

Anticipated acquisition by Skanska Construction UK Limited of the UK Highways operational services business of Atkins Limited

ME/5967/13

The OFT's decision on reference under section 33(1) given on 16 May 2013. Full text of decision published 6 June 2013.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **Skanska Construction UK Limited (Skanska)** is a wholly owned subsidiary of Skanska UK PLC, which in turn is wholly owned by Skanska AB, a Swedish company listed on the Stockholm Stock Exchange. Skanska operates in the construction and infrastructure industry, including financing projects, design and construction, facilities management, operation and maintenance.
2. **WS Atkins plc (Atkins)** is an engineering and design consultancy. In the UK, its areas of operation include water, education, environment, aerospace, defence and infrastructure design as well as significant activity in the transportation sectors. It is headquartered in the UK and listed on the London Stock Exchange.
3. **The Target** is the UK highways maintenance business of Atkins Limited, a subsidiary of Atkins. The business provides highways operation and maintenance services to the UK. The Target's UK turnover for the year ending 31 March 2012 was £[].

TRANSACTION

4. Skanska proposes to acquire the Target, a division of Atkins Limited, which supplies highways operation and maintenance services to customers in the

UK. In particular, it is acquiring eight contracts, associated leasehold premises, leasehold vehicles and other incidental assets as well as approximately 1,220 members of staff associated with the contracts (the **Transaction**). The consideration paid is expected to be £[].

5. The Business Sale Agreement was signed on 27 February 2013 and the Transaction was announced on 28 February 2013. The Transaction was notified to the Office of Fair Trading (**OFT**) on 19 March 2013 and the administrative deadline is 17 May 2013.

JURISDICTION

6. As a result of this Transaction Skanska and the Target will cease to be distinct. The OFT believes that the combination of assets acquired by Skanska is sufficient to constitute an 'enterprise' for the purposes of section 23 of the Enterprise Act 2002 (the **Act**).
7. The UK turnover of the Target exceeds £70 million, so the turnover test in section 23(1)(b) of Act is satisfied.¹
8. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

COUNTERFACTUAL

9. The OFT may be required to consider a merger at a time when there is the prospect of another merger in the same market (a parallel transaction). For the OFT, the question is, as always, whether the transaction under review creates the realistic prospect of a substantial lessening of competition (**SLC**), and it is likely to consider whether the statutory test would be met whether or not the parallel transaction proceeds (unless the parallel transaction can clearly be ruled out as too speculative).²
10. At the time of this decision, the OFT is aware of and currently investigating the mergers between Kier/May Gurney and Costain/May Gurney. However,

¹ The merging parties submitted that the proposed Transaction does not satisfy the jurisdictional thresholds of the EU Merger Regulation (Council Regulation 139/2004/EC, OJ L24, 29/1/2004).

² Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 5.3.25.

the OFT does not need to conclude whether or not either of these transactions is likely to succeed or is too speculative, given that under either scenario, the OFT would have no competition concerns with this Transaction. Out of caution, the OFT therefore considers whether or not the Transaction creates a realistic prospect of a SLC in the event that either the Kier/May Gurney or the Costain/May Gurney proposed transactions were to proceed.

FRAME OF REFERENCE

11. The OFT considers that market definition is a useful tool, but not an end in itself. Market definition provides a framework for assessing the competitive effects of the merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of a merger in a mechanistic way, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.³
12. The merging parties overlap in the supply of highways maintenance services for the Highways Agency, through Skanska's activities in the Skanska Atkins joint venture, a contractual arrangement to operate a contract for the Highways Agency, and Atkins' standalone activities.

Product scope

13. The merging parties submitted that the relevant frame of reference is the supply of utilities and infrastructure services, with the supply of highways maintenance services forming part of this broader segment. The merging parties argued that it was not appropriate to segment the market according to contract size as there is no clear delineation. The merging parties did note that larger contracts are typically those tendered by the Highways Agency and smaller contracts are typically those tendered by the local authority.

³ Merger Assessment Guidelines, A joint publication of the Competition Commission and the Office of Fair Trading, OFT1254, September 2010, paragraph 5.2.2.

14. In Balfour/Beatty,⁴ the OFT assessed the transaction on the basis of civil engineering as the product scope. However, it did note that civil engineering may be segmented further such as by type of customer (rail, road or water) or by size of contract. Similarly, in Skanska/McNicholas the OFT assessed the merger on the basis of the supply of gas, the overlapping sector, as well as in the utility and infrastructure services separately.⁵ The OFT also noted that in Ferrovial/Amey,⁶ the European Commission left the relevant market open but the parties submitted that the product scope was the supply of management and maintenance of road infrastructure services.
15. On the demand side, there is no substitution between different sectors (since, for example, a water project is not a substitute for a highways project) and there may only be limited substitution by customers between maintenance and capital projects.
16. The OFT also considered whether it should distinguish between contract sizes. As noted above, the merging parties submitted that this is akin to distinguishing between highways maintenance services for local roads (the responsibility of local authorities) and for motorway or trunk roads (the responsibility of the Highways Agency, Transport Scotland, Transport for London and the Welsh government). Third party responses suggested that relevant experience is important and may constitute a barrier to moving from providing highways maintenance services to local authorities to providing the same services to the Highways Agency or vice versa. The fact that Skanska bid for but was not successful in winning contracts for highways maintenance with local authorities also supports this.
17. It is not necessary for the OFT to come to a firm conclusion given that no competition concerns arise under any possible segmentation. Therefore, given the Target is only active in highways maintenance services, for the purposes of this assessment, the OFT considers the impact of the Transaction on the supply of highways maintenance services as well as on the supply of highways maintenance services for local authority and Highways Agency contracts, respectively.

⁴ ME/2525/06, Anticipated acquisition by Balfour Beatty plc of Birse Group plc, 1 September 2006.

⁵ ME/2801/06, Completed acquisition by Skanska Construction UK Ltd of McNicholas Holdings plc, 26 February 2007.

⁶ M.3172, FERROVIAL/AMEY, 23 May 2003.

Geographic scope

18. The merging parties submitted that the geographic frame of reference for highways maintenance services is predominantly national, although they recognised that there may be a regional dimension to competition for smaller contracts (those with the local authorities). They noted that this was consistent with the OFT's analysis in past cases.⁷
19. One third party competitor indicated that European providers have entered the UK market for highways maintenance, especially for larger contracts. The OFT received evidence from the merging parties and third party competitors that for highways maintenance services in London or for local authorities, customers' desire for bidders to have relevant experience may act as a barrier to firms wishing to expand from one geography to another.
20. The OFT has received no evidence to suggest that it should depart from its previous decisional practice. However, it is not necessary for the OFT to come to a firm conclusion given that no competition concerns arise under any possible segmentation. For the purposes of this assessment, the OFT considers the impact of the Transaction on the supply of highways maintenance services nationally as well as the supply of highways maintenance services through local authority contracts assessed regionally and Highways Agency contracts assessed nationally.

HORIZONTAL ISSUES

21. The merging parties overlap in the supply of highways maintenance services for the Highways Agency. Neither party is active in the supply of highways maintenance contracts for trunk roads in Wales, for Transport Scotland or for Transport for London.⁸ Only the Target has contracts with any local authorities.

⁷ ME/2525/06, Anticipated acquisition by Balfour Beatty plc of Birse Group plc, 1 September 2006 and ME/2801/06, Completed acquisition by Skanska Construction UK Ltd of McNicholas Holdings plc, 26 February 2007.

⁸ The OFT notes that Skanska bid unsuccessfully, through a joint venture with a third party, for Transport for London (TfL) contracts. However, given that the Target has not bid for any contract in London in the last [] years, the OFT does not consider there to be an overlap in this segment. Across the four TfL contracts recently tendered, there were at least nine other bidders in addition to Skanska.

Highways maintenance services

22. Skanska is active in highways maintenance services only through its existing contractual arrangement for a joint venture with the Target, which operates a Highways Agency contract for maintenance of motorways and trunk roads in the Highways Agency Area 2 in the South West. In its assessment, out of caution, the OFT has attributed half the joint venture's shares of supply to Skanska and considered this as an increment to the Target's share of supply (which the Target has by virtue of the joint venture and other contracts).
23. The merging parties submitted that they have a combined share of supply for highways maintenance services in the UK of [five-10] per cent, with an increment of less than [0-five] per cent. A large number of competitors will remain following the Transaction to constrain the merged entity, namely Amey/Enterprise ([10-20] per cent), Enterprise Mouchel ([five-10] per cent), which will both have larger shares than the combined entity as well as Balfour Beatty ([five-10] per cent), Ringway ([five-10] per cent), Ringway Jacobs ([0-five] per cent), Conway ([0-five] per cent), Costain and/or May Gurney ([0-five] and [0-five] per cent respectively), Colas ([0-five] per cent), Volker ([0-five] per cent) and Carillion ([0-five] per cent). Where third parties provided their own shares of supply, these were higher in the majority of cases than the merging parties had estimated. The OFT also identified Mott MacDonald as a competitor, through its joint venture with Balfour Beatty, as well as Galliford Try. The vast majority of third party customers did not raise any competition concerns.
24. Therefore, given the limited overlap and increment between the merging parties and given that a large number of competitors will continue to provide a strong competitive constraint, the OFT is of the view that the Transaction will not give the merged entity the ability to increase price or worsen non-price aspects of the competitive offering. The OFT therefore believes that the Transaction does not give rise to a realistic prospect of a SLC for the supply of highways maintenance services in the UK.

Highways maintenance services for the Highways Agency

25. The merging parties submitted that they have a combined share of supply for highways maintenance services for the Highways Agency in England of [10-20] per cent, with a [0-five] per cent increment. They listed a number

of competitors, which will continue to constrain the merged entity, including Mouchel ([20-30] per cent), Amey/Enterprise ([20-30] per cent), which will both continue to have larger shares than the merged entity, as well as Carillion ([five-10] per cent), WSP ([five-10] per cent), Balfour Beatty ([five-10] per cent), Mott Macdonald ([five-10] per cent), Colas ([five-10] per cent), Costain ([five-10] per cent) and Halcrow ([five-10] per cent).

26. The Highways Agency identified 12 companies, which are joint venture partners (including the merging parties) that would be expected to meet the pre-qualification criteria as well as Ferrovial (Amey) and Carillion, which would be expected to meet the criteria on a standalone basis. The OFT understands this to mean that all of these companies would be able to supply it with the relevant services. In addition, the OFT received evidence that indicated that for the last eight contracts, there were at least three compliant tenders and up to seven expression of interest, in the case of more recent ongoing awards. These included the tenders submitted by the Skanska Atkins joint venture arrangement, but neither Skanska nor Atkins bid independently. In addition, no third parties raised any competition concerns.
27. Therefore, given the limited overlap and increment between the merging parties, the large number of competitors which will continue to provide a strong competitive constraint and the absence of third party concerns, the OFT is of the view that the Transaction will not give the merged entity the ability to increase price or worsen non-price aspects of the competitive offering. The OFT therefore believes that the Transaction does not give rise to a realistic prospect of a SLC in the supply of highways maintenance services for the Highways Agency in the UK.

Highways maintenance services for local authorities

28. There is no current overlap between the merging parties given that Skanska does not have a highways maintenance contract with any local authority. However, Skanska has bid on a standalone basis for two highways maintenance contracts for local authorities since 2007, albeit unsuccessfully, and could therefore exert some competitive constraint through the bidding process.

29. The merging parties suggested that Skanska is not currently a credible bidder for the contracts to supply maintenance services to local authorities, as Skanska has been unsuccessful in its bids due to a lack of track record in providing these services. The OFT was of the view that some third party competitor responses suggested that Skanska is a weak bidder for the supply of maintenance services to local authorities. A couple of third party customers considered Skanska to be a credible bidder. However, a couple of others indicated that they had no experience of Skanska bidding (and were therefore unable to determine Skanska's credibility) or contracts with Skanska. The vast majority of third party customers did not raise any competition concerns.
30. The bidding data submitted by the merging parties suggests that they have not bid for the same contract in the last five years, suggesting the merging parties are not close competitors. The majority of third party local authorities also considered that the merging parties are not close competitors. In addition, the merging parties identified at least four large competitors in each region suggesting a number of credible bidders and competitors. Given they will remain to constrain the merged entity, the OFT does not find it necessary to assess the extent to which Skanska is an actual competitor, or actual or perceived potential competitor.
31. Therefore, given Skanska has not been successful in its bids, is not a close competitor and that there are a number of competitors which will continue to provide a competitive constraint, the OFT is of the view that the Transaction will not give the merged entity the ability to increase price or worsen non-price aspects of the competitive offering. The OFT therefore believes that the Transaction does not give rise to a realistic prospect of a SLC in the supply of highways maintenance services for local authorities in the UK.

Barriers to entry and expansion

32. The merging parties submitted that new entry is possible (for example, by acquiring an entity with complementary experience) but that entry is also possible through a joint venture with another provider. In addition, expanding the range of services is also possible for established providers. However, the merging parties did acknowledge that with respect to larger contracts, a provider needs sufficient demonstrable scale, skills and established track record. In addition, the rationale for the Transaction is for

Skanska to compete on its own for contracts in the highways maintenance segment, suggesting that standalone entry is not easy.

33. Third party responses suggested that prior experience is a very important factor, although it may be possible to enter initially through a joint venture (for example Aone + , a consortium of Costain, Colas and Halcrow entered the supply of maintenance services within the last five years). Third party competitor responses also noted that it can take up to three years for costs to be recovered. One third party competitor suggested that barriers to entry will be lower for smaller authorities.
34. However, as the Transaction does not give rise to concerns over unilateral effects for the supply of maintenance services (either to the highways agency or local authorities or both combined) in the UK, there is no need for the OFT to reach a firm conclusion regarding barriers to entry and expansion.

THIRD PARTY VIEWS

35. Third party comments have been taken into consideration and discussed above where relevant.
36. The OFT notes that no competition concerns were raised by third party competitors, the Highways Agency or by the majority of local authority customers.
37. A number of third party customers noted that it may be unlawful under European law for contracts to transfer from Atkins to Skanska, forcing them to re-procure. However, the OFT is of the view that this does not raise any competition concerns.
38. One third party noted that recent transactions have reorganised the market from one in which joint ventures are required in order to bring together design and implementation capability, to one in which there is a set of large firms that can provide both. They suggested that this may reduce the depth of experience that supports each individual contract, and also raised a concern about the impact on customers of dealing with very large companies. However, they acknowledged that the number of bidders for each contract has not been reduced. The OFT is of the view that this does not raise any competition concerns for the reasons set out under horizontal issues.

39. One third party competitor noted that the Transaction would result in a stronger competitor with a sufficient number of significant participants remaining. One third party customer also noted that the merged entity would be a more rounded single competitor whilst not reducing the number of bidders.

ASSESSMENT

40. As a result of this Transaction Skanska and the Target will cease to be distinct. The UK turnover of the Target exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.
41. The merging parties overlap in the supply of highways maintenance services for the Highways Agency, through Skanska's activities in the Skanska Atkins joint venture, a contractual arrangement to operate a contract for the Highways Agency, and Atkins' standalone activities.
42. Given there were no competition concerns under any possible segmentation, the OFT assessed the Transaction on the basis of the supply of highways maintenance services nationally as well as under local authority contracts assessed regionally and Highways Agency contracts assessed nationally.
43. With respect to the supply of highways maintenance services, the OFT concluded that there was limited overlap, the increment is negligible and there will be a number of competitors, which will continue to provide a strong constraint on the merged entity such that it will not have the ability to increase price or worsen non-price aspects of the competitive offering.
44. With respect to the supply of highways maintenance services to the Highways Agency, the OFT found that there was limited overlap, the increment was small, a number of competitors will continue to provide a strong competitive constraint and there were no third party concerns raised.
45. With respect to the supply of highways maintenance to local authorities, the OFT concluded that Skanska has not currently been successful in any bids, it is not a close competitor of Atkins and a number of competitors will continue to constrain the merged entity post-merger such that it will not be in a position to increase price or worsen non-price aspects of the competitive offering.

46. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

47. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.