

EN

***Case No COMP/M.7075 - CINTRA / ABERTIS / ITINERE /
BIP & DRIVE JV***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION

Date: 18/02/2014

***In electronic form on the EUR-Lex website under document
number 32014M7075***



EUROPEAN COMMISSION

Brussels, 18.2.2014
C(2014) 1156 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 No COMP/M.7075 - CINTRA / ABERTIS / ITINERE /
BIP & DRIVE JV
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹**

- (1) On 14 January 2014, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Cintra Infraestructuras, S.A. ("Cintra", Spain), Abertis Autopistas España, S.A. ("Abertis", Spain) and Itínere Infraestructuras, S.A. ("Itínere", Spain) acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control over BIP & Drive S.A. ("BIP & Drive JV", Spain) by way of purchase of shares in a newly created company constituting a joint venture (hereinafter referred to as "the proposed transaction").²
- (2) Cintra, Abertis and Itínere are designated hereinafter as the "Parties".

¹ OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² Publication in the Official Journal of the European Union No C 14, 18.01.2014, p. 13.

1. THE PARTIES

- (3) **Cintra** is active in the construction of roads and motorways and handles toll road concessions in Europe, in particular Spain, as well as Canada and the United States. Cintra belongs to the Ferrovial Group, which is a diversified group with activities in construction, infrastructure concessions, telecommunications and services operating internationally.
- (4) **Abertis** belongs to the Abertis Group, which manages mobility and telecommunications infrastructures all over the world, including Spain, through three business areas: toll roads, telecommunications and airports.
- (5) **Itínere** is a company ultimately controlled by the investment fund Citi Infrastructure Partners, L.P., belonging to Citigroup. Itínere manages motorway concessions in Spain. It is also active in the field of exploitation and provision of all types of services related to urban and intercity transport infrastructure; design, construction, execution, exploitation, management, administration, preservation and development of all kinds of infrastructures and works, both public and private; management of public water supply, sewage and purification services, and works and services administrative concessions, etc.
- (6) **BIP & Drive JV** is a newly created company, which will distribute electronic toll payment devices known as On-Board Equipment ("**OBE**") in Spain.³

2. THE CONCENTRATION

- (7) BIP & Drive JV shall be incorporated as a full-function joint venture within the meaning of the Merger Regulation and it shall be jointly controlled by the Parties.

2.1. Joint control

- (8) The corporate governance structure of BIP & Drive consists of the General Shareholders Meeting, the Board of Directors composed of eight members and the Directive Management. Abertis will have 50% of the share capital and the voting rights and will designate four members of the Board, whereas Cintra and Itínere will each have 25% of shares, rights and will each appoint two members of the Board.
- (9) The General Shareholders Meeting will normally require the quorum representing more than 50% of the share capital and voting rights present. Decisions will be taken by the favourable vote of shareholders representing more than 50% of the shares.
- (10) However, the adoption of a number of strategic decisions, amongst which, the appointment and the removal of the Board of Directors' members, the adoption of the initial business plan and the initial budget, as well as the business plan to be developed within one year from the date of incorporation of the JV, and which will determine the business strategy of the company for the following ten years shall require a reinforced majority of 76% or the votes of seven out of eight directors.

³ 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.

(11) In addition, BIP & Drive JV will have the Directive Management in charge of the daily operations, comprising the General Director, appointed by Abertis, the Financial Director by Cintra and the Technical Director by Itínere.

(12) Based on the above it follows that BIP & Drive will be jointly controlled by Cintra, Abertis and Itínere in the sense of the Merger Regulation.

2.2. Full-functionality

(13) BIP & Drive JV will have sufficient resources to operate independently on the market for distribution of OBE devices.

(14) The Parties will provide the initial contribution up to EUR [...] during the first five years as of the incorporation.

(15) BIP & Drive JV will have its own tangible and intangible assets, namely information systems necessary for operating the business as well as its own premises located in Madrid (Spain). It will also have its own management dedicated to day-to-day business and will recruit its own personnel.

(16) The essence of BIP & Drive JV's income will stem from the sales of OBE devices to the final customers (registration fee), annual charges for the OBE devices (maintenance fee) and from the commissions paid by the entities managing motorway concessions based on the expenses in toll payments made by OBE users distributed by BIP & Drive JV.

(17) BIP & Drive JV will conclude a supply contract with an OBE manufacturer, selected through a tender. The OBE devices will be sold [...]. BIP & Drive JV will have its own brand and will set up its own commercial policy. [...].

(18) BIP & Drive JV will compete with the entities currently distributing OBE devices in Spain, namely banks, other non-financial entities such as oil companies (Repsol and Cepsa) as well as specialised OBE distributors such as Pagatelia and undertakings specialised in technology payment methods (such as Ingénico).

(19) Lastly, BIP & Drive JV is established for an indeterminate period of time, thus it will perform on a lasting basis all functions of an autonomous economic entity.

(20) Therefore, BIP & Drive JV will be fully-functional within the meaning of the Merger Regulation.

(21) In view of the above, the proposed transaction constitutes a concentration within the meaning of Article 3(4) of the Merger Regulation.

3. EU DIMENSION

(22) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million⁴ (Cintra: EUR [...] million, Abertis: EUR [...] million, Itínere: EUR [...] million). Each of them has an EU-wide turnover in excess of EUR 250 million (Cintra: EUR [...] million, Abertis EUR [...] million, Itínere EUR [...] million) but they do

⁴ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p.1).

not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

(23) Therefore, the proposed transaction has an EU dimension under the meaning of Article 1(2) of the Merger Regulation.

4. MARKET DEFINITION

(24) The proposed transaction is vertical and conglomerate in nature and does not give rise to any horizontal overlap in relation to BIP & Drive JV's activities and its parents. It results in a vertically affected market due to the strong position of the parent companies in the market for the exploitation of motorway concessions in Spain which is vertically related to the market for the distribution of OBE devices where BIP & Drive JV will be active.

4.1. The upstream market for the exploitation of toll motorways

4.1.1. Product market definition

(25) In its practice, the Commission has repeatedly distinguished between the activities of granting a licence for a particular State-regulated activity (competition *for* the market) and the running of this activity (competition *in* the market).⁵ By analogy the Commission has distinguished within the activities related to toll motorways between (i) the market for the granting of toll motorway concessions (competition *for* the market) and (ii) the market for the exploitation of toll motorways (competition *in* the market).⁶ The following analysis aims at determining which of these two product markets is more relevant for the assessment of the vertical relationship with the downstream market for the distribution of OBE devices.

(26) In Spain, motorway concessions are granted by public authorities, via open tender procedure, to companies in charge of the construction and/or the exploitation for a period generally exceeding 20 years. Once the concession is granted to the winner of the tender procedure, that company has an exclusive right to manage that concession.

(27) The OBE distributors deal with the motorways managers running their concessions and have no influence on the granting of these concessions. Therefore, the upstream market concerned by the proposed transaction is the market for the exploitation of toll motorways, which consists of "*the provision of speedy and secure road transport infrastructures between various geographical points*".⁷ This market is vertically related to the market for the distribution of OBE devices.

(28) In addition, in previous decisions, the Commission considered that each motorway constituted a separate market for the exploitation of toll motorways, given the limited substitutability amongst motorways from the drivers' perspective.⁸ However, from the

⁵ See decision of the European Commission in case IV/M.567 – *Lyonnaise des Eaux/Northumbrian Water*, recitals 10 and subsequent.

⁶ See decision of the European Commission in case COMP/M.4687 – *Sacyr/Eiffage*, recital 26; COMP/M.4249 – *Abertis/Autostrade*, recitals 15 and subsequent; and M.4087 – *Eiffage/Macquarie/APRR*, recitals 9 and subsequent.

⁷ See decision of the European Commission in case COMP/M.4249 – *Abertis/Autostrade*, recital 18.

⁸ See decisions of the European Commission in case COMP/M.4087 - *Eiffage/Macquarie/APRR*, recital 19; and case COMP/M 4687 – *Sacyr/Vallehermoso/Eiffage*, recital 28.

perspective of OBE distributors, such product delineation is irrelevant, notably due to the fact that OBE distributors face concessionaires of toll motorways on a national basis regardless of the precise motorways that they exploit.

(29) In any event, the question whether the exploitation of each motorway concession should be regarded as a distinct product market can be left open for the purpose of the present case, as the competitive assessment does not change irrespective of the market definition retained.

4.1.2. *Geographic market definition*

(30) In past cases, while leaving the geographic scope of the markets open, the Commission held that the market for granting toll motorway concessions was probably EEA-wide in scope, whereas the geographic scope of the market for the exploitation of toll motorways 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.⁹

(31) For the purpose of the present case, from the point of view of OBE distributors, which due to national regulatory requirements need to ensure interoperability of their OBE devices on all toll motorways in Spain, the relevant geographic market could be considered as national in scope. This approach would be supported by the fact that there exists an association of Spanish concessionaires, ASETA, representing the collective interest of its members.¹⁰ Among others, ASETA checks whether any newly introduced OBE device is operable on all motorways in Spain.

(32) In any event, the question of the precise product and geographic market definition can be left open for the purpose of the present case, as the competitive assessment does not change irrespective of the market definition retained.

4.2. **The downstream market for the distribution of OBE devices**

4.2.1. *Product market definition*

(33) In relation to the distribution of OBE devices in Spain five main stakeholders are present, notably manufacturers, distributors, concessionaires, financial institutions and end OBE users (the drivers).¹¹ BIP & Drive JV will operate on the last stage of the distribution chain,

⁹ See decisions of the European Commission in case COMP/M.4687 – *Sacyr/Eiffage*, recitals 27 and 28; COMP/M.4249 – *Abertis/Autostrade*, recitals 18 and subsequent; and M.4087 – *Eiffage/Macquarie/APRR*, recitals 12 and subsequent.

¹⁰ The Association of Spanish Road, Tunnel, Bridge and Toll Road Concession Companies (ASETA) of Spanish companies, which controls concessions to build, maintain and operate toll roads in Spanish territory, where tolls are directly collected from the infrastructure user.

¹¹ OBE manufacturers are national and international multi-product businesses offering various products in different areas, so their activities are not limited to the manufacturing of OBEs. OBE manufacturers also provide motorway concessionaires with the equipment (antennas) to be installed at toll stations to read the OBE signal. The equipment needs to be capable of reading signals from any OBE device allowing thus all OBE distributors to compete on an equal footing. Currently in Spain OBE devices are mainly distributed by financial institutions. If an OBE distributor is a non-financial institution (like BIP & Drive JV), it pays a commission (a fee) per invoice to a financial institution for charging the end users the toll fees. The end users purchasing the OBE devices provide the OBE distributor with their bank account information allowing them to charge the toll fees for using the OBE device on

i.e. offering OBE devices to end users. The Commission has not previously analysed the market for the distribution of OBE devices as a payment method on toll motorways.

- (34) Toll payments can be made either by credit/debit cards, in cash or via electronic toll systems by using OBE devices.
- (35) The Parties submit that OBE devices are not substitutable to other means of toll payment (credit/debit card and cash). Even though all methods of toll payment will continue to exist on the motorways managed by the Parties, the toll payment by credit/debit cards and/or in cash are not substitutes for OBEs from a demand-side perspective, notably due to the fact that drivers who choose OBEs as a toll payment method do so in order to avoid stopping at toll stations. None of the other payment methods gives such a possibility. In this context, the Parties provide evidence that besides the fact that OBE devices are much more expensive than using credit/debit cards or cash, there is a great discrepancy in terms of OBE prices with a price variation reaching 70% between various OBE distributors, the market leader being the most expensive one. This indicates that price is not necessarily the decisive factor for end users' decision to purchase an OBE device and to choose a certain OBE distributor, but that other factors are taken into consideration, in particular the frequent use of motorways and the reduction of the time spent at the toll stations.
- (36) The information obtained by the Commission in the course of the market investigation largely indicates that the three different methods of toll payment do not form part of the same product market. A majority of market participants (both drivers and OBE distributors) indicated that once someone has started using an OBE device they would not switch to other means of toll payment, such as cash or credit/debit cards. In particular, they would not be willing to switch if the current costs of OBE devices (including both purchase price and the maintenance fee) were to increase by 5-10% on a permanent basis.¹² The majority of respondents to the market investigation indicated that OBE devices are used as method of toll payment mostly for comfort and security. OBE users make time and fuel consumption savings for not stopping their vehicles at the toll stations, on the one hand, and they benefit from more secure payment transactions than using other means of toll payment (cash in particular), on the other hand.¹³ Moreover, the majority of respondents to the market investigation also stated that OBE users would only pay the toll in cash or by credit/debit card in case the OBE device fails to work for various reasons.¹⁴
- (37) Therefore, the relevant market for the assessment of the proposed transaction is the market for the distribution of OBE devices.

the motorways as payment method. End users pay a purchase quota - either a single payment or an initial amount corresponding to a 'registration fee' plus an annual payment during the OBE's usable life (estimated at six years) corresponding to a 'maintenance fee'.

¹² Replies to Commission questionnaire Q3 to OBE users of 15 January 2014, question 7; and replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 3.

¹³ Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 4; and replies to Commission questionnaire Q3 to OBE users of 15 January 2014, question 5.

¹⁴ Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 5; and replies to Commission questionnaire Q3 to OBE users of 15 January 2014, question 6.

4.2.2. Geographic market definition

- (38) Directive 2004/52/EC on the interoperability of electronic road toll systems in the Community¹⁵ (hereinafter referred to as “Directive 2004/52/EC”) and Commission Decision 2009/750/EC on the definition of the European Electronic Toll Service (“EETS”) and its technical elements¹⁶, (hereinafter referred to as “the Commission Decision on EETS”) aim at the improvement of the interoperability of electronic road toll systems in the European Economic Area. However, when analysing the progress achieved in EETS implementation, the Commission reached the conclusion that there are still different national systems due to technical barriers which have not been removed by the Member States and the stakeholders. Therefore, a pan-European interoperability of electronic road toll systems has not been achieved yet.¹⁷
- (39) Directive 2004/52/EC was transposed into Spanish law by means of Royal Decree 94/2006,¹⁸ which governs the interoperability of the electronic toll systems installed on Spanish motorways. It provides *inter alia* that OBE devices must be interoperable and capable of communicating with the electronic toll systems operating in the European Union.¹⁹
- (40) The Parties submit that a European market for the distribution of OBE devices does not exist to date, in particular due to the lack of interoperability between different national systems. Therefore, the Parties consider that the market for the distribution of OBE devices is national in scope.
- (41) The responses obtained during the market investigation are inconclusive with regard to the geographic scope of the market for the distribution of OBE devices. On the one hand, concessionaires and OBE users indicated that, in the majority of cases, OBE devices purchased in Spain are used to pay tolls on the national motorways, and only the minority of them indicated that OBE devices can be used in other EU Member States.²⁰ On the other hand, the majority of OBE manufacturers and distributors stated that the geographic coverage of the OBE devices they manufacture and distribute respectively is EEA-wide, in particular due to the fact that the devices can be used in Spain as well as in other EU Member States.²¹ As regards the supply side, the information gathered during the market investigation militates in favour of the view that OBE distributors are currently essentially active on a national level. Indeed, the majority of OBE distributors stated that their

¹⁵ OJ L 166, 30.04.2004, p. 124.

¹⁶ OJ L 268, 13.10.2009, pp. 11–29.

¹⁷ Communication from the Commission of 30 August 2012 on the Implementation of the EETS, COM(2012) 474 final, p. 4.

¹⁸ Royal Decree 94/2006 of 3 February 2006, in *Boletín Oficial del Estado* n° 41, Friday 17 February 2006, pp. 6339-6342.

¹⁹ Article 8, paragraph 3 of the Royal Decree 94/2006.

²⁰ Replies to Commission questionnaire Q1 to Concessionaires of 15 January 2014, question 5; and replies to Commission questionnaire Q3 to OBE users of 15 January 2014, question 8.

²¹ Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 6; and replies to Commission questionnaire Q4 to OEMs of 15 January 2014, question 9.

customer base is essentially national, even though the OBE devices they distribute are interoperable on a wider than national basis.²²

(42) In light of the above, it can be concluded that for the time being the market for the distribution of OBE devices is likely national in scope.

4.2.3. Conclusion

(43) Therefore, the relevant market for the assessment of the proposed transaction is the market for the distribution of OBE devices in Spain.

5. COMPETITIVE ASSESSMENT

(44) The proposed transaction is vertical and conglomerate in nature and does not give rise to horizontal overlaps.

Factual background

(45) Abertis, Cintra and Itínere have a strong presence on the upstream market for the exploitation of toll motorway concessions in Spain as they control 75% of Spanish toll motorways in terms of number of kilometres.

(46) BIP & Drive JV is currently not present in the downstream market for distribution of OBE devices. There are more than 50 operators distributing OBE devices in Spain, including large Spanish financial institutions. The three main distributors of OBE devices are CaixaBank, BBVA and Catalunya Caixa with shares amounting to [20-30]%, [5-10]% and [5-10]% respectively in terms of the total number of Spanish vehicles having installed an OBE.²³ Currently OBE devices are installed in [5-10]% of vehicles in Spain.²⁴

(47) Following the implementation of the proposed transaction, the Parties expect that in the fifth year of activity the OBE devices distributed by BIP & Drive JV will be installed in more than [10-20]% of vehicles in Spain. Such a presence on the market would outperform by far the current OBE device usage. The Parties however submit that the market for distribution of OBE devices in Spain is currently underdeveloped and that assessing how much it can grow when stimulated by the implementation of an appropriate set of commercial policies is rather difficult. The assumption that BIP & Drive JV may more vigorously advertise OBE devices and thereby increase their popularity in Spain has also been shared by respondents to the market investigation: both concessionaires and OBE distributors expect that the creation of BIP & Drive JV will increase the number of OBE devices used in Spain.²⁵ On this basis, the Parties believe that in five years BIP & Drive JV is likely to have a market share similar to that of CaixaBank today (approximately [20-30]%).

²² Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, questions 6 and 7.

²³ See Annex 3.1.a.4. to the Form CO.

²⁴ This translates to 38% of toll payments being effected via OBEs, while 35% of toll payments were made via card and 27% cash.

²⁵ Replies to Commission questionnaire Q1 to concessionaires of 15 January 2014, questions 14 and 15; and replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, questions 17 and 18.

5.1. Potential vertical foreclosure effects

(48) In theory, one could imagine that Cintra, Abertis and Itfnere, due to their important position on the upstream market for exploitation of toll motorway concessions, would have the ability and incentive to restrict the access of other OBE distributors to the motorways under their concession, in order to protect BIP & Drive JV's market position on the downstream market for the OBE distribution. This input foreclosure strategy could theoretically be achieved in particular by worsening the terms of contracts with the OBE distributors (competitors of BIP & Drive JV), by bringing such contracts to an end or by limiting the technical interoperability between toll station reading equipment and OBE devices distributed by competing OBE distributors. A potential foreclosure strategy towards OBE manufacturers, due to an increasing buyer power of BIP & Drive JV in the future could also be envisaged.

5.1.1. *Input foreclosure strategy by contractual means or by means of limiting the technical interoperability*

5.1.1.1. The importance of the input for the downstream market

(49) The access to the reading equipment installed at the toll stations of a given motorway is a key element for the functionality of OBE devices distributed in the downstream market. There is no other alternative for OBE distributors apart from having a contract with concession managers guaranteeing that the OBE devices will be read by the toll equipment installed at the toll stations of a given motorway.

(50) In practice, OBE distributors negotiate contracts with motorway concessionaires on a mutual agreement basis.²⁶ Typically these contracts are entered into for three years and thereafter may be tacitly renewed every year. The negotiated contracts would determine *inter alia* i) the commissions that the motorway concessionaires will pay to OBE distributors based on the number of their OBE devices passing through the toll gates – depending on the contract, these commissions currently vary from 0.6% to 1.5% of the toll price²⁷; ii) the number of devices to be included on the list of invalidated OBE devices that should not be let through by the concessionaire (the so-called 'blacklist'); and iii) the terms of payment (since OBE distributors charge their customers with a delay, while they might need to pay the concessionaires earlier).²⁸

5.1.1.2. Ability to foreclose

(51) During the market investigation, some respondents raised the concern that the creation of BIP & Drive JV could lead to the marginalisation of other OBE distributors, notably if the Parties were to start granting lower commissions to BIP & Drive JV's competitors.²⁹

²⁶ See for instance the agreed non-confidential minutes of a teleconference call of 29 January 2014 with Novagalicia Banco, paragraph 5 and agreed non-confidential minutes of a teleconference call of 28 January 2014 with Pagatelia, paragraph 3.

²⁷ See Annex 1 – "Commissions to OBE distributors" of the Parties' reply to the Commission's Request for Information dated 27 January 2014; and agreed non-confidential minutes of a teleconference call of 29 January 2014 with Novagalicia Banco, paragraph 12.

²⁸ See Annex 2 – "Model Contract" of the Parties' reply to the Commission's Request for Information dated 27 January 2014.

²⁹ Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 16.

Certain market participants also noted that the concessionaires could have the ability to foreclose existing OBE distributors by offering unfavourable conditions as regards the maximum acceptable number of blacklisted OBE devices and the terms of payment. Allegedly the Parties could, first, reduce the number of registers in the blacklist, as a result of which those OBE distributors would run a higher risk of being liable for the OBE devices which do not generate toll payments. Second, the Parties could potentially request the OBE distributors to make payments to concessionaires once or twice a week, even though the OBE distributors receive money from end users only at the end of the month. This situation would require a more solid financial capacity of the OBE distributors. As a result of any of these strategies (or a combination of them), the Parties could marginalise or even slowly eliminate all competitors of BIP & Drive JV.³⁰

(52) Finally, some OBE distributors explained that it would be technically feasible for the Parties to reject at the toll gates OBE devices of certain OBE distributors that compete with BIP & Drive JV.³¹ For instance, the Parties could terminate (or not renew) the contracts with OBE distributors and through the software remove from their reading equipment those OBEs which had the PIN code of a given OBE distributor.

(53) None of these scenarios, however, seems to be realistic.

(54) Indeed, the Spanish legislation governing the interoperability of electronic toll systems (the Royal Decree 94/2006) sets out in its Article 6 a non-discrimination principle between manufacturers and distributors. In particular, the Spanish legislation obliges the motorway concessioners to use technologies which comply with open and public rules, available to all manufacturers and distributors on a non-discriminatory basis. As explained by the Parties, the fact that the rules are open and public and therefore known in advance by the industry does not allow concessionaires to favour any of the distributors to the detriment of the others.

(55) Therefore, the Commission concludes that the Parties do not have the ability to foreclose competing OBE distributors by restricting their access to the Parties' toll infrastructure by means of unfavourable contractual conditions or by limiting the interoperability between OBE devices distributed by BIP & Drive JV's existing and future competitors and the reading equipment installed at the Parties' toll stations.

5.1.1.3. Incentive to foreclose

(56) The Parties claim not to have an incentive to engage in an input foreclosure strategy as the foreclosure of competing OBE distributors will most likely be unprofitable for the Parties. This is because the profit the Parties are expected to make in their role as concessionaires, i.e. from the exploitation of the motorways concessions, is likely to be considerably higher than their likely profits generated by the distribution of OBE devices. In the last three years, the Parties' revenues from collecting motorway tolls amounted to several hundreds of millions of Euros per year while the order of magnitude of expected profits generated through the sale of OBE devices is considerably lower.

³⁰ Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 16.

³¹ Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, questions 15 and 17.

(57) Indeed, while BIP & Drive JV is expected to require EUR [...] million of investment, it is supposed to generate profit [...]. These figures indicate that the financial amounts required and generated by the exploitation of motorways, on the one hand, and by BIP & Drive JV, on the other hand, do not have the same magnitude. Therefore, the main interest of the concessionaires is to maximise the number of vehicles running through the motorways they manage and to optimise their cost structure, for example by reducing the number of manual toll payments. Both objectives are better achieved if the toll payment is made by means of OBE devices, regardless of the identity of the OBE distributor. The effect on the Parties' profitability of an increased number of cars passing smoothly through the gates at toll stations (to which the use of OBE devices contributes) is, by far, more relevant to the Parties than that the extra revenues BIP & Drive JV might achieve by foreclosing competitors on the market for distribution of OBEs. Thus, the Parties have no interest in reducing the number of companies selling OBE devices.

(58) The information gathered during the market investigation confirmed the Parties' claims in this regard.³² The majority of OBE distributors stated that such a strategy would be highly improbable and would not make sense.³³ First, as indicated by one market respondent, due to the fact that: "*The concessionaires have long been promoting this technology together with financial institutions to speed up queuing at the tolls, to reduce cost of 'manual payments' and increase their efficiency. I do not see any founded reason why concessionaires would stop accepting OBE devices from other distributors*".³⁴ Second, rejecting any OBE distributor would mean facing thousands of upset customers who could not use their OBE, which would cause queues on the toll stations and could be detrimental to the general perception of reliability of OBE devices. Finally, none of the respondents to the market investigation indicated any situation when the Spanish motorway concessionaires would have brought their contracts with an OBE distributor to an end.

(59) Based on the above, the Commission considers that the Parties will not have an incentive to foreclose existing and future 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.

5.1.1.4. Conclusion

(60) The Commission therefore concludes that in view of the Parties' legal obligation to refrain from discriminating any OBE distributor, the means both under Spanish and EU law allowing for enforcement of the non-discrimination principle regarding access to the toll reading equipment installed at the Parties' toll stations and the fact that the Parties would have no incentive to exclude other OBE distributors from the market, an input

³² Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 15.

³³ Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 15.

³⁴ See Catalunya Banc's reply to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 15: "*Las concesionarias hace muchos años que estan impulsando esta tecnologia conjuntamente con las entidades financieras para agilizar las colas en los peajes, reducir los costes de los pagos manuales e incrementar la eficiencia de sus companyias. No veo ninguna razón consistente para pensar que las concesionarias dejen de aceptar los OBEs comercializados por otras empresas.*" See also agreed non-confidential minutes of a teleconference call of 29 January 2014 with Novagalicia Banco, paragraph 17; and agreed non-confidential minutes of a teleconference call of 28 January 2014 with Pagatelia, paragraph 6.

foreclosure strategy by contractual means or by limiting the technical interoperability seems unlikely.

5.1.2. Possibility to foreclose OBE manufacturers from the market

(61) The information gathered during the market investigation confirmed that the Parties would not have the ability and incentive to foreclose OBE manufacturers from the market for the distribution of OBE devices. None of the OBE manufacturers raised concerns about the proposed transaction. This is mainly because OBE manufacturers tend to be national and international multiproduct businesses, offering various products in different areas, thus they generate revenues from activities other than supplying the Spanish OBE distributors. In addition, for the reasons stated above paragraph (60), it is also unlikely that BIP & Drive JV could become a dominant player on the Spanish market for OBE distribution capable of exerting any pressure on OBE manufacturers.

5.1.3. Conclusion

(62) The Commission therefore concludes that the proposed transaction does not raise serious doubts with respect to the vertical relationship between the upstream market for exploitation of toll motorways and the downstream market for distribution of OBE devices in Spain, and this is irrespective of the precise product and geographic market definition retained.

5.2. Potential conglomerate effects

(63) The markets for the distribution of OBE devices and for the exploitation of toll motorways are closely related as these products and services are generally purchased by the same set of customers for the same end use, namely driving on toll motorways. Therefore, it has to be assessed whether the Parties could harm effective competition on these markets by means of tying, bundling or other exclusionary practices.

5.2.1. Conglomerate effects by granting discounts at the Parties' toll stations to BIP & Drive JV's customers

(64) During the market investigation, an OBE distributor expressed the concern that Cintra, Abertis and Itfner would offer special discounts at their toll stations to BIP & Drive JV's customers, which competing OBE distributors could not offer to their customers.³⁵ If this practice were to materialise, BIP & Drive JV could attract a large scale of customers.

(65) In that respect, the Parties confirmed that the Spanish regulatory framework would indeed enable motorway concessionaires to offer discounts at their toll stations. The possibility to grant discounts is governed by the Decree 215/1973 of 25 January 1973, which among others specifies that the entity managing a motorway concession is entitled to offer discount schemes, season tickets or other rebates at the toll fees. These are however subject to prior authorisation by the relevant administration and must be of a general and objective nature. Indeed, they usually apply to eco-friendly vehicles or are based on the car occupation in high-frequency toll-roads at peak times.

³⁵ Replies to Commission questionnaire Q2 to OBE distributors of 15 January 2014, question 16.

(66) Therefore none of the Parties could offer discounts at their toll stations which target only BIP & Drive JV's customers. To the extent that they could offer discounts, they would need to be available to all OBE users, irrespective of the OBE device they use.

5.2.2. *Conglomerate effects by lowering BIP & Drive JV's margins*

(67) The Parties may also internalise the positive effect of customers switching from payment by cash or credit/debit card to payment by OBE devices. They could then lower their margins on the market for distribution of OBE devices to increase their overall profit.³⁶

(68) As discussed in paragraph (16), in the long term the Parties do not intend to fund BIP & Drive JV. On the contrary, according to its business plan the JV's income will stem from its own financial resources, which implies that BIP & Drive JV aims at being profitable regardless of the overall profit of the Parties.

(69) In addition, even with no intention to exclude competing OBE distributors from the market, in the long term BIP & Drive JV could nonetheless gain market power in the market for the distribution of OBE devices if its margins were lower than the margins of its competitors. Even in this hypothetical scenario, BIP & Drive JV would still face competitive constraints from potential new entrants given the low barriers to entry, as will be demonstrated in Section 5.2.3 below.

(70) Moreover, the majority of OBE users in Spain that have responded to the Commission's market investigation have not expressed any concerns regarding the Parties' plans to become active in the distribution of OBE devices by creating BIP & Drive JV.³⁷

5.2.3. *Barriers to entry*

(71) The Parties consider that there are no barriers to accessing the market for the distribution of OBE devices other than those related to technology. They submit that it takes less than one year for a new entrant to start up a new business. In particular, neither strong brand recognition nor a strong financial capacity is required from an OBE distributor to start up new services in the market for distribution of OBE devices in Spain.

(72) As indicated in paragraph (46), there are more than 50 operators distributing OBE devices in Spain, including large Spanish financial institutions and non-financial institutions such as Solred, Ressa, Pagatelia, etc.³⁸ The high number of operators gives already a *prima facie* indication of the relatively low investments necessary to enter the market for distribution of OBE devices in Spain.

(73) In addition, during the market investigation, an OBE distributor stated that the distributors essentially buy OBE devices that have been already certified.³⁹ Likewise,

³⁶ This incentive is often referred to as the "*Cournot effect*" (see paragraph 117 of the Guidelines of the assessment of non-horizontal mergers under the Merger Regulation).

³⁷ Replies to Commission questionnaire Q3 to OBE users of 15 January 2014, question 15.

³⁸ Replies to Commission questionnaire Q1 to concessionaires of 15 January 2014, question 6.

³⁹ See agreed non-confidential minutes of a teleconference call of 29 January 2014 with Novagalicia Banco, paragraph 15.

ASETA also indicated that: "*OBE manufacturers must conduct a standard certification process so that their models can be distributed to ETC issuers*".⁴⁰ The further steps that an OBE distributor has to carry out consist of (i) liaising with ASETA which ensures that the OBE devices comply with the technical requirements⁴¹ and (ii) contracting with each of the motorway concessionaires (usually mediated by ASETA).⁴²

(74) The Commission therefore considers that any technological barriers to entry apply more to the level of OBE manufacturers than to the level of OBE distributors. As regards the market for distribution of OBE devices, the Commission comes to the conclusion that a new entrant would not encounter high barriers to entry.

5.2.4. *Conclusion*

(75) The Commission therefore concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market on the basis of conglomerate effects, and this is irrespective of the precise product and geographic market definition retained.

6. **CONCLUSION**

(76) 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.

For the Commission

Signed
Joaquín ALMUNIA
Vice-President

⁴⁰ See the ASETA's reply to Commission questionnaire Q1 to concessionaires of 15 January 2014, question 11.

⁴¹ Such tests ensure that the signal transmitted by the OBE device is correctly read remotely by the antenna installed on all Spanish toll stations. This process takes approximately three months (see the Parties' reply to the Commission's Request for Information dated 28 January 2014).

⁴² Paragraph 226 of the Form CO.