



EUROPEAN COMMISSION
DG Competition

Case M.8694 - HOCHTIEF / ABERTIS

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 06/02/2018

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EUROPEAN COMMISSION

Brussels, 6.2.2018
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying party:

Dear Sir or Madam,

**Subject: Case M.8694 – Hochtief / Abertis
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 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').

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- (1) On 22 December 2017, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking Hochtief AG ("Hochtief", Germany), ultimately controlled by ACS Actividades de construcción y Servicios, S.A. ("ACS", Spain), intends to acquire within the meaning of Articles 3(1)(b) of the Merger Regulation sole control over Abertis Infraestructuras, S.A. ("Abertis", Spain), by way of a public tender competing offer (the "Offer") announced on 18 October 2017 (the "Transaction")³. ACS (including Hochtief) and Abertis are referred to below as the "Parties" whilst the undertaking that would result from the Transaction is referred to as "the merged entity".

1. THE PARTIES

1.1. Hochtief

1.1.1. Hochtief's activities

- (2) Hochtief is a German company active in the infrastructure sector and real estate related services. It carries out infrastructure development and building projects in the transport, energy and social and urban infrastructure sectors, as well as mining activities. Hochtief is present on the construction markets in Asia Pacific, the Middle East, the United States and Canada, as well as Europe (the Czech Republic, Germany, Greece, the Netherlands, Poland and the United Kingdom).

1.1.2. Control over Hochtief

- (3) Hochtief is solely controlled by ACS, the ultimate parent of a group of companies active in construction and services activities (the ACS Group). ACS Group's activities are divided into three business areas, namely (i) construction, (ii) industrial services, and (iii) services.
- (4) Other than through Hochtief, the ACS Group provides construction services also through Dragados, and it is active in the concessions business through Iridium. In addition, ACS' subsidiary SICE offers a range of services related to the sale and installation of control, management and information systems including electronic toll collection (ETC) systems.
- (5) Currently, ACS holds a stake of 71.72% in Hochtief and there has not been any material change in Hochtief's corporate governance since ACS acquired sole control over Hochtief in 2011.⁴
- (6) For the purpose of funding its offer for Abertis, Hochtief plans to issue a series of share rights' subscription corresponding to approximately 49.82% of Hochtief's current share capital. Hochtief and ACS entered into an agreement according to which ACS commits to waive all of its share subscription rights. As a result of the

³ Publication in the Official Journal of the European Union No C 6, 9.1.2018, p. 5–6.

⁴ The Commission approved the acquisition of sole control over Hochtief by ACS in case COMP/M.6020 – ACS/Hochtief in 2011. See also Form CO, paragraph 62.

non-subscription of its share rights, ACS' shareholding in Hochtief could fall to a figure as low as [...] should the offer be successful.⁵

- (7) Nevertheless, even if ACS does no longer hold the majority of Hochtief's share capital post-Transaction, ACS is expected to continue to have a majority of the voting shares represented at general shareholders' meetings,⁶ and would therefore be able to pass or reject the resolutions that require a simple majority of votes cast, including the election of shareholders' representatives in Hochtief's Supervisory Board. On this basis, ACS would continue to exercise *de facto* sole control over Hochtief within the meaning of the Merger Regulation.
- (8) In view of the above, the Commission will consider, for the purpose of this decision, that Hochtief is solely controlled by ACS, even if ACS' stake in Hochtief falls below 50% post-Transaction.

1.2. Abertis

1.2.1. Abertis' activities

- (9) Abertis is the parent company of a group operating mostly toll roads and telecommunication infrastructure.⁷ With regard to toll motorway management in the EU, Abertis is mainly active in the management of toll motorways in Spain (mainly through Acesa, Aumar, Avasa, Iberpistas, Aucat and Invicat among others), in France (through Sanef), and to a lesser extent in Italy (through the A4 Holding - Autostrada Brescia-Padova).
- (10) Abertis also operates and issues electronic payment systems through Bip&Go SAS ("Bip&Go"), Bip&Drive S.A. ("Bip&Drive") and Eurotoll SAS ("Eurotoll"), and electronic tolling and smart mobility solutions through Emovis SAS ("Emovis") and A4 Mobility Srl ("A4 Mobility").⁸

⁵ It is expected that ACS' stake in the entity resulting from a combination of Hochtief and Abertis will fall below 50% of Hochtief's share capital, although ACS' participation percentage in Hochtief post-Transaction will depend on several factors such as the number of shares actually subscribed for in the subscription rights share issuance, the level of acceptance of the offer, the structure finally selected to implement the combination and the exchange ratio upon a possible merger by absorption.

⁶ The attendance ratios (based on share capital) at Hochtief's general shareholders' meetings in the last three years were [...] (2017), [...] (2016) and [...] (2015) – Hochtief's response to QP2 of 15 December 2017.

⁷ Regarding telecommunications infrastructure, Abertis holds an interest of 90.7% in Hispasat S.A., a global satellite operator. There is however no horizontal or vertical overlap between Hochtief and the companies of the ACS Group with Abertis as regards the Hispasat satellite business. In addition, Abertis has a 34% non-controlling ownership interest in Cellnex Telecom, S.A., an operator of telecommunications infrastructure for mobile telephony and audio-visual broadcasting.

⁸ See Abertis' submissions to the Commission of 19 and 21 December 2017.

1.2.2. Control over RMG

- (11) Abertis indirectly owns a 33.33% stake in Road Management Group Limited ("RMG"), a consortium operating two toll motorway concessions in the United Kingdom, together with [...].⁹
- (12) The business and affairs of RMG are managed by a Board of Directors, to which [...] of the current Non-Executive Directors have been appointed by Abertis.¹⁰
- (13) Abertis submits that neither Abertis, nor any of [...], holds sole or joint control over RMG because none of them has the possibility of exercising decisive influence over RMG.¹¹ Nevertheless, there are some matters that require the prior approval of the Non-Executive Directors, which could be considered to be related to strategic decisions, such as [...].¹²
- (14) Furthermore, although RMG's Shareholders' Agreement provides for a Dispute Resolution mechanism to solve deadlock situations when the Non-Executive Directors are unable to reach an agreement in relation to any of these matters, such a mechanism would trigger a series of stages and attempts at reconciliation that [...].
- (15) Given the potential duration of the Dispute Resolution mechanism, and the financial burden of the outcome, the Commission cannot exclude, at this stage, that Abertis is able to exercise decisive influence over strategic decisions over RMG.
- (16) In any case, for the purpose of this decision, the question of whether Abertis jointly controls RMG's toll motorway concessions can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market even considering Abertis as active, through RMG, in the sector of toll motorway concessions in the United Kingdom (see section 5 below).

1.2.3. Control over Areamed

- (17) Abertis also owns a 50% stake in Areamed 2000 S.A. ("Areamed"), a joint venture with Areas S.A. ("Areas", of Portugal), a subsidiary of Elior Group active in the provision of concession food services on motorways in Spain.
- (18) Even though Abertis is not involved in the day-to-day management of Areamed's service areas, the Commission could not exclude in a recent decision that Abertis jointly controls Areamed together with Areas, exercising a decisive influence over strategic decisions concerning the operation of Areamed.¹³ Areamed's

⁹ RMG operates the A1(M) Alconbury-Peterborough motorway through Road Management Services (Peterborough) Limited, and the A417/A419 Swindon-Gloucester through Road Management Services (Gloucester) Limited.

¹⁰ See Abertis' submissions to the Commission of 16 January 2018 and 26 January 2018.

¹¹ See Abertis' submissions to the Commission of 16 January 2018.

¹² See Schedule 3 of the Shareholders' Agreement in attachment to Abertis' submissions to the Commission of 16 January 2018.

¹³ Case M.8536 – Atlantia/Abertis Infraestructuras, paragraphs 36 to 45.

shareholding structure and its governance and control mechanisms have not changed since.¹⁴

- (19) In any case, for the purpose of this decision, the question of whether Abertis jointly controls Areamed's operations related, directly or indirectly, to concession food services can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market even considering Abertis as active, through Areamed, on the market for the provision of concession food services (see section 5.2.6 below).

2. THE TRANSACTION

- (20) The Offer comes as a counter-bid to an offer for Abertis made by Atlantia S.p.A. ("Atlantia", of Italy) for 100% of Abertis' share capital on 15 May 2017 (the "Original Bid"), which the Commission unconditionally cleared on 13 October 2017 (Case M.8536 – Atlantia/Abertis Infraestructuras, hereinafter also referred to as the "Atlantia/Abertis" case). The Original Bid was approved by the Spanish Securities Exchange Commission ("the CNMV") on 9 October 2017,¹⁵ with a foreseen acceptance period of 15 calendar days due on 24 October 2017, and is currently suspended as a result of the counter-bid by Hochtief.
- (21) On 18 October 2017, Hochtief announced its intention to make a competing offer to acquire all of the shares representing the share capital of Abertis and submitted the corresponding request to the CNMV for approval. The Offer is conditional upon a minimum level of overall acceptance of at least 50% plus one of Abertis' total share capital. Considering Abertis' rules of governance, the offer may lead to a change of control over Abertis.
- (22) Therefore, the Transaction, pursuant to which Hochtief would acquire sole control over Abertis, constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

- (23) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (ACS: EUR 31 975 million; Abertis: EUR 4 900 million).¹⁶ Each of them has a Union-wide turnover in excess of EUR 250 million (ACS: EUR [...] million; Abertis: EUR 3 121 million), but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State.
- (24) The Transaction therefore has a Union dimension according to Article 1(2) of the Merger Regulation.¹⁷

¹⁴ See Abertis' submission to the Commission of 19 December 2017.

¹⁵ <https://www.cnmv.es/Portal/verDoc.axd?t={4cc03506-8dd2-43f3-94af-ff04b500360e}>

¹⁶ Turnover calculated in accordance with Article 5 of the Merger Regulation.

¹⁷ For completeness, the Transaction would still have an EU dimension according to Article 1(2) of the Merger Regulation even if Hochtief were deemed not controlled by ACS (Hochtief's world-wide turnover is EUR 19 908 million, and its EU-wide turnover is EUR [...] million, and it does not achieve

4. MARKET DEFINITION

- (25) ACS and Abertis are both active on the market for (i) toll motorway concessions. In addition, the Transaction also relates to services ancillary to the operation of toll motorway facilities, such as (ii) the construction of road infrastructure, (iii) distribution of on-board equipment (OBE), (iv) the provision of ETC systems, and (v) food service concessions on motorways.
- (26) The definition of all the markets referred to in the above paragraph was recently addressed by the Commission in the course of its market investigation for the Atlantia/Abertis case.

4.1. Toll motorway concessions

- (27) The operation of infrastructure concessions in general is an activity where private operators assume responsibility for the design, construction, finance, operation and maintenance of an infrastructure asset for a public sector customer. The contracts are usually long-term contracts and the construction costs and the subsequent maintenance/operation costs tend to be covered by fees paid either by the users of the asset (e.g. motorway tolls) or by the public sector customer throughout the contract term, rather than, as in a normal construction contract, upon completion of the construction. This transfers the responsibility for financing of the asset from the public to the private sector and this is what drives the public sector to opt for concessions to address their infrastructure needs.
- (28) In the case of motorways, concessionaires bidding for a motorway concession generally earn revenues through (i) direct tolling systems where the toll fees are paid directly by the motorists (also referred to as "real tolls"), (ii) shadow tolling systems where the toll fees are paid by the road administration based on the number of vehicles using the road, or (iii) availability payment schemes where the road administration pays the concessionaire according to pre-defined indicators based on the road availability and level of maintenance.
- (29) In prior decisions relating to infrastructure services provided by licensed operators such as motorway concessionaires, the Commission has held that competition essentially takes place (i) at the time where the license is granted by the public authorities (competition *for* the market), and (ii) whenever a licensed operator is subject to competition from substitutable alternatives (competition *in* the market).¹⁸ Therefore, the Commission has distinguished two markets relating to toll motorway concessions: (i) the market for the grant of toll motorway concessions, where supply is represented by public authorities and demand by undertakings or consortia of undertakings with an interest in acquiring toll motorway concessions, and (ii) the market for the transport on toll motorways,

more than two-thirds of its aggregate EU-wide turnover within one and the same Member State than Abertis).

¹⁸ Case M.7512 – *Ardian/Abertis/Tunels*, paragraph 19; case M.7075 – *Cintra/Abertis/Itinere/BIP&Drive JV*, paragraph 25; case M.5974 – *Finavias/ Abertis/ Autopista Trados M-45*, paragraph 11; and case M.4687 – *Sacyr/ Eiffage*, paragraph 26; M.4249 – *Abertis/Autostrade*, paragraphs 15-17.

consisting in the provision of speedy and secure road transport infrastructures between various geographical points (routes).¹⁹

4.1.1. The grant of toll motorway concessions

4.1.1.1. Product market definition

Hochtief's views

- (30) Hochtief submits that some concession companies prefer to focus on "greenfield" concessions, which include the initial construction and development of the road infrastructure, while other companies prefer to focus on "brownfield" concessions, which refer to the award of the motorway concession once the construction phase is complete and the road is fully operational. Some concessions are also referred to as "yellowfield" if the motorway infrastructure is already constructed, but requires work to upgrade or improve the asset.²⁰
- (31) Hochtief also notes that there might be a "secondary market" where the (co-)ownership and (co-)control of existing motorway concessions is transferred from existing shareholders to new investors.
- (32) Altogether, Hochtief considers that the relevant product market should be defined as the market for the grant of toll motorways concessions, without any further segmentation.²¹

The Commission's assessment

- (33) In its prior decision practice, the Commission has defined the market for the grant of toll motorway concessions as consisting 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
- (34) In the recent Atlantia/Abertis case, the Commission also pointed towards some differences between secondary sales of motorway concessions and the grant of motorway concessions, ultimately leaving the question open.²³

4.1.1.2. Geographic market

Hochtief's views

- (35) Hochtief considers that the geographic market for the grant of toll motorway concessions should be considered at least EEA-wide (and potentially worldwide) in scope.²⁴

¹⁹ Case M.4087 – *Eiffage/Macquarie/APRR*. Case M.8536 – *Atlantia/Abertis Infraestructuras*.

²⁰ Form CO, paragraph 142, in conjunction with Footnote 75.

²¹ Form CO, paragraphs 131 to 145.

²² Case M.7512 – *Ardian/Abertis/Tunels*, paragraph 21; and case M.4249 – *Abertis/Autostrade*, paragraph 15.

²³ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 65 to 68. In addition, for the purpose of the present decision, it is not necessary to consider the distinction between greenfield and brownfield concessions, since any further sub-segmentation of the market for the grant of toll motorway concessions would result in a lower overlap between the activities of the Parties.

The Commission's assessment

- (36) In the past, the Commission has left open the question of the geographic scope of the market for the grant of toll motorway concessions. While results of prior market investigations pointed out to an at least EEA-wide market,²⁵ the Commission did not exclude the existence of national markets.²⁶
- (37) This was also recently confirmed by the market investigation in the Atlantia/Abertis case, in which the Commission left open the question of whether the market for the grant of toll motorway concessions is national, EEA-wide or world-wide.²⁷

4.1.1.3. Conclusion on market definition

- (38) In any event, the Commission considers that for the purpose of this decision, the question of whether the market for the grant of motorway concessions may be further split into greenfield, brownfield or secondary sales of motorway concessionaires constitute another relevant product market may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.
- (39) Also, with regard to the geographic scope, the question of whether the market for the grant of toll motorway concessions is national, EEA-wide or world-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.
- (40) In view of the above, and for the purpose of this decision, the Commission will assess the effects of the Transaction for the grant of toll motorway concessions at national level (see section 5.1.1 below).

4.1.2. The management of transport infrastructure

4.1.2.1. Product market definition

Hochtief's views

- (41) Hochtief submits that there is no need to analyse in detail the precise delineation of the management of transport infrastructure given the absence of a relevant overlap.²⁸

The Commission's assessment

- (42) In its prior decision practice, the Commission has considered a market for the transport on toll motorways, also corresponding to the management of motorway

²⁴ Form CO, paragraphs 147 to 149.

²⁵ Case M.4249 – *Abertis/Autostrade*, paragraph 17.

²⁶ Case M.4687 – *Sacyr/Eiffage*, paragraph 27.

²⁷ Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 80.

²⁸ Form CO, paragraph 157.

concessions, and consisting in the provision of speedy and secure road transport infrastructure between various geographical points (routes).²⁹

- (43) In previous cases, the Commission has left open the question of whether alternative means of transport are in the same market as toll motorways, indicating that the existence and extent of inter-modal competition has to be assessed on a route-by-route basis.³⁰

4.1.2.2. Geographic market definition

Hochtief's views

- (44) Hochtief submits that there is no need to analyse in detail the precise delineation of the management of transport infrastructure given the absence of a relevant overlap.³¹

The Commission's assessment

- (45) In its prior decision practice, the Commission has defined transport on toll motorways according to the Origin & Destination ("O&D") method, whereby every combination of a point of origin and a point of destination is considered to be a distinct market from the demand side.³²

4.1.2.3. Conclusion on market definition

- (46) For the purpose of this decision, the question of whether the provision of transport services on toll motorways should be distinguished from the other transport modes may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible product market definition.
- (47) In any event, considering that Abertis does not offer transport infrastructure services other than on toll motorways or toll roads,³³ the Commission will assess the effects of the Transaction on the narrowest product market, i.e. the provision of transport infrastructure services on toll motorways.
- (48) As to the geographic market definition, for the purpose of this decision, every combination of a point of origin and a point of destination (O&D pair) will be considered as constituting a distinct market.

²⁹ Case M.4249 – *Abertis/Autostrade*, paragraph 18; case M.4087 – *Eiffage/Macquarie/APRR*, paragraph 18.

³⁰ Case M.5855 – *DB/Arriva*, paragraph 67; case M.4087 – *Eiffage/Macquarie/APRR*, paragraph 19; and case M.3770 – *Lufthansa/Swiss*, paragraph 14.

³¹ Form CO, paragraph 157.

³² Case M.7512 – *Ardian/Abertis/Tunels*, paragraph 25; and case M.4249 – *Abertis/Autostrade*, paragraphs 20-21.

³³ Form CO, paragraph 131.

4.2. Construction of infrastructure

4.2.1. Product market definition

Hochtief's views

- (49) Hochtief submits that a market for civil engineering construction should be considered, without any further segmentation according to the kind of infrastructure (i.e. roads, bridges, railroads, sewage systems, etc.).³⁴

The Commission's assessment

- (50) In its prior decision practice, the Commission has considered the possibility of distinguishing within the market for construction services between (i) large and small infrastructure (divided according to the projects concerned), (ii) roads and other types of infrastructure, and (iii) motorways and other roads.³⁵
- (51) In a prior decision regarding transport, the Commission has also considered engineering services as a distinct market.³⁶

4.2.2. Geographic market

Hochtief's views

- (52) Hochtief submits that the appropriate market may be wider than national given that international firms are able to bid for construction contracts in Member States in which they do not have a pre-existing presence by partnering with local construction companies.³⁷

The Commission's assessment

- (53) In its prior decision practice, the Commission has left open the question on whether the market for construction of infrastructure is national or EEA-wide in scope.³⁸

4.2.3. Conclusion on market definition

- (54) For the purpose of this decision, the question of whether a distinction should be made between (i) large and small infrastructure, (ii) roads and other infrastructure, and (iii) motorways and other roads may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (55) Considering that Abertis is only active in the concession of motorway infrastructure, the Commission will assess the effects on the Transaction on a narrower product market for motorways.

³⁴ Form CO, paragraphs 181 to 184.

³⁵ Case M.4087 – *Eiffage/Macquarie/APRR* and Case COMP/4249 – *Abertis/Autostrade*.

³⁶ Case M.6646 – *Alstom Transport SA/FSI/Translohr*.

³⁷ Form CO, paragraph 186.

³⁸ Case M.1157 *Skanska/Scancem*, Case COMP/M.4087 *Eiffage/Macquarie/APRR* and Case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraph 167.

- (56) In addition, the question of whether a distinction should be made between the market for construction of infrastructure and the market for engineering services may also be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible product market.
- (57) As to the geographic market definition, the question of whether the market for construction of infrastructure is national or EEA-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible geographic market.

4.3. Distribution of on-board equipment (OBE)

- (58) An OBE is a device installed in the vehicle and read remotely by an antenna installed on motorway tolls for the purposes of allowing the vehicles to pass without stopping to make the toll payment.³⁹

4.3.1. Product market definition

Hochtief's views

- (59) Hochtief submits that a market for the distribution of OBE should be considered, without any further segmentation according to the type of OBE users, i.e. car drivers as opposed to truck drivers.⁴⁰

The Commission's assessment

- (60) In prior decisions, the Commission has concluded that the different methods of toll payment, i.e. in cash, by credit/debit card, or by using a device installed in the vehicle, namely the OBE do not form part of the same product market. The Commission therefore defined a market for the distribution of OBE devices.⁴¹
- (61) In a prior decision, the Commission referred to five main stakeholders present in the distribution chain for OBE devices: “notably manufacturers, distributors, concessionaires, financial institutions and end OBE users (the drivers).” The Commission also noted that the BIP & Drive JV would operate on the last stage of the distribution chain, i.e. offering OBE devices to end users.⁴²
- (62) In the recent Atlantia/Abertis case, the Commission left open (i) whether the market for the provision of ETS / distribution of OBE devices constitutes a distinct market, (ii) OBE devices are substitutable to other means of toll payment, and (iii) distribution of OBE to cars should be distinguished from the distribution of OBE to trucks.⁴³

³⁹ Case M.7075 – Cintra/Abertis/Itinere/BIP&Drive JV, footnote 3.

⁴⁰ Form CO, paragraph 190.

⁴¹ Case M.7075 – Cintra/Abertis/Itinere/Bip & Drive JV, and case M.7512 – Ardian/Abertis/Tunels.

⁴² Case M.7075 – Cintra/Abertis/Itinere/Bip & Drive JV, paragraph 33

⁴³ Case M.8536 – Atlantia/Abertis Infraestructuras, paragraph 142.

4.3.2. Geographic market

Hochtief's views

- (63) Hochtief submits that there is no need to analyse in detail the precise geographic scope for the market for the distribution of OBE devices given that there is no adverse effect on competition regardless of market definition.⁴⁴

The Commission's assessment

- (64) In its prior decisions, the Commission has considered the market for the distribution of OBE devices as likely national in scope, even though the OBE devices may be interoperable on a wider basis than national basis. When analysing the progress achieved in the European Electronic Toll Service (EETS) implementation, the Commission reached the conclusion that there are still different national systems due to technical barriers which have not yet been removed by the Member States and the stakeholders. Therefore, a pan-European interoperability of electronic road toll systems has not been achieved yet.⁴⁵

4.3.3. Conclusion on market definition

- (65) For the purpose of this decision, the questions of whether the market for OBE devices is a distinct market, separate from the other means of payment (i.e. in cash, by credit/ debit card) and of whether the market should be further segmented according to the type of OBE users may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (66) As regards the geographic scope, the question on whether the market for the distribution of OBE devices is national or EEA-wide in scope may be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.

4.4. Provision of electronic toll collection (ETC) systems

- (67) ETC systems detect the presence of a vehicle passing a toll station, classify it and deduct the correct toll fee. Distinct companies offer a wide range of technological solutions for ETC systems. Some systems operate by recognising a transponder in the vehicles (the OBE device), while other systems use camera technology to capture the registration plate and identify the vehicle.⁴⁶

⁴⁴ Form CO, paragraph 194.

⁴⁵ Case M.7075 – *Cintra/Abertis/Itinere/BIP&Drive JV*, paragraph 38, and case M.7512 – *Ardian/Abertis/Tunels*.

⁴⁶ Form CO, paragraph 161.

4.4.1. Product market definition

Hochtief's views

- (68) According to Hochtief, there is a separate market for ETC systems. Hochtief also submits that the differentiation in the customers of ETC systems and OBE operators implies that they belong to separate markets.⁴⁷

The Commission's assessment

- (69) In a prior decision, the Commission considered a distinct market for ETC systems, while ultimately leaving the market definition open in view of the absence of any affected markets.⁴⁸
- (70) In the recent Atlantia/Abertis case, while considering a market for the provision of equipment or services for intelligent transport systems (ITS),⁴⁹ the Commission ultimately left open the question of whether a distinction should be made between the provision of ETC systems and of the ITS equipment.⁵⁰

4.4.2. Geographic market

Hochtief's views

- (71) Hochtief submits that the relevant geographic market is at least EEA-wide.⁵¹

The Commission's assessment

- (72) In prior decisions, the Commission ultimately left open the question whether the market for the provision of equipment or services for ITS is national or EEA-wide in scope.⁵²

4.4.3. Conclusion on market definition

- (73) For the purpose of this decision, the question of the actual scope of the market for ETC systems may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

⁴⁷ In particular, ETC systems providers offer a complete solution to concessionaires or public authorities, which are their clients. In contrast, manufacturers of OBE devices manufacture the OBE element of the system, for which the customers are specific OBE device distributors or, in some cases, the ETC provider. Finally, the market players active in each of these activities are not the same. Some manufacturers of OBE devices also manufacture various elements of the ETC system, but may not provide a complete ETC solution itself – see Hochtief's reply to QP2 of 15 December 2017.

⁴⁸ Case M.6020 – ACS/Hochtief.

⁴⁹ Intelligent Transport Systems (ITS) are advanced applications which without embodying intelligence as such aim to provide innovative services relating to different modes of transport and traffic management and enable various users to be better informed and make safer, more coordinated and 'smarter' use of transport networks (Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010).

⁵⁰ Case M.8536 – Atlantia/Abertis Infraestructuras, paragraph 152.

⁵¹ Form CO, paragraph 166.

⁵² Case M.6020 – ACS/Hochtief, and case M.8536 – Atlantia/Abertis Infraestructuras, paragraph 153.

(74) As regards the geographic scope, the question on whether the market for the provision of ETC systems is national or EEA-wide in scope may be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.

4.5. Food services concessions

(75) In its prior decision practice relating to concession food services, the Commission has mainly analysed the competitive dynamics at the time of the award of food services concessions (competition *for* the market).⁵³

(76) Considering that Abertis (through Areamed) may be subject to the competitive constraint exerted by other providers of conceded services (food services or retail), the Commission has assessed whether, in relation to concession food services, competition *in* the market should also be analysed. For that purpose, and by analogy with the approach taken for toll motorway concessions (see section 4.1 above), the Commission has considered the definition of two distinct markets: (i) the grant (or award) of food services sub-concessions on motorway service areas, and (ii) the provision of food services on motorway service areas.

4.5.1. *The grant of food services sub-concessions on motorway services areas*

4.5.1.1. Product market definition

Hochtief's views

(77) Hochtief submits that where the tender for the initial motorway concession includes ancillary services such as food services, the market for the grant of motorway concessions covers all these ancillary services. It is then not uncommon for the winner of the tender to subcontract these ancillary services.⁵⁴

(78) Hochtief considers that the relevant product market should therefore be defined as the market for concession food services without dividing it into the award of food services concessions and the provision of concession food services (exploitation of the concession).⁵⁵

The Commission's assessment

(79) In its prior decision practice, when assessing competition at the time of the award of food services concessions (competition *for* the market), the Commission has identified a market for concession food services distinct from contract food services, consisting in the outsourcing or the provision of food service requirements to the public in travel- and retail-related locations and leisure venues.⁵⁶

⁵³ Case M.8536 – *Atlantia/Abertis Infraestructuras* paragraph 92.

⁵⁴ Form CO, paragraph 296.

⁵⁵ Hochtief's reply to RFI 2 of 11 January.

⁵⁶ Case M.4762 – *Autogrill/Alpha Airports Group*, footnote 4; case M.4249 – *Abertis/Autostrade*, paragraph 28; case M.2977 – *Compass/Onama Spa*, paragraphs 12 and 18; and case M.8536 – *Atlantia/Abertis Infraestructuras* paragraph 102.

- (80) The Commission has further considered whether the market for food services concessions should be divided according to the type of activity primarily carried out in the areas where concession food services are provided (e.g. travel, retail, sports or leisure). Within food services concessions in travel-related locations, the Commission has considered a further sub-division according to the type of locations or venues (e.g. airports, railway stations, motorway service areas).⁵⁷
- (81) Conversely, the Commission has considered whether concession food services provided on motorway service areas are part of a broader market for services ancillary to the operation of toll motorway facilities, also including gas sales or hotel accommodation.⁵⁸

4.5.1.2. Geographic market definition

Hochtief's view

- (82) Hochtief considers that the market for concession foodservices may be considered at least national in scope, but it is likely to be wider.⁵⁹

The Commission's assessment

- (83) In its prior decision practice regarding food services concessions, the Commission has initially considered that the market for concession food services is national in scope,⁶⁰ before considering it as possibly wider than national.⁶¹ With regard to a neighbouring market, i.e. the market for the award of concessions for travel retail services at airports, the Commission has found some indications that the market could be at least EEA-wide in scope.⁶²
- (84) As for toll motorway concessions, it is not possible, at this stage, to conclude firmly on the precise geographic scope of the market for the grant of food services sub-concessions.
- (85) However, the progressive implementation in the national laws of EEA countries of requirements for motorway concessionaires to grant sub-concessions following a transparent competitive procedure as well as the internationalisation of food services concessionaires point towards the definition of an EEA-wide or even worldwide geographic market.⁶³

⁵⁷ Case M.4762 – *Autogrill/Alpha Airports Group*, paragraph 12; case M.3728 – *Autogrill/Altadis/Aldeasa*, paragraph 10; and case M.8536 – *Atlantia/Abertis Infraestructuras* paragraph 103.

⁵⁸ Case M.4087 – *Eiffage/Macquarie/APRR*, paragraph 22; and case M.8536 – *Atlantia/Abertis Infraestructuras* paragraph 104.

⁵⁹ Form CO, paragraph 148.

⁶⁰ Case M.2977 – *Compass/Onama Spa*, paragraph 17; and case M.126 – *Accor/Wagons-Lits*, point Y.3.

⁶¹ Case M.4762 – *Autogrill/Alpha Airports Group*, paragraph 15; and case M.3728 – *Autogrill/Altadis/Aldeasa*, paragraph 13.

⁶² Case M.7622 – *Dufry/ World Duty Free*, paragraph 24; case M.6263 – *Aelia/Aéroports de Paris/JV*, paragraph 52; and case M.8536 – *Atlantia/Abertis Infraestructuras* paragraph 111.

⁶³ Case M.8536 – *Atlantia/Abertis Infraestructuras* paragraph 114.

4.5.1.3. Conclusion on market definition

- (86) For the purpose of this decision, the question of whether there is an overall market for the grant of sub-concessions for commercial ancillary facilities on motorway services areas or whether it should be segmented by type of services or locations may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (87) In addition, the question of whether the market for the grant of food services sub-concessions on motorway service areas is national, EEA-wide or world-wide may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.

4.5.2. *The provision of concession food services on motorway service areas*

4.5.2.1. Product market definition

Hochtief's view

- (88) Hochtief considers that the relevant product market should be defined as the market for concession food services, covering the award of food services concessions and the provision of concession food services.⁶⁴

The Commission's assessment

- (89) The Commission has not, in its past decision practice, defined a market for the provision of concession food services on motorway service areas, distinct from the market for the grant of food services sub-concessions on motorway service areas.
- (90) However, it has identified two neighbouring markets: (i) the provision of retail services at airports, distinct from the market for the award of concession for the operation of retail services at airports;⁶⁵ and (ii) the retail supply of motor fuels (i.e. sales of motor fuels at service stations), possibly divided between sales at motorway and at non-motorway stations.⁶⁶
- (91) In addition, the Commission has found that there is a market for motorway catering distinct from the market of traditional catering, based on demand-side considerations (captive customers only made of motorway users) and supply-side considerations (wide turnover variations, importance of ancillary services, long opening hours and heavily regulated environment). Within that market, it has distinguished between (i) food services strictly speaking (restaurants), (ii) refreshment services, and (iii) sale of food products.⁶⁷

⁶⁴ Hochtief's reply to RFI 2 of 11 January.

⁶⁵ Case M.6723 – *Ferrovial/Qatar Holding/CDPQ/Baker Street/BAA*, paragraph 27; case M.6263 – *Aelia/Aéroports de Paris/JV*, paragraph 18; and case M.5123 – *Autogrill/World Duty Free*, paragraphs 8 and 16.

⁶⁶ Case M.7603 – *Statoil Fuel and Retail/Dansk Fuels*, paragraph 28; and case M.5637 – *Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings*, paragraph 29.

⁶⁷ Case M.126 – *Accor/Wagons-Lits*, points Y.1-2.

- (92) In that context, the Commission has assessed (i) whether the market for the provision of food services should be divided between food services provided on motorway service areas and at other locations, and (ii) concession food services provided on motorway services areas represent a part of a wider market also encompassing refreshments services and sale of food products on motorway services areas.

4.5.2.2. Geographic market definition

Hochtief's views

- (93) Hochtief submits that the market is at least national and very likely wider, but there is no need to analyse in detail the precise geographic scope for the provision of concession food services given that there are no possible effects on competition as a result of the Transaction.⁶⁸

The Commission's assessment

- (94) The Commission has not, in its past decision practice, defined the geographic scope of the market for the provision of concession food services.
- (95) Due to the homogeneity in prices and in consumer preferences as well as a possible chain of substitution effect across motorway service areas, it cannot be excluded that the market for the provision of concession food services is national. In addition, supply-side considerations, notably the number of players operating on an at least national basis, would plead in favour of the relevant geographic market being defined as wider than local.⁶⁹

4.5.2.3. Conclusion on market definition

- (96) For the purpose of this decision, the question of whether (i) a distinction should be made between the grant (or award) of food services sub-concessions on motorway service areas, and the provision of food services on motorway service areas and (ii) the market for the provision of concession food services on motorway service areas is part of a wider product market (encompassing other locations or other services) may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible market definition.
- (97) Considering that only Abertis but not Hochtief is active in the market for food services concessions in Spain, and in particular Abertis is only active across the motorways operated by Abertis' concession companies Acesa and Invicat,⁷⁰ without being active in relation to bidding for food services sub-concessions the Commission will assess the effects on the Transaction on a narrower market definition, that of the provision of food services on motorway areas.⁷¹

⁶⁸ Form CO, paragraphs 204.

⁶⁹ Case COMP/M.3728 - *Autogrill/Altadis/Aldeasa*; case M.4249 – *Abertis/Autostrade*; and case M.8536 – *Atlantia/Abertis Infraestructuras*, paragraphs 127 and 128.

⁷⁰ Abertis' reply to RFI-1 of 19 December 2017.

⁷¹ Hochtief's reply Response to RFI-2 of 11 January 2018 in conjunction with Abertis' reply to RFI-1 of 19 December 2017.

- (98) As to the geographic market definition, the question of whether the market for food services concessions is local or national may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market on either plausible geographic market.

5. COMPETITIVE ASSESSMENT

5.1. Horizontal effects

- (99) The Transaction gives rise to two affected markets for the grant of toll motorway concessions, on which ACS and Abertis are both active on the demand side, namely Spain and the United Kingdom.⁷²

5.1.1. The grant of toll motorway concessions

- (100) In the present case, the Parties' combined market share in the market for the granting of toll motorway concessions would be below 20% in the EEA and at worldwide level, both in terms of km and revenues. Nevertheless, if the geographic market is considered to be national in scope, the Transaction gives rise to a horizontally affected market for the grant of toll motorway concessions in Spain (in terms of km and revenues) and in the United Kingdom (in terms of revenues).

5.1.1.1. Analytical framework

- (101) In its prior decision practice regarding infrastructure managed under concession or franchise contracts, the Commission has assessed the impact of a concentration on the market for the grant of concessions or franchises based on three elements.⁷³
- (102) First, the Commission has taken account of the parties' combined share of the concessions or franchises operated by the parties, calculated notably on the basis of the number of concessions or franchises, of km or of revenues. Nevertheless, in bidding markets such as the grant of toll motorway concessions,⁷⁴ the Commission has acknowledged that those shares reflect the parties' position based on past grants, but not necessarily the actual or future bidding behaviour.⁷⁵
- (103) Second, the Commission has analysed historic bidding data to determine whether the parties are active bidders and compete head-to-head, as well as whether

⁷² The activities of the Parties overlap also horizontally in the market for the transport on toll motorways without leading to any affected markets under any plausible market definition. In addition, ACS is active on the market for ETC systems through its subsidiary SICE, and Abertis is also active on the market for ETC systems through its subsidiaries Emovis and A4 Mobility. However, SICE is not currently active in the market for ETC systems within the EEA (see Hochtief's reply to RFI-4 as of 19 January 2018). Therefore, no horizontally affected markets arise at national or EEA level for the provision of ETC systems.

⁷³ See for example case M.8536 – Atlantia/Abertis Infraestructuras, paragraphs 175 to 178.

⁷⁴ As recalled in section 4.1.1.1, the Concessions Directive requires that toll motorway concessions be granted following open competitive procedures.

⁷⁵ Case M.5855 – DB/Arriva, paragraph 32.

bidders are expected to enjoy significant incumbency or scale advantages as a result of previous grants of concessions or franchises.⁷⁶

- (104) Third, the Commission has considered the number of alternative bidders in the market and the competitive constraint they exert on the parties.⁷⁷

5.1.1.2. Hochtief's views

- (105) Hochtief claims that the Transaction is unlikely to create any concern relating to the grant of toll motorway concessions for the following reasons.
- (106) First, Hochtief submits that the market for toll motorway concessions is a bidding market where high value contracts are awarded following open and transparent tender procedures, which are conducted according to the relevant EU Directives 2014/23/EU and 2014/24/EU of the Parliament and of the Council, as transposed by the Member States into their national legislation.⁷⁸
- (107) Second, Hochtief submits that the Parties are not close competitors. Abertis specialises in brownfield concessions, which are projects in which the construction is completed so that the road is operational and generating revenue at the time of the investment. In contrast, ACS focuses (through Iridium and Hochtief) on greenfield concessions, which require the design, finance and construction before the road becomes operational.⁷⁹
- (108) Third, Hochtief submits that the Parties face strong competition from a wide range of international and local concession companies, construction firms and financial infrastructure investors which are capable to successfully bid, either alone or in consortia, for concessions.⁸⁰

5.1.1.3. The Commission's assessment

Calculation of market shares for toll motorway concessions

- (109) Managing and operating motorway concessions requires heavy upfront investments and specific know-how. It is standard practice for companies within the business to group in consortia (often called special purpose vehicles – SPV) in order to bid together for motorway concessions. Each participating company takes an equity interest in the consortium, depending on the level of investment and risk it wishes to take.
- (110) Within this framework, Hochtief claims that the Parties' combined market shares should be computed for each of them on the basis of their participation in each consortium.⁸¹
- (111) However, the Commission considers that the methodology proposed by Hochtief is not appropriate as it leads to a distorted picture of the competitive landscape of

⁷⁶ Case M.5855 – DB/Arriva, paragraphs 33-35.

⁷⁷ Case M.5855 – DB/Arriva, paragraph 37.

⁷⁸ Form CO, paragraphs 224 to 226.

⁷⁹ Form CO, paragraphs 228 to 235.

⁸⁰ Form CO, paragraph 236.

⁸¹ Form CO, paragraphs 208 to 219.

the market. First, the proposed methodology would allocate an artificial market share to the minority shareholders that do not have any influence over the strategic decisions or business policy of the consortia holding the motorway concessions, such as financial investors. Second, allocating market shares to the Parties on the basis of their participation in the consortia would underestimate their competitive position whenever they can drive the business strategy for holding joint control over the operation of the motorway despite not owning all of the shares of the consortia.

- (112) Given the reasons above, and for the purpose of this decision, the Commission will take a conservative approach whereby the market share of every consortium is allocated in full to the Parties as long as one of them holds joint or sole control over the consortium managing and operating the concession, according to the criteria in the Commission's Consolidated Jurisdictional Notice.⁸²

Combined market shares of toll motorway concessions operated by the Parties

- (113) At worldwide level, according to Hochtief, the Parties operate together [10-20]% of the toll motorway concessions based on km, and their combined market share based on revenues would be less than 10% on a worldwide basis.⁸³
- (114) At EEA level, according to Hochtief, the Parties operate together [10-20]% of the toll motorway concessions based on km, and [10-20]% based on revenues.⁸⁴
- (115) Therefore, the Transaction does not lead to any affected markets neither at worldwide level nor at EEA level.
- (116) At national level, the Transaction gives rise to affected markets in Spain and in the United Kingdom, the only two Member States where the Parties' activities on toll motorway concessions within the EEA overlap.
- (117) In Spain, according to Hochtief, the Parties' combined market share is approximately [40-50]% in km (ACS: [10-20]%; Abertis: [30-40]%) and [70-80]% in revenues (ACS: [5-10]%; Abertis: [60-70]%).⁸⁵ ACS operates 12 toll motorway concessions in Spain through its subsidiary Iridium, while Abertis operates 14 toll motorway concessions. Iridium's current portfolio would add 580 km to the 1 836 km operated by Abertis. In terms of revenue, the increment brought about by the Transaction would be lower than in km.

⁸² See section B.II of the Commission's Consolidated Jurisdictional Notice on Acquisition of control.

⁸³ Form CO, paragraph 210 and Annex 10, in conjunction with Hochtief's reply to RFI-5 of 25 January 2018.

⁸⁴ Form CO, paragraph 210 and Annex 10, in conjunction with Hochtief's reply to RFI-5 of 25 January 2018.

⁸⁵ The calculation of the market shares includes all concession motorways where the toll is paid through (i) direct tolling system, (ii) shadow tolls, and (iii) availability payment scheme. Abertis' individual market share includes two motorway concessionaires in which Abertis has a minority shareholding that might not grant Abertis joint control over their operation (Circunvalación de Alicante – CIRALSA, and Autopista Terrassa-Manresa, S.A. – AUTEMA, of 33 km and 48 km respectively). Form CO, Annex 10.

- (118) In Spain there are, according to Hochtief, six other operators holding more than 5% of the toll motorway concessions based on km: Sacyr (15%), Itinere (11%), Cintra (9%), FCC (9%), Globalvia (7%) and Acciona (6%).⁸⁶
- (119) In the United Kingdom, according to Hochtief, the Parties' combined market share is approximately [5-10]% in km (ACS: [0-5]%; Abertis: [5-10]%) and [40-50]% in revenues (ACS: [20-30]%; Abertis: [20-30]%).⁸⁷ ACS operates one toll motorway concession in the United Kingdom, while Abertis operates two motorway concessions.
- (120) In the United Kingdom there are, according to Hochtief, five other operators holding more than 5% of the toll motorway concessions based on km: Balfour Beatty (51%), 3i Group (23%), John Laing (21%), Sir Robert McAlpine (15%) and Henry Boot (6%).⁸⁸
- (121) The difference between the Parties' combined market share based on km against the combined market share based on revenues is partly due, according to Hochtief, to the lack of publicly available information for certain concession payment mechanisms.⁸⁹ In this regard, while it is relatively easy to collect data on the length of the existing toll motorways, Hochtief submits that it is not feasible to estimate market shares based on revenues because there is no publicly available data on the revenues generated by competitors through shadow tolling systems.⁹⁰ In addition, the length of a motorway does not necessarily have a linear relationship to the revenues it generates.
- (122) Against this background, the Parties' combined market shares in terms of revenues, as estimated by Hochtief, would be higher than in reality, since the total market size would not contain the revenues generated by the Parties' competitors through shadow tolling systems.
- (123) In Spain, the Parties operate ten shadow toll motorway concessions for a total length of 390 km,⁹¹ while the total shadow toll network in terms of km in Spain comprises 2 172 km. This implies that the revenue generated by the Parties' competitors on 82% of the shadow toll network is not captured in the combined market share reported in terms of revenue in Spain.
- (124) In the United Kingdom the total market size in terms revenues reported by Hochtief includes the revenues of the only direct tolling motorway (the M6) and the three shadow toll motorways operated by the Parties, which all together comprise 139 km of toll motorway. However, there would be sixteen more shadow toll motorway concessions operated by the competitors of the Parties in

⁸⁶ Form CO, Annex 10, in conjunction with Hochtief's reply to RFI-5 of 25 January 2018.

⁸⁷ The calculation of the market shares includes all concession motorways where the toll is paid through (i) direct tolling system, (ii) shadow tolls, and (iii) availability payment scheme. Form CO, Annex 10.

⁸⁸ Form CO, Annex 10, in conjunction with Hochtief's reply to RFI-5 of 25 January 2018.

⁸⁹ Form CO, paragraphs 217 to 220.

⁹⁰ Form CO, paragraph 217.

⁹¹ In Spain, Iridium operates nine shadow toll motorway concessions, while Abertis holds joint control over one shadow toll motorway through its [...] participation in Autopista Trados M-45. Form CO, Table 2 and Annex 10, in conjunction with Hochtief's reply to RFI-2 of 11 January 2018 and the Responses submitted by Abertis on 19 December 2017, Annex 3.

the United Kingdom comprising 1 228 km that are not included in the total market size in terms of revenues.

- (125) Therefore the market shares in terms of revenues provided by Hochtief are conservative estimates, meaning they are in all likelihood an overestimation of the real market share of the merged entity.

Historic bidding data and closeness of competition

- (126) Hochtief has provided data on the [...] tenders launched since 2005 in which either Hochtief or another subsidiary of ACS has participated for the grant of toll motorway concessions in the EEA.⁹² Equally, Abertis has participated in [...] tenders in the EEA since 2007 ([...]).⁹³ The analysis of the bidding data shows that (i) Abertis has not been a very active bidder in the EEA; and (ii) ACS and Abertis have never competed against each other for the award of the same motorway concession contract over the last ten years in the EEA.⁹⁴
- (127) This is also reflected in the replies to the market investigation. The respondents having expressed an opinion in the market investigation did not rank ACS and Abertis as the closest competitor to each other. According to the results of the market investigation, Cintra and Sacyr would be closer competitors to each of ACS and Abertis in Spain than the Parties are to each other. The groups Globalvia and Itinere are also listed as closer competitors of Abertis in Spain than ACS.⁹⁵
- (128) In addition, the granting authorities that participated in the market investigation confirmed that ACS and Abertis have never or rarely competed head-to-head against each other for being granted the same motorway concession over the last ten years, either in Spain, in the United Kingdom, or in any other EEA Member State.⁹⁶
- (129) The Commission also finds that ACS and Abertis have not competed directly against each other, even if it takes account of secondary transactions (i.e. sale and acquisition of existing concessionaires) in the EEA.⁹⁷ More specifically, out of the [...] secondary transactions identified by Hochtief and/or Abertis,⁹⁸ ACS only participated in [number of secondary transactions] in which Abertis was not present as a potential acquirer.⁹⁹

⁹² Form CO, Annex 18.

⁹³ Responses submitted by Abertis on 19 December 2017, Annex 3.

⁹⁴ For completeness, ACS and Abertis (through Acesa) jointly bid within a consortium for the construction and operation of the C-25 road 'Eix Transversal' between Cervera to Caldes de Malavella in Spain in 2007, although the concession was ultimately granted to a competing bidder.

⁹⁵ Replies to question 6 of Q1 – Questionnaire to competitors; and replies to question 4 of Q2 – Questionnaire to customers.

⁹⁶ Replies to question 2 of Q2 – Questionnaire to customers

⁹⁷ Form CO, Annex 19, and responses submitted by Abertis on 19 December 2017, Annex 4.

⁹⁸ Form CO, Annex 8.1.2.

⁹⁹ [...]. Form CO, Annex 19, in conjunction with footnote 79.

Parties' bidding strategies

- (130) The Parties bidding strategy further underpins that ACS and Abertis are not close competitors. While Abertis specialises in brownfield concessions, both Iridium and Hochtief focus on greenfield concessions.¹⁰⁰
- (131) According to Hochtief, Abertis has mainly acquired interests in mature concessions through secondary transactions, and it has not participated in tenders for newly granted greenfield concessions in recent years.¹⁰¹ Instead, Hochtief focuses on greenfield concessions, where it carries out the initial construction work and development of the infrastructure. Construction is the main driver of ACS' business, and 76% of ACS' revenues emanate from its construction business area. Hochtief claims that generally, once it has constructed the motorway and the infrastructure becomes operational, it sells on the concession to another operator, rather than continuing to operate the motorway concession itself.¹⁰²
- (132) The Commission's assessment of Hochtief's internal documents tends to confirm that the business strategy on motorway concessions by each of the Parties is different. In a presentation by J.P. Morgan to Hochtief's Executive Board, the Transaction's strategic and industrial rationale is described as "*a complementary combination of Hochtief's unrivalled global presence as top-tier infrastructure group and leading PPP concessions developer with Abertis, the world's largest toll road operator with a mature brownfield concessions portfolio and strong operation and maintenance (O&M) know how and credentials*".¹⁰³
- (133) In the same line, according to Abertis' Strategic Plan 2015-2017, Abertis has a preference to invest in brownfield and yellowfield projects, and that greenfield projects are generally excluded from the analysis, since Abertis prefers to take traffic risks, which can be better assessed in brownfield and yellowfield projects than in greenfield projects.¹⁰⁴
- (134) The results of the Commission's market investigation also support the complementarity of ACS' construction activities and appetite for greenfield concessions, against Abertis' preference for mature assets and less risky brownfield investments.¹⁰⁵

Barriers to entry or expansion

- (135) Hochtief submits that there has not been any significant entry into the motorway concession segment in Spain in the last five years, mostly because there has been no new motorway concession awarded in Spain in the last five years. However,

¹⁰⁰ Form CO, paragraph 228.

¹⁰¹ Form CO, paragraph 228.

¹⁰² Form CO, paragraph 229.

¹⁰³ Project Mars – Presentation to the Supervisory Board of Hochtief Aktiengesellschaft (slide 6). Form CO, Annex 5E.

¹⁰⁴ Responses submitted by Abertis on 19 December 2017, in conjunction with Abertis' Strategic Plan 2015-2017 submitted in attachment to its responses.

¹⁰⁵ Replies to question 5 of Q1 – Questionnaire to competitors.

Hochtief notes that infrastructure funds have invested in concession consortia in recent years.¹⁰⁶

- (136) The respondents to the market investigation identified the high investments (strong balance sheet and access to the financial markets), experience, know-how, and track record as the main barriers to enter or expand in the sector of toll motorway concessions.¹⁰⁷ In this framework, a large majority of the respondents to the market investigation having expressed an opinion consider that the Transaction would not have an impact on the barriers to enter or expand into toll motorway concessions.¹⁰⁸ In their replies, some respondents noted that the Transaction would increase the capabilities of the merging entity to bid, particularly for large projects. However, other respondents submit that the barriers will remain the same because the activities of each of ACS and Abertis are complementary to each other.¹⁰⁹
- (137) In addition, EU Directive 2014/23/EU (the "Concessions Directive") establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, which aim at ensuring non-discrimination, fair access to markets and EU-wide competition for high-value concessions. In particular, they provide for the mandatory publication at EU level of a concession notice, including a description of the concession and the conditions of participating in the concession award procedure,¹¹⁰ thus preventing the direct award of concession contracts without transparent competition.
- (138) The EU Member States had to transpose the Concessions Directive into their national legislation by 18 April 2016. And the implementation of the Concessions Directive is expected to promote the treatment on an equal footing of incumbent and non-incumbent concessionaires, considering that conceding authorities are required to apply harmonised selection criteria guaranteeing that the motorway concessions are awarded to the most economically advantageous tenders.¹¹¹

Other bidders

- (139) There are a number of large companies competing for the grant of toll motorway concessions against the Parties.
- (140) In Spain, the groups Sacyr, Cintra, Globalvia and Acciona were identified amongst the successful winners of several tender procedures for motorway concessions in the bidding data submitted by the Parties.

¹⁰⁶ Form CO, paragraph 351.

¹⁰⁷ Replies to question 8 of Q1 – Questionnaire to competitors; and replies to question 6 of Q2 – Questionnaire to customers.

¹⁰⁸ Replies to question 8.1 of Q1 – Questionnaire to competitors; and replies to question 6.1 of Q2 – Questionnaire to customers.

¹⁰⁹ Replies to question 8.1.1 of Q1 – Questionnaire to competitors; and replies to question 6.1.1 of Q2 – Questionnaire to customers.

¹¹⁰ Articles 31 and 33 of the Concessions Directive.

¹¹¹ For example, in its reply to question 8 of Q1 – Questionnaire to competitors, a competitor to the Parties noted with regard to the barriers to enter or expand in the sector of toll motorway concessions that "by EU directives, all competitors are at the same level."

- (141) In the United Kingdom the groups Balfour Beatty, Galliford Try and Macquaire were identified amongst the successful winners of several tender procedures for motorway concessions in the bidding data submitted by the Parties.
- (142) Furthermore, in addition to the concession groups identified above, other undertakings are also active in the EEA, such as Eiffage, Vinci or Atlantia, which could enter the Spanish or British market should a new tender come up.
- (143) A majority of both the competitors and public authorities that expressed an opinion during the market investigation consider that, post-Transaction, there would be a sufficient number of companies competing with the merged entity for toll motorway concessions to prevent the risk that conceding authorities receive less advantageous offers in Spain and the United Kingdom, as well as in other EEA countries and in non-EEA countries.¹¹² As a way of example, one competitor to the Parties noted that "*the number of major players active in the generality of the European markets is higher than 10, which guarantees competitive offers for the coming tenders independently of the dimension of the projects*".¹¹³

Overall assessment

- (144) In this context, a majority of respondents to the market investigation having expressed an opinion consider that there would be sufficient competition to prevent the merged entity post-Transaction from raising prices or degrading service quality in the management of toll motorways post-Transaction.¹¹⁴

5.1.1.4. Conclusion

- (145) In view of the above considerations and of the outcome of the market investigation, notably (i) the fact that Abertis has only bid for the grant of [...] toll motorway concessions in the EEA in the last ten years and in particular outside Spain and for greenfield operations; (ii) the fact that ACS and Abertis have not competed against each other for the award of the same motorway concession contract over the last ten years in the EEA; (iii) the complementarity of ACS and Abertis' business focus; (iv) the number and strength of the remaining competitors, (v) the degree of regulation of the award procedures for the grant of toll motorway concessions, and (vi) the fact that the majority of respondents to the market investigation expect sufficient competition to prevent the merged entity from raising prices, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the grant of toll motorway concessions or to secondary transactions, under any plausible geographic market definition (national, EEA-wide or worldwide).

5.1.2. *Management of toll motorway concessions*

- (146) In the EEA, Hochtief holds motorway concessions in Germany, Greece and the Netherlands, while ACS' subsidiary Iridium currently holds motorway

¹¹² Replies to question 7 of Q1 – Questionnaire to competitors; and question 5 of Q2 – Questionnaire to customers.

¹¹³ Replies to question 7.1 of Q1 – Questionnaire to competitors.

¹¹⁴ Replies to question 13 of Q1 – Questionnaire to competitors; question 11 of Q2 – Questionnaire to customers.

concessions in Spain, Portugal, Ireland and the United Kingdom; Abertis holds toll motorway concessions in Spain, France, Italy and the United Kingdom.¹¹⁵

- (147) However, despite the fact that both ACS and Abertis hold motorway concessions in Spain and in the United Kingdom, the motorways held by the Parties connect different O&D pairs, and therefore the Transaction does not give rise to any relevant horizontal overlap in the market for transport on toll motorways.¹¹⁶
- (148) The Transaction therefore does not raise serious doubts as to its compatibility with the internal market with respect to the management of toll motorway concessions, defined on a route-by-route basis.

5.2. Vertical effects

- (149) In this section, the Commission will examine whether the Transaction is likely to result in foreclosure in any of the markets that are vertically affected by the Transaction.

5.2.1. Legal framework

- (150) According to the Non-Horizontal Merger Guidelines,¹¹⁷ foreclosure occurs when actual or potential rivals' access to markets is hampered, thereby reducing those companies' ability and/or incentive to compete.¹¹⁸ Such foreclosure can take two forms: (i) input foreclosure, when access of downstream rivals to supplies is hampered;¹¹⁹ and (ii) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered.¹²⁰
- (151) For input or customer foreclosure to be a concern, three conditions need to be met post-Transaction: (i) the merged entity needs to have the ability to foreclose its rivals; (ii) the merged entity needs to have the incentive to foreclose its rivals; and (iii) the foreclosure strategy needs to have a significant detrimental effect on competition on the downstream market (input foreclosure) or on customers (customer foreclosure).¹²¹ In practice, these factors are often examined together since they are closely intertwined.

5.2.2. Overview of the vertically affected markets

- (152) The Transaction also gives rise to vertical links between the following markets (i) the construction of infrastructure and the grant/management of on toll motorways, (ii) the transport on toll motorways and the distribution of OBE, (iii) the provision

¹¹⁵ ACS (either through Hochtief or Iridium) also operates concession businesses for infrastructure different than motorways, such as schools, administrative buildings, car parks, hospitals or prisons; while Abertis only operates toll motorway concessions – Form CO, paragraphs 127 to 128 and 131.

¹¹⁶ All possible O&D pairs for the transport infrastructure managed by the Parties in Spain, France and the United Kingdom are illustrated in the maps provided by Hochtief - Form CO, Annex 21.

¹¹⁷ Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the "Non-Horizontal Merger Guidelines"), OJ C 265, 18.10.2008, p.7.

¹¹⁸ Non-Horizontal Merger Guidelines, paragraphs 29-30.

¹¹⁹ Non-Horizontal Merger Guidelines, paragraph 31.

¹²⁰ Non-Horizontal Merger Guidelines, paragraph 58.

¹²¹ Non-Horizontal Merger Guidelines, paragraphs 32 and 59.

of ETC systems and the transport on toll motorways, (iv) the provision of ETC systems and the distribution of OBE and (v) the transport on toll motorways and food services concessions.

- (153) Taking account that the Parties' individual or combined market shares only exceed 30% in the grant of toll motorway concessions in Spain and the United Kingdom, the following vertically related markets are affected by the Transaction:¹²² (i) the construction of infrastructure and the grant/management of toll motorways in Spain and the United Kingdom, (ii) the transport on toll motorways and the distribution of OBE in Spain, (iii) the provision of ETC systems and the transport on toll motorways in Spain,¹²³ and (iv) the transport on toll motorways and food services concessions in Spain.¹²⁴

5.2.3. *The construction of infrastructure and the transport on toll motorways*

- (154) The Commission will assess whether, post-Transaction, the merged entity would have the ability and incentive to restrict access from ACS and Abertis' motorways networks to building companies (customer foreclosure).¹²⁵

5.2.3.1. Customer foreclosure

Hochtief's views

- (155) According to Hochtief, it is unlikely that the Parties would pursue a foreclosure strategy of seeking to weaken third-party suppliers of construction services as a result of the Transaction, notably as the Parties will lack any ability and/or incentive to foreclose.¹²⁶

(a) Ability

- (156) In Spain, the Parties hold a strong position on the market for the grant of toll motorway concessions (see section 5.1 above). As a result, the Commission considers that the merged entity, post-Transaction, is likely to enjoy a significant degree of market power on the market for toll motorway concessions in Spain and likely have the ability to foreclose third party suppliers of construction services.
- (157) In the United Kingdom, the Parties' combined market share is approximately [5-10]% in km and [40-50]% in revenues. Given that the Parties' combined market share is very limited in km and remains below 50% in revenues, the Commission considers it unlikely that the merged entity will have a significant degree of

¹²² At EEA level, the Transaction does not give rise to any vertically affected markets.

¹²³ In the United Kingdom, only Abertis is active in the market for the provision of ETC with a market share of well below 30% under any plausible market definition. As a result, any foreclosure strategy engaged by the Parties in the United Kingdom, post-Transaction, remains unlikely.

¹²⁴ According to the information submitted by the Parties, the vertical link between the provision of ETC systems and the distribution of OBE does not give rise to any affected markets under any plausible market definition.

¹²⁵ While Abertis is not active in the market for infrastructure construction, ACS (through Dragados) and Hochtief (through Hochtief Infrastructure) are both active in the EEA and at national level with a market share of less than 20%. As a result, due to ACS/Hochtief only presence and limited position in infrastructure construction, the Commission considers that the implementation of any input foreclosure strategy remains unlikely.

¹²⁶ Form CO, paragraphs 251 to 267.

market power on the market for toll motorway concessions and [...] the ability to foreclose third party suppliers of construction services.

(b) Incentive

- (158) The Commission considers that, post-Transaction, the merged entity's incentive to engage in a foreclosure strategy by reducing or stopping contracting with third-party suppliers of construction services remains unlikely.
- (159) First, the award of construction contracts by motorway concessionaires is regulated by national laws implementing EU Directives,¹²⁷ which are likely to provide significant disincentives for the Parties to engage in any foreclosure strategy by excluding potential bidders from providing works on its motorways.
- (160) Second, Abertis is generally active in brownfield concessions only, which do not include construction work but mostly maintenance. Therefore, ACS which is already vertically integrated - with a market share for the construction of infrastructure in each of Spain and the United Kingdom of less than 20% - could not in any meaningful way foreclose competing construction firms on concessions held by Abertis.¹²⁸
- (161) Finally, the majority of the respondents to the market investigation having expressed an opinion indicated that, post-Transaction, any incentive of the Parties to reduce or stop contracting with competitors for infrastructure construction remains limited.¹²⁹

(c) Effect

- (162) As regards the overall likely impact on competition, the Commission considers that the integration of ACS and Abertis will not give rise to detrimental effects in the downstream market for the construction and maintenance of motorway infrastructure, notably as the same qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.
- (163) A majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition in Spain and the United Kingdom for the construction of infrastructure, should the merged entity engage in a customer foreclosure strategy post-Transaction.¹³⁰

5.2.3.2. Conclusion

- (164) In light of the above consideration and of the outcome of the market investigation, and taking account of all evidence available to it, the Commission considers that

¹²⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

¹²⁸ ACS' market share on the market for infrastructure construction is lower than 5% both at national and EEA level irrespective of any plausible sub-segmentation or geographical scope considered. Form CO, Annex 14.

¹²⁹ Replies to question 11.2 of Q1 - Questionnaire to competitors and replies to question 9.2 of Q2 – Questionnaire to customers.

¹³⁰ Replies to question 11.3 of Q1 – Questionnaire to competitors and replies to question 9.3 of Q2 – Questionnaire to customers.

in Spain, even if the merged entity would have the ability to engage in a customer foreclosure strategy in order to exclude third-party suppliers of construction services, it will not have any incentive to engage in such a strategy, notably due to Abertis' limited position in the construction of infrastructure as well as the fact that the award of motorway construction contracts is regulated by national laws. Similarly, the Commission considers that the merged entity will not have any ability and/or incentive to engage in a foreclosure strategy also in the United Kingdom as a result of the Parties' limited position in the transport on toll motorways. Based thereupon, the Commission concludes that the Transaction would not raise serious doubts as a result of the vertical link between the Parties' presence in the markets for the construction of infrastructure and the transport on toll motorways.

5.2.4. *The transport on toll motorways and the distribution of OBE*

(165) The Transaction would create a vertical link between the exploitation of motorway concession and the supply of OBEs. The Commission therefore needs to assess whether the merged entity would have the ability and incentive to restrict access to ACS and Abertis' motorway networks to competing OBE providers (input foreclosure).¹³¹

5.2.4.1. Input foreclosure

Hochtief's views

(166) According to Hochtief, it is implausible that the Parties would pursue a strategy of foreclosing third-party OBE distributors post-Transaction lacking any ability or incentive to engage in such strategy.¹³²

(a) Ability

(167) On the upstream market for the grant of toll motorways, at worldwide and EEA level, the merged entity would have limited market shares post-Transaction. However, in Spain, the Parties' combined market share reaches [70-80]% based on revenues and [40-50]% based on km.

(168) The Commission considers that, in view of the Parties' important position on the upstream market for the grant of toll motorway concessions in Spain, the merged entity is likely to enjoy a significant degree of market power and to have the ability to foreclose potential OBE distributors from the downstream market for the distribution of OBE devices, by restricting or limiting their access to the toll reading equipment installed at the Parties' toll stations.

(b) Incentive

(169) In Spain, the Commission considers that the Parties' incentive to engage in a foreclosure strategy by restricting access of potential OBE distributors is unlikely for the following reasons.

¹³¹ As the Parties' combined market shares in the market for the distribution of OBE is less than 20% under any plausible market definition, the Commission considers that the implementation of any customer foreclosure strategy remains unlikely.

¹³² Form CO, paragraphs 269 to 279.

- (170) First, engaging in a foreclosure strategy seems unlikely as the main interest of concessionaires, including the Parties, is to maximise the number of vehicles running on their motorways and to optimise their cost structure. Second, OBE distribution is governed by legal rules ensuring access in an open and non-discriminatory way, through technologies which comply with open and public rules available to all manufacturers and distributors on a non-discriminatory basis.¹³³ Such clear legal obligations may thus provide disincentives for the merged entity to engage in illegal conducts which could be easily identified and sanctioned. For these reasons, the Commission has recognised already in prior decisions that motorway concessionaires have no incentive to foreclose third-party existing and future providers of ETS / OBE distributors.¹³⁴
- (171) The Commission considers that, in view of (i) the legal obligation to refrain from discriminating any OBE distributor, (ii) the limited incremental effect brought about by the Transaction, and (iii) the fact that a potential foreclosure strategy appears to be unprofitable, the Parties will likely not have an incentive to foreclose OBE distributors from the downstream market for the distribution of OBE devices, by restricting or limiting their access to the toll reading equipment installed at the Parties' toll stations.

(c) Effects

- (172) As regards the overall likely impact on competition in Spain, the Commission considers that the vertical integration of ACS and Abertis would be unlikely to give rise detrimental effects in the downstream market for the distribution of OBE, notably as the same qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.
- (173) The majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition for the distribution of OBE in the EEA or at national level post-Transaction.¹³⁵

5.2.4.2. Conclusion

- (174) In light of the above consideration and of the outcome of the market investigation, and taking account of all evidence available to it, the Commission considers that even if the merged entity would have the ability to engage in an input foreclosure strategy to restrict the access of other OBE distributors, its incentive to engage in such a strategy as a result of the proposed Transaction remains unlikely, notably due to the Parties' interest to maximise their profits rather than to foreclose other OBE distributors, so that any effect on competition could be excluded. Based thereupon, the Commission concludes that the Transaction would not raise serious doubts as a result of the vertical link between the Parties' activities in the markets for the transport on toll motorways and the distribution of OBE.

¹³³ Case M.8536 – *Atlantia/Abertis Infraestructuras* and Commission's Proposal (to recast Directive 2004/52/EC) for a Directive of the European Parliament and of the Council on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the union – May 2017.

¹³⁴ Case M.7075 – *Cintra/Abertis/Itinere/Bip&Drive JV*; and case M.8536 – *Atlantia/Abertis Infraestructuras*.

¹³⁵ Replies to question 13 and 14 of Q1 – Questionnaire to competitors and replies to question 11 and 12 of Q2 – Questionnaire to customers.

5.2.5. *The provision of ETC systems and the transport on toll motorways*

(175) The Commission will assess whether, post-Transaction, the merged entity would have the ability and incentive to restrict access from ACS and Abertis' motorways networks to competing providers of ETC systems or services (customer foreclosure).¹³⁶

5.2.5.1. Customer foreclosure

Hochtief's views

(176) According to Hochtief, it is implausible that the Parties would pursue a strategy of foreclosing third-party ECT providers post-Transaction lacking any ability and/or incentive to engage in such strategy.¹³⁷

The Commission's assessment

(a) Ability

(177) In Spain, the Parties hold a strong position on the market for toll motorway concessions (see section 5.1 above). As a result, the Commission considers that the merged entity, post-Transaction, is likely to enjoy a significant degree of market power on the market for toll motorway concessions in Spain and likely have the ability to foreclose ETC providers.

(b) Incentive

(178) The Commission considers that the Parties' incentive to engage in such a foreclosure strategy in Spain, is unlikely for the following reasons.

(179) First, ACS is not active in the market for the provision of ETC systems in the EEA and Abertis is already vertically integrated being able to use its own ETC capability so that there will not be a material change as a result of the Transaction.

(180) Second, ETC providers seem not reliant on access to either Abertis or ACS to be viable and do not need local presence in order to provide their services.

(181) Finally, while already enjoying an important position in Spain, pre-Transaction, in the market for the transport on toll motorways, Abertis has not followed such strategy in the past and it is unlikely that its behaviour will change in the future as a result of the proposed Transaction.

(c) Effects

(182) As regards the overall likely impact on competition, the Commission considers that the integration of ACS and Abertis will not give rise to detrimental effects in the downstream market for the transport of toll motorway, notably as the same

¹³⁶ As the Parties' combined market shares in the market for the distribution of OBE is less than 20% under any plausible market definition, the Commission considers that the implementation of any input foreclosure strategy remains unlikely.

¹³⁷ Form CO, paragraphs 285 to 291.

qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.

- (183) The majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition in the EEA and at national level for the provision of ETC systems or services post-Transaction.¹³⁸

5.2.5.2. Conclusion

- (184) In light of the above consideration and of the outcome of the market investigation, and taking account of all evidence available to it, the Commission considers that even if the merged entity would have the ability to engage in a customer foreclosure strategy in order to exclude ETC providers from the market, its incentive to engage in such a strategy remains unlikely as a result of the proposed Transaction, notably since only Abertis is active in the market for the provision of ETC in Europe and it is already vertically integrated pre-Transaction so that any effect on competition could be excluded. Based thereupon, the Commission concludes that the Transaction would not raise serious doubts as a result of the vertical link between the Parties' activities in markets for the provision of ETC systems and the transport on toll motorways.

5.2.6. *The transport on toll motorways and food service concessions*

- (185) The Commission will assess whether, post-Transaction, the merged entity would likely reduce or stop granting food services sub-concessions to competitors of Abertis (Areamed) (input foreclosure).¹³⁹

5.2.6.1. Input foreclosure

Hochtief's views

- (186) According to Hochtief, it is implausible that the Parties would pursue a strategy of foreclosing food services providers on the motorways they manage favouring food services providers in which they have an interest.¹⁴⁰

(a) Ability

- (187) In Spain, the Parties hold a strong position on the market for toll motorway concessions (see Section 5.1 above). As a result, the Commission considers that the merged entity, post-Transaction, is likely to enjoy a significant degree of market power on the market for toll motorway concessions in Spain and likely have the ability to foreclose food service providers.

(b) Incentive

¹³⁸ Replies to question 13 and 14 of Q1 – Questionnaire to competitors and replies to question 11 and 12 of Q2 – Questionnaire to customers.

¹³⁹ In Spain, only Abertis is present in the market for food services through Areamed. Since Areamed does not intend to bid for new food services sub-concessions, there would be no change for competing motorway concessionaires. As a result, the Commission considers that the implementation of any customer foreclosure strategy remains unlikely.

¹⁴⁰ Form CO, paragraphs 206 to 301.

- (188) The Commission considers that, post-Transaction, the merged entity's incentive to engage in a foreclosure strategy by reducing or stopping contracting with third-parties' providers of food services remains unlikely.
- (189) First, in Spain, the national regulation requires that contracts for food services are offered for tender separately, ensuring that an open, transparent and competitive process is followed.¹⁴¹ Second, while Hochtief is not active in food services, Areamed is only active in two motorways operated by Abertis' concession company Acesa (Acesa AP7 and AP2 concessions from Tarragona to La Jonquera and from Barcelona to Zaragoza). Therefore, this vertical relationship is already existing pre-Transaction. Finally, Areamed does not seem to be an important customer for other motorway concessionaires, who currently grant concessions to other food service providers in Spain such as Abades and Cafestore.

(c) Effects

- (190) As regards the overall likely impact on competition, the Commission considers that the integration of ACS and Abertis will not give rise to detrimental effects in the downstream market for the provision of food services, notably as the same qualitative factors that explained the lack of incentive to engage in a foreclosure strategy also lead to a lack of effects.
- (191) A majority of respondents to the market investigation having expressed an opinion also indicate that there would likely be no impact on competition in the EEA and at national level for the provision of food services on toll motorways should the merged entity engages in an input foreclosure strategy post-Transaction.¹⁴²

5.2.6.2. Conclusion

- (192) In light of the above consideration and of the outcome of the market investigation, and taking account of all evidence available to it, the Commission considers that even if the merged entity would have the ability to engage in an input foreclosure strategy for the provision of food services with third-parties motorway concessionaires, it would not have any incentive to engage in such a strategy as result of the proposed Transaction, notably since Hochtief is not active in food services, and Abertis is only active in two motorways (through Areamed) and already pre-Transaction so that any effect on competition remains unlikely. Based thereupon, the Commission concludes that the Transaction would not raise serious doubts as a result of the vertical link between the Parties' activities in the markets for the transport on toll motorways and food service concessions.

5.3. Coordinated effects

- (193) In this section, the Commission will examine whether the Transaction may lead to coordination on the market for the transport on toll motorways.

Hochtief's views

¹⁴¹ In particular, Law 37/2015 on roads – the Road Act.

¹⁴² Replies to question 13 and 14 of Q1 – Questionnaire to competitors and replies to question 11 and 12 of Q2 – Questionnaire to customers.

(194) According to Hochtief, the Transaction will not give rise to any coordinated effects concerns in the market for transport on toll motorway.¹⁴³

The Commission's assessment

(195) The Commission considers that the structure of the markets for the management of toll motorways is such as to make coordination unlikely, for the following main reasons: (i) competition between operators mainly, if not exclusively, takes place at the time of the grant of the motorway concessions; (ii) the grant of those concessions is highly regulated and occurs following open competitive procedures; (iii) the number of concessions to be granted is limited and their conditions (notably the investments and risk profiles) heterogeneous; and (iv) the terms of the bids are complex and difficult to compare, including differentiated and long-term contracts.

(196) The results of the market investigation do not provide elements that would substantiate the likelihood of coordinated effects brought about by the Transaction.

Conclusion

(197) In view of the above, and considering all evidence available to it, the Commission concludes that the Transaction would not raise serious doubts as to its compatibility with the internal market due to coordinated effects.

6. CONCLUSION

(198) 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

¹⁴³ Form CO, paragraphs 304 to 311.