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*Case No COMP/M.3275 - SHELL
ESPANA/ CEPSA/ SIS JV*

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

Article 7(3)
Date: 14.09.2004



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.09.2004

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 7(3) DECISION

To the notifying party:

Dear Madame/ Sir,

**Subject: Derogation pursuant to Article 7.3 of Council Regulation (EEC) No 139/2004
Case No COMP/M.3275 - Shell España/ Cepsa/ SIS JV**

I. BACKGROUND

1. We refer to the application for a derogation from the suspension obligations provided for in Article 7(1) of Council Regulation (EEC) No 139/2004 (the Merger Regulation) submitted by Shell España, S.A. (part of the Royal Dutch/Shell group of companies, "Shell") and Compañía Española de Petróleos, S.A. ("Cepsa") on 10 September 2004. The parties are requesting a derogation from the suspension of the implementation of a concentration in respect of the proposed acquisition of joint control of a newly created company, Spanish Into-plane Services, S.L. ("SIS").

II. THE PARTIES AND THE TRANSACTION

2. Shell España is a wholly-owned subsidiary of the Royal Dutch/Shell Group. It is a Spanish limited liability company with its corporate seat in Madrid. Shell España is active mainly in the production, distribution and sale of motor, aviation, marine and domestic fuels, bitumen and lubricants and has had concessions to provide into-plane services at both Madrid (now expired) and Barcelona airports.
3. Cepsa is a listed company in the Spanish Stock Exchange Market, and is active across the energy sector, with a wide range of activities related to the extraction and refining of oil, and the production and commercialisation of all kinds of oil derivatives (fuels, jet fuel, bitumen, lubricants and petrochemical products, such as plastics, synthetic fibres and detergents), the distribution of natural gas and the production and distribution of electricity.

4. SIS is a newly created JV¹, of which Shell and Cepsa each own 50% and on which they exercise joint control as they have an equal number of directors on the board and have designated SIS' Managing Director jointly.
5. SIS has been set up to supply into-plane services² at airports on the Spanish mainland and the Balearic Islands following the process of liberalisation commenced by the Spanish authorities pursuant to Council Directive 96/67/EC of 15 October 1996 on access to the ground-handling market at Community airports.
6. On a preliminary examination, the Commission finds that the transaction could fall within the scope of the Merger Regulation. However, the final decision on this point is reserved.

III. THE REQUEST FOR DEROGATION

7. Prior to liberalisation, into-plane services at airports on the Spanish mainland and the Balearic Islands had been almost exclusively provided by CLH Aviación, S.A., ("CLH Aviación"), a subsidiary of Compañía Logística de Hidrocarburos, S.A., ("CLH").³
8. The liberalisation process requires the Spanish airports authority, Aeropuertos Españoles y Navegación Aérea ("AENA"), to appoint at least two suppliers of into-plane services at all Spanish airports designated high-volume. AENA is currently undertaking this process.
9. On 3 August 2004, following a tender process initiated by AENA, SIS received official notification that it had been awarded concessions at Malaga, Sevilla and Alicante airports.
10. The three concession letters stipulate a number of preliminary measures, which must according to Spanish law be implemented by SIS by specified dates. These measures comprise:
 - prior to signing the administrative contracts with AENA on 15 September 2004, SIS procuring insurance cover, obtaining any necessary Civil Aviation Authority authorisations, paying a deposit related to the provision of into-plane services and payment of a tender publication fee;
 - by 15 September 2004, SIS signing administrative contracts with AENA in respect of each of Malaga, Sevilla and Alicante airports;

¹ The Parties, entered into a Shareholders' Agreement on 8 September 2003.

² Into-plane services convey the jet fuel into aircrafts through the use of hydrant systems and refuelling equipment.

³ Shell operated an into-plane services concession at Madrid airport (now expired) and continues to operate one at Barcelona airport.

- within 15 days of the signing of the administrative contracts, signing leases over certain parts of Malaga, Sevilla and Alicante airports to SIS; and
 - within a maximum of 180 days of the administrative contracts being granted, commencing the provision of into-plane services at each airport respectively.
11. The Parties argue that these preliminary steps, and in particular the signature of the administrative contracts on 15 September 2004 (as well as steps which must be undertaken prior to such signature), may be viewed as implementation of a concentration within the meaning of Arts. 4(1) and 7(1) of the Merger Regulation. As a result, the Parties may not implement the concentration until it has been declared compatible with the common market.
 12. According to Spanish administrative law and practice these steps cannot be conditional upon competition law approval and failure to sign the agreements by any deadline imposed by AENA would result in SIS being in breach of its administrative law obligations.
 13. The parties argue therefore that if the measures set out above are delayed, this will cause irreparable damage to the Parties. First, AENA would be entitled to terminate the pre-existing contracts for breach of contract. Second, SIS would lose the concessions it has been awarded, and the deposits (totalling €540,000) that it was required to pay to AENA. Third, AENA would be entitled to sue SIS under Spanish law for any losses resulting from the breach by SIS of the concession agreements. These losses may include the costs of arranging new tenders for the Malaga, Sevilla and Alicante concessions.
 14. Further, if AENA were to terminate the concessions owing to SIS' failure to sign the administrative contracts, SIS would lose significant revenues associated with the supply of the services over the duration of the concession, which is seven years. This would reduce the Parties' desire and incentive to continue investing resources in SIS and would threaten the very existence of SIS itself.

IV. ASSESSMENT OF THE REQUEST

15. Article 7 (1) of the Merger Regulation as amended provides that a concentration as defined in Article 1 shall not be put into effect either before its notification or until it has been declared compatible with the common market pursuant to a decision under Article 6(1)(b) or Article 8(2) or on the basis of a presumption according to Article 10(6).
16. Under Article 7(3) of the Merger Regulation, the Commission may, on request, grant derogation from the obligations imposed in paragraphs 1 or 3 taking into account *inter alia* the effects of the suspension on one or more undertakings concerned or on a third party and the threat to competition posed by the concentration. A derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where the suspension provided for in the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.

Effects of a suspension

17. The Commission considers that the reasons presented by the Parties in support of their request for derogation from the suspension obligations can be regarded as exceptional. A failure to grant derogation could result in the removal of an alternative credible bidder in a market which is currently undergoing a process of liberalisation. It appears that a suspension pursuant to Article 7.1 of the Merger Regulation could seriously damage the continuation of all of SIS's businesses and the possibility for it to operate as an active force in the relevant market.

Effects on competition

18. The parties argue that the operation would not raise competition concerns in the relevant markets and be rather pro-competitive.

19. The parties have informed the Commission that SIS was established to tender for into-plane service concessions at Spanish airports against the incumbent monopolist CLH Aviación. The tender procedure is part of a larger Community initiative to liberalise the ground-handling market at Community airports. The tenders held by AENA up to this point have included a large number of bidders and has led to a number of new entrants entering the market. The tender documents provide that any operator, once awarded a concession, must apply a "competitive and non-discriminatory tariff", which will be actively supervised by AENA and it explicitly prohibits any agreement or understanding on prices.

20. Although it appears, on the basis of the information provided by the parties, that the transaction is not likely to pose any threat to competition within the EU or to the functioning of the EEA Agreement, it cannot be excluded at this stage that competition concerns may arise during the investigation process following notification. In any event, this decision is without prejudice to the positions that the Commission will finally take on this transaction following the investigation foreseen by the Merger Regulation.

21. However, the Commission considers that the derogation should not be wider than strictly necessary. To this end, the derogation is granted solely to authorise SIS to implement the following measures:

a) signing of the administrative contracts with AENA on 15 September 2004, SIS procuring insurance cover, obtaining any necessary Civil Aviation Authority authorisations, paying a deposit related to the provision of into-plane services and payment of a tender publication fee;

b) by 15 September 2004, signing administrative contracts with AENA in respect of each of Malaga, Sevilla and Alicante airports;

c) within 15 days of the signing of the administrative contracts, signing leases over certain parts of Malaga, Sevilla and Alicante airports to SIS.

22. Finally, it appears that the issue of the actual competition impact of the transaction can at this stage be left open also in view of the very nature of the measures that the parties are authorised to implement, which appear to be reversible.

V. CONCLUSION

23. On the basis of the above and in accordance with Article 7(3) of the Merger Regulation, the parties are hereby granted a derogation from the obligation imposed by Article 7(1) of the Regulation in accordance with the foregoing terms and conditions.

For the Commission
(signed)
Franz FISCHLER
Member of the Commission