality for the provision of equipment or services for ETC/ITS.²²⁵ These results are in line with the responses to the market investigation for the recent Case M.8536 – *Atlantia/Abertis Infraestructuras*, for which the same horizontal overlap for horizontal overlaps brought about by the proposed Transaction for the provision of equipment or services for ETC/ITS were also addressed, and the market investigation did not identify any concerns with respect to uncoordinated effects due to the horizontal overlap on the market for the provision of equipment or services for ETC/ITS in the EEA or at national level.²²⁶
- (258) With regard to those contracts described in paragraphs 110-112 above, the Commission considers, by examining the type of contracts that have been tendered out by public authorities since 2010, that neither Atlantia nor Abertis have to date won any such contract and did not realise any revenues in the EEA.²²⁷
- (259) The tenders in which at least either Atlantia or Abertis participated in the last nine years are the following:²²⁸ (i) Italy – ETC system for motorways directly managed by ANAS (2010),²²⁹ (ii) France - Ecotaxe project (2010),²³⁰ (iii) Hungary - Heavy vehicles free flow tolling system, (2012),²³¹ (iv) Belgium - Heavy vehicles free flow tolling system, (2013),²³² (v) Ireland – ETC free flow tolling system on M50, (2015),²³³ (vi) Slovenia – Heavy vehicles free flow tolling system, (2015),²³⁴ (vii)

²²³ Replies to question 36 of Q1 – Questionnaire to competitors; and question 16 of Q2 – Questionnaire to Granting Authorities.

²²⁴ Replies to question 37 of Q1 – Questionnaire to competitors and question 18 of Q2 – Questionnaire to Granting Authorities.

²²⁵ Replies to question 36 of Q1 – Questionnaire to competitors; and question 16 of Q2 – Questionnaire to Granting Authorities.

²²⁶ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 230.

²²⁷ ACS and Atlantia's reply dated 2 July to RFI 8.

²²⁸ ACS and Atlantia's reply dated 2 July to RFI 8.

²²⁹ ACS and Atlantia explain that [information about bidders].

²³⁰ ACS and Atlantia explain that: [information about bidders].

²³¹ ACS and Atlantia explain that: [information about bidders].

²³² ACS and Atlantia explain that: [information about bidders].

²³³ ACS and Atlantia explain that: [information about bidders].

Austria - Heavy vehicles free flow tolling system, (2016),²³⁵ (viii) Germany – Tender for the acquisition of Toll Collect GmbH, (2016) (on-going),²³⁶ (ix) Poland– Takeover of the existing tolling system and/or replacement with a new system proposed by the bidder, (2017),²³⁷ (x) Greece – replacement of the current tolling system, (2018) (on-going).²³⁸

- (260) These data show that there have been only three overlaps since 2010, namely: (i) France (2010), where Sanef bid but the contract with Atlantia was terminated, (ii) Belgium (2013), where the consortium in which Atlantia participated ultimately decided not to present a binding offer and (iii) Germany, the only situation where both Atlantia and Abertis are participating in the bidding process which has recently been launched. However, no binding offer has been submitted yet in this respect.
- (261) As of today, there are other strong and credible companies operating pure tolling systems at national or regional, including companies not only active in construction and/or services sectors, but also in the telecommunication, financing and/or technological sectors, such as Deutsche Telekom, DaimlerChrysler Services and Vinci, currently in Germany (through their joint venture Toll Collect).

5.1.4.3. Conclusion

- (262) Given the absence of an affected market, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in respect of the market for the provision of equipment or services for ETC/ITS, under any plausible segmentation.

5.1.5. *The provision of concession food services on motorway service areas*

- (263) Considering that Areamed (and through it Abertis) is not active in the market for the grant of food services sub-concessions on motorway service areas (i.e. Areamed does not compete *for* the market), the Commission will solely assess the effects of the Transaction on competition in the provision of concession food services on motorway service areas.
- (264) Abertis only provides concession food services in Spain, through the management by Areamed of 20 motorway service areas and the operation of 28 food services entrusted by Areamed to Areas.²³⁹ Assuming that Atlantia and Autogrill belong to

²³⁴ ACS and Atlantia explain that: [information about bidders].

²³⁵ ACS and Atlantia explain that: [information about bidders].

²³⁶ ACS and Atlantia explain that: [information about bidders].

²³⁷ ACS and Atlantia explain that: [information about bidders].

²³⁸ ACS and Atlantia explain that: [information about bidders].

²³⁹ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 207 confirmed by ACS and Atlantia's reply dated 25 June 2018 to RFI 5.

the same group, Atlantia also provides concession food services on motorway service areas in Spain.

5.1.5.1. ACS and Atlantia's view

(265) ACS and Atlantia submit that the Transaction does not give rise to serious competition concerns.²⁴⁰

5.1.5.2. The Commission's assessment

(266) At the level of each motorway service area in Spain, the activities of Abertis (through Areamed) and Atlantia (through Autogrill) do not overlap. Due to the small or medium size of Spanish motorway service areas, only one sub-concessionaire operates services outlets on each service area. Autogrill has no outlets on the toll motorways managed by the ACS group.²⁴¹

(267) Furthermore, the food services outlets operated on service areas managed by Areamed are not located in the vicinity of those operated by Autogrill.²⁴² As an exception, Autogrill and Areamed both operate on AP7 around the city of Tarragona with Autogrill's outlets located south of Tarragona and Areamed's outlets north of Tarragona.²⁴³ The services provided by Autogrill and Areamed can be seen as substitutable only by drivers entering AP7 before Tarragona and exiting AP7 after Tarragona. Therefore, considering the location of the outlets and the distance between the closest Autogrill's and Areamed's outlets (approximately 50 km), the competitive constraint exerted by Autogrill and Areamed on AP7 is limited.²⁴⁴

(268) If the market for the provision of concession food services on motorway service areas is defined as national, the Transaction would give rise to an affected market in Spain, where Autogrill and the food services outlets on Areamed's service areas respectively hold [10-20]% and [20-30]% of the market (in revenues).²⁴⁵

(269) However, Abertis only exercises an indirect control over the food services outlets located on Areamed's motorway service areas. Indeed, while Abertis jointly

²⁴⁰ Form CO, paragraph 320; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 209 confirmed by ACS and Atlantia's reply dated 25 June 2018 to RFI 5.

²⁴¹ Form CO, paragraph 362.

²⁴² Form CO, paragraph 362; Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 210 confirmed by ACS and Atlantia's reply dated 25 June 2018 to RFI 5.

²⁴³ Form CO, paragraph 362 and Annex 7.III; Case M.8536 - *Atlantia/Abertis Infraestructuras*, paragraph 211 confirmed by ACS and Atlantia's reply dated 25 June 2018 to RFI 5.

²⁴⁴ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 211 confirmed by ACS and Atlantia's reply dated 25 June 2018 to RFI 5.

²⁴⁵ Form CO, paragraph 319 and Table 32.

controls Areamed, the latter sub-leases the food services facilities to Areas, which has the main responsibility for the operation of the food services outlets.²⁴⁶

(270) Finally, Autogrill and Areamed will still face, post-Transaction, the competition of a number of strong competitors, e.g. Elixor (via Areas, the other parent of Areamed, who will not have an interest to support an exclusionary strategy by Areamed),²⁴⁷ Grupo Abades, Cafestore or Serviáreas.²⁴⁸

5.1.5.3. Conclusion

(271) In view of the above, and considering notably the geographic coverage of each of Atlantia's (through Autogrill) and Abertis' (through Areamed) outlets, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the provision of concession food services on motorway service areas, under any plausible geographic market definition (local or national).

5.1.6. *The Construction of infrastructure*

(272) Atlantia is active in the sector of infrastructure works through Pavimental and its in-house engineering services company Spea. The ACS group is active in this sector through Dragados and Hochtief. Abertis is not active in this sector.

5.1.6.1. ACS and Atlantia's view

(273) ACS and Atlantia submit that the Transaction does not give rise to affected market under any plausible market definition.²⁴⁹

5.1.6.2. The Commission's assessment

(274) According to the market share information provided by ACS and Atlantia, their combined EEA-wide market shares are well below 20% under any plausible market definition, including the segment of motorway construction. The construction activities of the Parties on national level overlap only in Poland where their combined market shares are also well below 20% under any plausible market definition, including the segment of motorway construction. In addition, Atlantia's Pavimental is mainly an in-house construction company generating [...] % of its sales within the group. In Poland, all of its sales were realised within the group.²⁵⁰

²⁴⁶ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 214; Form CO, paragraph 28.

²⁴⁷ Elixor has, in Spain, [40-50] % of the market for concession food services on motorways (in revenues) if the turnover of food services outlets located on the motorway service areas managed by Areamed are allocated to Elixor and [10-20] % if it is allocated to Abertis. Form CO, Table 32.

²⁴⁸ Their shares of the Spanish market for concession food services on motorways (in revenues) are the following: Grupo Abades: [10-20] %; Cafestore: [5-10] %; Serviáreas: [5-10] %. Form CO, Table 32.

²⁴⁹ Form CO, paragraphs 308-313.

²⁵⁰ Form CO, paragraphs 308-313 and Tables 22-28.

5.1.6.3. Conclusion

(275) Given the absence of an affected market, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market in respect of the markets for construction of infrastructure.

5.2. Vertical effects

(276) In this section, the Commission will examine whether the Transaction is likely to result in foreclosure in any of the markets that are vertically affected by the Transaction.

5.2.1. Legal framework

(277) According to the Non-Horizontal Merger Guidelines, foreclosure occurs when actual or potential rivals' access to markets is hampered, thereby reducing those companies' ability and/or incentive to compete. Such foreclosure can take two forms: (i) input foreclosure, when access of downstream rivals to supplies is hampered; and (ii) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered.²⁵¹

(278) For input or customer foreclosure to be a concern, three conditions need to be met post-Transaction: (i) the Parties needs to have the ability to foreclose its rivals; (ii) the Parties needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the downstream market (input foreclosure) or on customers (customer foreclosure). In practice, these factors are often examined together since they are closely intertwined.

5.2.2. Overview of the vertically affected markets

(279) Taking account of the Parties' individual or combined market shares exceeding 30%, the Transaction gives rise to the following vertically affected markets: (i) the provision of ETS/distribution of OBE and the grant of toll motorways concessions, (ii) the provision of ETC/ITS equipment/services and toll motorways, (iii) the provision of ETC/ITS equipment/services and the provision of ETS/distribution of OBE, (iv) The grant of food services sub-concessions and the provision of concession food services on motorway service areas, and (v) the construction of infrastructure and grant of toll motorways concession.

5.2.3. The provision of ETS/distribution of OBE and the grant of toll motorways concessions

(280) As already described in section 1, Atlantia and Abertis both operate as TSP in Italy (Atlantia through Telepass), in Spain (Abertis through Bip&Drive and Bip&Go) and in France (Abertis through Bip&Drive, Bip&Go and Eurotoll).

²⁵¹ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the "Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p.7.

(281) The Commission will assess in this section whether post-Transaction, (i) ACS and Atlantia would have the ability and incentive to restrict the access to actual or possible competitors for the provision of ETS/distribution of OBE to the Parties' toll motorway network (customer foreclosure) mostly in Italy and Spain; and (ii) ACS and Atlantia's subsidiaries would have the ability and incentive to reduce or stop contracting with competitors of Atlantia and Abertis for the exploitation of toll motorway concessions (input foreclosure).

5.2.3.1. Customer foreclosure

ACS and Atlantia's view

(282) ACS and Atlantia submit that it is implausible that the Parties would pursue a strategy of foreclosing third-party OBE distributors post-Transaction.

(283) In this regard, ACS and Atlantia submit that they might have the ability to foreclose actual or potential OBE distributors by restricting third parties access to the toll reading equipment installed at the Parties' toll stations, mostly in Italy (due to the strong combined position of Atlantia and Abertis) and in Spain (due to the strong combined position of ACS and Abertis). However, ACS and Atlantia claim that they would lack the incentives to pursue such conduct, notably because such a strategy would make limited business sense, considering inter alia the interests of the concessionaires in maximising the volumes of vehicles and revenues collected on their motorways and thus, their interest in expanding to the maximum the number of potential suppliers.²⁵²

The Commission's assessment

(284) In its assessment of the recent Case M.8536 – *Atlantia/Abertis Infraestructuras*, the Commission analysed the same vertical link brought about by the Transaction and it did not identify any concerns with respect to the upstream market for the provision of ETS/distribution of OBE.²⁵³ The proposed Transaction would not bring about any major change as compared to the vertical overlap already assessed for the Case M.8536 – *Atlantia/Abertis Infraestructuras* in Italy, France and Poland, where ACS is not active neither in the exploitation of toll motorway concessions nor in the provision of ETS/distribution of OBE.

(a) Ability

(285) Downstream, as described in section 5.1.1, the Parties' position for the exploitation of toll motorways at worldwide and EEA level is rather limited post-Transaction. In Italy however Atlantia and Abertis operate together [60-70]% of the toll motorway concessions based on revenues and [50-60]% based on km. In Spain, similarly, ACS and Abertis operate together [40-50]% of the toll motorway concessions based on revenues and [30-40]% based on km.

(286) The results of the market investigation produced mixed results. A majority of the respondents having expressed an opinion consider that ACS and Atlantia would

²⁵² Form CO, paragraphs 421-422.

²⁵³ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 288.

not likely have the ability, post-Transaction, to reduce or stop contracting with competitors of Telepass, Bip&Go or Eurotoll for the provision of ETS neither in Spain nor in any other EEA country.²⁵⁴

- (287) However, there were some voices raising concerns. One competitor to the Parties submitted however that ACS and Atlantia would have the ability to foreclose OBE distributors mostly because the regulatory framework established by the EETS has not been fully embodied to date.²⁵⁵
- (288) Another competitor to the Parties submitted that Abertis' A4 motorway will reinforce Atlantia's strong position for the exploitation of toll motorway concessions in Italy, where no other TSP besides in-house Telepass has a contract with Atlantia. With regard to Spain, another competitor to the Parties submitted however that even if a hypothetical scenario in which Telepass enters as a new TSP, there would be no relevant impact to the current competitive scenario.²⁵⁶
- (289) OBE distribution is governed by legal rules ensuring access in an open and non-discriminatory way, through technologies which comply with open and public rules available to all manufacturers and distributors on a non-discriminatory basis.²⁵⁷ Such clear legal obligations may thus restrain ACS and Atlantia to engage in illegal conducts which could be easily identified and sanctioned.²⁵⁸
- (290) The Commission considers that, despite the Parties' strong position on the market for exploitation of toll motorway concessions in Italy and Spain, the legal obligation to not discriminate OBE distributors should refrain from foreclosing them. ACS and Atlantia, together with Abertis, are therefore not likely to enjoy a significant degree of market power and to have the ability to foreclose potential OBE distributors from the market for the distribution of OBE devices, by restricting or limiting their access to the toll reading equipment installed at the Parties' toll stations.

(b) *Incentive*

- (291) The majority of respondents having expressed an opinion during the market investigation indicated that ACS and Atlantia would likely have, post-Transaction, an incentive to reduce or stop contracting with competitors of

²⁵⁴ Replies to question 23 of Q1 – Questionnaire to competitors.

²⁵⁵ Replies to question 23.1 of Q1 – Questionnaire to competitors.

²⁵⁶ Replies to question 23.1 of Q1 – Questionnaire to competitors.

²⁵⁷ See Directive 2004/52/EC, notably its Article 4, and Decision 2009/750/EC on the interoperability of electronic road toll systems in the Community, notably its Article 5(3). See also the Commission's Proposal (to recast Directive 2004/52/EC) for a Directive of the European Parliament and of the Council on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the Union – May 2017. As a result, once an operator has fulfilled the preliminary certification/authorisation step, toll motorway concessionaires, including the Parties, are therefore under an obligation to negotiate in good faith and on a non-discriminatory basis with all ETS providers.

²⁵⁸ Non-Horizontal Merger Guidelines, paragraph 46.

Telepass, Bip&Go, Bip&Drive or Eurotoll for the provision of ETS, both in Spain and in other EEA countries.²⁵⁹

- (292) One respondent to the market investigation expressed the concern that the Parties might have an incentive to reduce or delay contracts with new toll service providers in order to promote the cross-border interoperability of their OBE equipment. Another respondent claimed that the Parties would have an incentive to offer certain advantages to end customers (for example price promotions) against third party OBE units in order to make their business as toll service provider grow.²⁶⁰
- (293) The Commission considers that the Parties' incentive to engage in a foreclosure strategy by restricting access of current or potential OBE distributors is unlikely for the following reasons.
- (294) First, Atlantia and Abertis' strong position in Italy and Spain respectively for the exploitation of toll motorway concessions already exists pre-Transaction, and the incremental effect brought about the proposed Transaction (notably the addition by Abertis to Atlantia in Italy, and the addition to ACS to Abertis) remains limited. Second, as the Commission has recognised already in prior decisions, motorway concessionaires have no incentive to foreclose third-party existing and future providers of ETS/OBE distributors,²⁶¹ as concessionaires intend to maximise the volumes of vehicles on their motorways and the revenues from collecting motorway tolls.
- (295) The Commission considers that, in view of the limited incremental effect brought about the Transactions, and the fact that a potential foreclosure strategy appears to be unprofitable, ACS and Atlantia, together with Abertis, will likely not have an incentive to foreclose OBE distributors from the market for the distribution of OBE devices, by restricting or limiting their access to the toll reading equipment installed at the Parties' toll stations.

(c) *Effects*

- (296) Although the Parties are not likely to have the ability and incentive to engage in costumer foreclosure, the majority of respondents to the market investigation having expressed an opinion also indicated the proposed Transaction would likely decrease competition for the provision of ETS/distribution of OBE both in Spain and in other EEA countries, leading to higher prices and lower quality of the services.²⁶²
- (297) However, the Commission considers that even if the Parties had the ability and incentive to engage in costumer foreclosure the acquisition of joint control over Abertis by ACS and Atlantia will likely not give rise to significant detrimental

²⁵⁹ Replies to question 24 of Q1 – Questionnaire to competitors.

²⁶⁰ Replies to question 24.1 of Q1 – Questionnaire to competitors.

²⁶¹ Case M.7075 – *Cintra/Abertis/Itinere/Bip & Drive JV*.

²⁶² Replies to question 25 of Q1 – Questionnaire to competitors.

effects in the upstream market for the provision of ETS/distribution of OBE because of the limited increment to the Parties' individual market shares brought about by the Transaction and the modest combined market shares of the Parties post-Transaction in the market for grant of toll motorways concessions (see section 5.1.1.3 above).

Conclusion

- (298) In light of the above consideration and taking account of all evidence available to it, the Commission considers that even if ACS and Atlantia, together with Abertis, had the ability to engage in a customer foreclosure strategy in order to exclude ETS providers/OBE distributors from the market, its incentive to engage in such a strategy remains unlikely as a result of the proposed Transaction and any effect would not be significant.
- (299) Based thereupon, the Commission concludes that it would be unlikely that Abertis and ACS would pursue a strategy of foreclosing third-party ETS providers/OBE distributors post-Transaction.

5.2.3.2. Input foreclosure

ACS and Atlantia's view

- (300) ACS and Atlantia submit that it is implausible that the Parties would pursue a strategy of foreclosing third-party motorway concessionaires for the provision of ETS/distribution of OBE post-Transaction.
- (301) In this regard, ACS and Atlantia submit that they might have the ability to foreclose competing toll motorway operators, notably Telepass due to its dominant position in Italy. However, ACS and Atlantia claim that such conduct would be deprived of any economic sense, because ETS/OBE contracts last for several years, and Telepass would have no interest in stopping the provision of its services to some of Atlantia's competing concessionaires.²⁶³

The Commission's assessment

- (302) In its assessment of the acquisition of control of Abertis by Atlantia, the Commission did not identify any concerns with respect to the downstream market for the exploitation of toll motorway concessions by third party concessionaires.²⁶⁴ The proposed Transaction would not bring about any major change as compared to the vertical overlap already assessed for the Case M.8536 – *Atlantia/Abertis Infraestructuras* in Italy, France and Poland, where ACS is not active neither in the exploitation of toll motorway concessions nor in the provision of ETS/distribution of OBE.

²⁶³ Form CO, paragraphs 423.

²⁶⁴ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 297.

(a) *Ability*

- (303) At EEA level, the Parties' combined market share would be [30-40]% for the distribution of OBE to all drivers (with an increment of [5-10]%). If a narrower product market for the distribution of OBE to car drivers only is considered, the Parties' combined market share would reach [30-40]% (with an increment of [5-10]%). In Italy, Atlantia, through Telepass, is the sole provider of ETS/OBE, serving more than 20 concessionaires. On the other hand, Atlantia's position in Spain and France is insignificant on this market.
- (304) A majority of the respondents having expressed an opinion during the market investigation consider that Telepass, Bip&Go or Eurotoll would not likely have the ability, post-Transaction, to reduce or stop contracting for the provision of ETS to competitors of Atlantia, ACS or Abertis neither in Spain nor in any other EEA country.²⁶⁵
- (305) The Commission considers nevertheless that, in view of Atlantia's monopoly position in Italy, the Parties will likely have the ability to reduce or stop contracting for the provision of ETS/distribution of OBE with motorway concessionaires. However, this ability pre-dates the Transaction and is therefore not merger specific.

(b) *Incentive*

- (306) The Commission considers that ACS Atlantia's incentive to engage in a foreclosure strategy in Italy by reducing or stopping contracting, for the provision of ETS, with motorway concessionaires post-Transaction, would be unlikely.
- (307) First, once a toll motorway concession has been granted to a rival operator, it seems in Atlantia's interest to allow Telepass to work on that motorway. In this respect, it is unlikely that the Parties will sacrifice Telepass' profits from servicing a motorway whose concession may last several years just to weaken a third-party concessionaire in a future tender. Second, while already enjoying a monopoly position pre-Transaction in Italy, Atlantia has not followed such strategy in the past and it is unlikely that its behaviour will change in the future. Finally, any additional incentive to foreclose third parties bidders as a result of the integration with Abertis remains limited.
- (308) The majority of respondents having expressed an opinion during the market investigation confirmed that Telepass, Bip&Go, Bip&Drive, and Eurotoll, post-Transaction, would not have the incentive to reduce or stop contracting with competitors of Atlantia, ACS and Abertis for the provision of ETS neither in Spain nor in any other EEA country.²⁶⁶
- (309) The Commission considers that, in view of the legal obligation to refrain from discriminating any ETS provider/OBE distributor, the limited incremental effect brought about the Transactions, and the fact that a potential foreclosure strategy

²⁶⁵ Replies to question 26 of Q1 – Questionnaire to competitors.

²⁶⁶ Replies to question 27 of Q1 – Questionnaire to competitors.

appears to be unprofitable, the Parties will likely not have an incentive to foreclose ETS provider/OBE distributors from the downstream market for the provision of ETS/distribution of OBE devices, by restricting or limiting their access to the toll reading equipment installed at the Parties' toll stations.

(c) *Effects*

- (310) As regards the overall likely impact on competition, the Commission considers that the acquisition of joint control by ACS and Atlantia over Abertis will not give rise to detrimental effects in the downstream market for the provision of ETS/distribution of OBE, notably as the potential incremental foreclosure effect would be limited.
- (311) A majority of respondents to the market investigation having expressed an opinion also indicated that there would likely be no impact on competition at national level for the grant of toll motorway concessions should ACS and Atlantia decide to engage in a customer foreclosure strategy post-Transaction.²⁶⁷

Conclusion

- (312) Based on the above, and considering all evidence available to it, the Commission concludes that a customer foreclosure strategy for the provision of ETS/distribution of OBE, with third-party motorway concessionaires would be unlikely as a result of the proposed Transaction.

5.2.4. *The provision of equipment or services for ETC/ITS and the grant of toll motorway concessions.*

- (313) The Commission will assess in this section whether, post-Transaction, ACS and Atlantia would have the ability and incentive to restrict access from their toll motorway networks to competing providers of ETC/ITS (customer foreclosure).²⁶⁸

5.2.4.1. ACS and Atlantia's view

- (314) ACS and Atlantia submit that, although the Parties could theoretically have the ability to foreclose third parties ITS (and in particular ETC) providers in Italy and in Spain, they will not have any incentive to pursue such a strategy.²⁶⁹

²⁶⁷ Replies to question 28 of Q1 – Questionnaire to competitors.

²⁶⁸ The Commission will not assess input foreclosure for considering it highly unlikely. The Parties combined market share for the provision of equipment or services for ETC/ITS is well below 20% under any plausible market segmentation, both at EEA level and at national level. Atlantia's Autostrade Tech and Abertis' A4 mobility mainly operate in Italy on intra-group basis. Abertis also controls Emovis, active in a number of EEA countries (but not in Italy or in Spain) which serves mainly third-parties. Out of the combined revenues of these three companies (EUR [...] million in 2017) approximately [...] % was generated in-house. In addition, the majority of the respondents having expressed an opinion in the market investigation submitted that the Parties would have neither the ability nor the incentive to reduce or stop contracting with other toll motorway concessionaires, or distributors of OBE equipment for the provision of equipment or services for ETC systems.

²⁶⁹ Form CO, paragraph 427.

5.2.4.2. The Commission's assessment

(315) In its assessment of the acquisition of control of Abertis by Atlantia, the Commission did not identify any concerns with respect to the upstream market for provision of equipment or services for ETC/ITS.²⁷⁰ The proposed Transaction would not bring about any major change as compared to the vertical overlap already assessed for the Case M.8536 – *Atlantia/Abertis Infraestructuras* in Italy, France and Poland, where ACS is not active neither in the exploitation of toll motorway concessions nor in the provision of equipment or services for ETC/ITS.

Ability

(316) The Parties hold a strong position on the exploitation of toll motorway concessions particularly at national level in Italy (mainly Atlantia) and in Spain (mainly Abertis) – see section 5.1.1 above.

(317) The majority of the competitors having expressed an opinion during the market investigation indicated that ACS and Atlantia, together with Abertis, would likely have after the Transaction, the ability to reduce or stop contracting with their competitors for the provision of equipment or services for ETC systems.²⁷¹

(318) As a result, the Commission considers that, post-Transaction, the Parties are likely to enjoy a sufficient degree of market power on the market for exploitation of toll motorway concessions in Italy and Spain to have the ability to foreclose ETC providers.

Incentive

(319) The majority of the competitors having expressed an opinion during the market investigation indicated that the Parties, post-Transaction, would have the incentive to reduce or stop contracting with competitors of Autostrade Tech, Emovis or A4 Mobility for the provision of equipment or services for ETC systems.²⁷²

(320) Some competitors to the Parties however expressed concerns that Autostrade Tech, Emovis and A4 Mobility could sell their products within the Parties' captive market at a higher price in order to increase price pressure on competitors in the free market. Furthermore, according to one competitor, the economies of scale realised by the Parties would also allow them to leverage their production of OBE units, as well as their ETC roadside equipment, and the obligation for the Parties to tender their electronic tolling equipment would not always be monitored or enforced. In addition, the same competitor claimed that Atlantia's and Abertis' combined technology portfolio covers most of the Parties' needs for equipment,

²⁷⁰ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 308.

²⁷¹ Replies to question 29 of Q1 – Questionnaire to competitors.

²⁷² Replies to question 30 of Q1 – Questionnaire to competitors.

and that the proposed Transaction would reduce their need to promote innovation within their portfolio.²⁷³

- (321) Despite these arguments, the Commission considers that the Parties' incentive to engage in such a foreclosure strategy is unlikely for the following reasons.
- (322) First and foremost, the Investment Agreement and the Commercial Agreement do not envisage the combination of neither the toll motorway concession portfolio of the Parties, nor the ETC/ITS business of Atlantia and Abertis within one Parties.²⁷⁴ Each of ACS and Atlantia will continue to exert control over their current toll motorway concession portfolios in the same way they do pre-Transaction, while Abertis' business, including its toll motorway concessions and ETC/ITS subsidiaries, will be jointly controlled by each of ACS and Atlantia. Within this context, it seems unlikely that ACS would accept the implementation of any commercial strategy that favours the commercial interests of Atlantia's Autostrade Tech over those of its participated Abertis – for example, by acquiring ETC roadside equipment from Autostrade Tech which is technically or economically less performant than the equipment offered by other providers. Equally, it would not be logical for Atlantia to favour the commercial interests of Abertis' Emovis or A4 Mobility (participated by ACS post-Transaction) against the interests of its fully owned subsidiary Autostrade Tech. The same would hold true for ACS as toll motorway concessionaire to cover its needs for ETC/ITS from Abertis' Emovis and A4 Mobility at any rate not being the market price.
- (323) Second, against this scenario, it also seems unlikely that ACS and Atlantia engage in any business strategy aiming at reducing research and innovation for Abertis' Emovis and A4 Mobility ETC products and services against other competitors that have a wider geographic footprint, and for which their focus and core business is ETC/ITS equipment and services.
- (324) Third, in Italy (where the competitors' concerns mainly focus) Article 177 of legislative decree No. 50/2016 transposing the EU Concession Directive (as modified by Article 1, paragraph 568, of Law No. 205 of 27 December 2017) introduced the obligation for motorway concessionaires to award 60% of the contracts for supplies and services exceeding EUR 150 000 through public tender procedures. Consequently, in Italy, for 60% of the contracts to be awarded by Atlantia post-Transaction, direct awarding (without a public procurement procedure) to intra-group companies is precluded. As a result, the Commission considers that the regulatory framework applicable to the grant of the contracts for works, supplies and services in Italy is likely to provide material disincentives for the Parties' to engage in any foreclosure strategy. As described in section 4.3.1, similar regulatory frameworks apply in other EEA countries.
- (325) Against this background, Atlantia's ASPI purchased approximately 90% of ITS equipment/services in 2017 from external suppliers selected through bidding

²⁷³ Replies to question 30.1 of Q1 – Questionnaire to competitors.

²⁷⁴ ACS and Atlantia have not elaborated, nor defined, any plan as to the organisation of Atlantia's and Abertis' subsidiaries for the provision of ETS/distribution of OBE, and/or the provision of equipment or services for ETC/ITS (see ACS and Atlantia's reply dated 21 June 2018 to question 4 of RFI 3).

procedures benefiting from lower costs of more efficient suppliers.²⁷⁵ Therefore, by giving preferential treatment, post-Transaction, to its in-house ITS providers, Atlantia would likely incur additional costs.

- (326) Finally, while already enjoying an important position pre-Transaction in the market for the exploitation on toll motorways, and being active in the market for the provision of ETS/ITS equipment/services, Atlantia and Abertis have not followed such strategy in the past and it is unlikely that their behaviour will change in the future as a result of the limited increment brought about by the Transaction.
- (327) As a result, and based on (i) the fact that ACS and Atlantia do not have plans to merge their toll motorway concessions' business, or merge Abertis' Emovis and A4 Mobility into one common ETC/ITS business with Atlantia's Autostrade Tech, (ii) the regulatory framework in place, and (iii) Atlantia's and Abertis' outsourcing strategy in the last years, the Commission considers that ACS and Atlantia, post-Transaction, are unlikely to have the incentive to discriminate against competitors of Autostrade Tech, Emovis or A4 Mobility for the provision of ETC/ITS equipment and services.

Effects

- (328) The Commission's market investigation yielded mixed results with regard to the likely impact on the competition for the provision of equipment or services for ETC systems if ACS and Atlantia, together with Abertis, reduced or stopped contracting with competitors of Autostrade Tech, Emovis or A4 Mobility. Some competitors indicated that the proposed Transaction would decrease competition for the provision of equipment or services for ETC systems, while an equal number of competitors indicated that it would be no impact or even produce an increase of competition.²⁷⁶
- (329) Altogether, the Commission considers that the acquisition of joint control over Abertis by ACS and Atlantia will not give rise to detrimental effects in the upstream market for the provision of equipment or services for ETC systems, as the Parties will lack the ability and incentive to engage in input foreclosure strategy.

5.2.4.3. Conclusion

- (330) In light of the above considerations and taking account of all evidence available to it, the Commission considers that although ACS and Atlantia would have the ability to engage in a customer foreclosure strategy its incentive to exclude ETC providers from the market remains unlikely as a result of the proposed Transaction. Based thereupon, the Commission concludes that the Transaction would not raise serious doubts as a result of the vertical link between the Parties' activities in markets for the provision of ETC/ITS systems and the exploitation of toll motorways.

²⁷⁵ ACS and Atlantia's reply dated 21 June 2018 to RFI 3, Annex Q6.

²⁷⁶ Replies to question 31 of Q1 – Questionnaire to competitors.

5.2.5. *The provision of ETC/ITS equipment or services and the provision of ETS/distribution of OBE*

- (331) Atlantia is the only party engaged in the manufacture of OBE through its subsidiary Autostrade Tech.²⁷⁷
- (332) The Commission will assess in this section whether, post-Transaction, ACS and Atlantia would have the ability and incentive to restrict access to competing manufacturers of OBE for the provision of ETS/distribution of OBE (customer foreclosure).

5.2.5.1. *ACS and Atlantia's view*

- (333) ACS and Atlantia submit that it is implausible that the Parties would pursue a strategy of foreclosing third-party OBE manufacturers post-Transaction, as the proposed Transaction does not bring about any new vertical link between these markets in comparison to the recent Case M.8536 – *Atlantia/Abertis Infraestructuras*.²⁷⁸

5.2.5.2. *The Commission's assessment*

- (334) In its assessment of the acquisition of control of Abertis by Atlantia, the Commission did not identify any concerns with respect to the manufacture of OBE.²⁷⁹ The proposed Transaction would not bring about any major change as compared to the vertical overlap already assessed for the Case M.8536 – *Atlantia/Abertis Infraestructuras* since ACS is not active in the provision of ETC/ITS equipment or services nor in the provision of ETS/distribution of OBE.

(a) *Ability*

- (335) In Italy, Atlantia's Telepass, is the sole provider of ETS/OBE.²⁸⁰ In view of Atlantia's monopoly position in Italy, the Commission considers that the Parties will likely have the ability to reduce or stop contracting for the provision of ETS/distribution of OBE with ITS providers, and more in particular with OBE manufacturers.

(b) *Incentive*

- (336) The Commission considers that in Italy, post-Transaction, the Parties' incentive to engage in a customer foreclosure strategy, by reducing or stopping contracting, for the provision of ETS, with OBE manufacturers, remains unlikely, notably as (i) Atlantia's Telepass already relies exclusively on Atlantia's Autostrade Tech for its OBE (accounting for EUR [...] million in 2017) and (ii), according to ACS

²⁷⁷ Autostrade Tech essentially assembles OBE components that are standardized, off-the-shelf technologies (see ACS and Atlantia's reply dated 21 June 2018 to RFI 3).

²⁷⁸ Form CO, paragraph 433.

²⁷⁹ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 316.

²⁸⁰ The number of OBE distributed by Atlantia's Telepass in Italy is almost insignificant (see Form CO, table 35, in conjunction with ACS and Atlantia's reply dated 21 June 2018 to RFI 3, Annex Q2).

and Atlantia, all Abertis's OBE distributors purchase the vast majority of their OBE units from Kapsch, with their 2017 purchases amounting to less than EUR [...] million, a small percentage of Kapsch's revenues.²⁸¹ Therefore, no OBE manufacture/ITS provider would be significantly affected by a customer foreclosure strategy by Telepass or any of Abertis' subsidiaries.

(c) *Effects*

- (337) As regards the overall likely impact on competition, the Commission considers that the joint control of Abertis by ACS and Atlantia would not give rise to detrimental effects in the downstream market for the provision of ETS/distribution of OBE as the Parties will lack the ability and incentive to engage in foreclosure strategy..

5.2.5.3. Conclusion

- (338) Based on the above, and considering all evidence available to it, the Commission concludes that a customer foreclosure strategy in order to exclude OBE manufacturers would be unlikely.

5.2.6. *The grant of food services sub-concessions and the provision of concession food services on motorway service areas*

- (339) The Commission will assess whether, post-Transaction, (i) the Parties would likely reduce or stop granting food services sub-concessions to competitors of Atlantia (Autogrill) or Abertis (Areamed) (input foreclosure), and (ii) the Parties (Autogrill) would likely reduce or stop bidding for being granted food services sub-concessions by motorway concessionaires competing with the Parties post-Transaction (customer foreclosure).²⁸²

5.2.6.1. Input foreclosure

ACS and Atlantia's view

- (340) ACS and Atlantia submit that the post-Transaction they will not have the ability and incentive to engage in input foreclosure and that in any case the effects of such conduct would be limited.²⁸³

The commission's assessment

(a) Ability

- (341) As toll motorway managers the Parties grant sub-concessions for the management of motorway service areas, notably for the provision of food services on those

²⁸¹ Form CO, paragraph 431.

²⁸² Areamed does not bid for sub-concessions (ACS and Atlantia's reply dated 8 May 2018 to question 33 of QP1). Therefore, only Autogrill will be taken into account for the purpose of assessing the likelihood of an anticompetitive customer foreclosure scenario.

²⁸³ Form CO, paragraphs 410-414.

service areas. Therefore, the power of Parties on the market for the grant of food services sub-concessions corresponds to their power on the management of toll motorways. Based on the revenues they generate, the Parties manage more than 30% of the toll motorways in three EEA countries (Italy, Spain and Poland).

- (342) In Poland, where the ACS group and Abertis are not present, Atlantia manages [0-10]% of the toll motorway network based on km and [10-20]% based on revenues, behind AWSA I & AWSA II ([50-60]% in km and [30-40]% in revenues) and Gdansk Transport Company ([30-40]% in km and [40-50]% in revenues).²⁸⁴ It is therefore unlikely that the Parties will have a sufficient influence on the conditions of competition in the grant of food services sub-concessions to raise prices or degrade quality of food services provided by Autogrill's rivals on motorway services areas. In any case, there is no merger-specific effect, as the vertical link between Atlantia's activities as a grantor of sub-concessions and Autogrill's activities as a grantee of sub-concessions pre-dates the Transaction.
- (343) In Italy, where the ACS group is not present, Atlantia and Abertis would manage [50-60]% of the toll motorway network based on km and [60-70]% based on revenues.²⁸⁵ The [number of] food services concessions or outlets located on Atlantia's and Abertis' motorways represent [50-60]% of the total number of food services concessions or outlets located on Italian motorways. By comparison, the next largest motorway concessionaire, Gruppo Gavio, has only [20-30]% of total number of food services outlets located on its motorways.²⁸⁶
- (344) Therefore, Atlantia and Abertis are likely to enjoy a significant degree of market power in the grant of food services sub-concessions in Italy. However, the Transaction has a limited impact on the Parties' ability to foreclose access to food services sub-concessions on motorway service areas in Italy, since (i) the link between Atlantia's activities in the management of toll motorways and Autogrill's activities on concession food services pre-dates the Transaction, and (ii) the increment brought about by Abertis in the management of toll motorways does not exceed [0-5]% in km and [0-5]% in revenues, representing [number of] food services concessions ([0-5]%).²⁸⁷
- (345) In Spain, where Atlantia is not present, the ACS group and Abertis manage [30-40]% of the toll motorway network based on km and [40-50]% based on revenues.²⁸⁸ With [number of] food services outlets located on the motorways it manages in Spain, Abertis concentrates on its network [60-70]% of the total number of food services outlets on motorway service areas in Spain.²⁸⁹ In this

²⁸⁴ Form CO, Table 20; ACS and Atlantia's reply dated 27 June 2018 to question 6 of RFI 7.

²⁸⁵ ACS and Atlantia's reply dated 8 June 2018 to question 27 of RFI 2.

²⁸⁶ ACS and Atlantia's reply dated 25 June 2018 to question 1 of RFI 6.

²⁸⁷ ACS and Atlantia's reply dated 25 June 2018 to question 1 of RFI 6.

²⁸⁸ ACS and Atlantia's reply dated 8 June 2018 to question 27 of RFI 2.

²⁸⁹ ACS and Atlantia's reply dated 25 June 2018 to question 3 of RFI 6.

context, the Parties are also likely to enjoy a significant degree of market power in the grant of food services sub-concessions in Spain.

(346) As a conclusion, the Commission considers that the Parties would have the ability in Italy and Spain to restrict the grant of sub-concessions to Autogrill's competitors, thus to foreclose the latter from the market for the provision of concession food services on Italian and Spanish motorway service areas. In Italy nevertheless, the change in the ability stemming from the Transaction is limited, since (i) there are only [number of] service areas located on Abertis motorway network in Italy, out of which [number of] are already managed by Autogrill, and (ii) the [number of] sub-concessions held by Autogrill will expire in 2025 and 2026, i.e. shortly before the expiry of Abertis' motorway concession.²⁹⁰ There is thus uncertainty as to whether Abertis will remain the grantor of sub-concessions at the end of Autogrill's current sub-concessions.

(b) Incentive

(347) The Commission has first assessed whether the regulatory framework applicable to the grant of food services sub-concessions by motorway concessionaires in Italy and Spain, complemented by the commitments imposed by the AGCM in Italy (see section 4.5.1.2), is likely to provide significant disincentives to the Parties carrying out exclusionary practices against rival food services providers.

(348) The requirement to grant sub-concessions following open and transparent tender procedures and the scrutiny exercised by ANAS S.p.A. in Italy and by the Ministry of Public Works and Transport in Spain may contribute to reducing the risk that the Parties distorts the competitive process to favour Autogrill.

(349) In Italy, the regulatory requirements applicable to all motorway concessionaires are complemented by the commitments imposed on ASPI by the AGCM, which further reduce the risk that (i) Atlantia would circumvent the obligation to rely on open, transparent and non-discriminatory procedures for the grant of food services sub-concessions on its motorway, and (ii) such illegal conduct would be undetected. As a matter of fact, the share of food services outlets managed by Autogrill on Atlantia's motorway network has decreased from 72% at the time of the acquisition of control by Edizione over ASPI in 2000²⁹¹ to [40-50]% in 2017.²⁹² This seems to indicate that, prior to the Transaction, Atlantia did not engage in foreclosure practices, even if in theory it was able to do so.

(350) Finally, the Transaction does not give rise to any significant additional incentive for the Parties to engage in an input foreclosure strategy, since the 20 service areas located on Abertis' network in Italy represent less than [5-10]% of the total number of service areas currently located on Atlantia's network in Italy.²⁹³

²⁹⁰ Form CO, paragraph 411.

²⁹¹ Case C.3818 – *Edizione Holding/Autostrade Concessioni e Costruzioni*, paragraph 67.

²⁹² ACS and Atlantia's reply dated 25 June 2018 to question 4 of RFI 6.

²⁹³ ACS and Atlantia's reply dated 25 June 2018 to question 5 of RFI 6.

- (351) In view of the obligations imposed on Atlantia under the Italian law and the commitments imposed by AGCM, and of the limited incremental incentive created by the addition of Abertis' motorway network, the Commission considers that the Parties is likely not to have the incentive to foreclose Autogrill's competitors from access to sub-concessions in Italy.
- (352) The additional safeguard measures offered by the commitments imposed by the AGCM do not exist in Spain, while the Transaction would result in the vertical integration of the largest motorway concessionaire (Abertis) with the second largest food services sub-concessionaire (Autogrill). On the other hand, the ACS group would have a limited incentive to favour Autogrill, which does not belong to its group, over concessionaires that may be willing to offer better conditions.
- (353) The majority of respondents to the market investigation having expressed an opinion confirm that the Parties will have limited incentive to foreclose other concessionaries of food services in Spain.²⁹⁴

(c) Effects

- (354) There is no need to assess the potential effects of input foreclosure in Italy, considering that, as indicated in sections (a) and (b) above, Atlantia has not implemented such a strategy before the Transaction, while the Transaction has a limited impact on the Parties' ability and incentive to engage in an input foreclosure strategy.
- (355) In Spain, even if the Parties were to have the ability and incentive to restrict access to food services sub-concessions on its motorway network in Spain, the Commission deems that the effects of such attempts on the market for the provision of concession food services on motorway service areas would be limited.
- (356) As previously established by the Commission, in Spain, there is limited competition after the grant of sub-concessions, since, in general, only one sub-concessionaire operates on a given motorway concession. In addition, the end of the current food services sub-concessions located on the motorways managed by Abertis and ACS group in Spain corresponds to the end of the motorway concessions granted to them at which point it is not clear whether they will be granted to them again.²⁹⁵
- (357) With respect to Abertis, most of outlets on Abertis' network in Spain are already managed by Autogrill and Areamed and the expansion of Autogrill to the Abertis' remaining outlets will give it limited additional advantage that would not affect significantly strong competitors such as Elixor and Abades.²⁹⁶ Considering the limited market share of the ACS group in Spain in the management of toll

²⁹⁴ Replies to question 20 of Q1 – Questionnaire to competitors.

²⁹⁵ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 258.

²⁹⁶ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 259-262 and ACS and Atlantia's reply dated 25 June 2018 to question 6 of RFI 6.

motorways ([0-5]% by revenue, [5-10]% by km)²⁹⁷ the incremented brought about by the Transaction will not change this conclusion.

- (358) The majority of respondents to the market investigation having expressed an opinion confirm that the Transaction will not have an impact on the granting of food services sub-concessions.²⁹⁸

(d) Conclusions

- (359) In view of the above, and considering all evidence available to it, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market with regard to access to sub-concessions on motorway service areas (input) by concession food services providers.

5.2.6.2. Customer foreclosure

ACS and Atlantia's view

- (360) ACS and Atlantia submit that concerns of customer foreclosure may only arise in Italy where Autogrill's market share on the motorway service areas exceeds 30%. ACS and Atlantia argue that any attempt by Autogrill to engage in a conduct consisting in stopping or reducing bidding for the granting of future foodservices would harm Autogrill itself and would be countered by Autogrill's competitors.²⁹⁹

The commission's assessment

(a) Ability

- (361) For customer foreclosure to be a concern, the vertical merger must involve a company which is an important customer with a significant degree of market power in the downstream market.³⁰⁰ The market share of the Parties (through Autogrill³⁰¹) on the provision of concession food services on motorway service areas would exceed 30% only in Italy, where Autogrill holds [50-60]% of the market (in revenues).³⁰²
- (362) There are however alternative food services providers that could bid for the food services sub-concessions to be granted by the Parties' competitors in Italy. In particular, the Commission notes that the groups Cremonini (Chef Express), Elios (My Chef) and Lagardère (Ristop) are not only present in the provision of concession food services on motorway services areas in Italy, but are also

²⁹⁷ ACS and Atlantia's reply dated 8 June 2018 to question 27 of RFI 2.

²⁹⁸ Replies to question 21 of Q1 – Questionnaire to competitors.

²⁹⁹ Form CO, paragraphs 415-417.

³⁰⁰ Non-Horizontal Merger Guidelines, paragraph 61.

³⁰¹ Areamed does not bid for new food services sub-concessions (ACS and Atlantia's reply dated 8 May 2018 to question 33 of QP1).

³⁰² Form CO, Table 32.

significant players at all transport-related locations in Italy.³⁰³ They would thus have the ability (financial capacity, know-how and experience) to compete for the sub-concessions to be granted by motorway concessionaires competing with the Parties.

(b) Incentive

- (363) Even if Autogrill were to have the ability to foreclose the access of rival motorway concessionaires to the provision of concession food services on motorway service areas (*quod non*), the Commission considers that they would have no incentive to engage into such a strategy.
- (364) First, Autogrill generates annually EUR [...] million of revenues with competitors of Atlantia and Abertis, which approximately corresponds to the turnover generated by other food services providers on the motorways managed by Atlantia and Abertis in Italy (EUR [...] million).³⁰⁴ In a possible customer foreclosure strategy, in order not to forego revenue, Autogrill would need to replace in full the turnover generated with third party motorway concessionaires by the turnover generated with the Parties. To do so, Autogrill would have to manage all of the food services outlets located on the Parties' motorways. This is not authorised under the commitments imposed by the AGCM, which entitles Autogrill to manage up to 72% of those outlets.
- (365) Second, it is unlikely that the Parties could compensate for the losses in Autogrill's revenues by obtaining more advantageous conditions from public authorities upstream or increasing prices to motorway users for food services downstream. Due to the regulatory framework and the level of competition for the grant of motorway concessions, it seems that no economic benefit on the market for the management of motorway concessions could be drawn from Autogrill's customer foreclosure strategy by the Parties. In addition, on the market for the provision of concession food services, Autogrill will still be subject to the competitive constraint exerted by its competitors, including on Atlantia's and Abertis' motorways.
- (366) Third, the Transaction has a limited impact on Autogrill's incentive to engage in a customer foreclosure strategy in Italy, since there are only 20 services areas on the motorways managed by Abertis, out of which 11 are already managed by Autogrill.³⁰⁵

(c) Effects

- (367) Even if Autogrill were to have the ability and incentive to foreclose the access of rival motorway concessionaires to food services providers (*quod non*), the Commission considers that such a strategy would have no adverse impact on competition on the market for the provision of concession food services on motorway service areas. In particular, motorway concessionaires would not be put

³⁰³ Form CO, Tables 31 and 32.

³⁰⁴ ACS and Atlantia's reply dated 27 June 2018 to question 4 of RFI 7.

³⁰⁵ Form CO, paragraph 411.

at a disadvantage if Autogrill were to provide services only in-house and the competitiveness of Autogrill's rivals would not be lessened.

(d) Conclusion

- (368) In view of the above, and considering all evidence available to it, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market with regard to access to concession food services providers (customers) by motorway concessionaires.

5.2.6.3. Conclusion

- (369) In view of the above, and considering all evidence available to it, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market due to its vertical effects on the market for the provision of concession food services on motorway service areas.

5.2.7. *The Construction of infrastructure and the grant of toll motorway concessions*

- (370) The Commission will assess whether, post-Transaction, the Parties would have the ability and incentive to restrict access from Atlantia's and Abertis' motorways networks to building companies (customer foreclosure).

5.2.7.1. *ACS and Atlantia's view*

- (371) ACS and Atlantia submit that post-Transaction they will have neither ability nor incentive to restrict access from their motorway networks to construction companies.³⁰⁶

5.2.7.2. The Commission's assessment

(a) Ability

- (372) In Italy ([60-70]% in revenue and [50-60]% in km) and in Spain ([40-50]% in revenue and [30-40]% in km),³⁰⁷ the Parties hold a strong position on the market for the grant of toll motorway concessions. As a result, the Commission considers that the Parties, post-Transaction, are likely to enjoy a significant degree of market power on the market for the grant of toll motorway concessions in Italy and Spain and likely have the ability to foreclose third party suppliers of construction services.
- (373) In the United Kingdom, the Parties' combined market share is approximately [5-10]% in km and [5-10]% in revenue.³⁰⁸ Given that the Parties' combined market shares are very limited, the Commission considers it unlikely that they will have a significant degree of market power on the market for toll motorway concessions

³⁰⁶ Form CO, paragraph 434.

³⁰⁷ ACS and Atlantia's reply dated 8 June 2018 to question 27 of RFI 2.

³⁰⁸ ACS and Atlantia's reply dated 8 June 2018 to question 27 of RFI 2.

and likely have the ability to foreclose third party suppliers of construction services.

(b) Incentive

(374) The Commission considers that, post-Transaction, the Parties' incentive to engage in a foreclosure strategy by reducing or stopping contracting with third-parties' supplier of construction services remains unlikely.

(375) First, the Parties, as motorway concessionaires, account for a negligible portion of the demand for infrastructure works at EEA level under any plausible market definition. Second, the awarding of construction contracts by motorway concessionaires is regulated by EU and national laws (see section 4.4.1), which are likely to provide significant disincentives for the Parties' engage in any foreclosure strategy by excluding potential bidders for works on its motorways. This conclusion is confirmed by the majority of the respondents to the market investigation having expressed an opinion.³⁰⁹

(c) Effects

(376) As regards the overall likely impact on competition, the Commission considers that Transaction will not give rise to detrimental effects in the downstream market for the construction and maintenance of motorway infrastructure, notably as the same factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects. This conclusion is confirmed by the majority of the respondents to the market investigation having expressed an opinion.³¹⁰

(d) Conclusions

(377) Based on the above, and considering all evidence available to it, the Commission concludes that a customer foreclosure strategy post-Transaction by the Parties in order to exclude third-party suppliers of construction services is unlikely.

6. CONCLUSION

(378) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)

Margrethe VESTAGER
Member of the Commission

³⁰⁹ Replies to question 17 of Q1 – Questionnaire to competitors.

³¹⁰ Replies to question 18 of Q1 – Questionnaire to competitors.