

***Case No COMP/M.4087 -
EIFFAGE /
MACQUARIE / APRR***

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

Article 6(1)(b) NON-OPPOSITION
Date: 15/02/2006

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15/02/2006

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 6(1)(b) DECISION

To The Notifying Parties

Dear Sir/Madam,

**Subject: Case COMP/M.4087 – EIFFAGE / MACQUARIE / APRR
Notification of 11/01/2006 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 11/01/2006, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (“Merger Regulation”) by which the undertakings Eiffage (“Eiffage”, France) and Macquarie Infrastructure Group International Limited (“MIGIL”, Bermuda) controlled by the Macquarie Bank Limited (“Macquarie”, Australia) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the undertaking Autoroutes Paris-Rhin-Rhône (“APRR”, France) by way of purchase of shares.
2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

I. THE PARTIES

3. Eiffage is active in financing, design, construction and maintenance of projects and infrastructures including concessions of motorways and road construction. With regard to the operation of toll motorways in France Eiffage only controls the Viaduc de Millau which is a bridge of 2.5 km located in the Southern part of France. Furthermore, it has a non-controlling minority shareholding (17%) in Cofiroute.

¹ OJ L 24, 29.1.2004 p. 1.

4. MIGIL is an entity controlled by Macquarie, an Australian banking group investing amongst others in infrastructure assets. Macquarie is not active in the operation of motorways in France.
5. APRR is a motorway toll company owned by the French state in the central and eastern part of France.

II. OPERATION AND CONCENTRATION

6. The proposed transaction envisages the acquisition of joint control by Eiffage and MIGIL over APRR. The parties will purchase 70.2% of APRR's shares. The shares will be held by a company named HoldCo established for this purpose. Eiffage will hold 50% plus 1 share of HoldCo and MIGIL the remaining 50% minus 1 share. The Board of Directors will be formed by 6 members, 3 including the chairman appointed by Eiffage, 3 by MIGIL. However, pursuant to the Shareholders' Agreement strategic decisions (inter alia decisions on the business plan and significant capital investment) require the agreement of at least two of the Eiffage nominated directors and two of the MIGIL nominated directors. Therefore, the operation will confer joint control by Eiffage and MIGIL over APRR.

III. COMMUNITY DIMENSION

7. The undertakings concerned have a combined world-wide turnover of more than € 5 000 million (Eiffage: € 7,787 million; Macquarie: €[...] million; APRR: € 1,510 million). The aggregate Community-wide turnover of each of at least two of the undertakings exceeds € 250 million (Eiffage: €[...] million; Macquarie: €[...] million; APRR: € 1,510 million). The undertakings concerned have not achieved more than two-thirds of their respective aggregate Community-wide turnover within one and the same Member State. Therefore, the concentration has a Community dimension.

IV. COMPETITIVE ASSESSMENT

8. The markets concerned by the transaction are the markets for the grant of toll motorway concessions, the market for transport on the toll motorway, markets for ancillary services on toll motorways and the market for infrastructure constructions. None of these markets are affected markets according to the Merger Regulation.

Horizontal Effects

A. The market for the grant of toll motorway concessions

1. Product market

9. The parties have suggested a market for the grant of toll motorway concessions. This market definition is based on the approach taken in the *avis* of the French *Conseil de la Concurrence* of 2 December 2005 on the privatisation of the French toll motorways², one of which APRR is the subject of this notification. The grant of toll motorway concessions, usually in tendering procedures, consist in an economic activity where

² Avis n°05-A-22 of 2 December 2005.

supply is represented by the State and demand by undertakings or consortia of undertakings with an interest in acquiring toll motorway concessions.

10. This is in line with previous cases in which the Commission has held that the grant of a licence for the exploitation of a particular State-regulated activity is distinguishable from the running of that particular activity³.
11. The exact product market definition may be left open, since the transaction would not raise competition concerns even under a narrower product market definition which would be that each tendering procedure would represent a separate market.

2. Geographic market

12. According to the parties, the geographic market for the grant of toll motorway concessions is at least European wide, because the bidding process attracts European and even international undertakings.
13. Indeed, for example for APRR numerous European undertakings, including Autostrade (Italy), Abertis and Cintra (both Spain) submitted bids. The same occurred with regard to the privatisation of another toll motorway in France, i.e. Société des Autoroutes du Nord et de L'Est de la France (SANEF), where Abertis and financial investors submitted a successful bid, and other concessions in Europe (Germany, Greece).
14. However, the exact geographic market definition can be left open, since the transaction would not raise significant competition concerns however the relevant market is defined.

3. Competitive analysis

15. The combined market share of the parties on the market for the grant of toll motorway concessions (based on the length of motorway) would be less than [10-20]% in the EEA (APRR : [5-15]%; Eiffage less than [0-5]%; Macquarie less than [0-5]%) in 2005. Other competitors with higher market shares are Autostrade (Italy) with [10-20]% and Autoroutes du Sud de la France (ASF) with [10-20]%.
16. With regard to France it has to be emphasized that Eiffage only operates the 2.5 km Viaduc de Millau and Macquarie is not active in France on the market for the grant of toll motorway concessions. In any event no particular advantage would be acquired by the parties in that market following this operation. The parties will only be one among the many potential bidders for future infrastructure projects.
17. Therefore, the transaction does not raise serious doubts on the market for the grant of toll motorways.

³ Case No IV/M.567 Lyonnaise des Eaux/Nothumbrian Water, Para 12.

B. The market for the transport on a toll motorway

1. Product and geographic market

18. The activity of APRR consists in providing speedy and secured road transport infrastructures between various geographical points (“routes”). The parties suggest that such activity is part of a broader market including services using similar modes of transport such as motorways, national roads, regional roads or different modes as railways and air. The parties argue that both intra-modal and inter-modal competition may exist on a specific route.
19. In its previous decisions the Commission has emphasized that whether and to what extent inter-modal competition exists has to be assessed on a route-by route-basis⁴. It cannot be concluded in general that any alternative means of transport are in the same market⁵.
20. However, in the present case the exact market definition can be left open as no competition concerns would arise under any market definition considered.

2. Competitive analysis

21. On the basis of route-by-route market⁶ excluding intra-modal and inter-modal substitution there is no overlap between the notifying parties and APRR’s activities. The Viaduc de Millau operated by Eiffage is located far apart from the APRR motorway network and Macquarie is not operating a toll motorway in France.

C. Markets for services ancillary to the operation of toll motorway facilities

22. Markets for ancillary services include various segments as motorways service stations (such as e.g. gas sales, catering, hotel business) and the provision of telecommunication infrastructures.
23. Macquarie is not active in any of these markets for ancillary services in France. Both Eiffage and APRR are active in the sector of telecommunication infrastructures although in different market segments. Eiffage is only active in the French market for the provision of local loop infrastructures with a market share of less than [0-5]%. It is not present on the French market for the provision of long distance and international infrastructure. APRR, on the other hand, is not active in the market for the provision of local loop infrastructures but only in the market for the provision of long distance infrastructure along its motorway network with an estimated market share of not more than [0-10]% on the French market for the provision of long distance infrastructure.
24. The transaction does not lead to overlaps in the markets for services ancillary to the operation of toll motorway facilities. Therefore, the concentration does not raise serious doubts on these markets.

⁴ See e.g. Case COMP/M.3770 Lufthansa/Swiss para 14.

⁵ See Case COMP/M.3150 SNCF/Trenitalia/AFA, para 19.

⁶ “Point of origin / point of destination – approach” similar to the approach applied in the airline cases, see e.g. Case No. M.3280 Air France/KLM.

Vertical Effects

D. The market for infrastructure constructions

1. Product and geographic market

25. The transaction involves the sector of construction which is situated downstream from the activity of exploiting motorways in which Eiffage is active. The parties consider three different potential product market definitions. The first encompasses the market for large/small infrastructure constructions (divided according to the size of the projects concerned) and is in line with a previous Commission decision⁷. The second one relates to the market for road construction (combining both the laying of road surfaces and the production of road surfaces) which would be a subdivision of the public construction sector (and would represent half of its value). The third definition is limited to the market for motorway construction. The differences between this latter definition and the wider road construction market are however questionable as it seems to exist at least a supply-side substitutability, numerous companies (beside the three majors Eiffage, Vinci and Bouygues, large groups such as Demathieu et Bard, Ginger, Guintoli, Roger Martin, Setec, BEC, Baudin and SMEs) being active both on road and motorway constructions.
26. With regard to the geographic market the Commission has held in its previous case that the relevant geographic market for infrastructure constructions is national in scope.⁸
27. However, the exact definition of the markets may be left open since the appraisal of the transaction will not be altered under any alternative product market considered.

2. Competitive analysis

28. In a market for large infrastructure constructions, Eiffage's market share is [15-25]% in France (market size in 2004: €[2.5-3.5] billion) and [5-15]% in a market for small infrastructure constructions (market size: €[3.5-4.5] billion). In a market for road constructions (market size: €[11-13] billion), its market share is [10-20]% and in a separate market for motorway constructions (market size: €[0.8-1.2] billion) less than [10-20]% in France. Macquarie is not active in the operation of motorways in France.
29. The acquisition of a privatised motorway business by a company controlled by a group which is also active in the fields of constructions could lead to the potential risk of a foreclosure effect of other motorway constructions companies⁹.
30. However this foreclosure effect is unlikely to occur. It has to be recalled first that this market share results of the narrowest hypothetical market definition. Considering the market for road construction, the market share of the parties remains below 20%. As

⁷ Case No IV/M.1157, Skanska/Scancem, para 54.

⁸ Case No IV/M.1157 – Skanska/Scancem, Para. 60.

⁹ The parties rely on a Xerfy study (used by the French *Conseil de la Concurrence* in its *avis* of 2 December 2005) to estimate a hypothetical French market for (under concession only) motorway constructions of €[0.8-1.2] billion. In 2004, there were €240 million spent on motorways constructions by APRR, of which €[15-25] million are already achieved by Eiffage.

indicated above, numerous market players are able to compete at this level, without the adding of APRR bringing a detrimental advantage to Eiffage.

31. Moreover it must be kept in mind that Eiffage alone will not be in a position to determine APRR's commercial policy, including the allocation of construction and maintenance contracts, in light of the corporate governance provisions relating to APRR with MIGIL. Eiffage and MIGIL acquire joint control and MIGIL would have an interest in the most economical construction works and would have no interest in favouring Eiffage's subsidiaries. Since the motorway prices are regulated by the French State, there would be no reason for MIGIL, as enjoying joint control and as co-owner of APRR, to accept that Eiffage uses its vertical relationship with APRR to increase its construction and maintenance costs and thereby reduce the returns to which MIGIL would be entitled as evidenced by the corporate governance provisions.
32. Furthermore, following the *avis* of the French *Conseil de la Concurrence* relating to the risk that would derive from the acquisition of motorway business by a group active in the road construction sector¹⁰, Eiffage and MIG have accepted the following commitments requested by the French Government (in its *Cahier des charges* or annexes to it) to address any possible foreclosure concerns that the vertical relationship between Eiffage and APRR might generate.
33. First Eiffage undertook to systematically use public tendering procedures for public works, public supply and public service contracts to be made within the framework of the concession when the latter exceed €2 million for public works contracts and €240 000 for public supply and public service contracts.
34. Second the parties undertook to create a Construction work committee, composed of independent members and to which a member of the French competition authority (DGCCRF) will be invited, that will provide, as stated in the shareholder agreement between Eiffage and Macquarie, [...] to the board of directors of APRR in relation to the award of contracts worth over €2 million (works contracts) or €240 000 (supply and services contracts)¹¹. This committee will also define internal rules for the award and the implementation of the public works, supply and service contracts in order to ensure the effectiveness and transparency of any tender process.
35. Third Eiffage undertook not to increase the total proportion of contracts that it or its subsidiaries had with the target prior to the concentration for at least a [...] -year period starting in 2006. This proportion is set in accordance with the average value of works achieved by Eiffage and its subsidiaries with APRR over the last 3 years. This proportion was for each year between 2002 and 2004 under [5-15] %.
36. Fourth the concessionaire shall not, without having obtained prior approval from the *concédant* (the French State), participate to a merger, absorption, contribution,

¹⁰ This *avis* relates to the whole motorway privatisation process and is not limited to the Eiffage/MIG/APRR transaction.

¹¹ This [...] procedure can be overturned by a decision of the board of directors when the recommendation relates to a market above €[...] million (but then both Eiffage and Macquarie have to approve the award of the market concerned) or when the recommendation relates to a market that has to be concluded with Eiffage (but then Eiffage will not be allowed to vote under the *conventions réglementées* rules of the French *Code de commerce*).

scission, dissolution without liquidation or any other similar restructuring operation likely to affect its technical or financial capacity to fulfil its obligation under the concession in particular Article 6 of the *Cahier des charges* (relating among other to the first and second commitments described in para 33 and 34 above).

37. Fifth with regard to the possible vertical relationship between Eiffage and the target in the ancillary toll motorway facilities market, Eiffage undertook that it will generally conclude contracts through public tendering procedures and that each contractor will have to be previously approved by the French Minsiter *chargé de la voirie nationale*.
38. In lights of these commitments, Eiffage will in any case be prevented to use the vertical relationship with APRR to significantly increase its market share further to the acquisition of APRR.
39. Therefore, for all the reasons presented above, the transaction would not significantly impede effective competition on the relevant market.

V. CONCLUSION

40. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
Signed by Neelie KROES
Member of the Commission