



EUROPEAN COMMISSION
DG Competition

***Case M.7851 - USS NERO
/ OPTRUST / PGGM /
GLOBAL VIA***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 05/02/2016

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties:

Dear Sir/Madam,

**Subject: Case M.7851 - USS NERO / OPTRUST / PGGM / GLOBAL VIA
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²**

- (1) On 04 January 2016, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertakings OPTrust Infrastructure Europe I S.à.r.l., ("OPTrust", Luxembourg), a subsidiary of the OPSEU Pension Trust (Canada), Stichting Depository PGGM Infrastructure Funds ("PGGM", the Netherlands) and USS Nero Limited ("USS", United Kingdom) acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint

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").

control of the whole of the undertaking Global Vía Infraestructuras, S.A. ("Global Vía", Spain) by way of purchase of shares.³

- (2) OPTrust, PGGM and USS are designated hereinafter as the 'Notifying Parties' or the 'Lenders', whereas OPTrust, PGGM, USS and Global Vía are designated as the 'parties to the Transaction' or 'the Parties'.

1. THE PARTIES

- (3) USS is a wholly owned subsidiary of Universities Superannuation Scheme Limited which is the corporate trustee of Universities Superannuation Scheme, one of the largest private sector pension funds in the United Kingdom. It was established in 1974 to administer the principal pension scheme for academic and comparable staff in UK universities and other higher education and research institutions. The group to which USS belongs mainly invests in non-controlling equity holding of listed companies, fixed income and currency interests, property investments and alternative investments.
- (4) OPTrust is an indirect wholly-owned Luxembourg subsidiary of OPSEU Pension Trust ('the Trust, Canada). Launched on 1 January 1995, the Trust invests and manages the Ontario Public Service Employees Union ("OPSEU") Pensions Plan, with more than 86 000 members and retirees. OPTrust's role is to invest prudently and manage the pension plan's assets. It has investments interests in a number of sectors in North America and, to a lesser extent, in Europe, Australia and South America.
- (5) PGGM is a major Dutch pension administrator specialised in the administration of collective pensions. It manages the pensions for different pension funds, the affiliated employers and their employees. The top holding company of the PGGM group is PGGM, NV. All the shares in PGGM N.V. are ultimately held by PGGM Cooperatie U.A., which is a cooperative entity whose members are representatives of employers' organisations, unions, employers, workers and pensioners in the health care and welfare sector.
- (6) Global Vía is a Spanish infrastructure company active in the management, promotion, development and exploitation of public infrastructure under the regime of concession or under any other similar kind of contract. Global Vía exercises control over companies that are concessionaires of infrastructures (or direct or indirect holders of shareholdings in concessionaires).
- (7) The public infrastructures in which Global Vía could participate, on the basis of its bylaws, are: roads, railways, airports, hospitals and penitentiaries or police stations. It is currently ultimately jointly controlled by two Spanish companies - Bankia S.A. (Bankia), a Spanish financial entity and Fomento de Construcciones y Contratas, S.A. (FCC), a Spanish company mainly active in the construction sector.

2. THE OPERATION AND THE CONCENTRATION

- (8) According to the Share Purchase Agreement (SPA) of 23 October 2015, the shares in Global Vía will be acquired by the three Lenders in the following proportions: [...] % by OPTrust, [...] % by PGGM and the remaining [...] % by USS.

³ Publication in the Official Journal of the European Union No C 10, 13.01.2016, p. 6.

- (9) Global Vía directly or indirectly holds (controlling and, in some instances, minority) interests in a number of concessionaires that manage and operate infrastructure concessions.
- (10) Some of these interests in concessionaire companies are held by Global Vía's subsidiary Globalvía Inversiones. Currently, USS, OPTrust and PGGM are Lenders and, together with Global Vía itself, jointly controlling parents of Globalvía Inversiones.
- (11) [...] the concession companies over which Global Vía has direct controlling (and, in some instances, minority) interests, will be referred to as the 'Excluded Companies'. These Excluded Companies are due to be divested or liquidated [...]. Nevertheless, given that these Excluded Companies will continue to be part of Global Vía and therefore managed and controlled under the mechanism described below, and absent any reliable information about the likelihood and the time of such divestitures, in line with the prior practice of the European Commission, the Commission will attribute the Excluded Companies to Global Vía and base its assessment of the concentration on the whole of Global Vía as acquired by the Lenders.
- (12) Besides the Excluded Companies, Global Vía also controls (on a joint basis) Exproextradas, a Portuguese company active in the management of the expropriations of land in Portugal for the construction of the so-called Trasmontana motorway concession.

Joint control

The Parties' views

- (13) Post-Transaction, Global Vía will have a Board of Directors composed of [...] directors. Each of OPTrust and PGGM will have the right to nominate [...] directors of the Board, whereas USS will be entitled to nominate [...] directors ("the Shareholders Directors"). In addition to the Shareholders Directors, the Lenders will appoint an independent chairman [...]
- (14) Resolutions of the Board of Directors of Global Vía are to be adopted by a simple majority of the directors, except for the resolutions in respect of the Simple and Special Reserved Matters that require a qualified majority.
- (15) At least [...]%, i.e. [...] Shareholders' Directors are required for the approval or implementation of resolutions in respect of Simple Reserved Matters. Such matters include, among others, the adoption, approval or amendment of the Business Plan and the Annual Budget of Global Vía, as well as the appointment and dismissal of the senior management [...]. Consequently, both OPTrust and PGGM will be able to individually veto any of these matters, and exercise control over Global Vía.
- (16) At least [...]%, i.e. [...] Shareholders Directors are required for the approval or implementation of resolutions in respect of Special Reserved Matters. Therefore, consent by all Lenders (i.e. OPTrust, PGGM and USS) will be required for the:
 - a) approval of any proposed investment to be made by Global Vía. This covers any investments by Global Vía without any limitation in terms of amount, type or scope of the said investment;

- b) financing or refinancing projects with an individual value exceeding EUR [...] million or an aggregate value of EUR [...] million on any twelve-month period.
 - c) divestments by the Company or, to the extent that Global Vía is able to control the same, any other Group Company of infrastructure assets with an individual value exceeding EUR [...] million.
- (17) In the context of an infrastructure company such as Global Vía, decisions about investments and divestments are key for determining the commercial strategy of that company. For instance, decisions on whether to carry out or not a given investment – either by contending to a public tender for a certain concession (and, if successful, to perform the construction (if required), operate and exploit the said infrastructure during the life time of the concession), or by acquiring companies that have already been awarded the corresponding infrastructure concession – do play a significant (in fact, essential) role in the market where Global Vía operates. Therefore, such rights are of crucial relevance for determining the commercial strategy of Global Vía that – by themselves – are sufficient to concede USS, OPTrust, and PGGM joint control over the company.
- (18) Consequently, according to the Notifying Parties, post-Transaction, also USS will have joint control over Global Vía, as it will be in a position of vetoing the key strategic decisions over Investments and Divestments of Global Vía.

Commission's Assessment

- (19) Paragraph 68 of the Commission's Consolidated Jurisdictional Notice on the control of concentrations between undertakings (the Consolidated Jurisdictional Notice)⁴ indicates that, depending on its precise content and its importance in the context of the specific business of the joint venture, even a single veto right could be sufficient to concede joint control to a minority shareholder.
- (20) In the case at hand, and in line with paragraph 71 of the Consolidated Jurisdictional Notice, it can indeed be concluded that in the markets Global Vía is active in, investment decisions on whether to submit a bid for a concession and subsequently investment decisions for the exploitation of the acquired concessions are essential for running such a business, as they play the key role in determining the commercial strategy of infrastructure companies, such as Global Vía. A similar reasoning can be applied to the Excluded Companies, where USS will have a veto over any investment, without any limitation in terms of amount. Although the decision as to their divestment has already been taken, until such divestment takes place, USS could block any investment, including investments necessary to keep up or increase the value of those companies.
- (21) Consequently, all three Lenders (i.e., OPTrust, PGGM and USS) will be able to exert decisive influence and thereby exercise joint control over Global Vía.
- (22) The Transaction consists in the change of direct and indirect joint control over Globalvía Inversiones from five shareholders to three and the acquisition of joint

⁴ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C95 of 16.04.2008, p. 1.

control of the Lenders over the Excluded Companies and Exproextradas from third parties, namely Bankia and FCC, the current parents of Global Vía. Therefore,⁵ there is no need to assess full-functionality in the current case.⁶

- (23) Therefore, the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

- (24) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 2 500 million⁷ (USS: EUR [...] million; OPTrust: EUR [...] million; PGGM EUR [...] million; and Global Vía: EUR [...] million). In each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million (Great Britain: EUR [...] million for [Name of companies]; Poland: EUR [...] million for [Name of companies]; Spain: EUR [...] million for [Name of companies]). The aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million in each of the 3 said Member States. Finally, the aggregate Community-wide turnover of each of at least two of the undertakings concerned is in excess of EUR 100 million (USS: EUR [...] million; OPTrust: [...] million; PGGM: EUR [...] million).

- (25) The notified operation therefore has an EU dimension pursuant to Article 1(3) of the Merger Regulation.

4. COMPETITIVE ASSESSMENT

4.1. Market Definition

- (26) The Transaction would lead to overlaps in the markets for toll motorway and railway infrastructure concessions.

4.1.1. Toll motorway concessions

4.1.1.1. Relevant product markets

- (27) Other than through Globalvía Inversiones, Global Vía controls a number of concessionaires that are present in the business of managing and exploiting toll motorway concessions or other speedy road concession in Spain. The Lenders, through Globalvía Inversiones, also control a number of concessionaires active in managing and exploiting toll motorway concessions within the EU, in particular in Spain, Ireland and Portugal. Once awarded the concessions through public tendering procedures, the concessionaire exploits the infrastructure on behalf of the State or the competent granting regional or local authority.

⁵ Paragraph 91 of the Consolidated Jurisdictional Notice.

⁶ In line with paragraph 24 of the Consolidated Jurisdictional Notice, Global Via is an existing business with a market presence to which a turnover can be clearly attributed.

⁷ Turnover calculated in accordance with Article 5 of the Merger Regulation.

- (28) In line with previous Commission decisions the Notifying Parties propose to distinguish in the field of toll motorway concessions between:⁸
- i. The grant of toll motorway concessions, which is usually granted through tendering procedures, consists of an economic activity where supply is represented by the State and demand by companies or consortia of companies with an interest in acquiring toll motorway concessions; and
 - ii. The commercial exploitation of toll motorway concessions (or transport on toll motorway concessions), which consists of providing road transport infrastructures between various geographical points ("routes").
- (29) This distinction would be in line with previous decisions related to concessions in other economic sectors by means of which the Commission has held that the granting of a licence for the exploitation of a particular State-regulated activity is distinguishable from the running of that particular activity.⁹
- (30) The Commission has so far left open the exact product market definition in this sector. The Notifying Parties have submitted information on toll motorway concessions as a whole, also in line with the approach of the Spanish Competition Authority that has considered that all those road concessions granted by public authorities in the context of tendering procedures can be included within a market comprising the construction, exploitation, management and maintenance of toll motorway concessions as a whole.
- (31) In the present case, it is not necessary to conclude on the exact product market definition, as the Transaction does not give rise to any competition concerns under any plausible alternative market definition considered.

4.1.1.2. Relevant Geographic Markets

- (32) As regards the geographic scope of the market for the grant of toll motorway concessions, the Commission has previously considered this to be probably EEA-wide, although the possibility of national markets was left open. Regarding the geographic scope of the market for the exploitation of toll motorway concessions, the Commission considered in its previous practice that it should be defined according to the "origin & destination method", i.e. assuming that each motorway constitutes a distinct market due to lack of substitutability from the point of view of a driver who needs to reach a certain geographical point.¹⁰
- (33) For the purposes of the present case, the geographic market definition for the granting and exploitation of toll motorway concessions can be left open, as the Transaction will not raise any competition concerns, irrespective of the geographic market definition.

⁸ See, for instance, the decisions of the Commission in Case COMP/M.429 – Abertis / Autostrade, paras. 15-21; Case COMP/M.4687 – Sacyr Vallehermoso / Eiffage, para. 26; Case COMP/M.5.974 – Finavias/Abertis/Autopista Trados M-45, para. 11; Case COMP/M.6020 – ACS / Hochtief, para. 24.

⁹ See, for instance, the decisions of the Commission in Case No IV/M.567 Lyonnaise des Eaux / Northumbrian Water, para. 12 or Case COMP/M.429 – Abertis / Autostrade, para. 15.

¹⁰ See, for instance, the decisions of the Commission in case COMP/M.4687 – Sacyr/Eiffage, para. 27 and 28; COMP/M.4249 – Abertis/Autostrade, para. 18 and subsequent; and COMP/M.4087 – Eiffage/Macquarie/APRR, para. 12 and subsequent.

4.1.2. Railway Infrastructure Concessions

4.1.2.1. Relevant Product Market

- (34) Other than through its control over Globalvía Inversiones, Global Vía controls one single tramway infrastructure concession, through the company Tranvía de Parla S.A., located in the village of Parla in the Region of Madrid, Spain.¹¹ In turn, the Lenders do not control any railway infrastructure concession in the EEA, other than those tramway and metro concessions controlled by Globalvía Inversiones (that they jointly control along with Global Vía). Globalvía Inversiones controls several concessionaires that have been entrusted by public authorities with the building, management and maintenance of railway services in the context of public tendering procedures in Spain.
- (35) In so far as railway infrastructure is concerned, there are three main types of railways that can potentially be managed through a concession, namely metro, tram and train.¹² As regards trains, until the very recent entry into force of the new Spanish Act on the Railway Sector, there have been no tenders in Spain to obtain licenses to operate railway passenger routes linking Spanish cities.¹³ Following the entry into force of the new Spanish regulation, the Parties expect that tenders for concession of licenses to operate railway passenger routes linking Spanish cities, would be called in the future. Therefore, the Parties claim that for the purpose of this Transaction there is a single product market for railway infrastructure concessions.
- (36) In previous decisions, the Commission has considered that the management and maintenance of railway infrastructures as a whole constitutes a separate product market from the management and maintenance of other infrastructures (especially road infrastructures).¹⁴
- (37) The Commission has, however, considered that metro and tramway concessions could be part of the market for urban transport of passengers which would also encompass buses.¹⁵ As the Parties are not active in urban transport other than through tram and

¹¹ The acquisition of joint control by FCC and Bankia (then Caja Madrid), through Global Vía, of the Tranvía de Parla was notified to and cleared by the Spanish Competition Authority (at the time the Comisión Nacional de la Competencia, CNC) in 2008. See CNC decision of 8 October 2008, case C-101/08, FCC/Caja Madrid/Tranvía Parla.

¹² See CNMC decision C/0579/14 Globalvia/Tramvia Metropolitana/Tramvia Metropolitana del Besos, para. 34.

¹³ Act 39/2003 has been repealed and substituted by Spanish Act 38/2015, of 29 September, on the Railway Sector (Ley 38/2015, de 29 de septiembre, del Sector Ferroviario) with entry into force as of 1 October 2015 and aiming at the opening of the sector to competition.

¹⁴ See, for instance, the Commission Decision in Case COMP/M.3172 – *Ferrovial / Amey*, para 9. and 10.

¹⁵ In case M.5741 CDC/Veolia Environnement/Transdev/Veolia Transport, there were indications from the market investigation that a more granular subsegmentation according to mode of transport could be envisaged. Specifically, in the case of France, the exploitation of so-called "heavy" modes of transport (metro, tramway) could constitute a subsegment of the wider market for urban passenger transport as distinct from the interurban passenger transport. Nevertheless, the Commission left the market definition open. As the Parties are not active in "light" modes such as bus transport concessions, in the case of Spain, the hypothetical market for heavy urban transport would be identical to the market for railway concessions.

metro concessions in Spain, it can be left open whether the relevant product market is railway concessions including tram and metro, as the Spanish competition authority considered¹⁶, or urban transport as the Transaction does not give rise to any competition concern under any of these plausible alternative market definitions.

4.1.2.2. Relevant Geographic Markets

(38) In general, the Commission has considered that the geographic market for railway infrastructure concessions would be national in scope, without ruling out that it could also have an EEA-wide dimension.¹⁷ As regards metro and tram as urban modes of passenger transport, while leaving the geographic market definition open, the Commission has considered the market at the most national in scope.¹⁸ The Parties have provided information for both EEA and national level (Spain). In any event, the precise definition for the geographic scope of railway infrastructure concessions can be left open since it does not give rise to any competition concerns under any plausible alternative market definition considered.

4.2. Competitive assessment

(39) The Transaction would lead to horizontal overlaps in the markets for toll motorway and rail concessions. Only the market for rail concessions in Spain would be affected.¹⁹

4.2.1. Toll motorway concessions

(40) The Transaction gives rise to negligible overlaps between the activities of the Notifying Parties (through their jointly controlling interest in Globalvía Inversiones) and Global Vía. The Parties' combined volume-based market share for the grant as well as the exploitation of toll motorway concessions is [0-5]% in the market for toll motorway concession at an EEA level and [5-10]% in Spain, with very small market share increments of only [0-5]% and of [0-5]%, respectively. If the estimates would be measured in value, the combined market share of the Parties would be of only [0-5]% with a negligible market share increment of [0-5]% in Spain. These low market shares do not give rise to any competition concerns. Moreover, the respective concessions have been under the common control of Global Vía prior to the Transaction and there is, therefore, no significant change in the market structure.

4.2.2. Railway Infrastructure Concessions

(41) The Transaction would lead to a very limited horizontal overlap of the activities of Global Vía and the Lenders (through Globalvía Inversiones) in the activities of railway infrastructure concessions in Spain.

¹⁶ See, as a way of illustration, the SDC Decision in Case N-06125 FCC – Caja Madrid , para. V; or the CNC decision in C-0101/08 FCC/Caja Madrid/Tranvía Parla, para. IV; and the CNMC decision C/0579/14 Globalvia/Tramvia Metropolitana/Tramvia Metropolitana del Besos, para. 36.

¹⁷ See, for instance, the Commission decision in Case COMP/M.6020 – ACS / Hochtief, para. 28 or Case COMP/M.4806 – DSB / First/ Öresunds/ Tåg paras. 13-15.

¹⁸ See for instance M.5557 CDC/CDPQ/SNCF/Keolis/Effia, para. 42, M.5741 CDC/Veolia Environnement/Transdev/Veolia Transport, para. 19.

¹⁹ Namely, the combined market share of the Parties to the concentration will be above 20%.

- (42) Through Globalvía Inversiones, Global Vía and the Lenders control eight concessionaires of railway infrastructure concessions in Spain, focused on urban transportation of passengers (i.e. metro and tramways, amounting to [...] km. Through the Excluded Companies, Global Vía also controls the company Tranvia de Parla, S.A., concessionaire of the tramway service in the city of Parla, in the Spanish Region of Madrid, with 8.5 km. The Lenders do not control any railway infrastructure concession in the EEA, other than those in Spain controlled by Globalvía Inversiones (that they jointly control with Global Vía).²⁰
- (43) The combined market share of the Lenders (through their jointly controlling interest in Globalvía Inversiones) and Global Vía is [10-20]% in value and [0-5]% in volume, in the market for railway infrastructure concessions at an EEA level (with a small market share increment of only [0-5]% in value and [0-5]% in volume) and of [30-40]% in value and [20-30]% in volume in Spain, with small market share increments below [0-5]% (corresponding to the 8.5 km of volume), i.e. only [0-5]% in value and [0-5]% in volume.
- (44) On a market for urban transport infrastructure concessions in Spain, the market share of the Parties would necessarily be considerably lower than the one for railway infrastructure concessions, as none of the Parties is active in other urban passenger transport modes, such as bus. On a narrower than national market, there would be no overlap in Spain, as the Lenders and Global Vía are active in different urban areas.
- (45) Moreover, this horizontal overlap was pre-existing to the Transaction. Indeed, Global Vía is at present one of the undertakings jointly controlling Globalvía Inversiones (along with the Lenders). In this regard, Global Vía already had sole control over Tranvia de Parla, S.A. and joint control over the railway infrastructure concessions controlled by Globalvía Inversiones (in this case jointly with the Lenders). Consequently, the Transaction would not bring about any material modification in the market structure and will not give rise to any competition concerns.
- (46) Given the negligible market shares of the Parties and the fact that there are only horizontal overlaps which predate the Transaction, as the respective concessions have been under the common control of Global Vía prior to the Transaction, there is no significant change in the market structure brought about by the Transaction and therefore the Transaction does not raise serious doubts as to its compatibility with the internal market.

²⁰ Paragraph 135 of the Form CO. Moreover, neither Global Via nor the Lenders control any other means of transport in Parla and none of the Parties carries out activities in Spain of urban bus transportation of passengers.

5. CONCLUSION

- (47) 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*