



EUROPEAN COMMISSION
DG Competition

***Case M.10561 - CINTRA / ABERTIS /
ITINERE / BIP & DRIVE***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 14/02/2023

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EUROPEAN COMMISSION

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PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

CINTRA
Calle Príncipe de Vergara, 135
E- 28002 Madrid
Spain

ABERTIS AUTOPISTAS
Paseo de la Castellana, 89 – 9th floor
E-28046 Madrid
Spain

ITINERE
Calle Poeta Joan Maragall, 1 – Planta
11^a
E-28020 Madrid
Spain

**Subject: Case M.10561 – CINTRA / ABERTIS / ITINERE / BIP & DRIVE
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²**

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

² OJ L 1, 3.1.1994, p. 3 (the ‘EEA Agreement’).

Dear Sir or Madam,

- (1) On 10 January 2023, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Cintra Infraestructuras España, S.L. ('Cintra', Spain), belonging to the Ferrovial Group (Spain), Abertis Autopistas España, S.A. ('Abertis', Spain), jointly controlled by Atlantia S.p.A ('Atlantia', Italy) and Actividades de Construcción y Servicios, S.A. ('ACS', Spain) and Itínere Infraestructuras ('Itínere', Spain), controlled by Group APG ('APG', the Netherlands) will acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of Bip&Drive E.D.E. S.A. ('Bip&Drive', Spain) by way of purchase of shares (the 'Transaction').³
- (2) Cintra, Abertis and Itinere are designated hereinafter as the 'Notifying Parties' and together with Bip&Drive as the 'Parties' or 'Parties to the Transaction'.
- (3) The same transaction was notified to the Commission on 7 October 2022, but was subsequently withdrawn on 26 October 2022.

1. THE PARTIES

- (4) **Bip&Drive**, the Target, is a distributor of electronic toll payment devices (also known as On-Board Equipment, 'OBE') for Spanish motorways.
- (5) **Cintra** is active in the construction, improvement, maintenance and management of roads and motorways and handles toll road concessions. It belongs to the Ferrovial Group, a diversified group which operates internationally in construction, infrastructure concessions, telecommunications and services.
- (6) **Abertis** belongs to the Abertis Group which manages mobility and telecommunications infrastructure all over the world. In the EU, it is mostly active in Spain and France and, to a lesser extent, in Italy. Abertis is jointly controlled by Atlantia and ACS. In Europe, Atlantia manages motorways (Spain and Poland) and airports (Italy and France) under concession and offers mobility services. ACS carries out construction, concessions and services activities in Europe, America and Asia.
- (7) **Itínere** manages motorway concessions in Spain. It is controlled by APG,⁴ a Dutch pension investment company which invests in, among others, energy and utility, telecommunications and transportation infrastructure assets. APG jointly controls ViaVerde, a Portuguese OBE distributor, and also manages toll motorways in Spain and Portugal.⁵

³ Publication in the Official Journal of the European Union No C 017/08, 18 January 2023, p. 10.

⁴ The acquisition of control by APG over Itinere was approved by the Spanish Competition Authority by its decision of 26 October 2022.

⁵ See Commission decision in case M.9879 – APG/NPS/JMI/Brisa.

2. THE OPERATION

- (8) Bip&Drive was created in 2014 as a greenfield joint venture and was, at the time of its creation, controlled by Cintra, Abertis and Itínere.⁶
- (9) On 17 December 2015, Caixabank Payments & Consumer, E.F.C., E.P., S.A.U. ('CPC') acquired a 25% shareholding in Bip&Drive (the '2015 Transaction'). Following the 2015 Transaction, CPC, Abertis, Cintra and Itínere had a 25%, 35%, 20% and 20% shareholding in Bip&Drive respectively. Based on the shareholders' agreement entered into by CPC and the Notifying Parties, the rules for the adoption of strategic commercial decisions gave rise to a situation of 'shifting alliances' between all Bip&Drive's shareholders: there was no stable majority in the decision-making procedure and the majority could on each occasion be any of the various combinations possible amongst the minority shareholders. In addition, there were no strong common interests between Cintra, Abertis and Itínere and there was no pooling agreement to act in the same way.⁷
- (10) As a result, the 2015 Transaction led to a situation of 'no control' and did not constitute a concentration under the Merger Regulation. Therefore, pre-Transaction, none of its shareholders controls Bip&Drive.
- (11) Pursuant to a Sale and Purchase Agreement signed on 28 October 2021, CPC will sell its 25% shareholding in Bip&Drive to the Notifying Parties. Post-Transaction, Abertis will have a 50% shareholding, while Cintra and Itinere will hold 25% each. The Notifying Parties have prepared a draft Shareholders' Agreement, which they expect to sign after receiving the clearance from the European Commission.⁸
- (12) Pursuant to the draft Shareholders' Agreement, strategic commercial decisions will be taken by the Board of Directors composed of [...] directors. Abertis will appoint [...] directors while Cintra and Itinere will appoint [...] directors each. The Chairman of the Board will be one of the directors appointed by [...] but will not have a casting vote. Strategic commercial decisions within the meaning of the Consolidated Jurisdictional Notice, such as, the approval of the business plan and the annual budget, or appointment and removal of senior management will require a favourable vote of [...] out of the [...] directors. Consequently, all three shareholders will have to agree to adopt these decisions.
- (13) In addition, the deadlock resolution mechanism does not lead to one of the Notifying Parties being able to decide on strategic commercial matters alone.
- (14) Based on the above, Cintra, Abertis and Itínere will, post-Transaction, acquire joint control over Bip&Drive, a business with a market presence to which a market turnover can be clearly attributed, within the meaning of Article 3(1)(b) of the Merger Regulation.

⁶ See Commission decision of 18 February 2014 in case M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV*, clearing unconditionally the creation of Bip&Drive.

⁷ See Consolidated Jurisdictional Notice (CJN), OJ C 95, 16.4.2008, p. 1–48, paragraphs 75-80.

⁸ Notifying Parties' response to RFI 1, question 1.

3. UNION DIMENSION

- (15) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million ([...]).⁹ Two of them have a Union-wide turnover in excess of EUR 250 million ([...]), but each of the undertakings concerned do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

4. MARKET DEFINITION

4.1. The market for the distribution of OBE devices

4.1.1. Relevant product market

- (16) An OBE is a device installed in the vehicle and read remotely by an antenna installed on motorway tolls in order to allow vehicles to pass without stopping to make the toll payment.¹⁰
- (17) In order to electronically collect road tolls, drivers and motorway concessionaires need to enter into contracts with OBE distributors that interconnect road users with the road managers, manage the toll collection, and its transfer to the toll motorway managers.¹¹
- (18) With regard to the distribution of OBE devices, the Commission identified the following five main categories of stakeholders in a previous decision: concessionaires, OBE manufacturers/Intelligent Transport Systems providers, distributors or electronic tolling service providers, financial institutions, and OBE users (the drivers). The payment of the toll fee can be made either in cash, by credit/debit card or via OBE devices.¹² Bip&Drive operates at the last stage of the distribution chain, i.e. offering OBE devices to end users.
- (19) In its decision in case M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV*, the Commission concluded that the different methods of toll payment, that is, by cash, credit/debit card or using an OBE device do not form part of the same product market and defined a market for the distribution of OBE devices as distinct from other methods of toll payment.¹³ However, in its most recent decisional practice, the Commission has left open whether the market for the distribution of OBE devices constitutes a distinct market and whether OBE devices are substitutable to other means of toll payment.¹⁴
- (20) The Notifying Parties submit that, from a demand side perspective, payment by credit/debit cards or cash are not substitutes for OBE.¹⁵

⁹ Turnover calculated in accordance with Article 5 of the Merger Regulation.

¹⁰ See, for instance, Commission decision of 18 February 2014 in case M.7075 – *Cintra/Abertis/Itinere/Bip&Drive JV*, footnote 3.

¹¹ See M.8894 - *ACS/Hochtief/Atlantia/Abertis Infraestructuras*, paragraph 87.

¹² See M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV*, paragraphs 33-34.

¹³ See M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV*, paragraph 37.

¹⁴ See, for instance, M.8894 - *ACS/Hochtief/Atlantia/Abertis Infraestructuras*, paragraph 98.

¹⁵ Form CO, paragraph 157.

- (21) The market investigation carried out in this case confirms that, if the cost of OBE devices (including both purchase price and the maintenance fee) were to rise by 5-10% on a permanent basis, OBE users on Spanish motorways would not switch to other means of toll payment i.e. cash or credit/debit cards.¹⁶
- (22) That said, for the purposes of the present case, the question of whether OBE devices are substitutable to other means of toll payments may be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market under any alternative product market definition. The Commission will assess the effects of the Transaction on the narrowest plausible product market, that is, the market for the distribution of OBE devices.
- (23) In prior cases, the Commission has also left open whether distribution of OBE devices to cars should be distinguished from distribution of OBE devices to trucks.¹⁷
- (24) The Notifying Parties note that toll motorways in Spain, which is the only country in which Bip&Drive distributes its OBE devices, do not have different toll charger equipment for cars and trucks, as opposed to other jurisdictions like, for instance, France. Consequently, they submit that a potential distinction between distribution of OBE to cars and to trucks is not applicable to the Spanish market for the distribution of OBE devices.¹⁸
- (25) In view of the above, and for the purposes of the present decision, the Commission considers that the distinction between cars and trucks is not relevant and will assess the impact of the Transaction on the overall market for distribution of OBE devices.

4.1.2. *Relevant geographic market*

- (26) In case M.7075, the Commission held that the geographic scope of the market for the distribution of OBE devices was likely national, mainly because the customer base of OBE distributors (drivers) was essentially national and they mainly used the devices on the national motorways, even though the OBE devices might be interoperable on a wider basis than national.¹⁹
- (27) In its latest decisional practice, the Commission left open the question of whether the market for the distribution of OBE devices is national or EEA-wide in scope.²⁰
- (28) The Notifying Parties submit that a pan-European interoperability of electronic road toll systems has not been achieved yet.²¹

¹⁶ Reply to question 2 of the questionnaire sent by email to motorist associations.

¹⁷ See M.8694 - *Hochtief/Abertis*, paragraph 64; M.8894 - *ACS/Hochtief/Atlantia/Abertis Infraestructuras*, paragraph 94.

¹⁸ Form CO, paragraph 159.

¹⁹ See, M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV* paragraphs 41-42. When analysing the progress achieved in the implementation of the Directive on the interoperability of the European electronic toll systems (EETS), the Commission reached the conclusion that there are still different national systems due to technical barriers not removed by the Member States and stakeholders. See M.7075, paragraph 38.

²⁰ See, for instance, M.8894 - *ACS/Hochtief/Atlantia/Abertis Infraestructuras*, paragraphs 97 and 99; M.8536 - *Atlantia/Abertis Infraestructuras*, paragraph 143; M.8694 - *Hochtief/Abertis*, paragraph 66.

- (29) In the market investigation in this case, all OBE manufacturers indicated that the OBE devices they manufacture for Spain could operate in other countries as well.²² Similarly, all OBE distributors indicated that the OBE devices they distribute for Spain could operate in other countries as well.²³
- (30) That said, for the purposes of the present case, the question of whether the market for the distribution of OBE devices is national or EEA-wide in scope may be left open as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible geographic market definition.

4.2. The market for the management/exploitation of toll motorway concessions

4.2.1. Relevant product market

- (31) The Commission has previously held that the operation of infrastructure concessions in general is an activity where private operators assume responsibility for the design, construction, finance, operation and maintenance of an infrastructure asset for a public sector customer. The contracts are usually long-term contracts and the construction costs and the subsequent maintenance/operation costs tend to be covered by fees paid either by the users of the asset (e.g. motorway tolls) or by the public sector customer throughout the contract term, rather than, as in a normal construction contract, upon completion of the construction. This transfers the responsibility for the financing of the asset from the public to the private sector and this is what drives the public sector to opt for concessions to address their infrastructure needs.²⁴
- (32) In its previous decisions relating to infrastructure services provided by licensed operators such as motorway concessionaires, the Commission has held that competition takes place at the time when the license is granted by the public authorities (competition for the market) and whenever a licensed operator is subject to competition from substitutable alternatives (competition in the market).
- (33) The Commission has therefore distinguished two markets relating to toll motorway concessions:
- i. the market for the grant of toll motorway concessions, where supply is represented by public authorities offering toll motorway concessions and demand by undertakings or consortia of undertakings with an interest in acquiring toll motorway concessions; and
 - ii. the market for the transport on toll motorways, also corresponding to the management/exploitation of toll motorway concessions,²⁵ and consisting of

²¹ Form CO, paragraph 169.

²² Reply to question 4 of the questionnaire sent to OBE manufacturers.

²³ Reply to question 3 of the questionnaire sent to OBE distributors.

²⁴ See M.8894 - ACS/Hochtief/Atlantia/Abertis Infraestructuras, paragraph 41.

²⁵ This market will be referred to as the 'market for the management of toll motorway concessions' in the rest of this decision.

the provision of road transport infrastructure between various geographical points (routes).²⁶

- (34) In Spain, motorway concessions are granted by public authorities, via open tender procedures, 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
- (35) The Notifying Parties submit that from the perspective of OBE distributors, it is irrelevant whether each motorway concession should be regarded as a distinct product market, notably because OBE distributors deal with toll motorway concession holders on a national basis, regardless of the specific motorways that they operate.²⁸
- (36) In line with the approach taken in case M.7075 (and in subsequent decisions),²⁹ the relevant product market for the assessment of the vertical relationship with the market for the distribution of OBE devices, is the market for the management of toll motorway concessions. As the Notifying Parties do not offer transport infrastructure services other than on toll motorways in Spain, the Commission will in any case assess the effects of the Transaction on the narrowest product market, that is, the market for the management of toll motorway concessions.³⁰
- (37) In previous cases, the Commission has left open whether alternative modes of transport (e.g. by rail, air or sea) are in the same market as transport on toll motorways, indicating that the existence and extent of inter-modal competition has to be assessed on a route-by-route basis.³¹
- (38) For the purposes of this case, the question of whether the provision of transport services on toll motorways should be distinguished from other transport modes may be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under any plausible alternative product market definition.

4.2.2. *Relevant geographic market*

- (39) In its prior decisional practice, the Commission has in general defined the market for the management of toll motorways, according to the Origin & Destination

²⁶ See, for instance, M.8894 - *ACS/Hochtief/Atlantia/Abertis Infraestructuras*, paragraph 43; M.8694 - *Hochtief/Abertis*, paragraph 29; M.8536 - *Atlantia/Abertis Infraestructuras*, paragraphs 53 and 82; M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV*, paragraphs 25 and 27.

²⁷ Form CO, paragraph 187.

²⁸ Form CO, paragraph 189.

²⁹ See, for instance, M.8694 - *Hochtief/Abertis*, paragraph 152; M.8536 - *Atlantia/Abertis Infraestructuras*, paragraph 278; M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV*, paragraph 48.

³⁰ See Form CO, paragraph 24 and similar approach taken in case M.8894 - *ACS/Hochtief/Atlantia/Abertis Infraestructuras*, paragraph 84.

³¹ See, for instance, M.8694 - *Hochtief/Abertis*, paragraph 43; M.5855 - *DB/Arriva*, paragraph 67; M.4087 - *Eiffage/Macquarie/APRR*, paragraph 19; M.3770 - *Lufthansa/Swiss*, paragraph 1.

(“O&D”) method, whereby every combination of a point of origin and a point of destination is considered to be a distinct market from the demand side.³²

- (40) For the purposes of the present case, however, and in line with the approach taken in case M.7075, the relevant geographic market should rather be considered national in scope. Indeed, the decisive aspect in the present case in order to analyse the vertical relationship with OBE distribution is the point of view of OBE distributors. OBE distributors need to ensure interoperability of their OBE devices on all toll motorways in Spain, due to national regulatory requirements, and their addressable customer base are all motorway concessionaires in Spain, regardless of their geographic scope of activity. The Notifying Parties agree with this approach.³³ This approach would also be supported by the fact that there exists an association of Spanish concessionaires, SEOPAN, representing the collective interest of its members. Among other tasks, SEOPAN checks whether any newly introduced OBE device is operable on all motorways in Spain.³⁴
- (41) Consequently, for the purposes of this case, where the Commission is only assessing the vertical link with OBE devices, the assessment will be carried out at the national level.
- (42) Regarding the value chain between the market for the distribution of OBE devices and the market for the management of toll motorway concessions, the toll motorway managers need to enter into contracts with OBE distributors who provide the OBE devices to the drivers, the users of the motorways. The motorway managers pay OBE distributors a commission fee per OBE transaction for the service rendered, which includes bearing the risk associated with the driver defaulting on their payments.³⁵ In this sense, the market for distribution of OBE devices is upstream from the market for management of toll motorways.³⁶

5. COMPETITIVE ASSESSMENT

- (43) The Transaction does not create any horizontal overlaps at the national level between the Notifying Parties and Bip&Drive, as none of them is active in the market for OBE distribution in Spain, where Bip&Drive is active. It only gives rise to a horizontal overlap between the Target’s activities and those of Abertis (through Bip&Go, a subsidiary of the Abertis group, which is active in France) and those of Itinere/APG (through ViaVerde, which is active in Portugal and where APG has a jointly controlling stake)³⁷ in the market for distribution of OBE devices at the EEA level.³⁸ There are no horizontally affected markets arising from the

³² Due to the lack of substitutability from the point of view of a driver who needs to reach a certain geographical point. See, e.g., M.8894 - *ACS/Hochtief/Atlantia/Abertis Infraestructuras*, paragraph 82; M.8694 - *Hochtief/Abertis*, paragraph 45; M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV*, paragraph 30.

³³ Form CO, paragraph 194.

³⁴ Form CO, paragraph 189.

³⁵ Form CO, paragraph 359.

³⁶ This value chain was also assessed in case M.8894 – *ACS/Hochtief/Atlantia/Abertis Infraestructuras*, paragraph 248.

³⁷ M.9879 – *APG/NPS/JMI/Brisa*, Commission decision of 18 September 2020.

³⁸ Bip&Drive is active in the market for distribution of OBE devices only in Spain, as it targets only the Spanish market. While OBE devices distributed by Bip&Drive are interoperable also in France and Portugal, and can thus circulate there, this is only because of an agreement with OBE distributors in

Transaction as the Parties' combined market share remains well below 20% at the EEA level (estimated at around [5-10]%). This horizontal relationship is unlikely to give rise to concerns and is therefore not further discussed in this decision.

- (44) The Transaction also gives rise to a vertical link (and vertically affected markets) between the Target's activities in Spain in the market for the distribution of OBE devices (upstream) and the Spanish market for the management of toll motorway concessions (downstream), where only the Notifying Parties are active.³⁹
- (45) The Commission will also address potential conglomerate effects of the Transaction in relation to the markets for OBE distribution and the management of toll motorways, taking into account that both markets 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.⁴⁰ In particular, the Commission will assess any potential effects (i) by granting special discounts at the Notifying Parties' toll stations to Bip&Drive customers in Spain, and (ii) through an exclusive cooperation agreement between Bip&Drive and ViaVerde for the circulation of OBE devices in Portugal.

5.1. Vertical link between the markets for OBE distribution and the management of toll motorway concessions

5.1.1. Market shares in the vertically affected markets

- (46) As regards the upstream market for distribution of OBE devices in Spain, Bip&Drive's market share in terms of volume is estimated at around [30-40]% in 2021.⁴¹
- (47) With respect to the downstream market for management of toll motorways in Spain, where only the Notifying Parties are active, the combined market share is estimated in 2021 at a maximum of around [50-60]% in terms of kilometers⁴² and around [90-100]% in terms of revenues.⁴³ The market share in terms of revenues, based on information provided by SEOPAN, the Spanish Association of Infrastructure Contractors and Concessionaires, overestimates the Notifying

these countries ([...]). However, Bip&Drive is not active in the market for the distribution of OBE devices in France or Portugal. Consequently, there is no horizontal overlap arising between the activities of Bip&Drive and those of Via Verde in Portugal or between Bip&Drive and Bip&Go in France or vertical link in France and Portugal.

³⁹ As indicated in footnote 38 above, as Bip&Drive is only active in the market for the distribution of OBE devices in Spain, the only vertical link arising post-Transaction is in Spain. Any potential conglomerate effects between the Parties' activities in Portugal are assessed in section 5.2 of this decision.

⁴⁰ See M.7075 - *Cintra/Abertis/Itinere/Bip&Drive JV*, paragraph 63.

⁴¹ Form CO, Table 14 and 18. The share data is calculated on the basis of the number of single OBE units of each distributing company that were used in the Spanish toll motorways, for those toll motorway managers affiliated to SEOPAN. Bip&Drive also has an agreement with [...], a governmental entity that manages toll motorways in Spain, which is not affiliated to SEOPAN and does not provide data to it. Bip&Drive's market share reaches [30-40]% (Form CO, Table 19) considering the OBE devices provided to [...]. However, this overestimates Bip&Drive's market share in Spain as the OBE devices of Bip&Drive's competitors circulating on [...] motorways have not been included, since this information is not available. Form CO, paragraph 237.

⁴² Form CO, Table 26. This market share was calculated based on the Parties' best estimates.

⁴³ Form CO, Table 25.

Parties' market share however. This is because the data used do not include information related to motorway operators who are not members of SEOPAN, for instance, motorways managed by governmental bodies such as SEITT⁴⁴ and BIDEGLI.

5.1.2. Assessment of the vertically affected markets

- (48) The Commission will assess in this Section whether the Transaction could lead to (i) input foreclosure, pursuant to which Bip&Drive would foreclose the competitors of the Notifying Parties in Spain by not contracting with them or contracting under less favourable terms; or (ii) customer foreclosure, pursuant to which the Notifying Parties would foreclose other OBE distributors by, for instance, limiting interoperability or contracting mostly or exclusively with Bip&Drive or contracting with other OBE distributors on less favourable terms.

5.1.2.1. Input foreclosure

5.1.2.1.1. The Parties' views

- (49) With respect to the risk that Bip&Drive restricts or deteriorates access of the Notifying Parties' competitors to its OBE devices (through worse operability of its OBE devices for instance), the Parties submit that Bip&Drive will have neither the necessary market power nor the incentive to engage in an input foreclosure strategy.⁴⁵

5.1.2.1.2. The Commission assessment

- (50) For the reasons set out below, the Commission considers that an input foreclosure strategy where Bip&Drive restricts or denies access of other toll motorway managers to its OBE distribution services or downgrades the quality and/or worsens the conditions under which its devices operate by, for instance, increasing the commission fee it requires is unlikely in this case.
- (51) *First*, in terms of **ability**, Bip&Drive does not appear to have the ability to engage into input foreclosure. Its market share in the upstream market for the distribution of OBE devices at EEA level is low, estimated at [0-5]%. In Spain, its market share is estimated at around [30-40]%.⁴⁶ The remaining around [60-70]% of the OBE distributorship market in Spain to which other toll motorway managers could turn includes established competitors, such as CEPSA ([10-20]%), Pagatelia ([5-10]%), BBVA ([5-10]%), Solred ([5-10]%), Banco Sabadell ([5-10]%)⁴⁷ and others. Also, there is no indication that the remaining OBE distributors would be less efficient, offer less preferred alternatives, or lack the ability to expand output in response to any attempt by Bip&Drive to restrict access to its OBE devices or ask other toll motorway managers for increased commission fees.
- (52) *Second*, in terms of **incentive**, if Bip&Drive's OBE devices were not interoperable on all Spanish toll motorways, users would be likely to switch to other OBE

⁴⁴ SEITT is a government body, part of the Spanish Ministry of Development, while BIDEGLI is an entity of the Regional Government of Guipúzcoa/Gipuzkoa. Form CO, paragraph 263.

⁴⁵ Form CO, paragraph 329.

⁴⁶ Form CO, Table 13.

⁴⁷ Form CO, Table 18.

distributors offering full interoperability. Bip&Drive's OBE devices would gradually lose customers and thus revenue and profits. It appears unlikely that the Notifying Parties will sacrifice Bip&Drive's profits from servicing a motorway whose concession may last several years and lose such a revenue stream.

- (53) This conclusion is also supported by the market investigation where the Notifying Parties do not appear to have engaged into such a foreclosure strategy in the past and Bip&Drive has not refused to do business with other toll motorway managers, when the Notifying Parties already jointly controlled (upon its creation as a greenfield joint venture in 2014) or owned a sizeable share in Bip&Drive (following the entry of CPC in December 2015). Specifically, none of the toll motorway managers responding to the market investigation indicated that Bip&Drive has ever refused to do business with them, including during the period before the entry of CPC.⁴⁸ In addition, none of the toll motorway managers responding to the market investigation raised any input foreclosure concerns post-Transaction, following the exit of CPC as a shareholder and they did not raise any concerns that the Transaction would lead to any material change in the market.⁴⁹ One of them also indicated that they are not concerned about the acquisition of joint control by the Notifying Parties since *'at the time of its creation, prior to the entry of Caixabank, they were already the same companies.'*⁵⁰
- (54) Finally, even if Bip&Drive engaged into a foreclosure strategy, the likely impact on effective competition downstream would be limited since the proportion of rivals which could be foreclosed in the downstream market for toll motorway management is not high⁵¹ and toll motorway managers could turn to Bip&Drive's competitors who could capture the customers that it would lose.⁵²

5.1.2.1.3. Conclusion

- (55) Based on the above considerations and all evidence available to it, the Commission concludes that an input foreclosure strategy post-Transaction by Bip&Drive in order to exclude or deteriorate access of the Notifying Parties' competitors to its OBE distribution services is unlikely.

5.1.2.2. Customer foreclosure

5.1.2.2.1. The Parties' views

- (56) Regarding the risk that the Notifying Parties will engage into a customer foreclosure strategy and restrict access of other OBE distributors to the motorways

⁴⁸ See response to q.6 of questionnaire to concession holders/toll motorway managers.

⁴⁹ See response to q.1 and 2 of questionnaire to concession holders/toll motorway managers. One of the concession holders indicated that the Transaction would not have a negative impact on their business in so far as the resulting entity would not significantly increase its fees and noted that Bip&Drive's fees are not yet the highest among the companies providing OBE distribution services and they represent a small percentage out of the expenses of toll motorway managers. See response of one concession holder to q. 1, 2 and 7 of questionnaire to concession holders/toll motorway managers.

⁵⁰ See response to q. 1 of questionnaire to concession holders/toll motorway managers. In any case, the Notifying Parties have indicated that, in the adoption of decisions within Bip&Drive while Caixabank was a shareholder, [information on Caixabank voting behaviour]. Form CO, paragraph 49.

⁵¹ Non-Horizontal Merger Guidelines, paragraph 48.

⁵² Non-Horizontal Merger Guidelines, paragraph 50.

under their concession, either by contractual means or by limiting the technical interoperability of OBE devices of other distributors, the Notifying Parties submit that they will have neither the ability nor the incentive to do so, mainly in view of the obligations imposed by the Spanish legislation.⁵³

5.1.2.2.2. The Commission assessment

- (57) One OBE distributor during the market investigation was concerned that, post-Transaction, Bip&Drive could benefit from more favourable commercial conditions with the Notifying Parties than other OBE distributors, in particular with regard to the commission fee the Notifying Parties would pay to Bip&Drive, making it harder for other OBE distributors to continue operating profitably in the market. As mentioned above,⁵⁴ toll motorway managers pay OBE distributors a commission fee per OBE transaction; this commission fee aims at compensating OBE distributors for the service rendered, which also includes bearing the risk associated with customers defaulting on their payments.⁵⁵
- (58) Abertis, Cintra and Itinere taken together are important customers of OBE distribution in Spain, controlling around [50-60]% of Spanish motorways in terms of kilometres (in 2021)⁵⁶ and, under a conservative scenario, around [90-100]% in terms of revenues from all the toll payments (in volume of sales in 2021).⁵⁷ While the market share in terms of revenue overestimates the parties' market position due to the lack of complete data, as the Notifying Parties are not able to provide more precise data, the assessment will be made with the market shares by revenues, which is the most conservative approach.
- (59) For the reasons set out below, the Commission considers that, despite the high combined market share, it is unlikely that, post-Transaction, the Notifying Parties would restrict access of other OBE distributors (competitors of Bip&Drive) to their toll motorway networks downstream by, for instance, limiting interoperability, contracting with other OBE distributors on less favourable terms or not contracting with them at all.
- (60) *First*, from a technical point of view, the interoperability of a given OBE device depends on the antennas installed at the toll stations to read these devices. Spanish legislation governing interoperability of electronic toll systems provides that the toll equipment installed on Spanish motorways must be capable of reading the signals from any OBE device distributed in Spain.⁵⁸ Therefore, due to the Spanish legislation, which obliges toll motorway managers to provide technical interoperability without any discrimination, the Notifying Parties, as toll motorway managers, would be unable to engage into a customer foreclosure strategy and would be unable to stop purchasing OBE distribution services from Bip&Drive's competitors who might wish to offer their services. This was confirmed by other toll motorway managers, respondents to the market investigation, who indicated for

⁵³ Form CO, section 7, V II A, paragraph 295 et seq.

⁵⁴ See above, paragraph 42.

⁵⁵ Form CO, paragraph 359.

⁵⁶ Form CO, Annex 7.

⁵⁷ Form CO, Table 25.

⁵⁸ Article 6 and Article 14.1.b of Royal Decree 183/2022 of March 8 2022, regulating the interoperability of electronic toll systems on Spanish highways.

instance that ‘we cannot limit reading to a single device issued by a certain company. In fact, our contract with the Grantor obliges us to read the main devices.’⁵⁹ In addition, all concession agreements have a so-called progression clause, which is aimed at ensuring that the concession holder is technologically up-to-date by obliging the concession holder to use the most up-to-date technology from time to time. The progression clause specifically provides that it is applicable to toll systems.⁶⁰

- (61) *Second*, even if, in view of their high market share, it was considered that the Notifying Parties had the ability to engage into a customer foreclosure strategy, it seems unlikely that the Notifying Parties would have an **incentive** to foreclose other OBE distributors and work only with Bip&Drive.
- (62) This is because the greatest part of the Notifying Parties’ revenues/profit is earned from the management of the motorway concessions, rather than the revenues that Bip&Drive generates. The main interest of the motorway concessionaires is to maximise the number of vehicles that use the motorways they manage and to optimise their cost structure. Both objectives are better achieved if the toll payment is made by means of OBEs, which means that it is in the Notifying Parties’ interest to allow access to the OBE devices of as many OBE distributors as possible. Based on data from the last three years, the sale of Bip&Drive’s OBE devices would constitute less than [...]% of all revenues of each Notifying Party (Abertis: [...]%, Itinere: [...]%, and Cintra [...]%).⁶¹ The effect on the Notifying Parties’ profitability of an increased number of cars passing smoothly through the gates at toll stations (to which the use of OBE devices of any OBE distributor contributes) is, by far, more relevant to them than the extra revenues Bip&Drive⁶² might achieve by foreclosing competitors on the market for distribution of OBEs. Consequently, they are unlikely to risk losing motorists travelling smoothly on their motorways by foreclosing other OBE distributors, who represent almost [60-70]% of the OBE distributorship market in Spain.
- (63) The Notifying Parties submitted that they have never refused to contract with any OBE distributor who showed an interest in entering a contract with them.⁶³ In addition, none of the OBE distributors who responded to the market investigation has experienced in the last five years a refusal from the Notifying Parties to use, purchase and/or provide access to the OBE devices they distribute on the toll motorways managed by the Notifying Parties, while the latter already held a stake in Bip&Drive.⁶⁴
- (64) *Third*, with regard to the concern expressed by the market participant on the commission fee that the Notifying Parties would pay other OBE distributors, it must be noted that Spanish legislation sets out a non-discrimination principle pursuant to which toll motorway managers must not offer worse conditions to certain OBE distributors. In addition, any compensation/commission fee paid by toll motorway managers to OBE distributors must, according to Spanish law, be

⁵⁹ See response to q.5 of questionnaire to concession holders/toll motorway managers.

⁶⁰ Form CO, paragraph 290.

⁶¹ Form CO, paragraph 309. Bip&Drive’s turnover in 2021 was only EUR [...].

⁶² Form CO, paragraph 308.

⁶³ Form CO, paragraph 289.

⁶⁴ Responses to the questionnaires to OBE distributors, question 4.

based on transparent and non-discriminatory terms.⁶⁵ The Parties submitted that non-compliance with the non-discrimination principle would constitute an improper provision of the toll motorway service, which could be sanctioned by the relevant national competent authority and could eventually lead to the withdrawal of the concession.⁶⁶

- (65) In addition, it appears from the information provided by the Notifying Parties that the commission fee the Notifying Parties paid to Bip&Drive is in general [information on commission fee paid].⁶⁷ It also appears that while in the last five years, the commission fee paid by the Notifying Parties has [information on commission fee paid] and the Notifying Parties do not expect [...] in the future.⁶⁸ In any event, from the information provided, it would appear that OBE distributors' revenues largely come from the fees charged to customers and not from the commission received from toll motorways. For instance, between 2019 and 2021, the Bip&Drive revenues associated with the commission fee charged to toll motorway operators represented between [...] of its total revenues and in 2021, [...] of Bip&Drive's revenues came from the fees charged to end customers (drivers).⁶⁹ Consequently, based on the above, even if the commission fee paid to Bip&Drive was higher, there would likely be no significant impact on effective competition.

5.1.2.2.3. Conclusion

- (66) Based on the above considerations and all evidence available to it, the Commission concludes that a customer foreclosure strategy post-Transaction by the Notifying Parties is unlikely.

5.1.3. Conclusion on the vertical effects

- (67) Based on the above considerations and in light of all the evidence available to it, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market due to vertical effects.

5.2. Potential conglomerate effects in relation to the markets for OBE distribution and the management of toll motorway

5.2.1. Conglomerate effects by granting special discounts at the Notifying Parties' toll stations to Bip&Drive customers in Spain

5.2.1.1. The Notifying Parties' views

- (68) The Notifying Parties submit that they will not have the ability to grant special discounts at their toll stations to Bip&Drive customers in Spain.⁷⁰

⁶⁵ Article 7.1 of the Royal Decree 183/2022 of March 8 2022, regulating the interoperability of electronic toll systems on Spanish highways.

⁶⁶ Form CO, paragraphs 291 et seq.

⁶⁷ [...]. Form CO, Annex 8.1.d.

⁶⁸ Form CO, paragraph 360.

⁶⁹ Form CO, Table 3 and paragraphs 74-76.

⁷⁰ Form CO, paragraphs 319 to 323.

5.2.1.2. The Commission's assessment

- (69) For the reasons mentioned below, it seems unlikely that, post-Transaction, the Notifying Parties could cause competitive harm by using conglomerate strategies and offering special discounts at their toll stations only to Bip&Drive's customers.
- (70) *First*, under Spanish law, companies managing motorway concessions are not allowed to grant reductions on toll fees without prior authorisation by the administration which awarded the concession, and any such reductions may not be specific but shall have a general and objective nature.⁷¹ This means that those discounts would need to be applicable to all OBE users, irrespective of the OBE distributor they have contracted with. These reductions usually apply to eco-friendly vehicles or are based on the car occupation in high-frequency toll-roads at peak times.⁷² The Notifying Parties are therefore not allowed to target Bip&Drive's customers specifically. To the extent that they want to offer discounts, those would need to be made available to all OBE users, irrespective of the OBE device they use, and have a general and objective nature.
- (71) *Second*, Spanish legislation provides that toll motorway managers must not request OBE distributors to use specific solutions or technical processes which might hinder the interoperability of their OBE devices and prohibits toll companies to use or benefit from any of the information shared with them by OBE distributors.⁷³ Therefore, it seems unlikely that the Notifying Parties would be able to use their position to increase the sales of Bip&Drive's OBE devices through any sort of technical or contractual tying strategy.

5.2.2. *Conglomerate effects through an exclusive interoperability cooperation agreement between Bip&Drive and ViaVerde for the circulation of OBE devices in Portugal*

5.2.2.1. The Notifying Parties' views

- (72) The Notifying Parties submit that Bip&Drive will not have the ability nor the incentive to enter into an exclusive interoperability cooperation agreement with ViaVerde for the circulation of Bip&Drive OBE devices in Portugal.⁷⁴

5.2.2.2. The Commission's assessment

- (73) ViaVerde, where APG has a controlling stake, is the sole distributor of OBE devices in Portugal. All OBE distributors active in Spain currently have an interoperability cooperation agreement with ViaVerde. It means that OBE devices purchased by drivers in Spain can also be used in Portugal when travelling there.
- (74) In this section, the Commission assesses whether, post-Transaction, the Notifying Parties could cause competitive harm by entering into an exclusive interoperability cooperation agreement with ViaVerde in Portugal, foreclosing from the circulation in Portugal the OBE devices distributed in Spain by Bip&Drive's competitors (that

⁷¹ Article 43 of Decree 215/1973 of 25 January, approving the schedule of specific clauses for the construction, preservation and exploitation of motorways in concession regime.

⁷² Form CO, paragraph 320.

⁷³ Articles 13.2.c and 14.1.c of the Royal Decree 183/2022.

⁷⁴ Form CO, paragraphs 243-251.

is, OBE devices bought by drivers in Spain that the driver could also use in Portugal when travelling there).

- (75) For the reasons mentioned below, it seems unlikely that, post-Transaction, the Notifying Parties could cause competitive harm by entering into an exclusive interoperability cooperation agreement with ViaVerde in Portugal.
- (76) *First*, it is unlikely that the Notifying Parties would have the **ability** to engage into such a strategy. While ViaVerde and the OBE distributors in Spain enter into cooperation agreements for the interoperability of OBE devices distributed in Spain and circulating in Portugal, it is the Portuguese motorway concessionaires themselves that decide on which methods of payment they accept on their motorways.⁷⁵ Consequently, even if ViaVerde wished to enter into an exclusive cooperation agreement with Bip&Drive for the circulation of OBE devices in Portugal, toll motorway managers could refuse to validate such an agreement.
- (77) *Second*, it is unlikely that the Notifying Parties would have the **incentive** to engage into such a strategy. Bip&Drive's market share for the distribution of OBE devices in Spain is around [30-40]%. If Bip&Drive and ViaVerde were to enter into an exclusive interoperability cooperation agreement in Portugal, the agreement would *de facto* exclude from the circulation in Portugal around [60-70]% of the OBE devices distributed in Spain, that is, the OBE devices distributed by Bip&Drive's competitors. It would therefore not be a profitable strategy for ViaVerde. In addition to the reduced profitability, the lack of incentive must be assessed together with the fact that it is in the toll motorways' interest to increase the number of OBE devices circulating on their motorways to improve traffic-flow and decrease significantly the average waiting time at motorway toll stations. Furthermore, it should be noted that APG does not have sole control over ViaVerde, but exercises joint control together with two other shareholders.⁷⁶ These ViaVerde shareholders are unlikely to agree to a foreclosure of other OBE distributors as they would not benefit from any additional profits that Bip&Drive might generate.

5.2.3. *Conclusion on the conglomerate effects*

- (78) Based on the above considerations and in light of all the evidence available to it, the Commission concludes that the Transaction does not raise serious doubts as to its compatibility with the internal market due to conglomerate effects.

⁷⁵ Form CO, paragraph 245.

⁷⁶ See Commission decision in case M.9879 – APG/NPS/JMI/Brisa.

6. CONCLUSION

- (79) 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
Executive Vice-President