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***Case No M.7512 -
ARDIAN / ABERTIS /
TUNELS***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 04/05/2015

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EUROPEAN COMMISSION

Brussels, 4.5.2015
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying parties:

Dear Sir/Madam,

Subject: Case M.7512 – Ardian / Abertis / Tunels
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) On 1 April 2015, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which ARDIAN Group ("ARDIAN", France) and Infraestructures Viàries de Catalunya, Societat Anònima Concessionària de la Generalitat de Catalunya (Unipersonal) ("INVICAT", Spain), a subsidiary of Abertis Infraestructuras, S.A. ("Abertis", Spain) acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of Túnel de Barcelona I Cadí, Concessionaria de la Generalitat de Catalunya, S.A. ("Tunels", Spain), currently jointly controlled by INVICAT and BTG Pactual Iberian Concessions Ltd. ("BTG"), by way of purchase of shares ("the Transaction"). Ardian, Invicat and Tunels will hereinafter be 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.

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

1. THE PARTIES

- (2) ARDIAN is a private investment company, active in various sectors in Europe, North America and Asia. The company is majority-owned by its employees. ARDIAN's activity in toll motorway concessions is limited to France, through its co-controlling stake in Alicorne 88 and a non-controlling stake in Sanef, S.A. and in Spain, through its co-controlling stake in Autopista Trados 45, S.A.
- (3) INVICAT is a subsidiary of Abertis, which is listed on the Spanish Stock Exchange and part of the Abertis Group. The Abertis Group is active in toll motorways concessions and telecommunications infrastructures in 11 countries in Europe and America. Abertis' activity in toll roads is greater in France, where it controls Sanef, S.A. and Spain, where it is the largest toll road operator in terms of kilometres. The Abertis Group has further toll road activities in UK and Ireland, as well as beyond the EEA.
- (4) Tunels is the holder of a 25-year concession, to operate two sets of tunnels and access roads connecting Barcelona with the Barcelona Outer Ring Road and with Toulouse through the Pyrenees, Túnel de Vallvidrera and Túnel del Cadí. The concession was acquired when the Catalanian Government privatised Túnel in December 2012 and its term started on 01 January 2013 and will run until 2037. Currently Tunels is jointly controlled by BTG, which owns 65% of its shareholding and INVICAT, which owns the remaining 35%.

2. THE OPERATION AND THE CONCENTRATION

- (5) The Transaction consists in the replacement of BTG by ARDIAN as jointly controlling majority shareholder in Tunels. ARDIAN will acquire the entire shareholding of BTG in Tunels, thus holding 65% of Tunels' shares post-Transaction, and will replace BTG in all its rights in Tunels.

Full functionality

- (6) Tunels is a full functioning joint venture, according to paragraphs 94 and following of the Commission's Consolidated Jurisdictional Notice ("JN").
- (7) First, Tunels establishes an independent presence on the market through the operation of the two toll motorways, performing the functions normally carried out by undertakings active on that market, as provided in paragraph 24 JN. Indeed, Tunels does not receive a fee by the authority for operating the concession, but is in direct contact with the motorists and collects from them the toll corresponding to their use of the two motorways.
- (8) Second, as Tunels' revenues result directly from the toll collected every year, the operation of the motorways results in taking a financial risk for Tunels. Tunels cannot unilaterally decide on the tolls imposed, as the tariffs charged to the drivers are set by the authority and any change to them needs to be approved by the latter. Tunels has committed to a standardised canon fee to be paid to the Catalanian Government. [Further details on the financial agreements between the concessionaire and the Catalanian Government]. If however the collected net toll revenues are lower than projected in the financial plan, Tunels bears the full risk. Therefore, Tunels takes a significant risk associated with the operation of the concession.

- (9) Third, Tunels has access to the appropriate resources and specific know-how that allows it to operate the two motorways, primarily through a Technical Service Agreement ("TSA") with INVICAT. Through the TSA, INVICAT offers to Tunels [a number of services] required for the operation of the concession. The Parties explain that INVICAT offers its services to Tunels [conditions on which the services are offered]. Tunels is thus free to also engage third parties in the provision of these services.
- (10) Fourth, the concession has been granted to Tunels for 25 years, it is therefore sufficiently long, for the latter to operate on a lasting basis on the market for toll motorways.
- (11) As a result, Tunels' is economically autonomous from an operational viewpoint from its parents and a full functioning undertaking. Therefore, a change of control over Tunels constitutes a concentration according to the EUMR.

Joint control

- (12) Reflecting their holding in Tunels, ARDIAN will have 65% and Abertis 35% of the voting rights in the General Shareholders' Meeting. ARDIAN will appoint [confidential] and Abertis [confidential] of the [confidential] members of the Board of Directors.
- (13) Despite this preponderance of ARDIAN, both ARDIAN and INVICAT will enjoy veto rights in relation to the budget, business plan, major investments and the appointment of senior management on the basis of a signed Shareholders' Agreement ("SHA"). Major strategic decisions will be taken at the Board of Directors' level. [Description of the process to elaborate and approve Tunels' annual budget, business plan and any amendments thereof and the relevant majorities required for such purpose]. Consequently, the agreement of both INVICAT [role in the elaboration of the business plan and annual budget] and ARDIAN having [number of votes] at the Board will be ensured.
- (14) [Role of ARDIAN and INVICAT in the elaboration of Tunels' business plan and annual budget and majorities required for their approval] Therefore, both parents of Tunels' have a veto right over its budget and business plan.
- (15) Moreover, the SHA provides that the CEO of Tunels will be appointed jointly by ARDIAN and INVICAT, whereas [parent company 1] appoints the CFO and [parent company 2] the COO.
- (16) On the basis of the above, the Transaction constitutes a change of control over an undertaking on a lasting basis and therefore is a concentration within the meaning of the EU Merger Regulation.

3. EU DIMENSION

- (17) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million³. Each of them has an EU-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate

³ Turnover calculated in accordance with Article 5 of the Merger Regulation.

EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

4. COMPETITIVE ASSESSMENT

4.1. Market Definition

- (18) The Parties submit that their activities overlap or are vertically related on the following markets: i) the market for the grant of toll motorway concessions in Spain, France or the EEA, ii) the market for the provision of transport services on toll motorways in Spain and France, iii) the market for infrastructure constructions in Spain, France or the EEA, iv) the market for the provision of ancillary services to the operation of toll motorway facilities in Spain, France or the EEA and v) the market for the distribution of OBE devices in Spain or France.
- (19) The only product markets, where ARDIAN, Abertis and Tunels are all present are the market for the granting of toll motorway concessions and the market for transport on toll motorways. While these two markets might seem closely related, the Commission has held that the granting of a licence for the exploitation of a particular State-regulated activity (competition for the market) is distinguishable from the running of that particular activity (competition in the market). However, the Commission has left open the exact product market definition.⁴
- (20) This decision will concentrate on those two markets, as the Parties' activities on a market for infrastructure constructions,⁵ a market for the provision of ancillary services to the operation of toll motorway facilities⁶ and a market for the distribution of OBE devices⁷ are marginal and ancillary to their activity in the other two markets.

⁴ See among others, cases M.4087 - *Eiffage/Macquarie/APRR*, M.5974 - *Finavias/Abertis / Autopista Trados M-45*.

⁵ The Parties submit that construction works aimed at the maintenance of the toll motorways that they operate constitute part of the corresponding concession and are ancillary to the provision of transport services on said toll motorways. The Parties do not offer infrastructure construction services independently on the market and do not directly perform infrastructure construction services on the toll motorways they operate, but outsource them to specialised companies.

⁶ ARDIAN has no activity on a market for the provision of ancillary services to the operation of toll motorway facilities (e.g. operation of service stations etc.). INVICAT and Tunels have an indirect presence on this market, through the service stations on the toll motorways they operate; this overlap however pre-dates the Transaction. In any event, no Party offers such services independently on the market, INVICAT and Tunels merely undertake such activities to the extent that these are linked to the toll motorways they operate.

⁷ Only Abertis is active on a market for the distribution of OBE devices, there are therefore no overlaps between the Parties' activities. As Abertis offers such services on the market in France and Spain through dedicated subsidiaries, a vertical relationship could arise between Abertis and Tunels and Abertis and ARDIAN. Any such relationship between Abertis and Tunels pre-dates the Transaction. Similarly, such vertical relationship pre-exists between Abertis and ARDIAN, as they already jointly control the Trados 45 toll motorway in Spain. The Transaction will merely lead to a minimal increase in Abertis' and ARDIAN's aggregate market share in the upstream market for the provision of transport services on toll motorways; this change however will not give rise to any foreclosure risk.

4.1.1. Market for the award of toll motorway concessions

- (21) The Commission has considered in its past decision practice, that the market for the award of toll motorway concessions consists 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.
- (22) While the results of the market investigation in past cases pointed to an at least EEA-wide relevant geographic market for the granting of toll motorway concessions, the Commission left the exact definition of the relevant geographic market open, giving the possibility for a delineation of a national market.
- (23) As, irrespective of the exact market definition, the Transaction would not give rise to any competition concerns, the product and geographic delineation of the market for the award of toll motorway concessions may also in the present case be left open.

4.1.2. Market for the provision of transport services on toll motorways

- (24) The Commission considered in its previous decision practice that the market for the provision of transport services on toll motorways consists in the provision of speedy and secure road transport infrastructure between various geographical points ("routes").
- (25) The Commission further considered that the geographical delineation of this market would be organised on a point-to-point basis. Therefore every combination of a point of origin and a point of destination is considered a separate market from the demand side.
- (26) In the present case, the exact product and geographic market definition may ultimately be left open, as it would not alter the competitive assessment of the case.

4.2. Competitive Assessment

4.2.1. Market for the award of toll motorway concessions

- (27) The Parties submit that on an EEA market for the award of toll motorway concessions, their combined market share would be below 10% in terms of km (more specifically [5-10]%, of which [5-10]% of Abertis and [0-5]% of ARDIAN) and below [10-20]% in terms of toll revenues (more specifically [10-20]%, of which [10-20]% of Abertis and [0-5]% to ARDIAN). Tunels' market share in the EEA is marginal, corresponding to [0-5]% in terms of km and [0-5]% in terms of toll revenues.
- (28) On a market for the award of toll motorway concessions in France, the Parties' aggregated market share is [confidential] below [10-20]% in terms of km (more specifically [10-20]%, of which [0-5]% of ARDIAN and [10-20]% of Abertis) and [10-20]% in terms of toll revenues (of which [10-20]% of Abertis and [0-5]% of ARDIAN). Moreover, the Parties note that their overlap and aggregated market share on the French market pre-date the Transaction, as they both hold shares in Sanef S.A.

- (29) On a market for the award of toll motorway concessions in Spain, the Transaction would give rise to an affected market. Indeed, the Parties' aggregated market share would amount to [40-50]% in terms of km and [70-80]% in terms of toll revenues.
- (30) Despite the fact that the Parties' combined market share is rather high, the increment of the Transaction is very small. This results from the fact that ARDIAN is only active on the Spanish market through the operation of Trados-45 motorway near Madrid, which it jointly controls together with Abertis. The market share of Trados-45 is [0-5]% in terms of km and [0-5]% in terms of toll revenues and Tunels' market share [0-5]% in terms of km and [0-5]% in terms of toll revenues. Therefore, even if the entire market share of Trados-45 and Tunels were fully attributed to ARDIAN, these would not exceed 5% of the Spanish market; such attribution however would not take into account that Abertis jointly controls both Trados-45 and Tunels already pre-Transaction.
- (31) In addition, the market for the award of toll motorway concessions is a bidding market with a sufficient degree of competition. ARDIAN [information of Ardiان's participation in bidding processes] in Spain in the past ten years, whereas Abertis [information on Abertis' participation in bidding processes]. Given the structure of these bidding markets, market shares have a more limited value, as the award of each new concession is decided on the basis of the specific bids submitted.
- (32) Moreover, a number of other significant competitors, such as Itínere, Ferrovial, Sacyr and Globalvia are active on the Spanish market for the award of toll motorway concessions. Itínere has a market share of [10-20]% in terms of km and [10-20]% in terms of toll revenues, Ferrovial has a market share of [10-20]% in terms of km and [5-10]% in terms of toll revenues, Sacyr has a share of [5-10]% in terms of km and of [0-5]% in terms of toll revenues and Globalvia has a share of [0-5]% in terms of km and of [0-5]% in terms of toll revenues.
- (33) In view of the above considerations and given its limited impact on the market for the award of toll motorway concessions in Spain, the Transaction does not appear likely to reduce competition in the Spanish Market for the award of toll motorway concessions and therefore does not raise any competition concerns on this market.

4.2.2. *Market for the provision of transport services on toll motorways*

- (34) The Parties submit that there are no horizontal overlaps between the toll motorways operated by the Parties on a market for the provision of transport services on toll motorways.
- (35) ARDIAN is only active on the Spanish market for the provision of transport services through the operation of Trados-45, jointly with Abertis. As Trados-45 however is located in the Region of Madrid, this does not lead to any overlaps with the activities of Tunels or Abertis in this market.
- (36) The toll motorways operated by Tunels cannot be seen as a substitute to other toll motorways operated by Abertis in Spain. Indeed, Tunels connect Barcelona Outer Ring to the city of Barcelona, whereas Abertis operates this Barcelona Outer Ring, connecting different points of origin and destination. The Parties submit that these toll motorways serve different types of traffic and that there are sufficient alternatives to Tunels in connecting the Barcelona Outer Ring with the city. Moreover, any overlap between the activities of Tunels and Abertis predates the

Transaction, which therefore does not give rise to any competition concern in this market.

- (37) Moreover, the ARDIAN and Abertis' activities in France would also not give rise to any competition concern, as Abertis is only active through the operation of the Sanef toll motorway, which it jointly controls with ARDIAN already pre-Transaction.

4.2.3. *Coordinated effects*

- (38) Furthermore, the Transaction is not likely to give rise to any coordinated effects. Tunels' activity is very limited in terms of scope and only on the Spanish markets for the award of toll motorway concessions and the provision of transport services thereon. In addition, ARDIAN is already present in the Spanish and the French market, in which Abertis is also active and more importantly, there is already a link between the two companies' activities, through Trados-45 in Spain, which they jointly control, and through Sanef in France, which is controlled by Abertis and in which ARDIAN already has a minority stake. Lastly, the fact that the markets for the award of toll motorway concessions are bidding markets in which several competitors are active impedes further the effectiveness of any potential coordination.

5. **CONCLUSION**

- (39) 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