

EN

*Case No COMP/M.3450 – Macquarie Bank
Limited/Crown Castle UK Holdings Limited*

Only the English text is available and authentic.

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

**Article 7(3)
Date: 28.5.2004**



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.05.2004
C(2004) 202194

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 7(3) DECISION

To the notifying parties

Dear Sirs,

Subject : Case No COMP/M.3450 – Macquarie Bank Limited/Crown Castle UK Holdings Limited

1. I refer to your letter of 19/05/2004, and to the prior and subsequent correspondence, requesting, on behalf of Macquarie Bank Limited (“Macquarie”), which is the parent of the managers of Macquarie Communications Infrastructure Group (MCIG) (together the “Controlling Purchasers”), and in advance of notification of a possible future concentration, a derogation from the obligation imposed by Article 7(1) of Council Regulation No. 139/2004¹ (« the Merger Regulation ») to suspend the implementation of that concentration 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).
2. The Commission may, upon request, pursuant to Article 7(3) of the Merger Regulation, grant a derogation from the above-mentioned obligation. In taking its decision, the Commission takes into account, *inter alia*, the effects of the suspension on one or more of the undertakings concerned by the concentration or on a third party, and the threat to competition posed by the concentration.

I THE FACTS

The parties

Controlling purchasers

3. Macquarie and MCIG form a single undertaking. Macquarie is a Bank listed on the Australian Stock Exchange, with shareholdings widely dispersed among private investors. Whilst the major part of its business interests lies in Australia and Asia, Macquarie also has a number of significant operations in the European Union, earning

1 OJ L 24, 29.01.2004, p.1.

income from trading, investment, financial advisory and cross-border leasing activities. In particular, Macquarie and its subsidiaries are active in Europe in the investment banking business and offer corporate finance advice, structured finance, equity sales and trading, treasury and commodity trading, as well as management and advisory services. Macquarie's worldwide turnover (2003) was EUR 4,769 million and its EC-wide turnover was EUR 660.8 million.

4. MCIG is composed of two entities which are Macquarie Communications Infrastructure Trust (MCIT) and Macquarie Communications Infrastructure Limited (MCIL). MCIG makes equity investments in communications infrastructure in OECD countries. Macquarie Communications Infrastructure Management Limited ("MCIML") manages MCIG and is a wholly owned subsidiary of Macquarie.

Vendor and target

5. Crown Castle International Corp ("CCI") is a company listed on the New York Stock Exchange. CCI owns, operates and leases towers and co-locatable roof-top sites, and transmission networks for wireless communications and broadcast transmission. CCI has operations in the UK, the US and Puerto Rico, and Australia.
6. Crown Castle UK Holdings Limited ("Target") leases, in relation to its site rental business, antenna space on its sites to a variety of wireless carriers that provide GSM, 3G and other services. In relation to its transmission business, Target provides transmission and related services for analogue and digital television and radio. In addition to the two primary businesses, Target also offers certain network services, primary consisting of antenna installation services. Target's worldwide turnover (2003) was EUR 337.6 million and its EC-wide turnover was EUR 337.6 million.

The proposed transaction

7. The proposed transaction consists of the acquisition from CCI of a 100% stake in Target by a new company ("Newco") which would be controlled by MCIG. The issued capital of Newco will be held as to at least 50% by MCIG, while Macquarie will underwrite approximately 30% of Newco's issued capital with a view to releasing it in due course to financial investors with not controlling or other special rights. The balance will be held by additional financial investors, who would not have controlling rights in Newco or Target, or other special rights other than standard minority shareholders protection.

II ASSESSMENT OF THE REQUEST

Background

8. Derogation from the suspension obligation imposed under Article 7(1) of the Merger Regulation is requested so as to enable Newco and the Controlling Purchasers to enter into a binding and unconditional offer to acquire Target. The Controlling Purchasers request that the derogation should at least authorise the Controlling Purchasers to purchase the shares and to take all shareholders' decisions that may be required for the purpose of completion, including relating to the financing of the transaction.
9. The transaction is the subject of a competitive bid process and Macquarie has been informed by CCI that in the absence of an unconditional offer from the Controlling Purchasers, CCI may instead complete the sale of a 100% stake in Target with a rival bidder which Macquarie understands is not subject to an obligation to notify under the

ECMR. CCI has further informed Macquarie that the rival bidder is currently conducting due diligence on Target in parallel with Macquarie.

Purported effects of a failure to grant the suspension

10. If a derogation from the suspension obligation imposed under Article 7(1) of the Merger Regulation were not granted, the Controlling Purchasers would effectively lose the opportunity to acquire Target on the sole basis of the acquisition by them being subject to approval under the Merger Regulation and the consequent inability to enter into a binding and unconditional contract. The absence of a derogation in favor of the Controlling Purchasers would damage their interests by creating an insurmountable competitive disadvantage for them, which is outside their control irrespective of the fact that the transaction does not present any material competition concern. By the same token, the Controlling Purchasers point out that CCI would lose a significant competitor in the auction process for the sale of Target.

Purported effects of a suspension on third parties

11. The Controlling Purchasers claim that the granting of a derogation would not have a negative effect on any third party. On the contrary, as stated above, the Controlling Purchasers claim that it would have a positive effect for CCI as CCI will be in a position to negotiate with at least two potential bidders rather than one.

Threat to Competition

12. The Controlling Purchasers do not consider that the proposed transaction will have any actual or potential effect on competition in the EEA. None of the Controlling Purchasers has any broadcast or telecommunication transmission networks in the EU; nor does any of them provide any related transmission services, or control or have any significant minority shareholding in any broadcast or communications operator in the EU. Therefore the transaction does not create any horizontal overlap or give rise to any vertical relationship between the Controlling Purchasers and Target.

Assessment

13. In considering whether to grant a derogation of suspension pursuant to Article 7(3) of the Merger Regulation the Commission is required to take into account the likely effects of the suspension on one or more of the undertakings concerned by the concentration or on a third party and of the threat to competition posed by the concentration.

14. The Controlling Purchasers would suffer a serious disadvantage relative to other potential bidders for the assets if a derogation were not granted. They would be effectively excluded from the bidding process.

15. As explained above, on the basis of the information provided by the Controlling Purchasers, the transaction does not create any horizontal overlap or give rise to any vertical relationship between the Controlling Purchasers and Target. For that reason, the derogation is not likely to adversely affect any other undertakings concerned by the concentration or any third parties.

16. In any case, pending final approval of the concentration under the Merger Regulation, the Controlling Purchasers will only be authorised to exercise the voting rights attached to their shareholding in Target in order to maintain the full value of their investment in Target.

17. Accordingly, the Commission has examined the request for a derogation made by the Controlling Purchasers and finds it to be adequately reasoned. It further finds that, having considered the request, and in particular the effect on the Controlling Purchasers of failing to grant a suspension, as well as the absence of a threat to competition posed by the proposed operation, that a derogation can be granted. However, it considers that the derogation should not be wider than is necessary to ensure equality of treatment for all parties. To this end, the derogation is granted subject to the terms and subject to the conditions set out in section III below.

III TERMS AND CONDITIONS OF THE DEROGATION

18. Until the Commission has adopted a decision on the compatibility of the operation, this derogation is granted solely in so far as it is necessary to allow Newco and the Controlling Purchasers to enter into a binding and unconditional contract to acquire the Target. The derogation authorises the Controlling Purchasers to purchase the shares and to take all shareholders' decisions that are required for the purpose of completion, including relating to the financing of the transaction. Therefore, the Controlling Purchasers are authorised to take or procure the following actions:

- a) take all measures necessary for the creation of Newco, and for the acquisition by Newco of 100 per cent of the share capital of the Target.
- b) take resolutions as shareholders of Newco relating to adopting the articles of association and share capital structure of Newco and appointing and removing the members of the board of Newco and its subsidiaries (including the Target and its subsidiaries).
- c) take resolutions as shareholders and directors of the Target and its subsidiaries relating to the provision of security by the Target including authorisation of the provision of such security and of any financial assistance that this security might constitute.
- d) take any other actions necessary, subject to the condition of agreement of the Commission.

19. It is a condition of the present derogation that the Controlling Purchasers shall not take any of the additional actions referred to in point 18 (d) above without the agreement of the Commission.

20. The foregoing terms and conditions are necessary in order to ensure that any possible threat to competition arising from the granting of the derogation is neutralised until the Commission has had the opportunity to pronounce upon the compatibility of the merger with the common market in accordance with the Merger Regulation.

IV CONCLUSIONS

21. Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation, Macquarie is hereby granted a derogation from the obligations imposed by Article 7(1) of the Regulation in accordance with the foregoing terms and conditions until the acquisition has been declared compatible with the common market by means of a decision pursuant to Article 6(1)(b) or 8(2) or a presumption pursuant to Article 10(6) of the Merger Regulation.

**For the Commission,
(Signed)
Stavros DIMAS
Member of the Commission**