



EUROPEAN COMMISSION  
DG Competition

***Case M.8896 - MACQUARIE GROUP / THE GOLDMAN  
SACHS GROUP / HES INTERNATIONAL***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 23/07/2018

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## EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 23.7.2018  
C(2018) 4929 final

PUBLIC VERSION

**To the notifying parties:**

**Subject: Case M.8896 – Macquarie Group / The Goldman Sachs Group / HES International  
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004<sup>1</sup> and Article 57 of the Agreement on the European Economic Area<sup>2</sup>**

Dear Sir or Madam,

- (1) On 22 June 2018, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which MEIF 5, a wholesale investment fund managed by a subsidiary of Macquarie Group Limited ("Macquarie", Australia) and WSIP III, a fund managed by the Goldman Sachs Group ("Goldman Sachs", USA) acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of HES International B.V. ("HES", the Netherlands) by way of purchase of shares. MEIF 5 and Goldman Sachs are collectively referred to as the "Notifying Parties".

### **1. THE PARTIES**

- (2) Macquarie is a global provider of banking, financial, advisory, investment and fund management services, based and headquartered in Australia. Its wholly-owned subsidiary Macquarie Infrastructure and Real Assets (Europe) Limited manages MEIF 5, namely Macquarie European Infrastructure Fund 5 LP and Macquarie European Infrastructure Fund 5 SCSp.

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<sup>1</sup> 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.

<sup>2</sup> OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

- (3) Goldman Sachs is a global investment banking, securities and investment management firm incorporated in the USA. WSIP III is an infrastructure investment fund managed within the Goldman Sachs Merchant Banking Division. Goldman Sachs is active in physical and financial trading in thermal coal through its affiliate J. Aron.
- (4) HES operates and develops dry, liquid and break bulk terminals in North and West Europe, providing transshipment, storage, blending and processing services for dry bulk and liquid bulk, including deep-sea terminals for coal and iron in the Netherlands.<sup>3</sup>

## **2. THE OPERATION AND THE CONCENTRATION**

- (5) Macquarie and Goldman Sachs will purchase 100% of the shares of the HES Group through a special purpose vehicle only created for the purpose of effecting the Transaction.<sup>4</sup>
- (6) Goldman Sachs and Macquarie will [...] hold [...] % of the shares of the special purpose vehicle and will [Confidential information on the ownership and governance structure of HES International].<sup>5</sup> Approval of directors representing more than [...] % of the shareholders will be required for the following strategic decisions relating to the HES Group: adoption of business plan and annual budget, management and board appointments and removals, major expenditure (in excess of EUR [...] million) and entry into or amendment of material contracts.<sup>6</sup>
- (7) These matters will confer on Goldman Sachs and Macquarie joint control over HES.
- (8) Therefore, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## **3. EU DIMENSION**

- (9) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>7</sup> (Macquarie: EUR [...], Goldman Sachs: EUR [...], HES: EUR [...]). Each of them has an EU-wide turnover in excess of EUR 250 million (Macquarie: EUR [...], Goldman Sachs: EUR [...], HES: EUR [...]), and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.<sup>8</sup>

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<sup>3</sup> [Names of the holding companies currently owning HES International].

<sup>4</sup> Form CO, paragraph 38 et seq. and Annex 3B, Signing Protocol of 30 March 2018.

<sup>5</sup> Form CO, paragraph 39, Annex 3B, Shareholders' Agreement Heads of Terms, annex to Signing Protocol of 30 March 2018, Annex 4 Subscription Agreement of 30 March 2018.

<sup>6</sup> Form CO, paragraph 39, Annex 3B, Shareholders' Agreement Heads of Terms, annex to Signing Protocol of 30 March 2018.

<sup>7</sup> Turnover calculated in accordance with Article 5 of the Merger Regulation.

<sup>8</sup> [Two-thirds rule analysis of the Parties' respective turnover in the EU]

#### 4. RELEVANT MARKETS AND MARKET DEFINITION

- (10) The Transaction creates a vertical relationship between HES upstream activities in terminal services for coal and iron ore and the downstream supply of thermal coal in which Goldman Sachs is active through its affiliate J. Aron.

##### 4.1. Supply of thermal coal

###### 4.1.1. Product market definition

###### 4.1.1.1. The views of the Notifying Parties

- (11) The Notifying Parties are of the view that physical trading and financial trading constitute distinct product markets, stating that these two types of trading pursue different objectives and are different in nature.<sup>9</sup> The Notifying Parties argue that only their physical trading is relevant for the competitive analysis of the Transaction due to its vertical relationship to HES' coal and iron ore deep-sea terminal services.<sup>10</sup> The Notifying Parties further submit that it is arguable that the supply of thermal and coking coal are different product markets.<sup>11</sup> While thermal coal could in principle be segmented according to its geological properties, this question could be left open by the Commission.<sup>12</sup>

###### 4.1.1.2. The Commission's assessment

- (12) In its prior decisional practice, the Commission found that for most of the users of hard coal it is not possible to replace coal by other fuels in the short term. Therefore hard coal constitutes a distinct market from other fuels. More precisely, lignite (brown coal) and hard coal have been found in the past to belong to different markets in view of their different properties.<sup>13</sup> Within hard coal the Commission has consistently defined separate markets for (i) thermal coal and (ii) metallurgical coal (also referred to as coking coal) in view of the characteristics required depending on the end use: thermal coal for producing electricity and heat, and metallurgical coal for the steel industry.<sup>14</sup>
- (13) The Commission has found in its prior decisional practice that hard coal can be differentiated according to its geological properties; it can be anthracite, bituminous coal or sub-bituminous coal. While coking coal is bituminous, thermal coal can be any of the three types. A segmentation of thermal coal according to its geological properties has been considered in the past by the Commission but ultimately the question was left open.<sup>15</sup>

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<sup>9</sup> Form CO, paragraph 82.

<sup>10</sup> Form CO, paragraph 87.

<sup>11</sup> Form CO, paragraph 89.

<sup>12</sup> Form CO, paragraph 89.

<sup>13</sup> M.8687 – *Prisko / OKD Nastupnicka*, paragraph 31; M.6541- *Glencore / Xstrata*, paragraphs 391-396; and IV/M.402 – *PowerGen / NRG Energy / MorrisonKnudsen / Mibrag*, paragraph 10.

<sup>14</sup> M.8687 – *Prisko / OKD Nastupnicka*, paragraph 32; M.6541- *Glencore / Xstrata*, paragraphs 401, 405 and the references there.

<sup>15</sup> M.8687 – *Prisko / OKD Nastupnicka*, paragraph 37-41; M.6541 – *Glencore / Xstrata*, paragraph 406.

- (14) Respondents to the Commission's market investigation in this case indicated that almost all thermal coal used in Europe is bituminous coal.<sup>16</sup> The Notifying Parties submit that [type of coal] represents the significant majority of J. Aron's trading.<sup>17</sup> The question whether the market for supply of thermal coal should be differentiated according to its geological properties can be left open as the Transaction does not give rise to serious doubt as to its compatibility with the internal market under any plausible market definition.
- (15) In its prior decisional practice, the Commission found that producers of coal (i.e. mining companies) and traders (i.e. companies that buy coal from producers and sell it to users) belong to the same product market.<sup>18</sup> Respondents to the Commission's market investigation in this case also supported this conclusion.<sup>19</sup>
- (16) In its prior decisional practice, the Commission considered that it might be appropriate to distinguish between financial and physical trading of commodities, but ultimately left this question open.<sup>20</sup> The Commission's market investigation in this case supported the view that financial trading and physical trading in thermal coal constitute different product markets.<sup>21</sup>
- (17) Since the Transaction creates a link between Goldman Sachs' physical coal trading and HES' coal and iron ore terminal services, the Commission will examine the effects of the Transaction on the segment of physical supply of thermal coal, leaving the question of the exact product market definition open.
- (18) Ultimately, the exact scope of the product market may be left open, as serious doubts as to the compatibility of the Transaction with the internal market would not arise under any of the above-mentioned plausible product market definitions. The impact of the Transaction will be assessed on a market for physical trading of thermal coal comprising producers and traders of coal.

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<sup>16</sup> Agreed non-confidential minutes of conference call of 13 June 2018 with Jera Rietland and Jera Trading, point 6; Agreed non-confidential minutes of conference call of 13 June 2018 with Javelin Global Commodities, point 5; Agreed non-confidential minutes of conference call of 13 June 2018 with Glencore, paragraph 9.

<sup>17</sup> Form CO, footnote 60.

<sup>18</sup> M.6541- *Glencore / Xstrata*, paragraph 41.

<sup>19</sup> Agreed non-confidential minutes of conference call of 8 June 2018 with [a customer], point 5; Agreed non-confidential minutes of conference call of 14 June 2018 with [a customer], point 5; Agreed non-confidential minutes of conference call of 13 June 2018 with Jera Rietland and Jera Trading, point 5; Agreed non-confidential minutes of conference call of 13 June 2018 with Javelin Global Commodities, point 4; Agreed non-confidential minutes of conference call of 13 June 2018 with Glencore, paragraphs 3-5.

<sup>20</sup> M.5844 – *JP Morgan / RBS / Sempra*, paragraphs 10, 16 and the references there.

<sup>21</sup> Agreed non-confidential minutes of conference call of 8 June 2018 with [a customer], point 6; Agreed non-confidential minutes of conference call of 13 June 2018 with Jera Rietland and Jera Trading, point 4; Agreed non-confidential minutes of conference call of 13 June 2018 with Javelin Global Commodities, point 6; Agreed non-confidential minutes of conference call of 13 June 2018 with Glencore, paragraph 6.

#### 4.1.2. *Geographic market definition*

##### 4.1.2.1. The view of the Notifying Parties

- (19) The Notifying Parties submit that the geographic market definition can be left open as the Transaction does not give rise to any adverse effects on competition under any plausible market definition.<sup>22</sup>

##### 4.1.2.2. The Commission's assessment

- (20) The Commission has in its prior decisional practice defined a seaborne market for thermal coal which is global, given the low cost of transportation by sea and left open the question whether it included indigenous production in the EEA.<sup>23</sup>
- (21) As the Transaction does not raise serious doubts as to its compatibility with the internal market under any plausible market definition, the exact geographic scope of the market for supply of thermal coal can be left open.

#### 4.1.3. *Conclusions on market definition*

- (22) In the present case, it is not necessary to reach a definitive conclusion whether the market for seaborne supply of thermal coal should be further segmented according to geological properties and whether its geographic scope should include EEA indigenous production as the Transaction does not give rise to serious doubts as to its compatibility with the internal market under any plausible market definition.

## 4.2. **Market for deep-sea terminal services for coal and iron ore**

#### 4.2.1. *Product market definition*

##### 4.2.1.1. The views of the Notifying Parties

- (23) The Notifying Parties suggest analysing the effects of the Transaction on the market for deep-sea terminal services for coal and iron ore.<sup>24</sup>

##### 4.2.1.2. The Commissions' assessment

- (24) In its prior decisional practice, the Commission concluded that there is a separate market for deep-sea terminal services for coal and iron ore.<sup>25</sup> The Commission also distinguished between separate product markets for hinterland traffic (from deep-sea ship directly to inland barge, train or truck) and transshipment traffic (from deep-sea ship to relay/feeder vessels). The Commission found that most of the coal and iron ore handled by the terminals in the Antwerp-Rotterdam-Amsterdam, ("ARA") range goes to hinterland customers. However, a limited volume of coal and iron ore handled in these ports is transhipped by coasters to another final discharge port. In many instances this final discharge port is a draught restricted port in the United Kingdom. Although the main handling

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<sup>22</sup> Form CO, paragraph 93.

<sup>23</sup> M.6541- *Glencore / Xstrata*, paragraph 416.

<sup>24</sup> Form CO, paragraph 106.

<sup>25</sup> M.3848 – *Sea-Invest / EMO-EKOM*, paragraph 23.

techniques and the handling terms and conditions are similar, whether the coal or iron ore is transported to the hinterland or transhipped, the range of ports and terminals that may be potential substitutes for transshipment traffic is not identical to the range of ports and terminals that may be substitutes for specific hinterland traffic. Terminal handling for transshipment purposes can, in principle, take place in a larger group of ports than terminal handling for hinterland transport to a specific destination.<sup>26</sup>

- (25) According to respondents to the Commission's market investigation in this case, deep-sea terminal services for coal and iron ore constitute a distinct market.<sup>27</sup> However, the distinction between hinterland and transshipment traffic used to be relevant in the past when coal had to be transhipped to the United Kingdom on small vessels due to draught limitations in the United Kingdom's ports but today this distinction is of less relevance, since this trade has decreased significantly.<sup>28</sup>
- (26) The question whether the market for deep-sea terminal services for coal and iron ore should be segmented according to hinterland and transshipment traffic can, however, be left open as the Transaction does not give rise to serious doubt as to its compatibility with the internal market under any plausible market definition.

#### 4.2.2. *Geographic market definition*

##### 4.2.2.1. The views of the Notifying Parties

- (27) The Notifying Parties submit that no precise geographic market definition needs to be reached as the Transaction will not give rise to any adverse effects on competition regardless of the market definition.<sup>29</sup>

##### 4.2.2.2. The Commission assessment

- (28) In its prior decisional practice, the Commission considered the relevant geographic market for terminal services for hinterland traffic for coal and iron ore to include the Dutch ports of Rotterdam, Amsterdam and Zeeland but not the ports of Antwerp, Ghent and Dunkirk.<sup>30</sup>
- (29) Concerning the market for terminal services for transshipment traffic for coal and iron ore, the Commission considered the relevant geographic market to include the range made of Gothenburg – Le Havre and the United Kingdom deep-sea ports.<sup>31</sup>
- (30) The results of the Commission's market investigation were inconclusive in this regard. None of the respondents opined on the possible geographic scope of the market for services for transshipment traffic for coal and iron ore, which, as noted

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<sup>26</sup> M.3848 – *Sea-Invest / EMO-EKOM*, paragraph 24-26.

<sup>27</sup> Agreed non-confidential minutes of conference call of 11 June 2018 with ABT / Sea-invest, points 5 and 12; agreed non-confidential minutes of conference call of 13 June 2018 with Jera Reitlanden / Jera Trading, point 11.

<sup>28</sup> Agreed non-confidential minutes of conference call of 13 June 2018 with Jera Reitlanden / Jera Trading, point 12.

<sup>29</sup> Form CO, paragraph 93.

<sup>30</sup> M.3848 – *Sea-Invest / EMO-EKOM*, paragraph 71.

<sup>31</sup> M.3848 – *Sea-Invest / EMO-EKOM*, paragraphs 72.

above, relevance seems to have decreased. Opinions diverged on the geographic scope of the market for services for hinterland traffic for coal and iron ore. The respondents confirmed that the choice of terminal is mainly driven by users' considerations pertaining to the optimisation of logistic chains. Important considerations in the choice of terminals are the hinterland connection needs of the user and possibly also the draught requirements of the ships carrying the users' cargo. Although some respondents confirmed that the relevant geographic scope of the market is limited to the Dutch ports,<sup>32</sup> others suggested that it may include also the port of Antwerp (the "ARA range")<sup>33</sup> and even the range from Germany (Wilhelmshaven and Hamburg) to France (Dunkirk and Rouen).<sup>34</sup>

- (31) The exact geographic scope of the market for deep-sea terminal services for coal and iron ore can be left open as the Transaction does not give rise to serious doubt as to its compatibility with the internal market under any plausible market definition.

#### 4.2.3. *Conclusions on market definition*

- (32) In the present case, it is not necessary to reach a definitive conclusion whether the market for deep-sea terminal services for coal and iron ore should be further segmented by hinterland and transshipment traffic and regarding its exact geographic scope as the Transaction does not give rise to serious doubts as to its compatibility with the internal market under any plausible market definition.

### 4.3. **Competitive assessment**

#### 4.3.1. *Legal framework*

- (33) 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.
- (34) According to the Non-Horizontal Merger Guidelines,<sup>35</sup> foreclosure occurs when actual or potential rivals' access to markets is hampered, thereby reducing those companies' ability and/or incentive to compete.<sup>36</sup> Such foreclosure can take two forms: (i) input foreclosure, when access of downstream rivals to supplies is hampered;<sup>37</sup> and (ii) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered.<sup>38</sup>

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<sup>32</sup> Agreed non-confidential minutes of conference call of 11 June 2018 with ABT / Sea-invest, point 8; Agreed non-confidential minutes of conference call of 13 June 2018 with Jera Rietlanden / Jera Trading, point 10.

<sup>33</sup> Agreed non-confidential minutes of conference call of 13 June 2018 with Javelin Global Commodities, point 8; Agreed non-confidential minutes of conference call of 11 June 2018 with [a customer] and [a customer], point 7.

<sup>34</sup> Agreed non-confidential minutes of conference call of 7 June 2018 with ThyssenKrupp (EECV), point 7; Agreed non-confidential minutes of conference call of 8 June 2018 with [a customer], point 8, Agreed non-confidential minutes of conference call of 12 June 2018 with OJET B.V., point 7.

<sup>35</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 7.

<sup>36</sup> Non-Horizontal Merger Guidelines, paragraphs 20-29.

<sup>37</sup> Non-Horizontal Merger Guidelines, paragraph 31.

<sup>38</sup> Non-Horizontal Merger Guidelines, paragraph 58.



- (35) 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).<sup>39</sup> In practice, these factors are often examined together since they are closely intertwined.

4.3.2. *Vertically affected markets: Market for terminal services for coal and iron ore (upstream) and market for supply of thermal coal (downstream)*

- (36) The transaction gives rise to the following vertically affected markets: the upstream market for terminal services for coal and iron ore on which HES is active and the downstream market for the supply of thermal coal on which Goldman Sachs is active through its affiliate J. Aron.
- (37) HES controls or has interest in several deep-sea terminals for coal and iron ore in the Netherlands. HES controls the OBA terminal in Amsterdam, the EBS and EMO terminals in Rotterdam. It also holds an interest in the OVET terminals in Terneuzen and Flushing. The Notifying Parties argue that HES does not control OVET<sup>40</sup> but nevertheless provided market share information attributing OVET's shares to HES in a conservative approach. According to the information provided by the Notifying Parties, on the narrowest plausible geographic market, limited to Dutch deep-sea ports, HES has a market share of [70-80%] by throughput and [80-90%] by capacity.<sup>41</sup> On the widest plausible geographic market, in the range from Dunkirk to Hamburg, HES' market shares are [40-50%] by throughput and [30-40%] by capacity.<sup>42</sup>
- (38) According to the Notifying Parties, J. Aron is mainly active in financial trading in thermal coal and, to a lesser extent, in the physical trading of thermal coal.<sup>43</sup> The Notifying Parties estimate that J.Aron's market share in the market for the seaborne supply of thermal coal is below [0-5%] under any plausible market definition.<sup>44</sup> The limited presence of J. Aron in the market for physical trading of thermal coal was also confirmed by several respondents to the Commission's market investigation.<sup>45</sup>
- (39) Based on the considerations above and all evidence available to it, the Commission concludes that the Notifying Parties will not have the ability to engage in customer foreclosure strategy post-Transaction.

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<sup>39</sup> Non-Horizontal Merger Guidelines, paragraphs 32 and 59.

<sup>40</sup> Form CO, paragraph 66.

<sup>41</sup> Form CO, paragraph 142. These market shares exclude terminals that provide services exclusively within their groups and attribute OVET market shares to HES.

<sup>42</sup> Form CO, paragraph 147. These market shares exclude terminals that provide services exclusively within their groups and attribute OVET market shares to HES.

<sup>43</sup> Form CO, paragraph 82.

<sup>44</sup> Response of the Notifying Parties of 28 June 2018 to RFI 1.

<sup>45</sup> Agreed non-confidential minutes of conference call of 14 June 2018 with [a customer], point 5; Agreed non-confidential minutes of conference call of 13 June 2018 with Javelin Global Commodities, point 9; Agreed non-confidential minutes of conference call of 13 June 2018 with Jera Rietlanden / Jera Trading, point 7; Agreed non-confidential minutes of conference call of 8 June 2018 with [a customer], point 10; Agreed non-confidential minutes of conference call of 13 June 2018 with Glencore, paragraph 14.

(40) The Commission will therefore concentrate its analysis on input foreclosure.

#### 4.3.3. *Input foreclosure*

##### 4.3.3.1. The views of the Notifying Parties

(41) The Notifying Parties submit that the Transaction does not give rise to concerns of input foreclosure. In support of their view the Notifying Parties point out that HES terminals have long term relationships with their main customers who are not competitors of J. Aron, that terminal handling costs represent a small proportion of overall cost of coal, and that Macquarie, which is not active in [...]\*, will have little incentive to support such strategy.<sup>46</sup>

##### 4.3.3.2. The Commission's assessment

###### a) Ability to foreclose

(42) Input foreclosure may raise competition problems only if it concerns an important input for the downstream product. This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its costs, an input may also be sufficiently important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market, or it may represent a significant source of product differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high.<sup>47</sup> For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of power in the upstream market and thus, possibly, on prices and supply conditions in the downstream market.<sup>48</sup>

(43) HES enjoys high market shares both in terms of capacity and throughput<sup>49</sup>, and the access to deep-sea terminal services is an important qualitative input in the logistical chain of thermal coal users. In addition, an input foreclosure strategy with respect to thermal coal users would have a limited impact on HES business since a significant part of it is accounted for by iron ore and metallurgical coal.<sup>50</sup>

(44) However, in the present case, according to the respondents to the Commission's market investigation there is strong competition in the market for deep-sea terminal services for coal and iron ore due to the decrease in the use of coal in Europe which resulted in overcapacity and even exits from the market for deep-sea terminal service for coal and iron ore.<sup>51</sup> The majority of respondents to the

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\* Should read: [physical coal trading]

<sup>46</sup> Form CO, paragraphs 109-126.

<sup>47</sup> Non-Horizontal Merger Guidelines, paragraph 34.

<sup>48</sup> Non-Horizontal Merger Guidelines, paragraph 35.

<sup>49</sup> According to the market share information provided by the Notifying Parties, even if the market shares of OVET are not attributed to HES, HES still enjoys market shares of [60-70%] by throughput and [70-80%] by capacity in a market encompassing Dutch ports and [30-40%] by throughput, [20-30%] by capacity in the Dunkirk – Hamburg range.

<sup>50</sup> Form CO, paragraphs 114-115.

<sup>51</sup> Agreed non-confidential minutes of conference call of 13 June 2018 with Jera Rietlanden / Jera Trading, points 8 and 13; Agreed non-confidential minutes of conference call of 8 June 2018 with [a customer], point 8; Agreed non-confidential minutes of conference call of 12 June 2018 with OVET,

Commission's market investigation having expressed an opinion on the matter considered that a switch between terminals is possible and frequent.<sup>52</sup> In addition, there are indications that OVET does indeed compete with the terminals controlled by HES and may offer an additional alternative to customers.<sup>53</sup>

- (45) According to respondents to the market investigation in this case, the above circumstances are not likely to change post Transaction.
- (46) Furthermore, the respondents to the Commission's market investigation in this case confirmed that the cost of terminal services is not a significant cost factor, representing only a small proportion of the total cost of coal (not more than 5%).<sup>54</sup>
- (47) To conclude, the Commission considers that on balance, it cannot be excluded that post-Transaction the Notifying Parties may have some ability to engage in input foreclosure strategy.

b) Incentive to foreclose

- (48) The incentive to foreclose depends on the degree to which foreclosure would be profitable. The vertically integrated firm will take into account how its supplies of inputs to competitors downstream will affect not only the profits of its upstream division, but also of its downstream division. Essentially, the merged entity faces a trade-off between the profit lost in the upstream market due to a reduction of input sales to (actual or potential) rivals and the profit gain, in the short or longer term, from expanding sales downstream or, as the case may be, being able to raise prices to consumers.<sup>55</sup> The incentive for the integrated firm to raise rivals' costs further depends on the extent to which downstream demand is likely to be diverted away from the foreclosed rivals.<sup>56</sup>
- (49) First, as explained above, terminals struggle with overcapacity and competition between them is strong. In such a competitive environment, the incentive to implement input foreclosure strategies appears limited. Second, considering that Macquarie and Goldman Sachs will jointly control HES post-Transaction and that Macquarie is not active in the physical trading of coal, Macquarie's incentive to support an input foreclosure strategy would likely be limited.

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points 7 and 8; Agreed non-confidential minutes of conference call of 11 June 2018 with ABT / Sea-Invest, points 3, 6 and 7; Agreed non-confidential minutes of conference call of 13 June 2018 with Glencore, paragraph 10 and 12.

<sup>52</sup> Agreed non-confidential minutes of conference call of 7 June 2018, with ThyssenKrupp (EECV), point 7; Agreed non-confidential minutes of conference call of 8 June 2018 with [a customer], point 8; Agreed non-confidential minutes of conference call of 12 June 2018 with OVET, point 7; Agreed non-confidential minutes of conference call of 11 June 2018 with ABT / Sea-Invest, point 12; Agreed non-confidential minutes of conference call of 13 June 2018 with Glencore, paragraphs 10 and 12.

<sup>53</sup> Agreed non-confidential minutes of conference call of 12 June 2018 with OVET, point 5.

<sup>54</sup> Agreed non-confidential minutes of conference call of 7 June 2018, with ThyssenKrupp (EECV), point 6; Agreed non-confidential minutes of conference call of 11 June 2018 with [a customer] and [a customer], point 6; Agreed non-confidential minutes of conference call of 13 June 2018 with Javelin Global Commodities, point 7; Agreed non-confidential minutes of conference call of 8 June 2018 with [a customer], point 7; Agreed non-confidential minutes of conference call of 13 June 2018 with Glencore, paragraph 8.

<sup>55</sup> Non-Horizontal Merger Guidelines, paragraph 40.

<sup>56</sup> Non-Horizontal Merger Guidelines, paragraph 41.

(50) In addition, as noted above, the cost of terminal services represents a small proportion of the total cost of coal. Downstream demand for thermal coal is therefore unlikely to be significantly diverted away from foreclosed competitors.

(51) To conclude, the Commission considers that the Notifying Parties will likely not have any incentive to foreclose actual or potential rivals post-Transaction.

c) Overall effect of foreclosure

(52) In general, a merger will raise competition concerns because of input foreclosure when it would lead to increased prices in the downstream market thereby significantly impeding effective competition.<sup>57</sup>

(53) First, the Commission notes that most of the seaborne supply of coal to Europe is purchased by users directly from the producers. Users are in general responsible for receiving the coal and buying the necessary deep-sea terminal services in Europe.<sup>58</sup> Consequently, competitors of J. Aron, namely other coal traders and producers, represent only a small part of the demand for deep-sea terminal services for coal and iron ore. Since any input foreclosure strategy would affect only a limited share of the supply of coal, it will also have a limited effect on competition in the downstream market for the supply of thermal coal.

(54) Second, as noted above, because the cost of terminal services represents a small proportion of the total cost of coal the effects of an input foreclosure strategy on prices in the downstream market for the supply of thermal coal would be limited.

(55) Third, nothing in the information collected through the market investigation suggests that J. Aron would play any significant competitive role compared to other players in the physical coal trading market. Moreover, no change in entry barriers would result from the Transaction.

(56) Finally, the large majority of respondents to the Commission's market investigation were of the view that the Transaction does not give rise to competition concerns. Specifically, none of the respondents expressed any concerns regarding the new vertical relationship between J. Aron and HES that the Transaction will create. In their view the change of control would not affect the commercial strategy of HES, even more so considering that the Notifying Parties, as the current owners, are financial institutions.<sup>59</sup>

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<sup>57</sup> Non-Horizontal Merger Guidelines, paragraph 47.

<sup>58</sup> Form CO, paragraph 114-115; Agreed non-confidential minutes of conference call of 14 June 2018 with [a customer], points 2,4, 5; Agreed non-confidential minutes of conference call of 7 June 2018, with ThyssenKrupp (EECV), point 4; Agreed non-confidential minutes of conference call of 11 June 2018 with [a customer] and [a customer], point 7; Agreed non-confidential minutes of conference call of 13 June 2018 with Javelin Global Commodities, point 7; Agreed non-confidential minutes of conference call of 13 June 2018 with Glencore, paragraphs 7 and 11.

<sup>59</sup> Agreed non-confidential minutes of conference call of 14 June 2018 with [a customer], point 9; Agreed non-confidential minutes of conference call of 7 June 2018, with ThyssenKrupp (EECV), point 9; Agreed non-confidential minutes of conference call of 13 June 2018 with Javelin Global Commodities, point 10; Agreed non-confidential minutes of conference call of 13 June 2018 with Jera Rietlanden / Jera Trading, point 14; Agreed non-confidential minutes of conference call of 11 June 2018 with ABT / Sea-invest, point 14; Agreed non-confidential minutes of conference call of 8 June 2018 with [a customer], point 12; Agreed non-confidential minutes of conference call of 12 June 2018 with OVET, point 10; Agreed non-confidential minutes of conference call of 13 June 2018 with

- (57) To conclude, the Commission considers that the Transaction would not likely have any overall negative impact on effective competition.

#### 4.3.3.3. Conclusion

- (58) Based on the considerations above and all evidence available to it, the Commission concludes that an input foreclosure strategy post-Transaction by the Notifying Parties in order to exclude third party customers of deep-sea terminal services for coal and iron ore is unlikely.

### 5. CONCLUSION

- (59) 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*

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Glencore, paragraph 15; Agreed non-confidential minutes of conference call of 12 June 2018 with [a customer], point 8.