

***Case No COMP/M.6020 -
ACS/ HOCHTIEF***

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

Article 6(1)(b) NON-OPPOSITION
Date: 14/01/2011

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EUROPEAN COMMISSION

Brussels, 14.1.2011

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.6020 - ACS/ HOCHTIEF
Notification of 3/12/2010 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 3/12/2010, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking ACS ACTIVIDADES DE CONSTRUCCION Y SERVICIOS, S.A. ("ACS", Spain) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking HOCHTIEF AG ("**Hochtief**", Germany) by way of a public bid announced on 16 September 2010. ACS ("the Notifying Party") and Hochtief are jointly referred to as "the Parties".

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.

I. THE PARTIES

2. **ACS** is a company incorporated under Spanish law with its registered office in Madrid. It is active in the construction, concessions, environmental and industrial services sectors. The bulk of its turnover (about 82%) is achieved in the EU, mainly in Spain (90% of its EU turnover derives from its home market), Portugal, Poland and France.
3. **Hochtief** is a German public limited company incorporated under German law. It is active in the construction and real estate-related services sector. About 82% of its turnover is obtained outside the EU, mainly in Australia and the USA, through different subsidiaries. Its main EU markets are Germany, Austria, Poland and the Czech Republic.

II. THE OPERATION

4. The transaction consists in the voluntary takeover offer published by ACS for the shares in Hochtief not already held by ACS². ACS's objective is to acquire at least 50% plus one share in Hochtief and the majority of voting rights. ACS would thus acquire sole control over Hochtief if the offer is successful.

III. EU DIMENSION

5. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³ (ACS: EUR 15 605 million, Hochtief: EUR 18 166 million). Each of them has a EU-wide turnover in excess of EUR 250 million (ACS: EUR [...] million, Hochtief: EUR [...] million) but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has a EU dimension.

III. RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

Construction services

6. The traditional business of both Parties to the transaction is construction, which comprises on-site construction or assembly of buildings and other structures and building engineering. The Commission has generally considered the possibility to distinguish the following product markets in the construction sector⁴: (i) construction

² At the stage of notification ACS held a non-controlling 29.98% stake in Hochtief.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.04.2008, p. 1).

⁴ See cases M.5200 - Strabag/ Kirchner; M.5158 - Strabag / Kirchhoff; M.4687 - Sacyr Vallehermoso / Eiffage; M.3864 - Fimag / Züblin; M.874 - Amec / Financière spie Batignolles / Spie Batignolles.

of residential buildings covering blocks of flats, other multi-household buildings and single household buildings, (ii) construction of non-residential buildings (such as, e.g., industrial buildings, offices, shopping centres and hospitals) and (iii) construction of infrastructure/civil engineering (such as roads, bridges, railroads, sewage systems, etc. The Commission in previous decisions has held that the geographic market for construction services is national⁵.

7. In the present case, the product and geographic market definitions for construction services may be left open since the transaction does not lead to any affected market under any alternative market definition, as will be explained in the section on the competitive assessment.

Construction equipment rental

8. The equipment rental business is driven by the construction firms' need to free up capital and avoid paying for expensive assets which are not used. The Commission in previous decisions has considered a single overall equipment rental market.⁶ The Notifying Party considers that the geographic market for construction equipment rental is national in scope.
9. However, it is not necessary in the present case to reach a conclusion on the definition of the relevant product and geographic market for construction equipment rental since the transaction would not lead to any affected market under any alternative, even if assessed on the basis of the narrowest possible market definition.⁷

Building materials

10. The Commission has considered the possibility to distinguish between (i) ready mixed concrete materials⁸, (ii) precast concrete products⁹, (iii) reinforcing steel products¹⁰ and (iv) construction aggregates¹¹. The Commission in previous decisions has held that

⁵ Ibidem. In this respect, the provision of construction services is by nature an on-site activity. Despite European Union legislation such as public procurement directives which seek to open up national markets, numerous national regulations continue to apply to construction services.

⁶ See cases M.1134 – Tarmac/Bovis; M.486 – Holdercim / Origny – Desvrouises.

⁷ There is no Member State with a horizontal overlap in construction equipment rental. According to the Notifying party, the only national market where there is a potential vertical relationship is Poland, where Hochtief is present upstream on the market for equipment rental (with a market share of below [0-10]% on the overall market and on a possible narrow segment for cranes' rental) and both Parties including ACS are present downstream on the Polish construction market (with a combined market share of below [0-5]% under any alternative market definition). This potential vertical relationship thus does not lead to an affected market and does not raise any competition concerns. Therefore, it will not be discussed further in this decision.

⁸ See case M.4719 - Heidelbergcement / Hanson; and M.3572 - Cemex / RMC.

⁹ See case M.3415 – CRH / Semapa / Secil / JV and M2317 – Lafarge/Blue Circle (II).

¹⁰ See case M.4225 – Celsa / Funda.

¹¹ See cases M.4719 - Heidelbergcement / Hanson and M.2596 – RMC/UMA/JV

the geographic scope of the markets for the products concerned is national and for reinforced steel products possibly EEA-wide.

11. However, it is not necessary in the present case to reach a conclusion on the definition of the relevant product and geographic market for the products concerned since the transaction would not lead to any affected markets under any potential market definition.¹²

Real estate services

12. Real estate services comprise real estate development services (i.e. purchase of land with a view to constructing a building and selling it as a speculative investment) and various support services to property owners such as real estate management (i.e. management and operation of a real estate on behalf of its owner).
13. The Commission has considered the possibility to distinguish between the following product markets in real estate services¹³: (i) real estate development and (ii) real estate management services. The Commission in previous decisions has held that the geographic market for real estate services is either national or city-by-city¹⁴.
14. In the present case, the exact product market definition may be left open since the transaction does not lead to any affected market under any alternative market definition, as the Parties do not overlap in any of the national nor any city-by-city markets.

Facilities management services

15. Both parties offer facilities management services. Such services comprise a broad variety of auxiliary support services that are important for a company, but do not form part of its core business. The services package offered to a customer is tailor-made to suit its particular needs and may include workplace support, production support, telephony, security and property support.
16. As regards these services, the Commission has considered the possibility to distinguish between¹⁵: (i) technical facility management; (ii) commercial facility management (mainly accountancy); and (iii) general facility management (incl. security, cleaning

¹² There is no horizontal overlap between the Parties in respect to sales of building materials. According to the Notifying party, the only national market where there is a potential vertical relationship is Poland, where ACS has a very minor presence in the building materials market (with a market share of below [0-5]% on any of the segments) and both Parties have activities on the construction markets with a combined market share of below [0-5]% under any alternative market definition. This potential vertical relationship thus does not lead to an affected market and does not raise any competition concerns. It will thus not be discussed further in this decision.

¹³ See case M.2825 - Fortis AG SA / Bernheim-Comofi SA.

¹⁴ See footnote 13.

¹⁵ See case M.3653 - Siemens / VA Tech.

and caretaker services). The Commission in a previous decision has held that the geographic scope for the markets concerned is national.¹⁶

17. In the present case, the exact product and geographic market definitions may be left open since the transaction does not lead to any affected market under any alternative market definition, as the Parties are active in different Member States and there would be no geographic overlap.

Energy management services

18. Both parties are active in energy management services. These services aim at reducing the customers' energy costs, covering activities such as advice on measures to reduce energy consumption (e.g. structural measures related to the building or a switch of supplier or energy source), implementation of energy management systems, monitoring of energy use, assistance with energy procurement and the operation and maintenance of equipment related to the customers' energy consumption. As to the geographic market, the Notifying Party considers that these services form part of a facilities management bundle and therefore that the market should similarly be defined as national in scope.
19. However, in the present case, the exact product market definition may be left open since there is no geographic overlap in the provision of energy management services between the Parties.

Electrical and mechanical installations

20. The Commission has identified a distinct product market for mechanical and electrical services¹⁷. Such services concern the provision of mechanical and electrical design and management, the provision of technical equipment for industrial and commercial projects, e.g. lighting and air conditioning, power transmission and distribution, lifts, escalators, moving walkways, etc. The Commission has in its previous decisions considered that the relevant geographic market is national¹⁸.
21. In the present case, the exact product market definition may be left open since there is no geographic overlap in electrical and mechanical installations between the Parties.

Electronic toll collection (ETC) systems

22. ETC systems detect the presence of a vehicle passing a toll station, classify it and deduct the correct toll fee. The Notifying Party proposes to define a distinct market for ETC systems and that the geographic scope of the market is at least EU-wide.

¹⁶ See footnote 15.

¹⁷ See M.5445 - Mytilineos / Motor oil / Corinthos Power; and M.874 - Amec / Financiere Spie Batignolles / Spie Batignolles.

¹⁸ See M.5445 - Mytilineos / Motor oil / Corinthos Power; M.3653 – Siemens/ VA Tech; and M.874 - Amec / Financiere Spie Batignolles / Spie Batignolles.

23. However, in the present case the product and geographic market definitions may be ultimately left open in view of the absence of any affected markets under any alternative possible delineation.¹⁹

Toll motorway concessions

24. The Commission has previously considered the possibility to distinguish (i) the market for the grant of toll motorway concessions from (ii) the market for the commercial exploitation of toll motorways.²⁰
25. The grant of toll motorway concessions, usually in tendering procedures, consist in an economic activity where supply is represented by the State and demand by undertakings or consortia of undertakings with an interest in acquiring toll motorway concessions. In previous cases, relevant geographic market definition for the grant of toll motorway concessions was considered to be probably EEA-wide, but the possibility of national markets was left open.
26. The market for commercial exploitation of toll motorways consists of providing road transport infrastructures between various geographical points (“routes”). The Commission has previously considered that the relevant geographic markets are based on a point-to-point basis, meaning that toll motorways covering different routes would not be substitutable. There are no overlapping routes operated by the parties.
27. In the present case, the product and geographic market definitions may ultimately be left open in view of the absence of any competition concerns under any alternative market definition, as will be explained in section IV (Competitive assessment) below.

Other concessions

28. Other concessions include airports, railway infrastructure, car parks, transport and interchange stations. The Notifying Party considers that the geographic market for other concessions is likely to be national in scope.
29. In the present case the exact market definition of other concessions might ultimately be left open since the transaction leads to no overlaps between the parties as regards these concessions.

¹⁹ The transaction leads to a potential vertical link between the upstream market of ETC systems in which ACS is present and the downstream market of toll motorway concessions in which both of the Parties are present. However according to the Notifying Party estimates, ACS market share EEA-wide in ETC systems is [0-5]%, and the combined EEA market share downstream on the market for toll motorway concessions is below [0-10]%, which does not result in any competition concerns. In case the geographic scope of the market of ETC systems were to be defined as national, the transaction will not lead to any competition concerns since ACS is only significantly present in Spain where Hochtief is not present and according to the Notifying Party has never bid for a motorway concession contract.

²⁰ See cases M.4687 – Sacyr Vallermosto / Eiffage; M.4087 Eiffage / Macquarie /APRR and M.4249 Abertis/ Autostrade.

IV. COMPETITIVE ASSESSMENT

30. The activities of ACS and Hochtief are largely complementary, as both companies have a different geographic focus. In the EEA, ACS is mainly present in Spain while Hochtief focus is mainly in Germany.
31. The transaction does not give rise to any affected markets in all but one market (a possible national market for the grant of toll motorway concessions in Greece, discussed below). As was demonstrated above, no affected markets would arise under any alternative market definition in respect to the markets for real estate services, facility and energy management services, electrical and mechanical installations, ETC systems, concessions, construction equipment rental and building materials.
32. Equally, the Transaction would not give raise any affected markets under any alternative market definition in relation to construction services markets, where the Parties traditionally focus their activities. On the basis of national markets, the only very limited overlaps between the Parties would occur in Poland and in the UK. In Poland, according to the Notifying Party's estimates, the combined market share in the construction services market between the Parties would be approximately [0-5]% (with an increment of [0-5]%). In the UK, according to the Notifying Party's estimates, the combined market share would be approximately [0-5]% (with an increment of [0-5]%). According to the Notifying party, Hochtief is not active on ACS's home Spanish market, and ACS is not active on the German market which is the home-base of Hochtief. Considering an EEA-wide market for construction services, the combined market share of the Parties remains very low with only about [0-5]% and with an increment of [0-5]% on the total construction marker, and in any event below [0-5]% combined in any of the market segments.²¹

Market for toll motorway concessions in Greece

33. Considering all the relevant markets in which the Parties are active, the transaction only leads to an affected market in case the geographic market for toll motorway concession were to be defined as national. In this case, the transaction leads to an affected market in toll motorway concessions in Greece. The combined market share of the Parties would be [10-20]% (ACS [5-10]%, Hochtief [5-10]%).²²
34. In addition to these modest market shares, several factors demonstrate that the transaction is not likely to lead to any competition concerns even under a possible national Greek market for the grant of toll motorway concessions. First, there are other strong companies present on the Greek market, both international construction companies such as Vinci, and a number of local companies like Gek Terna, Ellaktor, Cintra or J&P Avax. Second, other major EU concession firms should be able to

²¹ Notifying Party estimates.

²² Market share calculated on the basis of tolled kilometres in Greece. As the concessions for tolled motorways are granted to consortia, the consortia market shares were allocated in proportion to each member's stake in the share capital of the consortium. If the consortia market shares are allocated in equal parts to the members, then the combined market share would amount to slightly below [10-20]%. All figures are ACS's estimates.

participate as credible bidders in the future grant of concessions in Greece, as the parties themselves had no prior experience of Greek toll motorway concessions when the consortia they belong to were awarded the concessions. Moreover, the motorway concessions the parties are involved in Greece date back to bids submitted in 2006 or even earlier. Since then, the parties did not participate in any consortia which bid for the same contract in Greece. Therefore the transaction is unlikely to lead to any competition concerns on the bidding markets for the grant of toll motorway concessions in Greece.

V. CONCLUSION

35. 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.

For the Commission
(signed)
Siim KALLAS
Vice-President